

# OUTLINE OF SUBMISSION TO FAIR WORK AUSTRALIA



C2011/3908  
Appeal against decision [[2011] FWA 1639] of Senior Deputy  
President O'Callaghan in matter number AG2011/72

 AUSTRALIAN INDUSTRY GROUP

20 April 2011

# OUTLINE OF SUBMISSIONS

## 1. Overview

1. This is an appeal against a decision of Senior Deputy President O'Callaghan to reject the *Philmac Production, Distribution and Maintenance Enterprise Agreement 2010 (South Australia)* ("the Enterprise Agreement").
2. In these proceedings, Ai Group is representing its member company Philmac Pty Ltd ("Philmac").
3. In addition, Ai Group seeks leave to make submissions in its own right, as a registered organisation with a significant interest in the outcome.
4. This Outline of Submissions is lodged on behalf of Philmac and Ai Group.
5. Ai Group submits that the decision of Senior Deputy President O'Callaghan is affected by relevant errors and should be overturned.
6. These errors include:
  - 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;
  - The Senior Deputy President erred in taking into account the good faith bargaining requirements when assessing the application for the approval of an enterprise agreement (Ground 2.4 of the Notice of Appeal); and

- 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. Leave to Appeal**

7. 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: FW Act, s.604; *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 137 ALR 70 at 90-91; *Australian Postal Corporation v CEPU* ([2009] FWAFB 599 at [8] to [11]).
8. Philmac is clearly a person aggrieved by the decision of Senior Deputy President O’Callaghan and meets the relevant tests.

## **3. Ai Group’s application to make submissions in its own right**

9. 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.
10. Ai Group and its members have a direct and substantial interest in this matter.

11. In *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWA FB 4337, the Full Bench said:

*“[9] A preliminary issue arises concerning the competence of the appeal. The Fair Work Act provides that an appeal may be made by a person who is aggrieved by a decision. The relevant section is s.604(1)(a). The question in this case is whether Ai Group is “aggrieved” by Commissioner Ryan’s decision to approve the agreement. Ai Group relies on the following matters:*

*(a) it is a major registered organisation which represents employers in a wide range of industries;*

*(b) it is a “peak council” as defined in s.12 of the Fair Work Act;*

*(c) the proceedings affect thousands of Ai Group members who have received a notice by a union official to enter their premises or who are parties to or may bargain for enterprise agreements; and*

*(d) the outcome of the appeal will have a direct and substantial impact on a large number of Ai Group’s members.*

*[10] After reference to relevant authority Ai Group submitted that the decision under appeal prejudicially affects the interests of Ai Group and its members and that Ai Group’s interest is above that of an ordinary member of the public.*

*[11] A Full Court of the Federal Court of Australia considered the meaning of the term “person aggrieved” in Tweed Valley Fruit Processors Pty Ltd v Ross and others. It may fairly be said that the term “person aggrieved” is capable of extending beyond persons whose legal interests are affected by the decision in question and extends to persons with an interest in the decision beyond that of an ordinary member of the public. The statutory context is not relevantly different in this case.*

*[12] We have concluded that Ai Group, for the reasons it advanced, is a person aggrieved by the Commissioner’s decision. We are influenced in particular by the considerations that Ai Group is a large organisation of employers with eligibility to enrol members in a wide range of industries and that the issue with which the appeal is concerned is one of significance for employers generally.”*

12. Ai Group has been granted the right to make submissions in its own right in a substantial number of Full Bench matters relating to the bargaining laws under the *Fair Work Act*.<sup>1</sup>

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<sup>1</sup> *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWA FB 1464; *Metropolitan Fire & Emergency Services Board v United Firefighters’ Union of Australia* [2010] FWA FB 3009; *Minister for Employment and Workplace Relations (re. TriMas)* [2010] FWA FB 3552; *Australian Industry Group v Pacific Brands Limited t/a Dunlop Foams* [2010] FWA FB 4337; *Airport Fuel Services Pty Limited v Transport Workers’ Union of Australia* [2010] FWA FB 4457; *McDonald’s Australia Pty Ltd v Shop, Distributive and Allied Employees’ Association* [2010] FWA FB 4602; *Armacell Australia Pty Ltd and Others* [2010] FWA FB 9985; *Power Projects International Pty Ltd v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)* [2011] FWA FB 1327; and *JJ Richards v TWU* (C2011/90 and C2011/3563)

13. The issues being considered by the Full Bench in this case have wide implications for employers engaged in bargaining and agreement making.
14. Ai Group's application for leave to make submissions meets the relevant tests.

