



10 April 2018

Dear Mr Jordan

s185 Application for approval of the Electorate Officers' (Victoria) Single Enterprise Agreement 2017

AG2018/1297

An application for approval was lodged with the Fair Work Commission on 4 April 2018.

Upon preliminary review of the application, it appears that the notice of employee representational rights contains content that is not prescribed by Schedule 2.1 of the Fair Work Regulations. The content in the notice that is identified as not being prescribed is removal of the word “employer” from the final paragraph of the notice and the insertion of the words “Richard Jordan, 8682 2610”.

In *Peabody Moorvale v CFMEU [2014] FWCFB 2042*, a Full Bench of the Fair Work Commission said at paragraphs [46] - [47]:

“In our view s 174(1A) is clear and unambiguous. There is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity. We agree with the Minister's submissions on this point, that is:

A mandatory template is provided in the Regulations. The provisions make it clear that there is not scope to modify either the content or the form of the Notice **other than as set out in the template.**

Taking into account the considerations identified in Project Blue Sky we have concluded that the legislative purpose of s 174(1A) is to invalidate any Notice which modifies either the content or form of the Notice template provided in Sch 2.1 of the Regulations. We now turn to the facts of this case to determine whether the Notice given by Peabody complies with Sch 2.1”. (**Emphasis added**, Footnotes omitted)

More recently, in *Maritime Union of Australia, The v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics and Others [2017] FWCFB 660*, a Full Bench of the Commission considered the validity of a Notice which contained the telephone number of the Fair Work Ombudsman in the final paragraph.

Regarding the Notice, the Full Bench said, at paragraphs [98] and [101]:

“[98]... In light of *Aldi*, we consider that the proper course is to follow *Peabody* and approach the NERR issue on the basis that a purported NERR which does not strictly

comply with the prescribed form in Schedule 2.1 is invalid, and that an enterprise agreement which proceeds on the basis of an invalid NERR is incapable of approval.

[101]... The prescribed form clearly intended that employees in receipt of an NERR be informed of the telephone number of the Fair Work Commission infoline as a source of information about enterprise bargaining. The prescribed form commanded that the number for that infoline be inserted for that purpose. That purpose would be frustrated entirely if a different and incorrect telephone number could validly be inserted into the NERR. Even if the requirement for strict compliance still allowed some capacity for errors of an entirely trivial nature to be overlooked (the possibility of which was adverted to by Jessup J in *Aldi* at [49] and by the Full Bench in *KCL* at [17]), we do not consider that the defect in the NERRs here could be characterised as trivial...”

The Full Bench held at paragraph [104]:

“... That the Commission’s duty is to not approve enterprise agreements where the NERR issued by the Employer does not strictly comply with the current prescribed form in respect of that last paragraph.”

It would appear that, in line with the above mentioned decisions, the notice in this case does not comply with the Act as it departs from the form prescribed in Schedule 2.1 of the Regulations, and is therefore invalid. It seems to follow that as no valid notice of employee representational rights was given to employees, the Agreement **cannot be approved**.

If you would like to be heard in relation to the above, the matter may be listed for a hearing.

Alternatively, if you wish to withdraw the application, please file a notice of discontinuance. This may be accessed here: <https://www.fwc.gov.au/content/rules-form/notice-discontinuance>.

The Commission requests that this correspondence be addressed as soon as possible but not later than **close of business 13 April 2018** by providing a response to member.assist@fwc.gov.au.

Please ensure a copy of your response is provided to all bargaining representatives.

Yours sincerely,

Fair Work Commission

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