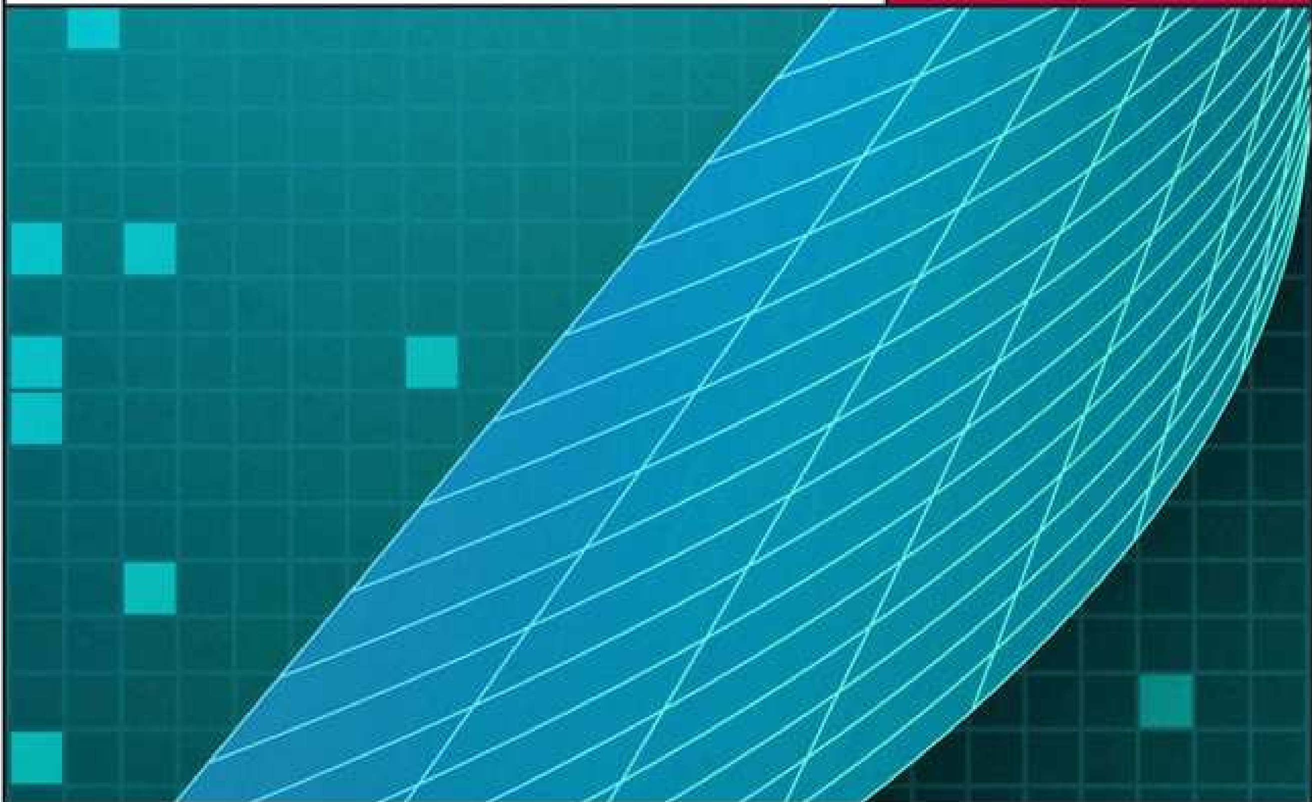
OUTLINE OF SUBMISSION TO FAIR WORK AUSTRALIA

C2010/3643

Appeal by McDonald's Australia Pty Ltd against Decision ([2010] FWA 1347) of McKenna C

AUSTRALIAN INDUSTRY GROUP

26 May 2010



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OUTLINE OF SUBMISSION

Introduction

1. The Australian Industry Group (Ai Group) seeks to make submissions in these proceedings in its own right.

2. We are taking this course of action, primarily for two reasons:

   - Firstly, we believe that the approach which McKenna C has taken in dealing with the application for approval of the *McDonald's Australia Enterprise Agreement 2009* (the Agreement), threatens the workability of Australia's enterprise bargaining system. In short, we submit that virtually no employer or union which had negotiated a national enterprise agreement covering a large number of employees in many locations would be able to meet the approval requirements applied by the Commissioner; and

   - Secondly, we believe that McKenna C has misinterpreted and misapplied the law in a number of key areas.

