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Employment Law e-alert

The “Fair Work Principles”: Purchasing policies that take into account workplace practices of suppliers risk *Fair Work Act* exposure

The Fair Work Principles (“FWPs”) are a procurement policy of the Commonwealth government which requires that government suppliers have a particular form of dispute settlement provision (“DSP”) in new enterprise agreements. This requirement does not sit comfortably with the *Fair Work Act* 2009 and could lead to exposure for government entities and their suppliers.

The Commonwealth government considers that best practice for DSPs includes the capacity for one party to be able to refer a dispute to independent arbitration. The FWPs reinforce that view by requiring that procurement be only from suppliers who have DSPs modelled on that practice in any new enterprise agreements (after 1 January 2010). However, that DSP model is not something that is required under the *Fair Work Act*. A common alternative is for enterprise agreements to make arbitration of disputes available only by agreement of both parties to the particular dispute.

Prescribing only one method for arbitration of disputes to occur, when the *Fair Work Act* allows for others, could amount to a restriction on a workplace right of the parties to the agreement – that is, the workplace right to use a different DSP model. It follows that in these circumstances applying the FWPs to refuse to engage a particular supplier could amount to adverse action taken for reasons that include the existence of that workplace right. Adverse action motivated by that reason can be contrary to the *Fair Work Act*.

The Commonwealth government has implemented the FWPs to promote what it regards as best practice workplace arrangements amongst its suppliers. If that alone were enough to justify the use of commercial pressure to promote particular workplace arrangements, then any other level of government or purchaser could take a different view on what DSP model is “best practice”, and what workplace arrangements amongst its suppliers are a pre-condition for procurement contracts. This could leave suppliers in an impossible position.

The existence of the FWPs should not encourage a view that procurement policies can be introduced without taking into account the *Fair Work Act*. The general protections provisions of the *Fair Work Act*, including protection from adverse action based on workplace rights, mean that procurement policies need to be constructed and applied with care whenever they have potential to restrict or alter choices that are protected under the *Fair Work Act* itself.

Key issues

- A government entity or supplier which is considering refusing services of a contractor on the basis of a requirement under the FWPs should carefully consider whether a refusal would be consistent with the *Fair Work Act*.
- A viewpoint about whether a supplier’s enterprise agreement is “best practice”, when considered in procurement decisions, is not in itself an excuse for a failure to comply with the *Fair Work Act*.
- The *Fair Work Act*’s general protections provisions prevent legitimate choices about conditions in enterprise agreements from being a basis to discriminate between suppliers in certain commercial dealings.

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