

[2018] FWC 4647

The attached document replaces the document previously issued with the above code on 10 August 2018.

The replacement document makes minor formatting changes to the paragraph numbering.

Fatima Paras
Associate to Commissioner McKenna

Dated 13 August 2018



DECISION

Fair Work Act 2009
s.185—Enterprise agreement

Chubb Fire & Security Pty Ltd
(AG2018/1507)

COMMISSIONER MCKENNA

SYDNEY, 10 AUGUST 2018

Application for approval of the Chubb Fire Safety, Alice Springs, Electrical Technicians, Collective Agreement, 2017 - 2019.

[1] Chubb Fire & Security Pty Ltd (“Chubb”) has made an application, pursuant to s.185 of the *Fair Work Act 2009* (“the Act”), for the approval of a single-enterprise agreement titled the *Chubb Fire Safety, Alice Springs, Electrical Technicians, Collective Agreement, 2017 – 2019* (“the Chubb Agreement”). Were it not for the discrete issue addressed in this decision the Chubb Agreement would have been approved by me, albeit, I expect, with undertakings being sought to address certain concerns which I would otherwise have canvassed with Chubb and the employee bargaining representative who was appointed by his work colleagues.

[2] Section 185 of the Act provides as follows:

“185 Bargaining representative must apply for the FWC’s approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a multi-enterprise agreement that is a greenfields agreement, the application must be made by:

- (a) an employer covered by the agreement; or
- (b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:

- (a) a signed copy of the agreement; and

- (b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

- (3) If the agreement is not a greenfields agreement, the application must be made:
 - (a) within 14 days after the agreement is made; or
 - (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.
- (4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

- (5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

Single-enterprise agreements that are greenfields agreements

- (6) This section does not apply to an agreement made under subsection 182(4).”
(my underlining)

[3] Thus, s.185(2) of the Act provides that the application for the approval must be accompanied by a signed copy of the agreement. Moreover, s.185(5) provides that the regulations may prescribe requirements relating to the signing of enterprise agreements. As to the s.185(5) requirements, the *Fair Work Regulations 2009* (“the Regulations”) read as follows (also reproduced are the notes within the Regulations):

“2.06A Bargaining representative must apply for FWC approval of an enterprise agreement—requirements for signing agreement

- (1) For subsection 185(5) of the Act, this regulation prescribes the requirements for the signing of an enterprise agreement.

- (2) For paragraph 185(2)(a) of the Act, a copy of an enterprise agreement is a signed copy only if:

- (a) it is signed by:
 - (i) the employer covered by the agreement; and
 - (ii) at least 1 representative of the employees covered by the agreement; and
- (b) it includes:

- (i) the full name and address of each person who signs the agreement;
and
- (ii) an explanation of the person's authority to sign the agreement.

Note: Paragraph 185(2)(a) of the Act requires an application for approval of an enterprise agreement to be accompanied by a signed copy of the agreement.

(3) Unless the representative of the employees covered by the agreement is an employee in a class of employees who will be bound by the agreement, the representative's signature is not taken to indicate that the representative intends to be bound by the agreement."

(my underlining)

[4] Regulation 2.06A of the Regulations thereby prescribes the requirements for the signing of an enterprise agreement. Moreover, reg.2.06A specifies that for s.185(2)(a) of the Act, a copy of an enterprise agreement is a signed copy "only if" it is signed in accordance with each of requirements of reg.2.06A(2)(a)(i) and (ii), and reg.2.06A(2)(b)(i) and (ii). In relation to this application for the approval of the Chubb Agreement, there was, unfortunately, no address for the employer signatory - in circumstances where reg.2.06A requires a copy of an enterprise agreement to include (among other things) "the full name and address of each person who signs the agreement". Section 185(2) provides that the application must be accompanied by a signed copy of the agreement, but that statutory criterion was not met in relation to the Chubb Agreement.

[5] In dismissing an application for the approval of the *Malteurop Australia Enterprise Agreement 2014 (Malteurop Australia Pty Ltd [2014] FWC 2476)*, Kovacic DP noted:

"[6] The signed agreement attached to the application did not meet the requirements of s.185(2)(a) of the Act as it did not include the full name and address of each person who signed the agreement nor an explanation of some of the signatories authority to sign the agreement as required by Regulation 2.06A.