3. Ai Group is representing its member company McDonald's Australia Pty Ltd in these proceedings and has briefed Counsel. Therefore, we do not seek to waste the Tribunal's time by repeating the arguments which Counsel will be making on behalf of McDonald's. Ai Group supports and adopts the submissions made by Counsel on behalf of McDonald's.

4. The submissions which A Group seeks to make in these proceedings deal with the following limited number of issues:

- Explanation of the terms of the agreement to the employees;
- Provision of material incorporated by reference into the agreement;
- The “fairly chosen” group concept;
- Application of the No Disadvantage Test; and
- Deductions from wages on termination.

Leave sought to make submissions

5. Section 590 of the *Fair Work Act 2009* (“the FW Act”) gives FWA the power to inform itself in relation to any matter before it, in such manner as it considers appropriate. This includes granting a party with a substantial interest in the outcome the right to make submissions.

6. Ai Group seeks leave to make submissions in these proceedings on grounds which include the following:

   - Ai Group is a major registered organisation which represents employers in a wide range of industries including fast food, manufacturing, construction, ICT, automotive, printing, transport, labour hire, and numerous others;
   - Ai Group is a “peak council” within the meaning of the term defined in the FW Act and is formally recognised as a State Peak Council in the NSW Industrial Relations System;
   - Commissioner McKenna’s decision creates doubt about the process to be followed and the tests to be applied in the approval of enterprise agreements applicable to Ai Group member companies;

- Commissioner McKenna's decision casts doubt upon the validity of terms in enterprise agreements made between employers and employees;

- The proceedings are of relevance to thousands of employers who either have enterprise agreements in place or who may wish to bargain in the future;

- Hundreds of Ai Group members are currently bargaining and the decision which the Full Bench makes will have a direct and substantial impact on a very large number of Ai Group member companies.

Explanation of the terms of the agreement to the employees

7. The Commissioner, at paragraphs 57 to 83 inclusive of the decision, identifies that the requirements of s.180(5) of the FW Act have not been met by the employer. Ai Group submits that the Commissioner has incorrectly interpreted the obligations imposed by s.180(5), including applying a prohibition on explaining the terms of the proposed agreement during the access period which is not present in the Act.

8. At paragraph 57, the Commissioner, whilst accepting that the Company provided information explaining the Agreement to employees on 14 December 2009, rejected that this material could be relied upon for the purposes of discharging s.180(5)(a) *"because such information was provided within the access period."*

9. Ai Group submits that this limitation on the timing of the provision of information is not reflected within the Act. Paragraph 180(5)(a) requires that the employer take all reasonable steps to ensure that *"the terms of the agreement, and the effect of those terms, are explained to relevant employees"*. In our submission, this could occur before the access period or during the access period.

10. Indeed, whilst not an expressed requirement of the Act, Ai Group contends that in most circumstances further explanation of the Agreement would occur during the access period, particularly if the version of the Agreement provided to employees under s.180(2) differed from the terms of earlier versions of the Agreement discussed with employees.

11. Additionally, the Commissioner has also concluded that the obligations imposed by s.180(5)(a) are non-delegable and cannot be discharged through an employer's awareness of information provided to employees by someone other than the employer. We submit that there is nothing in the language of s.180(5) which warrants such a restrictive view. The section refers to the employer taking reasonable steps to ensure that a certain outcome is achieved. There is nothing in this language that supports the proposition that an employer cannot rely on material jointly prepared with the employees' bargaining representative or which it knew the bargaining representative would convey to the employees with its consent.

