The perils of getting the Notice of Employee Representational Rights wrong.....

Members would be aware that section 173 of the *Fair Work Act 2009* (Cth) (the Act) requires that an employer must take all reasonable steps to give the Notice of Employee Representational Rights (NERR) no later than 14 days after the notification time for a proposed enterprise agreement.

Section 174 of the Act further requires that the NERR conforms to strict content requirements and be in the form prescribed by the *Fair Work Regulations 2009*. It is in this area that many enterprise agreements have failed in being approved due to the issuing of non-compliant NERR’s. The Employment Relations Team at LASA have included some significant decisions below relating to NERR’s that have come from the Fair Work Commission (FWC).

**Peabody Moorvale v CFMEU [2014] FWCFB 2042**

In this case, Peabody Moorvale (the Employer) issued to employees the NERR along with two bargaining representative nomination forms (employer and employee copy), with all three documents stapled together.

On submitting the agreement for approval, the Employer also submitted the stapled documents as a part of its supporting material. When it was brought to the Employer’s attention that the NERR issued to employees may not be compliant, the Employer sought a Full Bench determination to ascertain if the NERR as distributed to employees was compliant with the Act and Regulations.

The Full Bench concluded that the three stapled documents as distributed by the Employer were the NERR. Because of the two extra documents attached, the NERR was not compliant with the requirements of section 174, ultimately resulting in the application for approval of an enterprise agreement being dismissed.

This decision has since become the leading authority on the subject of NERR’s and the principles of this decision are often applied when making a decision relating to NERR’s.


In two identical decisions, the FWC rejected two applications for approval of an enterprise agreement from DP World, due to a departure from the form and content of the NERR from what is prescribed in the Act and Regulations.

In these two instances, the NERR used by DP World for both agreements were identified to contain other content in the form of a company logo and letterhead information, as well as incorrectly referring to the *DP World Melbourne Enterprise Agreement 2014* and the *DP World Brisbane Enterprise Agreement 2014*.

In reaching a decision, the Commissioner formed a view that the incorrect date of the title of the agreements did not represent a material change to the form and content of the NERR as prescribed. However, the Commissioner did find that the additional content; being the company logo and letterhead information, while seemingly insignificant, was a more serious concern and concluded that the NERR had departed from the form and content as prescribed and the FWC could not approve the agreements. Accordingly, both applications for approval were dismissed.

**Transit (NSW) Services Pty Ltd [2016] FWC 2742**

In this decision of the FWC, the Deputy President refused to approve an application for approval of an enterprise agreement due to the inclusion of the FWC website.

The proforma NERR template provided in the Fair Work Regulations makes reference to the Fair Work Ombudsman website (www.fairwork.gov.au). While the FWC conceded that it was not clear if any employee was negatively impacted because of the error and if the error had any influence over their decision in the voting process, it was clear that the ‘website that Parliament intended to be referred to in the NERR was the Fair Work Ombudsman’s, in this case that was not done and Parliament’s intentions were not met’.

The Deputy President concluded that the website error was not insignificant, minor or inconsequential and subsequently dismissed the application for approval.


**Methodist Ladies' College [2015] FWC 4050**

The NERR provided to employees at Methodist Ladies College as a one page document, including a Nomination Form for employees to use to nominate a bargaining representative for enterprise agreement negotiations.

The key issue the FWC had to determine was whether the Nomination Form was part of the NERR. In making a decision, the FWC referred back to the Peabody decision, which found that extra content included with the NERR was inconsistent with the requirements of the Act.

In applying the principles of Peabody, the FWC found that the NERR as issued by Methodist Ladies College was inconsistent with the requirements of the Act and dismissed the application for approval. This decision was further upheld in a Full Bench decision of the FWC.


**The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics (C2016/4902); The Maritime Union of Australia v DOF Management Australia Pty Ltd (C2016/4903); The Maritime Union of Australia, v Smit Lamnalco Australia Pty Ltd (C2016/4904) [2017] FWCFB 660**

In a recent decision, the Full Bench of the FWC overturned two approval decisions for enterprise agreements that were negotiated in the offshore sector.

In appealing the original decisions which approved the agreements made between three different companies and their employees, the Maritime Union of Australia (MUA) submitted that there were deficiencies with the DOF Management Australia and Smit Lamnalco Australia NERR’s that were issued to employees. The deficiencies identified referred to the fact that both companies had inserted the phone number of the Fair Work Ombudsman instead of the Fair Work Commission Infoline.

In allowing permission to appeal, the Full Bench agreed with the submission of the MUA in relation to the NERR’s departing from the prescribed form, quashing the original decisions for the DOF Management Australia and Smit Lamnalco Australia enterprise agreements and dismissing the applications for approval.


Following this most recent decision, Employment Minister Michaela Cash provided a statement to the media resolving to introduce legislation to fix anomalies such as those found in relation to the role of NERR’s in the
enterprise bargaining process. The statement made by Michaela Cash draws further attention to onerous administrative requirements for enterprise agreements that can prevent a genuinely agreed to enterprise agreement from being approved, a problem identified in the 2012 report: *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, and the Productivity Commission’s *Inquiry into the Workplace Relations Framework* in 2015.

The Employment Relations Team at LASA will update Members if there are any changes to The Act introduced to Parliament pertaining to enterprise bargaining.

If any Member has any questions regarding this article or would like further advice in relation to the NERR or enterprise bargaining, please contact the Employment Relations Team on 02 9212 6922 or employmentrelations@nswact.lasa.asn.au