[7] As the requirements of s.185(2)(b) have not been complied with the application is not a valid application. The application is therefore dismissed."

[6] In *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU) [2014] FWCFB 2042 ("Peabody Moorvale")* a Full Bench of the Fair Work Commission (Ross P, Hatcher VP, Asbury DP, Gostencnik DP, Simpson C) considered, among other matters, signing requirements for enterprise agreements. In *Peabody Moorvale*, the CFMEU contended that non-compliance with reg.2.06A(2)(b)(i) goes to invalidity and that if the persons who sign the agreement do not set out their residential address the application to approve the agreement is invalid. As to what was described in the decision as "The Regulation 2.06A point", the Full Bench in *Peabody Moorvale* considered whether "address" in reg.2.06A(2)(b)(i) means the residential address or whether it is sufficient if the work address is supplied. The Full Bench relevantly concluded that a work address was sufficient. With only the question of the sufficiency of a work address arising for determination in *Peabody Moorvale*, the operation and requirements of s.185(2) and reg.2.06A are uncontroversial. As the Full Bench otherwise noted in plain terms:

“[87] Subsection 185(2)(a) provides that an application for the approval for an enterprise agreement must be accompanied by ‘a signed copy of the agreement’ and s.185(5) provides that the Regulations may prescribe requirements relating to the signing of enterprise agreements. Regulation 2.06A is made pursuant to s.185(5) and relevantly provides: ...”

[7] I have considered also the provisions of s.585 and s.586 of the Act, which read as follows (also reproduced are the notes within the s.585):

“585 Applications in accordance with procedural rules

An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind.

Note 1: Certain provisions might impose additional requirements in relation to particular kinds of applications (see for example subsection 185(2)).

Note 2: The FWC may, under section 587, dismiss an application that is not made in accordance with the procedural rules.

586 Correcting and amending applications and documents etc.

The FWC may:

- (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
- (b) waive an irregularity in the form or manner in which an application is made to the FWC.”

[8] The requirements of s.185(2) and reg.2.06A involve strict compliance, given the mandatory language in the Act and the Regulations. As such, s.596 of the Act cannot properly be used to correct or amend a signature page for an enterprise agreement where there are s.185(2)/reg.2.06A issues. That is because s.185(2) of the Act specifies that *the application must be accompanied by a signed copy of the agreement* and reg.2.06A specifies that, for s.185(2)(a) of the Act, *a copy of an enterprise agreement is a signed copy only if it meets each of the cumulative requirements*. Given the mandatory nature of the wording in the s.185(2) of the Act and reg.2.06A of the Regulations, the invalidity cannot be cured by the use of s.596 of the Act.

[9] Separately, I note that challenges have been made to the approval of enterprise agreements - and sometimes long after they have been approved - including so as to seek to oppose underpayment of wages claims: see, for example, *MPR Scaffolding Pty Ltd t/a MPR Scaffolding v Construction, Forestry, Mining and Energy Union* [2015] FWCFB 7237 and *Construction, Forestry, Mining and Energy Union v MPR Scaffolding Pty Ltd and ors* [2017] FCCA 1593 which is now, apparently, before the Federal Court. (I should note there is no suggestion of anything at all untoward involved in the making of the Chubb Agreement - only the difficulty presented by the requirements of s.185(2) and reg.2.06A.)

[10] I should also note, finally, that if I considered I had the ability or discretion to approve the Chubb Agreement I would do so (with, as I have noted, undertakings as to matters that I

would have canvassed/sought to address certain concerns). This is because I have no wish to impede the approval of the enterprise bargain with its generally superior pay and conditions that was, as I learned in the proceedings, so long in the making - and where the employer and (five or so) employees understandably wish to have their enterprise agreement approved. Against the background of what was touched upon in the proceedings as to the history of matters, it is a matter of particular regret that the Chubb Agreement is incapable of approval.

[11] The application is dismissed.

COMMISSIONER

Appearances:

N Saunders for the respondent.

B King, employee bargaining representative.

Hearing details (re signature page):

Sydney/Northern Territory by telephone link:

2018:

August 7.

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