#### **4. The nature of the appeal and establishing error**

15. The appeals are to a Full Bench of FWA and therefore will proceed by way of rehearing.<sup>2</sup>
16. The powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker.<sup>3</sup>
17. It is Ai Group's contention that Senior Deputy President O'Callaghan made errors of law.

#### **5. Objects of the Act and FWA's role in agreement-making**

18. The FW Act is designed to encourage employers and employees to enter into collective agreements.
19. Modern awards and the NES provide a safety net but the Act encourages employers and employees to implement wages and conditions which suit their particular needs.

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<sup>2</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>3</sup> See *McDonald's Australia* at paragraph [9], *Coal and Allied Operations* at paragraph [14], and the Explanatory Memorandum at paragraph [2322].

20. Numerous sections of the FW Act support this goal including:
- Sub-section (3)(f), which recognises the important role of collective bargaining in achieving improvements in productivity and fairness;
  - Paragraph 171(a), which states that the collective bargaining framework is to be simple, flexible and fair to enable enterprise agreements to be reached that deliver productivity benefits; and
  - Paragraph 171(b), which emphasises the important role of FWA in facilitating agreements.
21. It is the parties at the enterprise level who are best-placed to decide what enterprise agreement terms suit their needs.
22. The Tribunal's role in approving enterprise agreements under the Act is to ensure that any agreement lodged for approval meets the statutory requirements and, if it does, to approve it.
23. Parliament has decided upon the statutory requirements for enterprise agreements. Tribunal members are required to apply those requirements. The requirements are designed to ensure fairness and consistency.
24. Enterprise agreement-making is very worthwhile, but it is also often time-consuming, disruptive and expensive. It is unfair and unproductive for employers, employees and their representatives to be subjected to the cost and disruption associated with the rejection of their enterprise agreement by an FWA Member, if the agreement meets the requirements of the FW Act.

## 6. Compliance with statutory requirements

25. In compliance with the statutory requirements, the following key events occurred in the lead-up to the making of the Enterprise Agreement:

- On 28 April 2010, Philmac provided the employees covered by the proposed agreement with a Notice of Representational Rights and also invited nominations for employee bargaining representatives.
- On 7 May 2010, Philmac notified its employees of the employee bargaining representatives. All bargaining representatives nominated by employees were appointed.
- Between May and November 2010, the parties negotiated over the enterprise agreement.
- On 22 November 2010, Philmac posted to each employee's home address:
  - a copy of the proposed enterprise agreement;
  - a memo explaining the terms of the proposed enterprise agreement;
  - a memo outlining the time and place at which the vote would occur and instructions for the vote;
  - a Ballot Slip; and
  - a reply paid envelope.
- From 30 November, communication sessions were held to discuss the terms of the proposed enterprise agreement with the employees.
- The vote took place between 3 and 6 December 2010. The proposed enterprise agreement was not approved by the majority of the employees who cast a valid vote.

- Between 7 December and 13 December 2010, the company sought feedback and proposals from the employee bargaining representatives and individual employees about amendments to the proposed enterprise agreement.
- On 15 December 2010, Philmac gave written advice to each bargaining representatives notifying them of the common elements of the feedback provided by the employees.
- On 17 December 2010, Philmac gave a copy of the amended Enterprise Agreement to the bargaining representatives, together with details of the voting process.
- On 17 December 2010, Philmac posted to each employee's home address:
  - a copy of the Enterprise Agreement;
  - a memo explaining the terms of the Enterprise Agreement;
  - a memo outlining the time and place at which the vote would occur and instructions for the vote;
  - a Ballot Slip; and
  - a reply paid envelope.
- The vote took place between 31 December and 5 January 2011. 131 of 194 employees cast a vote of which 110 were valid. 69 of the 110 employees who cast a valid vote (63 per cent) voted in favour of the Enterprise Agreement. 21 votes were deemed invalid because the voters did not comply with the voting requirement to lodge their votes in a sealed envelope. This requirement was implemented based upon advice which the company received from the FWA Helpline because some false ballot papers were discovered amongst the returns for the first vote in early December.

