

IN THE MATTER OF THE FAIR WORK ACT 2009 (CTH)

IN THE MATTER OF AN APPEAL PURSUANT TO S. 604 OF THE ACT  
FROM THE DECISION OF SENIOR DEPUTY PRESIDENT O'CALLAGHAN ON  
AN APPLICATION FOR APPROVAL OF THE MOYLE BENDALE TIMBER PTY  
LTD ENTERPRISE AGREEMENT 2010

OUTLINE OF SUBMISSIONS

ON BEHALF OF THE AUSTRALIAN INDUSTRY GROUP

**I. Introduction**

1. The Australian Industry Group (**Ai Group**) seeks permission to appear, and to intervene in the appeal brought by the Construction, Forestry, Mining and Energy Union (**CFMEU**) from the decisions of O'Callaghan SDP in Fair Work Australia (**FWA**) matter no. AG2010/20176 (**the Decision**)
2. The Full Bench has agreed to the CFMEU's request that this appeal be heard together with an appeal (**ADJ Appeal**) brought by Ai Group concerning a decision of Acton SDP on an application (AG2011/364) by ADJ Contracting Pty Ltd made pursuant to s. 185 of the *Fair Work Act 2009* (**FW Act**).
3. These submissions are made in reply to the submissions filed by the CFMEU on 21 July 2011 (**CFMEU Submissions**). Ai Group also relies on its submissions filed in the ADJ Appeal on 15 July 2011.
4. Ai Group submits that O'Callaghan SDP did not fall into error by deciding that clause 7.12 of the Moyle Bendale Timber Pty Ltd Enterprise Agreement 2010 (**the Agreement**) provided for right of entry other than in accordance with Part 3-4 of the FW Act and was accordingly an unlawful term pursuant to sub-s. 194(f) of the FW Act.

5. Accordingly, the CFMEU's appeal should be dismissed and the decision of O'Callaghan SDP should be allowed to stand.

## II. Permission to appear and to intervene

6. Section 590 of 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.
7. Given the complex nature of the issues in the two appeals before FWA, and the fact that counsel are briefed to appear in each appeal, and did so below, it is submitted that the Tribunal should grant counsel for Ai Group permission to appear on behalf of Ai Group and make oral submissions in accordance with s. 596 of the FW Act.
8. Insofar as intervention is concerned, it is clear that a "person who is aggrieved" by a decision of FWA may appeal to a Full Bench or intervene in an appeal lodged by another party.<sup>1</sup>
9. The two appeals are being heard together at the request of the CFMEU because, the CFMEU submits, there is some overlap in the issues between the appeals in relation to right of entry. In these circumstances, the CFMEU could not oppose Ai Group's intervention in this appeal.
10. In any event, permission to intervene should be granted because Ai Group's interest in the CFMEU's appeal meets the relevant tests. Ai Group and its members have a direct and substantial interest in this matter for the following reasons:
  - a. the Tribunal has agreed that this appeal be heard together with the ADJ Appeal;
  - b. this appeal and the ADJ Appeal both consider the operation and application of clauses within an enterprise agreement which purport to permit union officials to enter a workplace outside the confines of Part 3-4 of the FW Act;

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<sup>1</sup> FW Act, s 604; *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 137 ALR 70 at 90-91; (1996) 65 IR 393; *CFMEU v Woodside Burrup Pty Ltd* [2010] FWAFB 6021 at [3]–[5], and *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* (2010) 196 IR 125

- c. Ai Group is a major registered organisation which represents employers in a wide range of industries including manufacturing, construction, ICT, automotive, printing, transport, labour hire and numerous others and a large majority of its members will be impacted by the outcome of this appeal; and
- d. Ai Group is a “peak council” within the meaning of the term defined in the FW Act.<sup>2</sup>

11. Further, absent intervention, the CFMEU’s appeal will have no contradictor. In this regard, and generally in support of its application to intervene, Ai Group relies upon the matters set out at AB 291-293 in the Appeal Book in the ADJ Appeal.

