Appeal By Woolworths Ltd T/A Produce and Recycling Distribution Centre

s.604 - Appeal of Decisions

Appeal against decision [[2010] FWA 30] of Commissioner Smith at Melbourne on 21 January 2010 in AG2009/14435

Re: application for approval of enterprise agreement

A submission by Australian Institute of Employment Rights for the attention of:

In Fair Work Australia

Fair Work Act 2009

FWA Matter No.: C2010/2647

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Date: May 2010

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The Issue and the clause

1. The issue addressed in this submission is whether the Woolworths Limited SDAEA Mulgrave Produce and Recycling Enterprise Agreement 2009-2012 ("the agreement") meets the requirements of section 186 (6) of the Fair Work Act 2009 (Cth) ("the Act"). The AIER submits that the agreement, particularly clause 30, does not meet those requirements and, therefore, the order of Commissioner Smith was correct.

2. The relevant dispute settling provisions are discussed in paragraphs [5] to [7] of the decision of Commissioner Smith. Clause 30.6 of the agreement states:

> "If after 30.5, there is still no resolution and the employer's Director of Human Resources and the employee agree or, in instances where the employee elects to be represented by the union, the employer's Director of Human Resources and the National Secretary of the union agree, the matter may proceed to arbitration by Fair Work Australia."

3. The operation of that clause was described by Commissioner Smith in the following terms:

> "Importantly, if either the Human Resources Manager, the employee or the National Secretary of the SDA do not agree, then the matter may not, under the Agreement, come to Fair Work Australia for arbitration. In short, there is a power of veto to the matter being settled."

4. There are three matters to note about the clause:

   (a) The clause does not provide for the FWA, or a independent dispute settler, to be involved in

arbitration of the dispute, except with the agreement of both parties.

(b) Under the clause, both parties hold "a power of veto to the matter being settled." This is a finding that is not challenged by the appellant.

(c) The dispute that is the subject of clause 30.6 is unresolved. On no view could the dispute be described as "settled".[1]

Subsection 186 (6) and its context

5. Section 186 (6) of the Act provides:

Requirement for a term about settling disputes

" (6) FWA must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows FWA, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: FWA or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent FWA from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4)."

[1] The terms of the clause itself state: "If after 30.5, there is still no resolution….."

6. Subsection 186(6) is in Part 2-4 of the Act which is concerned with establishing terms and conditions of employment for federal system employees by means of enterprise agreements. The Act subjects such agreements to a regime that includes an approval process. A consequence of the approval process is that the proposed agreement is accorded the status of an industrial instrument enforceable under the Act.

7. Agreements proposed for approval must comply with specified requirements. Subsection 186(6) is one such requirement. There are a range of other procedural and substantive requirements that must also be complied with in the Act for the agreement to be approved.

8. The parties are free to make an agreement that does not comply with the requirements in the Act. However, if the parties seek to gain the advantages of the approval of the agreement, then they must comply with the mandatory requirements.

The procedure contemplated by section 186(6)

9. To meet the requirements of subsection 186 (6) the term must "provide a procedure that requires or allows FWA (or another dispute settler) … to settle disputes". The phrase "to settle" has been carefully chosen by the legislature.

10. "Settle" is defined by the Shorter Oxford Dictionary in the following terms:

> "decide, come to a fixed conclusion on (a question, a matter of doubt or discussion); to bring to an end (a dispute) by agreement or intervention; put beyond dispute, establish (a principle or fact)."

11. A key notion at the heart of settling a dispute is its finality. A settled dispute is brought to an end; it is finalised and resolved.

A dispute that is not finalised is not settled. This is the plain meaning of the words "to settle". Settle is a synonym for resolve.[2]

12. The alternative interpretation of the phrase "to settle" sought by Woolworths is untenable. That contention is that the requirements of section 186 (6) are met when a term establishes a process that may leave the dispute unresolved. For example, a process that allows for conciliation alone by the FWA would, on Woolworth's contention, meet the requirements of section 186 (6), A process that may leave a dispute unresolved is not a process to settle that dispute. Such a process may fit the description of a process "to conciliate", "to mediate", "to consider" or "to try to settle". But it is not a process to settle disputes as the process lacks the key element of finality.

13. The submission of Woolworths equates the meaning of "to settle" with the meaning of the phrase "to deal with". In various other sections of the Act the legislature has referred to the role of the FWA "to arbitrate" and "to deal with". The choice of a different word ("to settle") suggests that the legislature had in mind a different concept.

