

Form F7 Notice of Appeal

(Rule 12, Fair Work Australia Rules 2010)

IN FAIR WORK AUSTRALIA

FWA use only

FWA Matter No.:

NOTICE OF APPEAL

Fair Work Act 2009—s.604

Appellant

Name: Philmac Pty Ltd
Address: 53-59 Deeds Road
Suburb: North Plympton **State:** SA **Postcode:** 5037

If the Appellant is a company or organisation:
Contact persons: Paul Richards **ABN:** 17 007873 047

Contact details for the Appellant or contact person (if one is specified):
Telephone: 08 8300 9240 **Mobile:** 0419 823 701

Fax: **Email:** paulr@philmac.com.au

Appellant's representative (if any)

Name: The Australian Industry Group **ABN:** 76 369 958 788

Address: 51 Walker Street
Suburb: North Sydney **State:** NSW **Postcode:** 2060

Contact person: Stephen Smith, Director – National Workplace Relations and
Michael Mead, Principal National Advocate

Telephone: 02 9466 5521 **Mobile:** 0418 461183

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and
michael.mead@aigroup.asn.au

1. Decision appealed:

The Appellant, being a person aggrieved, gives notice of an appeal against a decision made in a matter as follows:

Matter number: AG2011/72

Applicant: Philmac Pty Ltd

Decision maker: Senior Deputy President O'Callaghan

Decision appealed: [2011] FWA 1639: Refusal to approve the Philmac Production, Distribution and Maintenance Enterprise Agreement 2010 (South Australia)

Date of decision: 16 March 2011

2. Grounds:

- 2.1 The Senior Deputy President erred in refusing to approve the *Philmac Production, Distribution and Maintenance Enterprise Agreement 2010 (South Australia)* ("the Agreement").
- 2.2 The Senior Deputy President incorrectly applied and mischaracterised the operation of section 187(2) of the *Fair Work Act 2009* ("the FW Act"). This section only applies where a scope order is in operation and a scope order was not in operation.
- 2.3 The Senior Deputy President erred in taking into account whether the employer had met the good faith bargaining requirements in s.228 of the FW Act.
- 2.4 The Senior Deputy President erred in taking into account matters which FWA is not permitted to take into account when assessing an application for the approval of an enterprise agreement.
- 2.5 The Senior Deputy President erred in expressing a preliminary reservation about the integrity of the voting process and finding that there "is an element of doubt about the extent to which there was an adequate opportunity for genuine employee agreement in the circumstance". Such a finding was not reasonably open to His Honour in the circumstances.
- 2.6 The Senior Deputy President erred in finding that there was a "low vote return" in the postal ballot. This finding was not reasonably open to His Honour given that 131 of 194 employees cast a vote of which 110 were counted as valid.
- 2.7 Such other grounds as the Full Bench considers appropriate.

3. Public interest in permitting the appeal:

- 3.1 The appeal raises important issues about the statutory purpose and application of sections 187(2) and 228 of the FW Act and, in particular, whether FWA is permitted to refuse to approve an enterprise agreement on the basis of a finding that the good faith bargaining requirements were not met during the negotiation of the agreement.
- 3.2 If FWA was permitted to refuse to approve an enterprise agreement which has been duly made and lodged, and which meets all of the requirements of s.186 and 187, on the basis that one or more of the bargaining representatives did not meet all aspects of the good faith bargaining requirements during the negotiation process which proceeded the making of the agreement, a great deal of uncertainty and risk would arise for all parties.
- 3.3 The appeal raises important questions about the conduct of postal ballots to approve agreements.
- 3.4 The Senior Deputy President's decision, unless overturned, would have significant and widespread negative implications for the making of enterprise agreements in Australia and the role of FWA.
- 3.5 The Senior Deputy President's decision is affected by relevant error and should not be allowed to stand.
- 3.6 It is in the public interest that the issues raised by the appeal be determined by a Full Bench.

4. Stay under s.606:

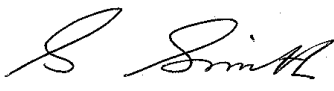
- 4.1 Is a stay of the decision sought?

Yes
 No

5. Extension of time:

- 5.1 Is an extension of time sought?

Yes
 No

Date:	6 April 2011
Signature:	
Name:	Stephen Smith
Capacity/Position:	Director – National Workplace Relations

Service requirements

This Notice of Appeal must be served on the other parties to the matter at first instance as soon as practicable after this Notice is lodged with FWA.

Note: Rules 9 and 10 deal with service.