- On 5 January 2011, the Enterprise Agreement was made in accordance with s.182(1) of the FW Act.
- On 17 January 2011, Philmac filed an application for approval of the Enterprise Agreement with FWA.
- On 1 February 2011, Senior Deputy President O’Callaghan wrote to the company requesting details of the voting process (see “Additional Documents for the Appeal”).
- On 4 February 2011, the company provided details of the voting process to Senior Deputy President O’Callaghan (see p.122-123 of the Appeal Book).
- At 10.30am on 25 February 2011, Senior Deputy President O’Callaghan conducted a hearing in respect of the company’s application to approve the Enterprise Agreement. The following representatives participated:
  - P Richards and S Collins of Philmac,
  - L Harrison and B McRae of United Voice;
  - J Adley of the CEPU;
  - N Alford of the AMWU;
  - Three employee representatives: I Buder, S Goldsworthy and C Pagano.
- At 2pm on 25 February 2011, the company wrote to Senior Deputy President O’Callaghan providing further correspondence and other documents to further highlight the consultations which had occurred with the employees and bargaining representatives.
- On 16 March 2011, Senior Deputy President O’Callaghan issued his decision refusing to approve the Enterprise Agreement.

## 7. Section 187(2) of the FW Act

26. The reason why Senior Deputy President O’Callaghan refused to approve the Enterprise Agreement is set out in paragraphs [32] to [39] of his Honour’s decision:

### **“Findings**

**[32]** *I have initially considered whether the consultation process which led to the finalisation of the agreement proposal occurred in a fashion which permits the approval of the agreement. In this respect it is appropriate that I categorically affirm that, on the information before me there is nothing that permits the conclusion that Philmac have deliberately set out to avoid compliance with the Act. However, the Act requires that I form a conclusion about whether the essential requirements of the bargaining process have been met.*

**[33]** *The good faith bargaining requirements referenced in s.187(1) and (2) are set out in the following terms:*

*“228 Bargaining representatives must meet the good faith bargaining requirements*

*(1) The following are the **good faith bargaining requirements** that a bargaining representative for a proposed enterprise agreement must meet:*

- (a) attending, and participating in, meetings at reasonable times;*
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;*
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;*
- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;*
- (f) recognising and bargaining with the other bargaining representatives for the agreement.*

*(2) The good faith bargaining requirements do not require:*

- (a) a bargaining representative to make concessions during bargaining for the agreement; or*
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.*

**[34]** *The only issues which cause concern in this respect go to whether Philmac met the requirements of subsection (f) in bargaining with the bargaining representatives for the agreement and the requirements of subsection (b) in disclosing relevant information in a timely manner.*

**[35]** In the hearing on 25 February 2011 Philmac agreed that it engaged in discussions with only some of the employee representatives. Further, Philmac advised that the process adopted after the initial "no" vote was not designed to re-engage the whole bargaining process but was fundamentally based on the feedback forms received from employees.

**[36]** The advice provided to me by Ms Pagano was that, as a night shift employee bargaining representative, she was not consulted by Philmac and was unaware of the ballot proposal until she received the postal ballot material. I have noted that Ms Pagano was sent at least one e-mail on 17 December 2010 enclosing the revised agreement, explanatory memorandum and voting information. However, in the context of the advice provided by Ms Pagano, I cannot conclude that this represents a negotiation process consistent with the requirements of s228.

**[37]** There is nothing in the Act that restricts an employer from seeking feedback from employees about an agreement proposal. However, s.228 clearly envisages a consultation process which provides all employee bargaining representatives with the opportunity to put, and to respond to proposals made by other bargaining representatives in recognising and bargaining with those other bargaining representatives. Whilst there is no requirement that agreement be reached, or that concessions be made, it is necessary that this information exchange process occurs.

**[38]** I do not consider that the employee feedback process can be taken to usurp or replace the continuing requirement for consultation to be available to all the employee bargaining representatives. I am not satisfied that the process applied by Philmac provided an opportunity for all of the employee bargaining representatives to be made aware of Philmac's revised proposals that may have been put by other bargaining representatives both before and after the employee survey. Further, the advice to employees suggests consultation with employee bargaining representatives, which in fact, is not entirely accurate.

**[39]** As a consequence, I am unable to conclude that the good-faith bargaining requirements have been met so as to enable the agreement to be approved."

(Emphasis added)

27. It is evident that Senior Deputy President O'Callaghan rejected the Enterprise Agreement on the basis of non-compliance with s.187(2) of the FW Act.

28. Section 187(2) states:

*"(2) FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation."*

29. The following extract from the Explanatory Memorandum for the *Fair Work Bill 2008* (“the Explanatory Memorandum”) explains the meaning and purpose of s.187(2):

**“Clause 187 – When FWA must approve an enterprise agreement – additional requirements**

787. This clause sets out additional requirements that must be met before FWA approves an enterprise agreement (subclause 187(1)).