14. The interpretation of the phrase "to settle" for which the AIER contends is consistent with the evident purpose of subsection 186 (6): namely, to provide for the settlement of disputes. The alternative contention of Woolworths is inconsistent with that purpose. It is impossible to discern why the legislature would require insertion into the agreement of a clause which at the end of the day does not give effect to the purpose for which the clause is to be inserted.

[2] Note that paragraph 783 of the Explanatory memorandum concerning subsection 186 (6) uses "resolve" as a synonym for "settle": "A disputes procedure could not, for example, provide for disputes to be resolved by…."

15. This interpretation of the meaning of the phrase "to settle" is supported by the Explanatory Memorandum that, when discussing subsection 186 (6) states:

> "2730. This requirement means, for example, that while the initial stages of a dispute resolution process may involve the direct participants, such as the manager and the employee (and his of her representative), **the final stage of the process must involve FWA** or any independent person or body, such as professional mediator."(emphasis added)

16. This interpretation of the phrase "to settle" furthers the objects of the Act. Section 186 (6) furthers the object in section 3 (e) of the Act which states:

> "The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> …..(e) enabling fairness and representation at work and the prevention of discrimination by ... providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms…."[3]

[3] In contrast section 3 (h) of the Workplace Relations Act 1996 (Cth) provided that:

"The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

> (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and
>
> (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and
>
> …. (h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes…"

17. It is important to note about this object that the purpose of the procedures is to "resolve" grievances and disputes. A procedure that left grievances and disputes unresolved would not further that object. Section 3 (e) concerns procedures that are "effective". A procedure that does not achieve the purpose of resolving a dispute is ineffective. The interpretation of Woolworths would allow the dispute to be unresolved at the end of the procedure.

18. Further, as noted above, section 3 provides that "The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians…" The resolution of disputes between industrial parties is in the public interest. The economy cannot afford long, protracted unresolved disputes, especially given their potential to spill over into the political and social sphere, creating division and disharmony. This destructive potential has been etched on the Australian workplace psyche for over a century. Disputes cause instability and loss and take their toll on the health and wellbeing of participants. Adopting the position advanced by Woolworths permits disputes to remain unresolved and has the potential to reek harm.

Settling disputes by means other than arbitration

19. Under section 186 it is not necessary that the FWA be the institution that settles the dispute. The parties can choose to have an independent third party settle the dispute.

20. Nor is it necessary that there be arbitration to settle the dispute. There are a range of dispute settling procedures that the parties may choose from as means of resolving a dispute to finality. Given the history of Australia's industrial laws, arbitration may

be the most common means chosen by the parties, but there are others. These include:

(a) An agreement to accept the recommendation of a third party, whether it be the FWA or another, would settle the dispute.

(b) An agreement to adopt the opinion of a mediator following mediation.

(c) An agreement to implement the findings of an inquisitorial review or inquiry conducted into the dispute.

(d) An agreement to accept the opinion of an expert formed without reference to evidence or argument.

(e) An agreement to randomly select the name of the winning argument out of a hat.

(f) A coin toss.

21. The FWA could perform each of the functions described above.[4] Section 595 (2) permits the FWA to deal with a dispute (other than by way of arbitration) as it considers appropriate. It then lists four different means of dealing with disputes, but it is a non-exhaustive list. The distinction between arbitration and the other means of dealing with the disputes is not a distinction between binding and non-binding. The Act does not use the term "binding".

22. None of the methods referred to in paragraph 20 would require an arbitration, but each would be a process to settle disputes under section 186 (6). As is stated in Halsbury's Laws of Australia title on Arbitration:

[4] It is acknowledged there may be doubts about the FWA resolving a dispute by a coin toss or random selection.

