Summary of Decision

4 December 2014

Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited

(C2014/1098)

[2014] FWCFB 7940

[1] Collinsville Coal Operations Pty Limited (Collinsville) operates the Collinsville coal mine located in the northern part of the Queensland Bowen Basin. On 13 March 2014 Collinsville applied under s. 185 of the *Fair Work Act 2009* (the FW Act) for approval of an enterprise agreement titled the *Collinsville Coal Operations Enterprise Agreement 2014* (Agreement). The Agreement was made with 21 employees who are named in the application. Each employee was described in the application as being a "self-appointed Bargaining Representative".

[2] The hearing to consider whether the Agreement should be approved took place before Senior Deputy President Harrison on 2 May 2014 and 16 June 2014. The Construction, Forestry, Mining and Energy Union (CFMEU) sought to be heard in relation to the application to make submissions opposing the approval of the Agreement on a number of grounds.

[3] The CFMEU submitted to the Senior Deputy President that it had a direct interest in the matter because it was a bargaining representative for one employee; it had a historic role and interest in the black coal mining industry, and had previously represented large numbers of persons who had worked at the Collinsville coal mine for a previous operator and were now unemployed. During the course of the hearing, her Honour made several preliminary or interlocutory rulings affecting the Appellant's role in the proceedings (Interlocutory Decisions), including that:

- the CFMEU was not permitted to have access to certain documents;
- Orders for production of documents which the CFMEU sought were not to be issued;
- certain submissions made by Collinsville from the bar table on disputed or challenged matters would be accepted;
- the CFMEU was not permitted to adduce evidence or to be heard on certain aspects of the case it wished to agitate in opposition to the approval of the Agreement, including whether the employees had genuinely agree to the agreement in accordance with s.188, whether there were reasonable grounds for believing that the agreement had not been genuinely agreed to by the employees and whether the matter constituted a test case;
- the CFMEU was confined to making submissions about the application of the BOOT;

- the CFMEU was not permitted to cross-examine witnesses about certain matters;
- the CFMEU was not a bargaining representative for the purpose of the proceedings; and
- an adjournment to allow the CFMEU to lodge a notice of appeal and have a stay application heard was refused.[1]

[4] On 18 August 2014 the Senior Deputy President published her decision[2] in which she indicated that she would approve the Agreement subject to receiving certain undertakings (Decision).[3] The Decision also set out the Senior Deputy President's reasons for some of her earlier Interlocutory Decisions. The CFMEU appealed the Senior Deputy President's decisions.

[5] On appeal the Full Bench granted permission to appeal and upheld the appeal on a limited basis ([2014] FWCFB 7940) The Full Bench's decision deals with two important issues:

- the right to be heard in an application for the approval of an agreement ('the right to be heard'); and
- the circumstances in which an employee organisation will have an entitlement to have an enterprise agreement cover it ('the entitlement to be covered by an enterprise agreement').

The right to be heard

[6] The gravamen of the CFMEU's complaint on appeal was that it was a bargaining representative for the Agreement and therefore had standing to be heard in the application for the approval of the Agreement and that it was denied the opportunity to fully participate in the proceedings. The CFMEU also said that irrespective of its status as a bargaining representative it should have been permitted to fully participate in the proceedings before the Senior Deputy President on the basis that it had a right, interest or legitimate expectation that might be affected by the proceeding. The CFMEU also submitted that the Senior Deputy President did not permit to develop the arguments it wished to develop to establish that it had a right to be heard.

[7] The Full Bench decided that the Senior Deputy President was correct in concluding that the CFMEU was not a bargaining representative for the proposed Agreement and did not have any standing in that capacity to be heard in relation to the application to approve the Agreement.

[8] Whether an employee organisation (which is not a bargaining agent) has a right to be heard in relation to an application for the approval of an agreement will depend on the circumstances in each case.

[9] In relation to the CFMEU's submission that it has a right to be heard based on the contention that it had a right, interest or legitimate expectation which may be affected by the approval of the Agreement, the Full Bench said (at [66]-[67] and [70]):

> "In our view the right, interest or legitimate expectation that is said to be affected by application of the kind before the Senior Deputy President must be identified and understood against the framework of enterprise bargaining and agreement making established by the FW Act. It is not enough, without more, to point to the status of the CFMEU as an employee organisation with a history of representation at the workplace or in the industry. Moreover, this is not a case where some of the members of the CFMEU voted against the approval of the Agreement or did not vote at all. All of the employees covered by the Agreement voted, and all of those employees (including Employee 2) voted in favour of approving the Agreement.