788. Subclause 187(2) provides for an additional approval requirement where a scope order is in operation in relation to a proposed enterprise agreement, or enterprise agreement. This subclause is intended to deal with the situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all the employees and employers specified in a scope order issued by FWA in relation to that agreement. FWA may approve an enterprise agreement in that situation provided that it is satisfied that the approval of the agreement would not be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives.

789. *If (despite a scope order) the bargaining representatives have subsequently all agreed to make an agreement of a different scope, this may not undermine good faith bargaining. However, if the employer has obtained employee approval for an agreement despite a scope order against the wishes of a group of employees who should have been covered (or excluded) as a result of the scope order, then this clause is likely to be triggered.”*

(Emphasis added)

30. Section 187(2) was considered by a Full Bench in *UFUA v Metropolitan Fire and Emergency Services Board* [2010] FWAFB 3009, which dealt with applications by the UFUA and the MFESB for scope orders. In outlining key arguments pursued by the ACTU, the Full Bench said:

*“[45] In referring to the considerations set out in ss.238(4) and (4A), the ACTU submitted that each involved an objective assessment and the exercise of discretion. The discretion should be exercised bearing in mind that a scope order is not directly enforceable, unlike other orders, but non-compliance will impact on the approval process pursuant to s.187. It was submitted that ss.187(2) and 228 guide the exercise of discretion required by s.238, as indicated by the following passage from its submissions:”*

31. Section 187(2) has also been discussed in a number of decisions of individual FWA Members.

32. In *Property Sales Association of Queensland, Union of Employees* [2010] FWA 5653, in dealing with an application by the PSAQ for a scope order, Commissioner Asbury said:

*[26] I accept that the PSAQ would be in a stronger position to oppose approval of the Agreement if a scope order was made, because s.187(2) would operate so that FWA could not approve the Agreement on the basis that approval would undermine good faith bargaining. In this regard the Explanatory Memorandum to the Fair Work Bill makes it clear that s.187(2) is intended to deal with a situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all of the employees and the employer specified in a scope order. However, I do not accept that it would be appropriate to issue a scope order for this reason, in circumstances where the Agreement has been made, simply to put the PSAQ in a stronger position to oppose the approval of the Agreement.*

*[27] In short, there is an application for approval of the Agreement before FWA, and the parties to that Agreement are entitled to have it considered against the criteria for approval under the FW Act. Although the PSAQ is no longer a bargaining representative for a proposed agreement, the PSAQ is still a bargaining representative, and as such has other rights including the right to advance arguments about whether the Agreement should be approved by FWA.*

*[28] The PSAQ has made assertions in relation to concerns about the pre-approval processes for the Agreement, and its substantive terms. The concerns of the PSAQ may be legitimate. However, once the Agreement is made, the appropriate forum in which those concerns can be addressed is in the application for approval. The PSAQ has indicated that it seeks to be heard in the approval of the Agreement and has corresponded with the Registrar of FWA in this regard.*

*[29] The application by the PSAQ for a scope order under s.238 of the FW Act is dismissed. I Order accordingly.*

(Emphasis added)

33. In *Aegis Aged Care Staff Association Pty Ltd* [2010] FWA 3715, in approving the *LHMU and HSU Employees Agreement 2010* Commissioner Williams said:

*[14] With regard to the Good Faith Bargaining concerns of the ANF, the ANF argues that for a number of reasons the actions of the employer are such that they have not bargained in good faith with the ANF and as a consequence the Agreement should not now be approved.*

*[15] The ANF calls upon s. 187(2) in support of its argument. Section 187(2) is as follows:*

*Requirement that approval not be inconsistent with good faith bargaining etc.*

*(2) FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more*

*bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.*

**[16]** *The closing words of this section limit concerns regarding good faith bargaining to applications where FWA is considering approving a proposed enterprise Agreement, or an enterprise Agreement, in relation to which a scope order is in operation.*

**[17]** *The explanatory memorandum regarding s. 187 reinforces the conclusion that s. 187(2) does not have general application to all applications for approval of Agreements.*

**Clause 187 – When FWA must approve an enterprise agreement – additional requirements**

*787. This clause sets out additional requirements that must be met before FWA approves an enterprise agreement (subclause 187(1)).*

*788. Subclause 187(2) provides for an additional approval requirement where a scope order is in operation in relation to a proposed enterprise agreement, or enterprise agreement. This subclause is intended to deal with the situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all the employees and employers specified in a scope order issued by FWA in relation to that agreement. FWA may approve an enterprise agreement in that situation provided that it is satisfied that the approval of the agreement would not be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives.*