"25.1 Definitions: An 'arbitration' is the reference, usually by agreement, of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, to a person or to persons other than a court of competent jurisdiction…..[5]

"….[25.10] Conciliation and mediation are procedures intended to bring the disputing parties to agreement. They are plainly not arbitration. Agreements to be bound by counsel's opinion,[6] or by the result of a valuation or appraisal, or to refer questions arising out of races or athletic contests to racing stewards or referees do not amount to arbitration agreements, even though the agreement is in writing.[7]

[25-15] The parties may agree to refer the matter in dispute to an expert for expert opinion, valuation or appraisal and not as an arbitrator. Expert valuation or appraisal is not subject to the law of arbitration although the expert may be obliged to comply with the requirements of natural justice.[8] Whether in a given case the agreement is one for appraisal or for arbitration will depend upon the nature or subject matter of the dispute, the identity of the person nominated, whether the dispute is to be determined by some pre-existing standard, the nature of the inquiry and, above all, on the terms of the agreement itself.[9]…. Mere matters of valuation may be the subject of genuine arbitration agreements[10] where, for instance, the matter of valuation is referred with other matters,[11] or where it is clearly intended that there should be a judicial hearing,[12] and not merely that the referee should, without taking evidence or hearing

[5] Footnotes omitted
[6] Boyd v Emmerson (1834) 2 Ad & El 184; 111 ER 71. Compare Sybray v White (1836) 1 M & W 435; 150 ER 504.
[7] Benbow v Jones (1845) 14 M & W 193; 153 ER 445; Ellis v Hopper (1858) 3 H & N 766; 157 ER 677; Parr v Winteringham (1859) 1 El & El 394; 120 ER 957; Sadler v Smith (1869) LR 5 QB 40; Cipriani v Burnett [1933] AC 83 , PC. See also Brown v Overbury (1856) 11 Exch 715; 156 ER 1018.
[8] The expert is obliged to approach the task impartially (see [25-10]) and carefully: Sutcliffe v Thackrah [1974] AC 727; [1974] 1 All ER 859; (1974) 4 BLR 16Cautionary treatment indicated - Click for CaseBase entry, HL (certifying architect); Arenson v Casson Beckman Rutley & Co [1977] AC 405; [1975] 3 All ER 901, HL. Other requirements such as the audi alteram partem (both sides should be heard) rule apply only if the agreement appointing the expert so provides.
[9] Footnotes omitted.
[10] Australian Mutual Provident Society v Overseas Telecommunications Commission (Aust) [1972] 2 NSWLR 806 at 808 per Hutley AJA, CA(NSW); Isca Construction Co Pty Ltd v Grafton City Council (1962) 8 LGRA 87 at 92 SC(NSW); IOOF Australia Trustees Ltd v Seas SAPFOR Forests Pty Ltd (unreported, SC(SA), Debelle J, SCGRG 1323 of 1995; S5327, 3 November 1995, BC9502399) (ultimate issue was one of valuation).
[11] Re Evans, Davies, and Craddick (1870) 22 LT 507. See also Re Dawdy (1885) 15 QBD 426, CA.
[12] Re Hopper (1867) LR 2 QB 367; Hammond v Wolt [1975] VR 108 at 114-15; IOOF Australia Trustees Ltd v Seas SAPFOR Forests Pty Ltd (unreported, SC(SA), Debelle J, SCGRG 1323 of 1995; S5327, 3 November 1995, BC9502399).

> argument,[13] make a valuation according to his or her own skill, knowledge and experience.[14]"

23. Hence, there are a range of methods other than arbitration that can be adopted by the parties that can be used to settle the dispute to finality.

The operation of section 739 (4) and 740 (3)

24. Subsections 739 (4) and 740 (3) are in similar terms. The former provision states:

> "If, in accordance with the term, the parties have agreed that FWA may arbitrate (however described) the dispute, FWA may do so."

25. The purpose of the provision is to enable the FWA to arbitrate. It removes the barrier to arbitration created by ss 595 (3) that, but for ss 739 (4), would not enable the FWA to arbitrate.

26. Subsections 739 (4) and 740 (3) require the parties be clear whether it is the FWA or the independent dispute settler who is exercising any arbitral function.

Conditions and the settling process

27. Pursuant to subsection 186(6) there must be a dispute settler, either the FWA or an independent third party. There may be conditions upon the exercise of the dispute settling functions by the FWA. Those conditions may be imposed by the parties. However the conditions cannot be formulated in a way so as to

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[13] The right to be heard is an essential feature distinguishing arbitration: Datronics Engineers (Inc) v Hardeman-Monier-Hutcherson [1966] WAR 55 at 60; Hammond v Wolt [1975] VR 108 at 112 (disapproved, on a different point, PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301; 131 ALR 377; 69 ALJR; not followed, on a different point, Turner Corp Ltd v Austotel Pty Ltd (1992) 27 NSWLR 592.