12. The Commissioner's approach fails to take account of industrial realities and the role of unions in many workplaces where one or more unions have substantial involvement. It is very common for a union to explain the terms of an enterprise agreement which it has negotiated to the employees, with the agreement of the employer. There is nothing in the FW Act or any of the associated explanatory materials to indicate an intention to limit the role of unions in explaining the terms of enterprise agreements to employees.

13. The Commissioner's interpretation of the requirements of s.180(5)(b), we also contend is erroneous. Once again, in construing the terms of the provision the Commissioner seemingly inserts an additional obligation which is not found in the statute. This additional obligation is that of ensuring that *"differential arrangements"* are adopted for the explanation of the terms of the Agreement to those contemplated by s.180(6).

14. Sections 180(5)(b) and 180(6), in our submission, do not require that any differential arrangements are applied by an employer, rather the sections require that the employer has ensured that the explanation of the Agreement is provided *"in an appropriate manner"* having regard to the particular circumstances of the employees. There is no reason why a single set of materials drafted with consideration of this obligation could not meet these requirements.

15. Importantly, the Commissioner did not find that the material provided was inappropriate for use in explaining the terms of the Agreement to employees of a class identified in s.180(6) or employees more generally. It is apparent that her only reasoning for rejecting the Agreement under s.180(5)(b) and 180(6) was the absence of a 'different approach' in explaining the Agreement to young employees. Such a construction of the statute, in our submission, is clearly incorrect.

Provision of material incorporated by reference into the agreement

16. Section 180(2)(a)(ii) does not require the employer to provide a copy of the National Employment Standards (NES) or other material which applies with statutory force to employees during the access period. The Commissioner erred in determining that such an obligation existed.

17. Section 61(1) of the FW Act provides that the NES are a set of minimum standards which cannot be displaced. Reference to the NES does not "incorporate by reference" the terms of the NES into an Agreement, instead they are iterations of the law and not subject to the "material incorporated" test expressed in 180(2)(a)(ii).

18. Ai Group makes an equivalent submission regarding other legislative instruments which may be identified within an Agreement as having application and which apply by force of statute[1] .

The "fairly chosen" group concept

19. Sections 186(3) and 186(3A) require that FWA be satisfied that the group of employees covered by a proposed agreement are fairly chosen. At paragraph 135 of the decision the Commissioner determined that inclusion of Level 4 employees within the coverage of the Agreement offended the requirement for employees to be 'fairly chosen'.

20. In explaining this conclusion the Commissioner states:

"That conclusion arises in circumstances where: (a) the conditions provided in the Agreement for Level 4 employees are so markedly different from the other employees; and (b) the number of Level 4 employees is so comparative small (albeit still running to thousands of employees) that the combined effect of even a block vote by them against the approval of an enterprise agreement which so adversely affected them would be statistically irrelevant to the outcome of a vote if it was otherwise approved by a majority of the Level 1 – 3 employees."

21. Consideration of the statutory test of a 'fairly chosen' group has been undertaken in relation to other aspects of the FW Act, most notably in reference to scope order applications under s.238. The statutory provisions of s.238(4) and s.238(4A) which relate to the 'fairly chosen' group prerequisite for the making of a scope order are in all material respects equivalent to those found in s.186(3) and s.186(3A).

[1] Other than the statutory provisions of the *Fair Work Act 2009.*

22. In interpreting the provisions of s.238(4) and s.238(4A), the Full Bench of FWA in *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board,* [2010] FWAFB 3009 stated in relation to s.238(4) and s.238(4A):

"Section 238 permits a scope order which does not apply to a whole enterprise. In such a case the tribunal, in deciding whether the group is fairly chosen, must take into account whether the group is distinct in one of three specified respects. It may follow that if the group is not distinct in one of those respects it may not have been fairly chosen, but it does not follow in all circumstances."

