

6 May 2010

Employment Law e-alert

Union has no veto over enterprise agreement proposals: Full Bench

The role a union has to play when non-greenfields enterprise agreements (**EAs**) are being negotiated under the Fair Work Act 2009 is only as a bargaining representative. A union will not become a party in its own right until after an EA has been approved by employees in a ballot.

Obtaining the agreement of unions as employee bargaining representatives is desirable, and makes obtaining approval by employees in a ballot more likely, but is not an absolute requirement. If the price of union support for a proposed EA is too high, an employer can instead take steps to have employees approve the proposed EA. The impact of this is still being played out in a number of decisions of the industrial tribunal, Fair Work Australia.

The latest decision, of a Full Bench of the tribunal, is *CFMEU –v– Tahmoor Coal* [2010] FWAFB 3510. After lengthy negotiations and rejection by the CFMEU of a number of EAs proposed by Tahmoor, Tahmoor put its final proposal directly to employees, with the intention of asking employees to vote on the proposed EA. Tahmoor sent information to employees and held information sessions at which it explained its proposed EA. It did this with the knowledge but not the agreement of the CFMEU, which was a bargaining representative for the employees.

The CFMEU sought orders from the tribunal based on good faith bargaining obligations in the Fair Work Act. It said that in going directly to employees, Tahmoor was in breach of the obligation owed between bargaining representatives to "*refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining*". The Full Bench said: "*we are satisfied that in arranging to put its proposed agreement to the employees in a ballot, Tahmoor was not acting capriciously or unfairly in the circumstances prevailing at the time*".

An important consideration was that the CFMEU was, in a practical sense, aware of the approach to employees and what was being said by Tahmoor in support of its proposed EA. The CFMEU could not demonstrate that information given to employees by Tahmoor was misleading.

The decision confirms that an employer can put a proposed EA directly to employees without breaching the good faith bargaining obligations. However the employer should take reasonable steps to ensure that employee bargaining representatives have had a full opportunity to consider and respond to the proposed EA, and are kept informed about how direct communications with employees are being conducted.

Key points:

- There is no union right of veto over what EA content an employer can propose to employees, whether a ballot can be held at all, or how the ballot must be conducted. The real question is what conditions a majority of employees will approve in a ballot.
- Putting a proposed EA to employees in a ballot without agreement of employee bargaining representatives must be able to be justified as action that may progress a stalled agreement-making process.
- In negotiations with employee bargaining representatives, it will be important to gauge what proposed EA will have real prospects of being approved by a majority of employees, and to explicitly aim proposals at that mark.
- If it becomes necessary to put a proposed EA to employees directly, to test the waters with a ballot, the approach needs to be carefully planned to ensure it is in line with the good faith bargaining obligations and other provisions of the Fair Work Act, and any resulting agreement will meet the Fair Work Act tests for approval by the tribunal.

Contacts

Martin Dunne, Sydney (City)	+61 2 9391 3211	mdunne@hunthunt.com.au
Ian Miller, Sydney (North West)	+61 2 9804 5704	imiller@hunthunt.com.au
David Thompson, Melbourne	+61 3 8602 9252	dthompson@hunthunt.com.au
Tim Lange, Melbourne	+61 3 8602 9208	tlange@hunthunt.com.au
Andrew Knott, Brisbane	+61 7 3292 9760	aknott@macrossans.com.au
Chris Sharp, Adelaide	+61 8 8414 3385	csharp@hunthunt.com.au
Darren Miller, Perth	+61 8 9488 1300	darren.miller@marksandsands.com.au
Sarah Sealy, Hobart	+61 3 6231 0131	ssealy@hunttas.com.au
Chris Osborne, Darwin	+61 8 8924 2600	cosborne@huntnt.com.au
Justine Matthews, Newcastle	+61 2 4925 5500	jmatthews@hunthunt.com.au