[14] Re Hammond and Waterton (1890) 62 LT 808; 6 TLR 302; IOOF Australia Trustees Ltd v Seas SAPFOR Forests Pty Ltd (unreported, SC(SA), Debelle J, SCGRG 1323 of 1995; S5327, 3 November 1995, BC9502399).

defeat the purpose of the necessary term. As noted above, the purpose of the s186(6) term is to settle disputes. The parties cannot formulate conditions to the exercise of the FWA functions that subvert that purpose.

28. For example, the parties could formulate a condition that any conciliation conducted by the FWA will be concluded within 7 days. Or it might formulate a condition that any mediation be proceeded by an inspection. Or that the FWA will conduct an arbitration, but lawyers will not be permitted to appear before the FWA.

29. But the parties cannot formulate a condition that would defeat the very purpose of the scheme. The parties could not create a dispute settling process that allowed either of them to veto the involvement of the FWA because such a provision would leave the dispute unsettled indefinitely. Allowing a power to a party to veto the involvement of FWA would not be a process to settle disputes. It would be a process that allowed disputes to remain unresolved.

30. Such a veto power would not further the purpose of section 186 (6) identified in paragraph 14. Nor would it further the relevant objects of the Act discussed in paragraph 16 above. Further, object 3 (e) concerns procedures that are "accessible". The more numerous and formidable the barriers to access the procedures, the less the object is satisfied. A procedure that is difficult, or impossible, to access would not further the object. The argument of the employer would make access to arbitration dependent on the unreviewable whim of the employer.

The application to make submissions

31. The AIER seeks an invitation to make submissions under section 590. It does so in the context of there being no party who is a contradictor. Further, the decision will establish an important, and probably all but irreversible, precedent.

32. The rationale of the adversary system is that the interests of justice will be best served if the result of a case is the outcome of a contest in which the opposing interests are fairly represented and forcefully advocated. From time to time tribunals are confronted with situations in which both sides to the contest are agreed upon a particular outcome, but where the parties do not between them necessarily represent all who have a concern with the result. In such a situation the adversary system does not work as it should, unless the tribunal can find a contradictor.15 This is such a case.

33. The AIER is an independent not for profit organisation. The Objectives of AIER state:

> "2. Objects of the Institute
>
> Adopting the principles of the International Labour Organisation and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.
>
> 3. In particular it will:
>
> (a) commission academic research
>
> (b) hold conferences and seminars

[15] See *R v Gallagher* (1991) 23 NSWLR 220 at 232 per Gleeson CJ, with whom Meagher JA and Hunt J agreed (NSW CCA)

(c) publish and disseminate publications

(d) contribute to public discourse on employment issues through the media, community debates and public forums

(e) provide training to industrial participants

(f) provide advice and other services to industrial participants and governments

(g) develop a Charter of Employment Rights for Australia

(h) promote models of workplace arrangements which promote economic efficiency while respecting employment rights and standards

(i) work co-operatively with academic and community organisations which share similar objectives

(j) encourage the participation of members who share similar objectives.

4. The AIER is an organisation independent of government or any particular interest group and will implement these Objects with academic rigour and professional integrity.

34. The AIER includes employer and employee interests in its make-up, membership and operation. It is also fortunate to have included in its governance structure and advisory bodies representatives from the academic and legal fraternity.

35. A list of those involved on the AIER Executive Committee and its panel of experts is included as an Annexure to these submissions.

36. It is AIER's view that any system of industrial regulation must be founded in principles which reflect:

(a) Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;

(b) Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in

Australia's constitutional and institutional history of industrial/employment law and practice. In particular, values integral to what has been described as the "important guarantee of industrial fairness and reasonableness"16 ; and

(c) Rights appropriate to a modern employment relationship which are recognised by the common law.

Charter of Employment Rights

37. In 2007 the AIER published a Charter of Employment Rights. The Charter is based on the 3 sources of rights identified above.

38. The Charter's purpose is to unravel the complexity of the regulation of workplace relations and re-define it by identifying the fundamental values which good workplace relationships and good law made to enhance such relationships must be based upon.

39. The Charter of Employment Rights and the book which accompanies it, An Australian Charter of Employment Rights, is the work of eminent workplace relations practitioners from both the academic and legal communities who are independent of any stakeholders with vested interests. A list of those persons involved is included in this annexure.

40. The Charter has been through a rigorous assessment process. It was circulated in draft format and public comment was invited and taken during the period March to September 2007. An online survey was developed in order to receive feedback on its content. Public forums were held in Sydney and Melbourne.