> The statutory framework includes that enterprise agreements are made principally between an employer and employees; that bargaining representatives have a role in relation to enterprise bargaining either by default or by appointment; that default bargaining representatives can be displaced by appointment or by revocation; that enterprise agreements operate primarily at the single enterprise level and do not create rights of general application across an industry or have common rule application; that rights of an employee organisation to be involved in the bargaining process under the FW Act is not separate from its standing as a bargaining representative; and that its capacity to be involved in protected industrial action by seeking a protected action ballot authorisation cannot be separated from its standing as a bargaining representative. ...
>
> That an employee organisation has an ongoing relationship with its members who might become covered by an agreement and has a role under its rules in representing those members is not relevant in the context of a right to be heard in relation to the approval of an agreement. The FW Act does not confer a right on employee organisations (other than in the case of the greenfields agreement) to be covered by an agreement if it was not a bargaining representative. Likewise, the FW Act does not confer upon an employee organisation a role in enterprise bargaining under the FW Act outside of its status as a bargaining representative. The mere fact that an employee organisation has an ongoing relationship with its members and is entitled to represent their industrial interests is not a sufficient basis to conclude that the approval of an enterprise agreement will adversely affect a right, interest or legitimate expectation of that employee organisation."

[10] The Full Bench observed (at [71]) that in the context of the bargaining framework established by the FW Act the fact that an employee organisation has amongst its interests, objects or expectations, that it will obtain and maintain reasonable employment conditions for its members is an insufficient basis to give arise to a right, interest or legitimate expectation and thereby a conferral on the employee organisation of a right to be heard in relation to an application to approve an enterprise agreement.

[11] The Full Bench also observed that enterprise agreements may confer or deal with the rights and obligations of an employee organisation vis-à-vis the employees and that a new agreement might displace or alter those rights and obligations, but that was not the case here.

[12] The Full Bench concluded that the CFMEU had not established any right, interest or legitimate expectation that would be adversely affected by the decision to approve the Agreement which would give it a right to be heard. On that basis the Full Bench was not persuaded that the Senior Deputy President erred in not giving the CFMEU the opportunity to be heard or to lead evidence in relation to its opposition to the approval of the Agreement. The Full Bench went on to observe (at [76]):

> "We would make the observation however, that the Commission may choose, in a particular case, to hear from an employee organisation or any other person about the approval of an agreement even though the organisation or person may not otherwise have a right to be heard. The Commission has a broad power to inform itself in relation to any matter in such manner as it considers appropriate, including by inviting oral or written submissions from a person of organisation.[4] In this case the Senior Deputy President chose to exercise that power by permitting the CFMEU to be heard on the question of whether the Agreement passed the BOOT."

[13] The Full Bench accepted that the CFMEU (as with any person seeking to be heard) is entitled to be given a proper opportunity to develop its argument on the question of whether it should be heard. However, the Full Bench did not find it necessary to reach a concluded view on the CFMEU's submission that the Senior Deputy President denied it the opportunity to develop the arguments it wished to develop on the question of a right to be heard. In this context the Full Bench said (at [77]):

> "Finally as to the CFMEU's submissions that the Senior Deputy President did not give it an opportunity to develop the arguments it wished to develop on the question of a right to be heard, given our conclusions above, we have found it unnecessary to reach a concluded view on this issue. ... The CFMEU has had full opportunity to develop its argument before us. It did so and its argument did not persuade us that it should have been heard. Therefore, even if its submission is correct, any failure at first instance has now been rectified."

The entitlement to be covered by an enterprise agreement

[14] Section 183 provides as follows:

> *"183 Entitlement of an employee organisation to have an enterprise agreement cover it*
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> (1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give the FWC a written notice stating that the organisation wants the enterprise agreement to cover it.
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> (2) The notice must be given to the FWC, and a copy given to each employer covered by the enterprise agreement, before the FWC approves the agreement.
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> Note: The FWC must note in its decision to approve the enterprise agreement that the agreement covers the employee organisation (see subsection 201(2))." (Our underlining)

[15] The Full Bench rejected the submission by Collinsville that s.183 should be interpreted so that an employee organisation could only have standing to provide written notification if it was a bargaining representative for the proposed Agreement at the time the agreement was made. The Full Bench decided that when read in context the reference to "was a bargaining representative for the proposed agreement" in s. 183 does not operate in the narrow manner suggested by Collinsville. It is sufficient for a valid notice to be given under s. 183 that an employee organisation was at some point a bargaining representative of an employee for the propose agreement for which approval of the Commission is sought.

[16] To the extent that the Senior Deputy President concluded that the CFMEU was not entitled to give notice under section 183 and did not note in the Approval Decision that the Agreement covers the CFMEU, her Honour was in error.

- ***This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.***

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[1] see transcript at AB146 – AB197
[2] [2014] FWC 3129
[3] [2014] FWC 5628
[4] Section 590