*789. If (despite a scope order) the bargaining representatives have subsequently all agreed to make an agreement of a different scope, this may not undermine good faith bargaining. However, if the employer has obtained employee approval for an agreement despite a scope order against the wishes of a group of employees who should have been covered (or excluded) as a result of the scope order, then this clause is likely to be triggered.*

**[18]** *The ANF have referred the tribunal to the comments of Commissioner Whelan in Alphington Aged Care (AG2009/11742) Sisters of St Joseph Health Care Services (Vic) t/a Mary Mackillop Aged Care (AG2009/11382) [2009] FWA 301 at paras [54] – [57] set out below:*

*Conclusions*

*[54] For the above reasons I am satisfied that these agreements do not meet the requirements for approval under the Act and therefore the applications must be dismissed.*

*[55] The employers in this case appear to have been under the misapprehension that they could be both bargaining with the union, through their bargaining representative and seeking to make an agreement as they described it ‘directly with their employees’ on the other. This probably derives from the distinction between a ‘union collective agreement’ and an ‘employee collective agreement’ which existed under the Workplace Relations Act. Those distinctions no longer apply. Where an employer seeks to make an agreement with its employees and some of those employees are members of a union, unless the employees appoint another bargaining representative, the union will be recognised by the Act as their bargaining representative.*

*[56] Any single enterprise agreement under the Act is an agreement between an employer and its employees. The union however, has status as a bargaining representative, by virtue of its right to represent those employees who are its members. The bargaining in good faith requirements include recognising and bargaining with the other bargaining representatives for the agreement.*

*[57] In my view, where the employer is aware that there are employees who are union members and the union is therefore their bargaining representative, it would be a breach of good faith bargaining to put an agreement to a vote without notifying the union of its intention to do so. Particularly, as occurred in this case, where bargaining is underway with the union, to not notify the union that bargaining is at an end – which a decision to put an agreement to the vote clearly implies – undermines the process of good faith collective bargaining which the objects of the Act support.*

**[19]** *Commissioner Whelan's comments in paragraphs [55] – [57] regarding bargaining are general observations that do not directly address the particular point in this matter concerning s. 187(2) nor where they the reasons the agreements in those matters were not approved.*

**[20]** *More relevant to this application are the conclusions of Commissioner Cargill in Class Electrical Services Pty Ltd (AG2009/12658) and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (B2009/10626) at para [128] as follows:*

*[128] Section 187 sets out additional requirements which must be met before an agreement is approved. The CEPU has submitted that subsection (2) is relevant in this matter. That subsection requires FWA satisfaction that approving the agreement would not be inconsistent with or undermine good faith bargaining. However it only applies to an agreement, or proposed agreement, in relation to which there is a scope order in operation. There is no such order in relation to the Agreement so this subsection is not relevant to my determination. Likewise none of the remaining requirements of section 187 are relevant in this case.*

**[21]** *In this case the employers F 17 declaration states there is no scope order in operation in relation to this Agreement. That being the case the provisions of s. 187(2) are not a relevant consideration in this application. Consequently the complaints the ANF have made concerning the bargaining process are not relevant to the determination of this application for approval of the Agreement.*

**[22]** *With regard to the procedural defects the ANF have identified I do accept that the employer has not fully complied with the prescribed requirements for a s. 185 application.*

(Emphasis added)

34. We submit that Senior Deputy President O'Callaghan has made an error of law in rejecting the Enterprise Agreement on the basis of non-compliance with s.187(2). This section only applies in circumstances where a scope order is in operation.

35. A scope order was not in operation as identified in Philmac's answer to Question 2.23 in Form F17.

36. Accordingly, the decision of His Honour should be overturned and the Enterprise Agreement approved by the Full Bench.

## **8. The employees have genuinely agreed to the Enterprise Agreement**

37. As identified in section 7 above, Senior Deputy President O'Callaghan rejected the Enterprise Agreement on the basis of non-compliance with s.187(2) of the FW Act.