23. There will typically be many groups which are legitimately regarded as "fair" in any given bargaining situation. This was acknowledged by the Full Bench in the following extract from the *Metropolitan Fire and Emergency Services Board* decision:

*" **[55]** The relevant consideration under s.238(4)(b) is whether the order will promote the fair and efficient conduct of bargaining. The implication is that the tribunal should be satisfied that if an order is made the bargaining will at least be fairer or more efficient or both than it would be if no order were to be made. The relevant consideration under s.238(4)(c) is whether the specified group is fairly chosen. <u>It may be that a number of groupings might be fair – what this criterion requires is that the group which is included in the scope order is fairly chosen.</u> This issue is also dealt with in s.238(4A), which we discuss shortly."*

(<u>Emphasis added</u>)

24. Commissioner McKenna, in determining that the group of employees was not fairly chosen, paid no regard to the issue of whether the employees covered by the Agreement were geographically, organisationally or operationally distinct. The Commissioner therefore erred in consideration of the issue.

25. In addition, the alternate matters which led the Commissioner to her conclusion, we submit are not of a character which could lead to a conclusion that the group of employees was not fairly chosen. It cannot be assumed that the development of different conditions for different groups of employees is unfair. Equally it cannot be assumed that where a group of employees form less than the majority of employees their inclusion within the coverage of an Agreement is also unfair. These are the logical conclusions of the Commissioner's determinations and must be rejected.

Application of the No Disadvantage Test

26. The Commissioner, when undertaking the exercise of applying the no disadvantage test, failed to apply the test as intended by the FW Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.* The test requires FWA to look at the agreement **overall** and decide whether, on balance, the employees who are to be covered by the Agreement would suffer a reduction in their overall terms and conditions of employment[2].

27. The Full Bench in the *Enterprise Flexibility Agreements Test Case,* May 1995 as referred to by Wilcox CJ and Marshall J in *Tweed Valley Fruit Processors Ltd v Ross* (1996) 65 IR 393, found that:

> *"at 457 the Full Bench said: the Commission should adopt a global approach rather than a line by line approach in making a public interest determination under s 170NC(2)(b). In practice this involves a consideration of the overall package of terms and conditions of employment to apply to the employees covered by the agreement. The reductions in employee entitlements and protections need to be balanced against the benefits provided in the agreement. Such benefits may include a wage increase and improvement in conditions."*

[2] *Re Wenco Pty Ltd Certified Agreement 2003 (PR937872, Munro J, 19 September 2003) at [14] – [15]).*

28. Commissioner McKenna took a contrary approach to the accepted test by looking line by line, at various disadvantages and strongly emphasising such disadvantages in her decision. The decision refers to various advantages in the Agreement but a lesser weight was applied to such advantages and the Commissioner failed to give appropriate consideration to the advantages.

29. The Commissioner did not undertake a meaningful assessment of whether reductions in employee entitlements were balanced against the benefits provided by the Agreement.

30. Whilst the Commissioner noted the advantages in the agreement, she did not consider them collectively or provide any meaningful comparison with the disadvantages.

31. The Commissioner undertook a highly complex process in analysing the Agreement. Section 171 outlines that one of the objects of the part is to provide a simple, flexible and fair framework.

32. The detailed and complex analysis undertaken by the Commissioner regarding the "pre-approval steps", the criticisms and observations made, and the making of adverse findings or drawing adverse inferences which were not open to be made, contradict the above objects.

33. The Commissioner's reliance on extraneous material and the drawing of adverse inferences on material and evidence which was not before her was, we submit, a denial of natural justice.

34. The extremely complex process adopted by Commissioner McKenna, is at odds with processes followed by other Members of FWA. This level of inconsistency and complexity creates barriers to bargaining and creates uncertainty for bargaining parties.

35. The role FWA plays in enterprise bargaining is critical and one that has traditionally been based upon assisting bargaining parties to reach agreement and have their agreement approved. In contrast, Commissioner McKenna went to exhaustive lengths to find fault with the approach adopted by the negotiating parties and the outcome of their negotiations. The negotiating parties are very experienced in industrial relations and McKenna C's approach was not reasonable or warranted.

Deductions from wages on termination

36. Ai Group submits that the Commissioner, at paragraphs 357 to 370 inclusive of the decision, erred in finding that unilateral deductions from wages or other monies due on termination is a matter which cannot be subject of a provision within the Agreement.

