

Article

EMPLOYMENT LAW



Notice of Employee Representational Rights

Coalition Makes Change to Bargaining Process Under Fair Work.

By Ben Duggan

The FW Act regulates the bargaining process that occurs when creating enterprise agreements.

A series of steps must be followed under this bargaining process before an agreement can receive approval from the Fair Work Commission (**FWC**).

The most common manner in which the bargaining process for a new enterprise agreement commences is where an employer provides for its employees to be covered by the enterprise agreement with a Notice of Employee Representational Rights (**NERR**).

A number of employers have failed to have their enterprise agreement approved because of a failure to strictly comply with the form and content of the NERR.

Notice of Employee Representational Rights

A NERR must be given to all employees that will be covered by the enterprise agreement and are employed at notification time¹ as soon as practicable, and within 14 days of agreeing to enter the bargaining process.²

Greenfields agreements do not require the provision of a NERR to commence

enterprise bargaining as the employer is yet to have any employees at this time.

Form and Content of the NERR

An employer is required to provide a NERR to its employees that has the content as prescribed by Schedule 2.1 of the *Fair Work Regulations 2009 (FW Regulations)*.³

The content of the NERR as prescribed by the FW Regulations Notice explains the default bargaining representative for union members; identifying that if they wish to appoint someone other than the union, or appoint themselves, that authorisation must be given to the employer in writing. This is also the procedure for employees that are not union members. Employees are not obliged to return the form to the employer if they do not wish to nominate a bargaining representative. However, any reply should be signed, dated and in writing.⁴ The date is fundamental, as the nominated entity will become a bargaining representative from the date specified on the instrument of appointment.

The FW Act allows for any party involved in negotiating for the enterprise agreement to revoke the appointment

of their bargaining representative.⁵ For employees, the instrument of revocation must be in writing and a copy supplied to the employer's bargaining representatives. In the case of the employer, the instrument must be in writing. However a copy is only required to be supplied to the employees' bargaining representative(s) upon request.

Case Law Regarding the NERR

A number of decisions of the FWC have found that it is necessary for an employer to demonstrate strict compliance with the procedural requirements of enterprise bargaining including the form and content of the NERR provided to employees to be covered by the enterprise agreement.

The full bench in the FWC in *Peabody Moorvale Pty Ltd v Construction, Forstry, Mining and Energy Union* (2014) 242 IR 210 confirmed this strict approach when it held that:

"The consequence of failing to give a (NERR) which complies with the content and form requirements of section 174(1A) is that the Commission cannot approve the enterprise agreement."

¹ Fair Work Act 2009 (Cth) s 173(1)(a)-(b).

² Fair Work Act 2009 (Cth) s 173(3).

³ Fair Work Regulations 2009 (Cth) Schedule 2.1.

⁴ [2014] FWC 5628.

⁵ Fair Work Act 2009 (Cth) s 178A.

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An illustration of the effect of this strict approach is the two identical decisions involving stevedoring group, DP World, that were delivered during early 2016⁶.

The FWC in these decisions refused to approve enterprise agreements for its Melbourne and Brisbane based operations because it had failed to comply with the form and content requirements of the NERR.

DP World's error was to issue the NERR to the employees to be covered by the enterprise agreements at its Melbourne and Brisbane based operations that included its company logo and letterhead on the document.

Commissioner Cambridge of the FWC found that this error had:

"The effect of altering the character of the document whereby what is a regulatory form takes on the character of an Employer's document."

In reaching this conclusion Commissioner Cambridge relied upon earlier authority of the FWC to the effect that there is simply no ability for an employer to depart from the form and content of the NERR template as provided for in the FW Regulations.

DP World's application for approval of the enterprise agreements at its Melbourne and Brisbane based operations was on this basis refused by the FWC.

A full court of the Federal Court has also confirmed that a strict approach should be taken to compliance with the content and form of the NERR.

The decision came about following a judicial review relating to the approval of an enterprise agreement.

Justice Katzman in considering the FW Act provisions relevant to the NERR stated:

"Substantial compliance will not do[and that] nothing less than strict compliance is sufficient."

Her Honour also made clear that to be compliant with the NERR provisions, no alteration could be made to the form or content, and that no exceptions in this area were allowed for under the FW Act.

Coalition Makes Welcome Change to NERR

Business groups have been concerned as to the strict approach towards compliance with bargaining processes including the need to comply with the form and content of the NERR that has been identified as a reason for the significant reduction in employers seeking to negotiate new enterprise agreements.

The recently retired Vice President Watson has also been critical of the FWC's insistence upon strict compliance with the form and content of the NERR.

In response, the Coalition has in a welcomed move altered the Fair Work Regulations such that it will no longer be required to include the FWC's contact number in the NERR.

Schedule 2.1 of the Regulations formerly required the NERR to contain the following sentence:

"If you have any questions about this notice or about enterprise bargaining, please speak to either your employer, bargaining representative, go to www.fairwork.gov.au, or contact the Fair Work Commission Infoline on [insert number]."

The Fair Work Regulations have been amended by omitting the requirement to include the contact number such that the NERR has been updated replacing the former sentence with the following:

"If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission."

Implications for Employers

The Coalition's intention in making this amendment was to avoid the risk for employers of not having their enterprise agreement approved because they had failed to insert the FWC's contact number which was a common error.

Importantly, the Coalition's amendment does not impact the strict approach being taken towards procedural requirements such that any failure to comply with the form and content of a NERR is still likely to result in a decision being made by the FWC not to approve an employer's enterprise agreement.

A full version of the new NERR is reproduced below:



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⁶ DP World Melbourne Limited [2016] FWC 386 (19 January 2016) and DP World Brisbane Pty Ltd [2016] FWC 385 (19 January 2016).

Schedule 2.1 — Notice of Employee Representational Rights (regulation 2.05)

Fair Work Act 2009, subsection 174(1A)

[*Name of employer*] gives notice that it is bargaining in relation to an enterprise agreement ([*name of the proposed enterprise agreement*]) which is proposed to cover employees that [*proposed coverage*].

What is an Enterprise Agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

If you are an Employee who Would be Covered by the Proposed Agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a lowpaid authorisation applies—include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative.

[If a lowpaid authorisation applies to the agreement—include:]

Fair Work Commission has granted a lowpaid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union's status as your representative, or you are a member of another union that also applied for the authorisation.

[If the employee is covered by an individual agreementbased transitional instrument—include:]

If you are an Employee Covered by an Individual Agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.