38. However, in rejecting the Enterprise Agreement under s.187(2) His Honour expressed a "preliminary reservation" about postal ballot which led to the approval of the Enterprise Agreement:

*"[40] The second issue relates to the postal voting arrangement implemented by Philmac and the extent to which I can be satisfied that the employees covered by the agreement genuinely agreed to it.*

*[41] The only issue here is whether, pursuant to s.188(c) the sending out of a postal ballot on 17 December 2010, the day the Christmas annual leave break commenced, enabled an appropriately fair opportunity for employee input to the voting process.*

*[42] The Act does not prescribe that particular forms of ballots must be implemented. In normal circumstances I consider that a postal ballot represents an inherently fair and appropriate voting method. In this case, the only issue goes to whether the provision, without any effective prior advice, of information by post, after the annual leave break had commenced and during the Christmas period, meant that the integrity of the vote was prejudiced.*

*[43] Given my earlier findings I have expressed only a preliminary reservation in this respect in that the low vote return and Ms Pagano's advice of concerns on the part of certain of the night shift employees gives rise to an element of doubt about the extent to which there was an adequate opportunity for genuine employee agreement in this circumstance."*

39. It can be seen from the above that Senior Deputy President O’Callaghan’s preliminary reservation relates to the provisions of the FW Act which require that an enterprise agreement be genuinely agreed to by the employees covered by it. The relevant provisions of the Act are s.186(2)(a) and s.188:

### **Section 186(2)(a) and s.188**

40. Section 186(2)(a) states:

*“(2) FWA must be satisfied that:*

*(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement;”*

41. Section 188 states:

**“188 When employees have genuinely agreed to an enterprise agreement**

*An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if FWA is satisfied that:*

*(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:*

*(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);*

*(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and*

*(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and*

*(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.”*

42. Section 186(2)(a) and s.188 are drafted in terms of FWA being “satisfied” that the statutory requirements have been met.

## The requirement that FWA be “satisfied”

43. The concept of a Tribunal Member being “satisfied” was the subject of a great deal of focus in *Coal and Allied Operations*<sup>4</sup> and in the related decisions of the AIRC and Federal Court.
44. This issue was also canvassed in *Australian Industry Group v Pacific Brands Limited trading as Dunlop Foams* [2010] FWAFB 4337:

**[25]** *On an application for approval of an enterprise agreement, if Fair Work Australia is satisfied that each of the requirements specified in ss.186 and.187 are met, it must approve the agreement. Because the relevant requirements are not expressed in absolute terms, it may be argued that the sections confer a discretion on Fair Work Australia. If that is the case, the principles to be applied in an appeal from a discretionary decision set out in House v R are directly relevant.*

**[26]** *Although the relevant passage has been referred to many times, it is appropriate to set it out once again:*

*“If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.”*

**[27]** *It may be observed that the various matters specified in ss.186 and 187 of which Fair Work Australia must be satisfied are not all of the same nature. Some may involve the exercise of a broader discretion than others. Whether an agreement has been genuinely agreed to by the relevant employees, a question posed by ss.186(2)(a) and (b), is a matter on which “no one [consideration] and no combination of [considerations] is necessarily determinative of the result.” By contrast, the question posed by s.186(4) is primarily a question of law. We have no doubt that if a decision involves an error of law a Full Bench may exercise powers under s.604 to correct the error. Accordingly, whether it is correct to describe a decision under s.186(4) as a discretionary one is of no real significance.*

45. Accordingly, even though section s.186(2)(a) and s.188 are drafted in terms of FWA being “satisfied” that the statutory requirements have been met, a decision by an FWA Member to reject an Enterprise Agreement because the Member was not “satisfied” that the statutory requirements had been met, can be overturned on appeal if that Member has made an error of the type identified in *House v The King*<sup>5</sup>. That is, the Member has:

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<sup>4</sup> *Coal and Allied Operations Pty Ltd v AIRC* (2000) HCA 47.

<sup>5</sup> (1936) 55 CLR 488

- acted upon a wrong principle;
  - been guided by irrelevant factors;
  - mistaken the facts; or
  - failed to take some material consideration into account.
46. Importantly, Senior Deputy President O’Callaghan did not make a decision on whether or not the Enterprise Agreement complied with s.186(2)(a) and s.188. He simply expressed a preliminary reservation.
47. His Honour’s “preliminary reservation” regarding his satisfaction as to genuine agreement being reached was not a reason for his decision to refuse to approve the Enterprise Agreement. Accordingly, with regard to the issue of genuine agreement being reached, we are not seeking relief from a discretionary decision of His Honour below which would otherwise require identification of an error of the kind described in *House v The King*.
48. Should this Full Bench determine that for the reasons specified in section 7 above, His Honour below committed an error of law, this Full Bench is empowered to approve the Enterprise Agreement if it is “satisfied” that the requirements of the FW Act have been met.
49. To the extent that this Full Bench is minded to inquire into those matters that His Honour below identified as matters of “preliminary reservation” the following submissions are relevant.

