MCA briefing note

Fair Work Commission decision on multi-employer bargaining test case New South Wales coal mines

Background

On 23 August 2024, the Full Bench of the Fair Work Commission[1] released its decision[2] on the application by APESMA to compel four mining employers into multi-employer bargaining under the provisions of the *Fair Work Act* that were inserted in the government's 2022 amendments.

The Commission upheld the union's application and has issued a 'singe interest employer authorisation' under the new section 248 of the Act. This authorisation[3] will compel three of the four respondent employers (Glencore, Peabody, Whitehaven) to 'bargain' together for a multi-employer agreement for up to 12 months.

This was a significant test case that tested four separate issues:

1. What is necessary for a union to demonstrate that a majority of relevant employees 'want to bargain' for a multi-employer agreement;
2. What is sufficient to satisfy the requirement that the relevant employers have a 'common interest;
3. What is sufficient to demonstrate that the operations of the employer are 'reasonably comparable'; and
4. What is the test that applies in determining 'contrary to the public interest' in such cases.

Each of these four issues are considered below.

Consequences of the FWC decision

The Full Bench found against the employer parties on each of these four grounds. A finding in their favour on even one of those grounds would have been enough to defeat the application. As a result, the Commission has issued an authorisation requiring three of the four employers to engage in multi-employer bargaining with APESMA. These employers are:

1. Whitehaven Coal Mining Ltd
2. Peabody Energy Australia Coal Pty Ltd
3. Ulan Coal Mines Ltd (subsidiary of Glencore plc)

[1] Deputy President Hampton, Deputy President Wright, Commissioner Matheson
[2] https://www.fwc.gov.au/documents/sites/b2023-1339/2024fwcfb253.pdf
[3] https://www.fwc.gov.au/documents/sites/b2023-1339/pr777608.pdf

If an agreement cannot be reached, then they could be subjected to an arbitrated 'workplace determination' set by the Fair Work Commission. This would replace their existing enterprise agreements and effectively prohibit them from returning to single enterprise bargaining in future. The new legislation allows a union to 'game' the system to render bargaining 'intractable' and thus trigger compulsory arbitration after 12 months.

The implications of the decision are not limited to the three employers only. The Act also allows for additional employers to be added to the authorisation against their will once it is in operation.

Multi-employer bargaining would also allow 'protected industrial action' (i.e. strikes) across all of the sites. The positions involved are statutory positions, which are a legal requirement for mines to operate – if they stopped work then the mines would have to shut down.

Now that a precedent has been said in relation to a relatively small cohort of employees ('supervisors', 'managers' and the like) it can now be flowed through to the bulk of the workforce, i.e. production and maintenance employees.

Summary of the FWC decision

The Commission's decision on the four key issues was as follows:

1. A majority of the employees 'want to bargain'

The union in this case sought to establish 'majority support' via online ballots and other communications, of which the employers were not aware and based on forms of words. that was argued did not accurately reflect what was being proposed. The employers who were roped in argued that:

> 'the process leading to the Ballot involved misrepresentation and that APESMA provided inaccurate, incomplete or misleading information which invalidated the employees' apparent consent.'[4]

However, the Commission ruled that the Act gives it broad discretion to use *'any method [that it] considers appropriate*' in determining whether there is 'majority support'.[5] It ruled that:

> 'In the absence of any requirements in s.248(1B)(d) akin to 'genuine' or 'informed' support, we do not consider that these notions should be implied into the provision.'[6]

This approach creates a substantially lower onus on unions to explain multi-employer bargaining than that which is placed on employers to 'explain' proposed enterprise agreements.

2. Employer 'common interest' test

Under the legislation, there is a rebuttable presumption of a 'common interest' and the onus is on the employer parties to rebut the union application. The legislation is, quite intentionally, weighted in favour of union applications and against the commercial interests of employers.[7]

The union essentially argued that the fact that the four employers all mined the same commodity in the same state was sufficient to establish a 'common interest'. This is an extremely broad approach to the legislation, which would set very far-reaching precedents across almost any industry.

