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17 January 2017

The Hon Senator Michaelia Cash
Minister for Employment, Minister for Women
PO Box 6100
Senate Parliament House
Canberra ACT 2600

Dear Minister,

Enterprise agreement making - industry request for immediate reform to Fair Work Regulations

The Minister is requested to take immediate action to restore common sense to the Australian enterprise agreement making system by correcting a critical problem with the *Fair Work Regulations 2009 (Cth)* (**Regulations**).

A simple, non-controversial amendment to the Regulations would provide members of the Fair Work Commission (**Commission**) with flexibility to give life to countless enterprise agreements made by Australian employers, employees and their representatives provided that the spirit of the legislation and its process requirements are met. Without such a fix, our workplace relations system will remain overly rigid, prescriptive and will continue to generate a mounting burden on public resources and an extraordinary cost to Australian business.

We particularly write on behalf of two member companies who currently face having approved enterprise agreements, which are in operation and critical to employees working on multi-billion dollar resource projects, overturned by impending decisions of a Full Bench of the Commission.

The issue

The issue is a growing tendency towards an overly technical interpretation of the Regulations as a means to refuse the formal approval of enterprise agreements.

Specifically, minor deviations from the precise content of the legislative form at Schedule 2.1 of the Regulations (the Notice of Employee Representational Rights) have been interpreted by some Court and Commission members to amount to a fatal defect in the legislated enterprise agreement making process. This is in turn relied on as a basis for refusing the formal approval of a growing number of enterprise agreements otherwise validly made by an employer, its employees and their representatives.

To date, this interpretation and the serious consequence of enterprise agreement rejection has flowed from a typo, a staple or inconsequential human error in completing unpopulated sections of the legislated form.

There are good legal arguments to justify this approach as wrong. The already litigated cases demonstrate the practical nonsense.

In any event, such interpretation is inconsistent with the objects of the *Fair Work Act 2009 (Cth)* (**Act**) to *"provide workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future (and) economic prosperity"* and *"to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements".*

In contrast, AMMA is concerned about a number of instances where Commission members have approved applications for enterprise agreements with knowledge of a minor deviation from the precise content of the form and in circumstances where a union bargaining representative does not object. This demonstrates some level of discretion that is not fairly or consistently applied where employees choose alternate representation.

The real impact on the Australian community

This issue requires the Minister's immediate attention given the impact on a wide number of employers across the resources, hospitality, retail, services, manufacturing and indeed all other sectors, which are increasingly having applications for enterprise agreement approvals rejected due to this issue which bears no impact on genuinely agreed terms and conditions.

AMMA cautions this trend towards the overly technical interpretation described above, which in practice, means that:

- Enterprise agreements already in operation, following formal approval, are at risk of being unwound via a judicial review process; and
- Enterprise agreements already made by employers, employees and their representatives (in many cases after lengthy and difficult bargaining processes), currently pending formal approval, may be rejected and not allowed to commence operation.

This thereby creates an exposure to ongoing cost and effort directed at bargaining processes, industrial disputation and delay in the positive outcomes that had already been achieved by the agreement making process in each case (including, but not limited to, any wage increases and introduction of other benefits).

While Regulation 2.05 is allowed to continue without clarification, the complexity and uncertainty of Australia's workplace relations system will act as an impediment to Australian employers, employees and representatives alike from getting on with the job of keeping industries running and, in the longer term, as a disincentive to investment in Australia.

A simple fix is available

A basic, non-controversial procedural drafting amendment to Regulation 2.05 of the Fair Work Regulation would ensure that enterprise agreements, properly made and approved by a majority of employees, are formally approved by the Commission.

Regulation 2.05 already requires an amendment due to an outdated reference to section 174(6) of the Act. Further, the requested change is not complex. The text at Regulation 2.05 could sensibly be replaced with:

> "*For subsection 174(1A) of the Act, substantial compliance with the content and form of the notice of employee representational rights prescribed in Schedule 2.1 is required*."

Such a change would be arguably consistent with Productivity Commission Recommendation 20.1, without requiring legislative amendment. If made, with retrospective application, the requested change would effectively give life to enterprise agreements otherwise properly made.

This would resurrect the bargains made between employers, employees and their representatives and afford an appropriate degree of discretion to the Commission. AMMA submits this is a common sense approach that must be given urgent and immediate consideration by the Minister responsible for Australian employment.

Yours sincerely,

Tara Diamond
Acting Chief Executive