### **The preliminary reservation expressed by His Honour about the voting process**

50. The issues identified by Senior Deputy President O’Callaghan when expressing his preliminary reservation in paragraphs [40] to [43] of his decision, about whether genuine agreement had been reached, were:

- the allegedly “*low vote return*”;
- whether the ballot “*enabled an appropriately fair opportunity for employee input to the voting process*”; and
- whether the night shift employees were treated fairly.

51. Before addressing each of these issues, we stress the following important points:

- The parties have agreed to a substantial lump sum amount (see clause 20.4 in the Enterprise Agreement) plus a 6 per cent wage increase being payable to employees under the Enterprise Agreement from 1 January 2011. The company understood that the employees wanted these amounts to be paid as soon as possible. Hence, this was an important reason for the timing of the second vote.
- The voting process for the second vote was determined after the company obtained advice from the FWA Helpline.
- In his decision, Senior Deputy President O’Callaghan said “*In normal circumstances I consider that a postal ballot represents an inherently fair and appropriate voting method*”.
- At the hearing on 25 February 2011, the three union bargaining representatives - United Voice, CEPU and AMWU - confirmed their involvement in the enterprise agreement negotiations and confirmed their view that genuine agreement had been reached.
- At the hearing on 25 February 2011, the following positions were communicated by the three employee bargaining representatives who attended:
  - I Buder: supported the approval of the Enterprise Agreement;

- S Goldsworthy: supported the approval of the Enterprise Agreement;
  - C Pagano: opposed the approval of the Enterprise Agreement.
- It is important for the Full Bench to note that Ms Pagano is the bargaining representative for only two employees – herself and one other employee (see Additional Documents for the Appeal”). Ms Pagano is not the bargaining representative for the other night shift employees.

## **The vote return**

52. As stated in section 6 above:

- 131 of 194 employees cast a vote of which 110 were valid;
- 69 of the 110 employees who cast a valid vote (63 per cent) voted in favour of the Enterprise Agreement;
- 21 votes were deemed invalid because the voters did not comply with the voting requirement to lodge their votes in a sealed envelope.

53. In the first ballot in early December, approximately 20 false ballot papers were identified amongst the ballot returns. These false ballot papers were prepared (by an unknown person or persons) in a different font to the true ballot papers.

54. Given the false ballot papers submitted during the first vote, the company took advice from the FWA Helpline before devising the voting requirements for the second ballot. The process for the second ballot included: stamping each Ballot Slip with the company's seal and requiring that all Ballot Slips be returned in a sealed envelope.

55. The tampering which occurred during the first vote was of significant concern to both the company and bargaining representatives, as identified by the submissions made by Mr Richards (PN217) and Mr Buder (PN136-137) at the hearing on 25 February.
56. Section 181(2) of the FW Act provides that an “*agreement is made when a majority of those employees who cast a valid vote approve the agreement*”.
57. The term “majority” is defined by the *Macquarie Dictionary (3<sup>rd</sup> Edition)* as “*the greater part or number*”.
58. Beyond its use in Part 2-4 of the FW Act, the term “majority” is used in a number of important sections of the Act and has a consistent meaning. For example, the term is used in:
- Section 237 re. majority support determinations; and
  - Section 613(3) re. decisions of the majority of members of a Full Bench prevail.
59. An enterprise agreement is made even if only 51% of the employees who cast a valid vote approve the agreement. 63 per cent of the Philmac employees who cast a valid vote approved the Enterprise Agreement.
60. At paragraph [43] of Senior Deputy President O’Callaghan’s decision, His Honour characterised the ballot result as a “*low vote return*”. We submit that this finding (albeit described as a “preliminary reservation”) was not reasonably open to His Honour.
61. Of Philmac’s 194 employees, 131 of them cast a vote (68%), 110 of which were counted as valid votes. The rate of return was substantial for a postal ballot.

62. In a decision refusing to approve the *McDonald's Australia Enterprise Agreement 2009*, Commissioner McKenna described the rate of return (44.06 per cent) as “low”.<sup>6</sup>

63. Commissioner McKenna’s decision was overturned on appeal.<sup>7</sup> With reference to the Commissioner’s findings about the allegedly low rate of return and other matters, the Full Bench said:

*“[39] We agree that this aspect of the decision also involves errors. We find that there is no proper basis for concluding that the employees who voted for the agreement did not genuinely agree to it’.*

### **Employees had a fair opportunity to participate in the postal ballot**

64. The FW Act requires an employer to take all reasonable steps to notify employees of the time and place at which the vote will occur and the voting method used (see Section 180(3) of the FW Act).

