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Important Reminder for Employers on Enterprise Agreements

There are a number of benefits to an employer entering into an enterprise agreement. These include the ability to tailor terms and conditions of employment to best suit their business, the exclusion of any modern award that would otherwise apply, certainty with respect to terms and conditions of employment, and employees may not lawfully take industrial action for the life of the agreement. However, a recent case in the Fair Work Commission serves as a timely reminder to employers of the need to strictly adhere to the procedural requirements for making an enterprise agreement or else the agreement will not obtain the necessary approval of the Commission.

Background

There are a number of procedural requirements which must be followed by employers when making an enterprise agreement. Generally the first step is that the employer must provide a written Notice of Representational Rights (**NRR**) to each employee who will be covered by the proposed agreement. The NRR must be given as soon as practicable, and not later than 14 days, after the employer agrees to bargain, or initiates bargaining, for the proposed agreement.

The NRR must be in the form prescribed by the *Fair Work Regulations 2009* (**the Regulations**). As its name suggests, the NRR notifies employees that they have the right to appoint a representative to represent them in bargaining for the proposed agreement. It provides that if the employee is a member of a union, the default position is that the union will be the employee's bargaining representative for the agreement unless the employee specifically appoints another person as their representative or the employee revokes the union's status as their representative. The employees may not vote for an agreement until 21 days after the last NRR has been given.

The MLC Case

In the recent case of *Methodist Ladies' College and Independent Education Union of Australia & Capewell* (C2015/4657), the Full Bench of the Fair Work Commission (**FWC**) rejected the proposed

enterprise agreement submitted by the employer, private girl's school Methodist Ladies' College (**MLC**), for failing to adhere to the form and content requirements of the NRR. Specifically, MLC had provided its employees with an NRR which incorporated a form that asked employees to nominate a bargaining representative. The form contained an unbroken dividing line that split the document into two separate forms: one being the NRR and the other the nomination form.

According to the FWC, MLC had not complied with the applicable requirements on the basis that "it was misleading to have the nomination form presented in that fashion and … gave the impression that the nomination form, so presented, was the only opportunity for nomination". The FWC directed MLC to repeat the agreement making process before re-submitting the proposed agreement for approval.

This decision followed a previous decision of the Full Bench of the FWC in the case of *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWFCB 2042, where the FWC rejected a proposed enterprise agreement on the basis that the employer had stapled two nomination slips to the NRR it provided to its employees. In that case, the Full Bench stated that the legislation makes it clear "that there can be no departure from the content or form of the Notice prescribed in the Regulations".

Lesson for employers

The above cases highlight the need for employers to strictly adhere to the procedural requirements for making an enterprise agreement. This includes, but is not limited to, ensuring that the NRR issued to employees is in the correct form and does not contain any additional information. If an employer fails to comply with the applicable requirements for making an enterprise agreement, the FWC will not approve the agreement and the employer will need to spend the significant time, effort and expense involved in repeating the agreement making process.

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