### **III. Nature of the appeal**

- 12. This appeal considers whether clause 7.2 of the Agreement, which concerns right of entry, is an unlawful term because it creates an entitlement for a union official to enter the workplace for a purpose contemplated by Part 3-4 of the FW Act, contrary to sub-s. 194(f) of the FW Act.
- 13. The appeal is to a Full Bench of FWA and therefore will proceed by way of rehearing.<sup>3</sup>
- 14. The powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker.<sup>4</sup>
- 15. Ai Group submits that O’Callaghan SDP did not fall into error by refusing to approve the Agreement.

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<sup>2</sup> This was held to be the case in *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* (2010) 196 IR 125.

<sup>3</sup> See *McDonald’s Australia Pty Ltd and SDAEA* [2010] FWAFB 4602 at paragraph [8]; *Coal and Allied Operations Pty Ltd v AIRC* (2000) HCA 47 at paragraph [13]; and the Explanatory Memorandum to the Fair Work Bill 2008 (“the Explanatory Memorandum”) at paragraphs [2320] and [2321].

<sup>4</sup> See *McDonald’s Australia* at paragraph [9], *Coal and Allied Operations* at paragraph [14], and the Explanatory Memorandum at paragraph [2322].

#### **IV. Argument: clause 7.12 is an unlawful term**

16. Subsection 194(f) of the FW Act provides that a term of an enterprise agreement is unlawful if it provides for an entitlement to enter premises for a purpose referred to in s. 481 (conduct investigations) or to hold discussions of a kind referred to in s. 484 other than in accordance with Part 3-4 (which deals with right of entry).
17. Part 3-4 of the FW Act establishes a “framework for officials of organisations to enter premises” (s. 480) that carefully balances the rights of those affected by such entry. That balance is achieved by, inter alia, the requirement that an official entering the workplace hold a permit. Subsection 194(f) recognises the importance of the Part 3-4 framework by ensuring that where the purpose of entry pursuant to a term of an enterprise agreement is a purpose referred to in Part 3-4 (ss. 481 or 484), the framework applies.
18. The CFMEU submits that clause 7.12 of the Agreement is not unlawful because, although it provides for entry into the relevant workplace, that entry is not for a purpose referred to in s. 481 or for the purpose of holding discussions of a kind referred to in s. 484.
19. That submission must be rejected for the following four reasons.

#### ***The operation and effect of clause 7.12***

20. First, clause 7.12 allows or provides for a union official to enter, or have “access to” the workplace for several broadly defined purposes. They include:
  - a. dealing with disputes and representing employees under the dispute resolution procedure set out in the Agreement; and
  - b. any purpose connected to the relationship between the Union and the employer.
21. The focus must be upon the practical, industrial operation and effect of the clause. If the operation of the clause means that an official is entitled to enter the workplace for a purpose contemplated by s. 481 or s. 484, or a purpose that includes one of those purposes, then, in order not to be unlawful pursuant to sub-s. 194(f), the clause must

provide for entry to be in accordance with Part 3-4.<sup>5</sup>

22. On any view, clause 7.12 does not provide for entry in accordance with Part 3-4. Because s. 481 and s. 484 purposes are purposes of entry under the clause (see the submissions below), the clause is bad and the Agreement cannot be approved in accordance with sub-s. 186(4).

***The purposes expressed in clause 7.12 are Part 3-4 purposes***

23. Secondly, entry under clause 7.12 is expressed to be for many purposes. Those purposes overlap with, include or are mixed up with the purposes of investigating suspected contraventions and holding discussions with employees.
24. The purposes of entry set out in clause 7.12 cannot be divorced from the purposes of entering the workplace to conduct interviews or hold discussions as, for example, dealing with an employee's dispute may necessitate such conduct.<sup>6</sup> Further, numerous purposes "connected to the relationship between the Union and the employer" would necessitate such conduct.
25. It is artificial and inaccurate to characterise the rights to enter the workplace under clause 7.12 of the Agreement and Part 3-4 of the FW Act as mutually exclusive.<sup>7</sup> To do so ignores:
  - a. the broad language in which the respective purposes are expressed; and
  - b. the fact that the broad purposes expressed in clause 7.12 overlap with the even broader s. 481 and s. 484 purposes.
26. The Explanatory Memorandum to the Fair Work Bill cannot be relied upon to justify the inclusion in an enterprise agreement of terms providing for particular kinds of right of entry not governed by the Part 3-4 framework where those terms provide for right of entry

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<sup>5</sup> Such provision may be by simple reference to Part 3-4, or by a more elaborate set of terms that are consistent with the Part 3-4 framework.