65. Philmac complied with this obligation on 17 December 2010, by issuing a memo to its employees notifying employees of the voting process for the Enterprise Agreement, by way of post to the employees’ home addresses (see pages 130-131 of the Appeal Book). The memo was accompanied by:

- a copy of the Enterprise Agreement;
- a memo explaining the terms of the Enterprise Agreement;
- a Ballot Slip; and
- a reply paid envelope.

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<sup>6</sup> [2010] FWA 1347, [55].

<sup>7</sup> [2010] FWAFB 4602

66. The voting period did not begin until 31 December 2010 and closed on 5 January 2011. Therefore, employees were provided with ample opportunity to consider the terms of the Enterprise Agreement and become familiar with the voting process (2 weeks) before the commencement of the vote.
67. Mr Richards and Ms Collins were in the office during the week commencing 20 December and were available to answer any questions. In the email sent to bargaining representatives on 17 December (page 129 of Appeal Book), the bargaining representatives were invited to contact Mr Richards or Ms Collins if they had any questions.

### **All employees were treated fairly, including the night shift employees**

68. At the hearing on 25 February, Ms Pagano said that:
- she did not engage in discussions with Ms Collins about the amendments to the enterprise agreement and the voting process; and
  - she was the only representative of the night shift employees.
- (See PN168-PN176 and PN227 of the transcript).
69. Ms Pagano's statements fail to capture the extent of communication and consultation that was undertaken by Philmac with each of the bargaining representatives, including Ms Pagano.
70. Following the failed first vote, between 7 and 13 December 2010 Philmac requested feedback from each and every bargaining representative and its employees individually about the proposed enterprise agreement and any suggested changes to the agreement. This was identified by Ms Pagano at PN172 of the transcript whereby she acknowledged that she was given the opportunity to submit feedback regarding amendments to the agreement.

71. On 15 December 2010, Mr Richards of Philmac sent an email to each and every bargaining representative notifying them of the common elements of the feedback provided by the employees. An amended enterprise agreement was drafted incorporating that feedback (see page 128 of the Appeal Book). Ms Pagano responded to Mr Richards raising further issues for consideration for in the enterprise agreement (see “Additional Documents for the Appeal”). Mr Richards provided a detailed reply to Ms Pagano’s the following day addressing each of the issues raised in her email (see “Additional Documents for the Appeal”).
72. On 17 December 2010, Philmac sent an email to each of the bargaining representatives, including Ms Pagano, attaching the amended Enterprise Agreement and detailing the voting process.
73. Concerns expressed by Ms Pagano at the hearing on 25 February, that the night shift employees were not offered an adequate opportunity to vote (see PN168 of the Transcript), are dispelled by the fact that, not only was all the voting information posted to all employees, but the workplace reopened for operation on 4 January 2011 – a day before the voting period closed. That is, the night shift employees had a further opportunity to discuss the Enterprise Agreement with their bargaining representatives and/or management of the company before the vote closed.
74. As stated earlier, Ms Pagano is not the bargaining representative for the night shift employees, but rather only two of those employees – herself and one other employee. (See the “Additional Documents for the Appeal”).

## Additional Documents for the Appeal

75. Section 607(2) of the FW Act permits FWA to admit further evidence or take into account any other information or evidence when considering an appeal or a review of a decision made by a single member.
76. We seek leave to tender the following additional documents at the hearing of the appeal:
- The Preliminary Finding of Senior Deputy President O’Callaghan issued on 1 February 2011 (see paragraph 25 above);
  - The bargaining representatives nomination forms relating to Ms Pagano (See paragraphs 51 and 74 above); and
  - The email exchange between Mr Richards and Ms Pagano dated 15 and 16 December 2010 (See paragraph 71 above).
77. The Explanatory Memorandum for the *Fair Work Bill 2008* relevantly states:
- 2321.** *An appeal under clause 604 involves an appeal by way of rehearing. Although an appeal can and usually will be conducted by reference to the original evidence, the Full Bench is not limited to the evidence before the primary decision-maker and can admit further evidence (see subclause 607(2)).*
78. The additional documents which we have sought leave to tender clarify important issues raised at the hearing at first instance. Importantly, these documents are relevant in any rehearing of the application for the approval of the Enterprise Agreement and go to issues which were the subject of His Honour’s preliminary reservation.

## **9. Conclusion**

79. For the reasons set out in this submission, the decision of Senior Deputy President O'Callaghan should be quashed and the Enterprise Agreement approved by FWA.