Only one of the four employers (Delta Coal) was found not to have a 'common interest' as it only supplied coal to one power station, owned by a related entity and that *'its sole commercial purpose is not to make profits but to cover its costs of providing a reliable supply of thermal coal to Delta Energy'.*[8]

3. 'Reasonably comparable' test for the employers' operations

The MCA submitted to the Commission that the concept of 'reasonably comparable' must consider

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[4] Para [217]
[5] Para [238]
[6] Para]240]
[7] Section 249(3)(a)
[8] Para [492]; It was also found to not be 'reasonably comparable': Para [663]

something more than mere 'commonality' of interests. The explanatory materials for the legislation outlined that:

> 'despite two employers of similar size, scope and scale operating in the same industry, they are not 'reasonably comparable' once the full extent of the business activities and operations are considered.'[9]

The Commission accepted the evidence of the respondent employers that the mines were operationally distinctive, on the basis of, amongst other things, differences in mining methods; the stages of the mines in their production cycle; and the differing export markets they serve. However, none of these factors was sufficient to overcome the reverse onus that applies against employers.

Even the arguments that the nature of two of the workforces were fundamentally different was rejected as insufficient. For example, the Whitehaven mine at Narrabri has a 'FIFO' and 'DIDO' workforce working 7-day roster patterns due to its remote location.[10] In contrast, the Glencore Ulan No.3 mine is close to the town of Mudgee and thus most employees live locally and work conventional rosters to enable them to travel to and from home each day.[11] Even this significant difference in the working arrangements at two mines was not sufficient to find that they were not 'reasonably comparable'.

4. Public interest test

The legislation adopts a novel approach to the 'public interest' by also including a 'reverse onus' on employer parties, who must satisfy the Commission that the granting of a multi-employer bargaining authorisation is '*not contrary to the public interest*.'[12]

The Commission ruled that the reverse onus was not met in this case,[13] notwithstanding the various arguments of the employers and the MCA, including that bargaining would be '*unlikely to be facilitated in an efficient manner*', and the loss of the ability for businesses to determine their own workplace arrangements.[14]

Notwithstanding the submissions of the employers and the MCA on the potential impact on the NSW economy and the relevant local communities, the Commission ruled that:

> 'There is no evidence that establishes that the making of the authorisation would have a detrimental effect on the role of the Respondent Employers in the contributions made by the Industry. There is no evidence that employment would decline or that contribution to the regions or local and state governments would be affected.'[15]

Objects of the Act

The Commission also considered the question of the objects of the *Fair Work Act*, which provide for *'… achieving productivity and fairness through an emphasis <u>on enterprise – level collective bargaining'</u>* (emphasis added). This object, in section 3 of the Act, is inconsistent with the new objects of the bargaining provisions of the Act in section 171, which now include multi-employer bargaining. The Commission acknowledged the 'tensions' between the two.[16]

The Commission determined that:

> The FW Act and its objects should be understood as changing the emphasis from agreement making at the level of a single business or part of a single business to bargaining at an enterprise level. In that light, the inclusion and 'promotion' of multi-enterprise bargaining is consistent with the existing objects as understood in that way.[17]

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[9] Para [535]
[10] Paras [173]-[174], [177]
[11] Paras [161]-[164]
[12] Section 249(3)(b)
[13] Para [494]
[14] Para [496]
[15] Para [502]
[16] Para [36]
[17] Para [45]

It further stated that:

> ‘The authorisation of multi-employer bargaining is consistent with the promotion of collective bargaining which achieves productivity and fairness at the level of the enterprise…’[18]
>
> ‘the making of the Authorisation would not negatively impact any broader economic or competitive considerations.’[19]

The FWC’s reasoning that ‘enterprise’ bargaining also includes ‘multi-enterprise’ bargaining is not consistent with the general understanding of the notion of ‘enterprise bargaining’ as it has always been understood at a policy level.

Implications of the decision

This was the test case that will set the precedent for how the multi-employer bargaining laws will be applied.

The Commission has taken a very wide view of the law. The union argued that the fact that each of the companies mine coal for export in NSW should be enough for them to be roped in together. The Commission effectively endorsed this approach.[20]

If this precedent is extended to other industries, it would mean, for example:

- The major iron ore producers roped in together because they all mine the same resource in Western Australia.
- All ‘big four’ banks roped in together because they all provide retail banking services throughout Australia.
- Coles and Woolworths roped in together because they both sell the same types of groceries in similar types of stores in a particular state.

This decision effectively turns back the clock four decades and could unwind the historic movement from industry-wide wage fixing to enterprise-based terms and conditions that began in the 1980s and, until recently, had bipartisan support.

The government had claimed an outcome like this would not happen, but it is exactly what its legislation has now delivered.

[18] Para [503]
[19] Para [505]
[20] Para [655]