41. The Charter was circulated to a large (in excess of 2000) number of human resources practitioners via the Australian Human Resource Institute (AHRI) publication HR monthly.

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[16] *New South Wales and Others v Commonwealth [2006] HCA 52,* per Kirby J at [523] – [525].

42. Formal consultations regarding the content of the Charter were held with representatives of every major Australian political party.

43. The Charter contains at article 10 the following provision

10 Effective Dispute Resolution

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.
The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.

44. In his report from the NSW Government Inquiry into options for a new National Industrial Relations system17, Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South developed a set of principles that he believed should found a new national system. Williams cited a number of Australian and overseas sources used to develop the principles and gave particular emphasis to AIER's Charter of Employment Rights.

45. The Charter has become a blueprint for assessing government policy, for legislative reform, for company practice and for education about workplace rights.

Submissions

46. The AIER has made numerous submissions to Inquiries related to workplace relations law and practice including:

(a) Inquiry into the provisions of the Independent contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent contractors) Bill

[17] *Working Together – Inquiry into Options for a New National Industrial Relations System* released in January 2008.[17] http://www.industrialrelations.nsw.gov.au/action/inquiry.html

2006 – Senate Employment Workplace Relations and Education Legislation Committee

(b) Working Together - Inquiry into Options for a New National Industrial Relations System, NSW Government 2008

(c) The Fair Work Bill and Beyond - Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 200

(d) Preventative Health and Workplace Culture – Submission to the Prime Minister, Deputy Prime Minister & Minister for Health & Ageing 2009.

Public Education role of AIER

47. AIER activities include initiatives aimed at educating the public with respect to workplace rights. Activities aimed at this include:

WorkRight

(a) A curriculum resource for teaching and learning about workplace rights aimed at teachers, and students in Year 10. This resource was commissioned by the Victorian Government and produced in collaboration with the Teacher Learning Network. It will be distributed to all Public, Independent and Catholic secondary schools in Victoria in 2010.

Australian Standard of Employment Rights

(b) In 2009 the Australian Institute of Employment Rights launched the Australian Standard of Employment Rights, which provides a benchmark against which

employers and workers can measure the health of their workplace culture.

The Debate

(c) Introduces an innovative publishing format providing an overview of complex contemporary workplace relations issues in an accessible magazine format.

Research

(d) AIER has been commissioned to produce research reports on a variety of subjects.

Public Events

(e) The AIER has held numerous public events aimed at stimulating debate and educating around workplace issues. The AIER's annual debate in Sydney has been attended by over 300 people each year since its inception in 2007.

Annexure

Australian Institute of Employment Rights

Patrons
The Honourable RJ Hawke
Professor Ron McCallum AO

Executive Members
President
Mr Michael Harmer
Harmers Workplace Lawyers

Vice Presidents
Employer – Fiona Hardie – Hardie Grant Publishing
Employee – Cath Bowtell – ACTU
Independent - Professor Joellen Riley -University of Sydney

Members
Hon. Paul Munro
Sean Reidy – Carne Reidy Herd Lawyers
Gary Rothville - Gary Rothville and Associates
Mark Irving - Victorian Bar
Tim Kennedy - National Union of Workers
Lisa Heap – AIER Executive Director

Charter - Panel of Experts & Advisory Committee

Professor Joellen Riley, Sydney University

Professor Greg Bamber, Monash University

Carol Andrades, Ryan Carlisle Thomas

Associate Professor Anthony Forsyth, Monash University

Associate Professor Colin Fenwick, Melbourne University (and now ILO)

Professor Marilyn Pittard, Monash University

Professor David Peetz, Griffith University

Professor Barbara Pocock, Centre of Work and Life at the University of Adelaide

Justice Paul Munro, former Presidential Member of the AIRC

Mordy Bromberg SC, Victorian Bar (now Justice of Federal Court)

Professor Ron McCallum AO, Sydney Law School

David Chin, NSW Bar

Anne Gooley, Partner, Maurice Blackburn Cashman (now Commissioner Fair Work Australia)

Professor Russell Lansbury, University of Sydney (liaison)

Emeritus Professor John Neville, UNSW

Associate Professor Peter Kriesler, UNSW

Michael Harmer, Harmers Workplace Lawyers

Mark Irving, Victorian Bar

Peter Rozen, Victorian Bar

Bob Russell, Griffith University

Julia Watson, Melbourne University