37. Clause 15.2 of the Agreement concerns the notice of termination by an employee and states:

> *"15.2 Notice of termination by an employee*
>
> *The notice of termination required to be given by a Level 1, 2 employee is 1 week and the notice of termination required to be given by a Level 3 and 4 employee is the same as that required of an employer except that there is no requirement on the employee to give additional notice based on the age of the employee concerned. If an employee fails to give the required notice the employer may withhold from any monies due to the employee on termination under this award* [sic] *or the NES, an amount not exceeding the amount the employee would have been paid under this award* [sic] *in respect of the period of notice required by this clause less any period of notice actually given by the employee."*

38. The clause largely replicates terms widely included in modern awards and in enterprise agreements approved by FWA[3] and it was submitted by the Applicant at first instance that such a term is a permitted matter.

39. Commissioner McKenna finds at paragraph 363:

> *"The provisions of the Act at s.172(c) and s.324(1)(b), which allow deductions pursuant to an enterprise agreement only when authorised by an employee, may be compared to, and contrasted with, the provisions of s.324(1)(c) concerning deductions under a modern award, which provides that an employer may deduct an amount from an amount payable to an employee in accordance with s.323(1) if the deduction is authorised by or under a modern award. It is an ordinary principle of statutory construction that an express reference to one matter indicates that others are excluded. Following from that principle, it is a reasonable assumption that where legislation includes provisions relating to similar matters, but in different terms, there is a deliberate intention to deal with them differently. Such appears to be the case here, given the different approaches to what may be permitted in an award and an enterprise agreement concerning deductions."*

40. Ai Group does not concur with the Commissioner's view. Ai Group was heavily involved in the consultation processes relating to the development of the FW Act and the legislative provisions relating to the content which can be included in an enterprise agreement were hotly contested between employers and unions. We submit that the inclusion of the concept of *"deductions from wages for any purpose authorised by an employee who will be covered by an Agreement"* within the definition of "permitted matters" was intended to ensure that the deduction of union dues (which is not a matter pertaining to the employment relationship) was able to be included in enterprise agreements.

[3] Cl 26.3 KFC National Enterprise Agreement 2009 (AG2009/14188)[2009]FWAA1639

41. This view is supported by the terms of the Explanatory Memorandum which states:

> *"679. Paragraph 172(1)(c) provides that agreements will be able to contain terms about deductions from wages provided that they are authorised by an employee. This would, for example, permit terms dealing with salary sacrifice, payments to superannuation or the deduction of union membership fees. This has been expressly included because courts have held that such terms may not be a permitted matter under paragraph 172(1)(a)."*

42. There are a very large number of workplace agreements and enterprise agreements which include clauses which permit deductions from wages for notice not given on termination and such clauses clearly pertain to the employment relationship and hence are permitted by virtue of s.172(1)(a) of the FW Act.

43. Section 118 of the FW Act states that '*a modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment*'.

44. During the award modernisation process, the Full Bench decided to include a standard clause in modern awards giving employers the right to deduct monies on termination for notice not given by employees.[4] It follows that in doing so, the Full Bench decided that:

    - The term 'period of notice' in s.118 includes the ability to deduct monies for notice not given; and
    - A term relating to the deduction of monies for notice not given is a term which has effect for the purpose of s.326. (Note that s.151 provides that a modern award must not include a term that has no effect because of s.326).

[4] *Re Award Modernisation* (2009) 181 IR 19.

45. Additionally, section 527(2) of the *Workplace Relations Act* provides that "notice of termination" is a preserved award term and continues to have effect. This is as a result of the Item 2 of Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* which provides that pre-modern awards continue in existence as award-based transitional instruments. Ai Group submits that for the same reasons that the Full Bench formed the view that the term *"period of notice"* in s.118 of the FW Act includes the ability to deduct monies for notice not given, the term "notice of termination" in s.527 of the WR Act includes the ability to deduct monies.

46. It similarly follows that the deduction of notice is not "unreasonable" for the purpose of s.326(1)(c)(ii) of the FW Act.