<sup>6</sup> *Vlach v Electrolux Home Products Pty Ltd* [2010] FWA 2435 per O'Callaghan SDP.

<sup>7</sup> The CFMEU attempts to characterise the purposes for entry by a union official onto premises under clause 7.12 of the agreement and sections 481 and 484 of the FW Act as mutually exclusive. See the CFMEU's Submissions at [11] and [20].

for a purpose or a purpose that includes a s. 481 or s. 484 purpose. The EM, the examples it provides and the interpretation of a provision of the FW Act which it offers, cannot be used to construe, or allowed to influence a proper construction of, sub-s. 194(f).<sup>8</sup>

***The final sentence of the clause does not save it from being unlawful***

27. Thirdly, the final sentence of clause 7.12 does not save the clause from being unlawful, as the CFMEU contends. That sentence does not, in reality, qualify or place practical limits upon the exercise of the right of entry for which the clause provides.
28. Senior Deputy President O’Callaghan was correct to find that the final sentence of clause 7.12 of the Agreement did not cure its unlawfulness. All the sentence does is make a statement, which is legally and factually wrong, to the effect that the purposes expressed above it are not Part 3-4 purposes. It is a statement contrary to the proper construction and understanding of the operation of the earlier part of the clause.
29. As identified by O’Callaghan SDP at first instance, there is no capacity to establish a right of entry regime which permits the avoidance of the obligations in the FW Act by simply asserting that the purpose of the right of entry is separate from a purpose specified in Part 3-4.<sup>9</sup>

***Part 3-4 and lawful right of entry***

30. Fourthly, Ai Group agrees with the CFMEU’s submission that Part 3-4 of the Act does not create an exclusive code governing the rights of officers to enter the employer’s premises. There is similarly no dispute that enterprise agreements may include terms granting additional entitlements to officers to enter the employer’s premises, so long as the terms granting those additional right of entry entitlements are not unlawful terms under sub.s 194(f).
31. Enterprise agreements can be drafted, carefully and narrowly, to provide for right of entry

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<sup>8</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [264] per French CJ, Gummow, Hayne, Crennan, Kiefel JJ; [277] per Heydon. See also *J.J. Richards & Sons Pty Ltd v Transport Workers’ Union of Australia* [2011] FWAFB 3377 at [32] per Giudice J, Harrison SDP and Roberts C.

<sup>9</sup> See O’Callaghan SDP’s decision: [2011] FWA 2670 at [43].

to do limited things that do not encompass investigations or holding discussions with employees. The CFMEU's example of an enterprise agreement granting the right to a union officer to enter premises for the purpose of consulting with the employer about mass redundancies is unlikely to be an unlawful term. Similarly, a term that provides for an entitlement to enter for the purpose of lawful bargaining for a new agreement directly with the employer would be lawful, or a meeting with the employer outside the context of an investigation into suspected contraventions.

32. Of course, enterprise agreements can have all manner of broadly framed entitlements providing for right of entry. It is just that when they are broadly drafted they will come to have a s. 481 or s. 484 purpose and, in such cases, the agreement must provide for the exercise of the rights of entry in accordance with Part 3-4.
33. In other words, once the purpose of entry expressed by a term in the agreement is broad enough to include a s. 481 or s. 484 purpose, that is when the Part 3-4 framework, with its carefully balanced provisions, becomes applicable. At that point it has the effect of a code and Parliament has made that abundantly clear.

**V. Conclusion**

34. No error was made by O'Callaghan SDP. It follows that the appeal by the CFMEU should be dismissed.

DATE: 27 July 2011



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*Australian Industry Group*