DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Australian Municipal, Administrative, Clerical and Services Union
v
Warrnambool City Council
(C2025/7235)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT COLMAN
DEPUTY PRESIDENT GRAYSON

SYDNEY, 10 SEPTEMBER 2025

Appeal against decision [2025] FWCA 2248 of Commissioner Redford at Melbourne on 10 July 2025 in matter number AG2025/2041 – Application for approval of an enterprise agreement to apply to employees of Warrnambool City Council – Council failed to serve application and declaration– Union denied opportunity to object to application and give notice that it wanted to be covered – Whether denial of procedural fairness – Whether decision can be varied to cover a union that has not given notice – Appropriate relief.

[1] The Australian Municipal, Administrative, Clerical and Services Union (**ASU**) has lodged an appeal, for which permission is required, under s 604(1) of the *Fair Work Act 2009* (Cth) (the **Act**). The ASU seeks permission to appeal against a decision of Commissioner Redford made on 10 July 2025 to approve the *Warrnambool City Council Enterprise Agreement No 10 2025* (the **2025 Agreement**).[1] The 2025 Agreement covers Warrnambool City Council (the **Council**) and all employees of the Council (other than the Chief Executive and Senior Officers employed on maximum term contracts and employees who are covered by the Early Education Employees Agreement 2020).[2]

[2] The ASU was a bargaining representative for some employees covered by the 2025 Agreement. However, it chose not to actively participate in the bargaining which resulted in the making of the 2025 Agreement. The ASU complains that it was denied procedural fairness in relation to the decision to approve the 2025 Agreement by reason of the failure of the Council to serve its Form F16 (Application for approval of an enterprise agreement) and Form F17B (Employer's declaration in support of an application for approval of an enterprise agreement) on the ASU as required by rules 21 and 36 of the *Fair Work Commission Rules 2024* (Cth) (the **FWC Rules**). The ASU says that, as a result, it was denied the opportunity to adduce evidence and make submissions in relation to the approval of the 2025 Agreement and to give notice under s 183(1) of the Act that it wanted the 2025 Agreement to cover it.

[3] The ASU sought to rely upon further evidence on appeal in the form of a witness statement of Luke Cherry (Lead Organiser) dated 7 August 2025. The witness statement of Mr Cherry provides an account of the ASU's involvement in the bargaining which resulted in the

making of the 2025 Agreement and the application to the Commission for approval of the Agreement. The Council sought to rely on a witness statement of Peter Utri (Director of Corporate Services) dated 26 August 2025 which, it says, provides a more comprehensive chronology of relevant events. The Full Bench received the witness statements of Mr Cherry and Mr Utri as further evidence on appeal for the purposes of s 607(2) of the Act. As the appeal raises a complaint of a denial of procedural fairness, it is necessary for the Full Bench to have evidence before it to establish whether the ASU was denied procedural fairness and the circumstances surrounding the proceedings before the Commissioner.

[4] The ASU seeks permission to appeal and, if permission is granted, submits that the appeal should be allowed. The ASU submits that the appropriate orders to be made are that the decision to approve the 2025 Agreement should be quashed and the application for approval of the 2025 Agreement should be remitted for reconsideration to allow the ASU to participate as a party in the proceedings.

Background to the appeal

[5] On or around 18 December 2024, the Council wrote to its employees providing a Notice of Employee Representational Rights in which it proposed to commence bargaining for an enterprise agreement to replace the existing agreement, *Warrnambool City Council Enterprise Agreement No. 9 2022* (the **2022 Agreement**). On 20 December 2024, the Council wrote to the ASU by email attaching a letter which notified of the Council's commencement of bargaining for a single enterprise agreement. The ASU was covered by the 2022 Agreement.

[6] On 21 December 2024, Clay O'Brien (Lead Organiser) responded to the email of 20 December 2024 on behalf of the ASU. Mr O'Brien stated that the ASU was consulting with its members and other employees of Warrnambool City Council as to whether they wished to participate in bargaining for a single enterprise agreement or would prefer to pursue multi-employer bargaining. Mr O'Brien's email stated that: "For the avoidance of doubt, the ASU did not agree to bargain for a single-enterprise agreement".

[7] Although the ASU and the Australian Nursing and Midwifery Federation (the **ANMF**) did not participate in the bargaining, bargaining meetings were conducted on various occasions throughout April, May and June 2025. Mr Utri indicates that the unions were invited to attend the bargaining meetings and minutes of the meetings were sent to local delegates of the ASU and the ANMF.

[8] On 21 May 2025, the ASU sent a letter to the Council identifying concerns regarding the Council's bargaining conduct, including that the ASU had not been informed that the Council intended to seek approval from its employees for a single enterprise agreement, and where the ASU had not been provided a draft of the proposed agreement. The letter affirmed that the ASU would remain a bargaining representative for the purpose of any agreement proposed to cover employees of the Council. The letter sought that the Council provide the ASU with a copy of the draft proposed agreement, all materials provided to employees concerning the draft proposed agreement, undertakings to provide the ASU and all other bargaining representatives with reasonable notice of an intention to commence an access period for a single enterprise agreement and to facilitate the ASU's communication with its members and Council employees.

[9] On 28 May 2025, the Council wrote to the ASU identifying that the Council's view was that the ASU was invited to participate in the process of bargaining but that this was declined. The letter stated that the Council was "not of the view, that after expressly deciding to refuse to bargain that the ASU is now a participant in the current round of bargaining, that would be afforded the normal courtesies you are seeking". The Council indicated that it did not agree to any of the requests for information as outlined in the ASU's letter of 21 May 2025 under the heading of 'Next Steps'.

[10] On 3 June 2025, the ASU wrote to the Council identifying that the Notice of Representational Rights was sent to employees by post and that the ASU was aware of employees who had not received the NERR. The ASU stated that the notices had not been validly issued. In this correspondence, the ASU raised once more that it had not been provided a draft of the proposed agreement despite a written request made on 21 May 2025 and where it was a bargaining representative. The ASU notified the Council of its intention to seek bargaining orders in the Commission if the issues raised were not resolved. The Council responded on 4 June 2025 stating that the Council had repeatedly offered the ASU the opportunity to participate in the bargaining process and that it would continue to meet its obligations to provide access to the proposed agreement to the employees covered.

[11] On 6 June 2025, the Council commenced the 7-day access period for the proposed agreement. Voting in relation to the proposed agreement opened on 13 June 2025 and closed on 23 June 2025. Approximately 65 percent of employees who participated in the vote, voted to approve the proposed agreement. Mr Utri stated that, before voting results were made known to all staff, he made a courtesy call to an organiser of the ASU, Melissa Wainwright and informed her of the outcome of the vote.

[12] On 27 June 2025, the Council filed its Form F16 (Application for approval of an enterprise agreement) and Form F17B (Employer's declaration in support of an application for approval of an enterprise agreement) with respect to the agreement. The Council accepts that it did not serve the ASU or the ANMF with the documents. Mr Utri said that this occurred as a result of the ASU's decision to not participate in the preparation of the agreement. Among other things, Mr Utri stated:

> Because of the ASU's indication in December 2024 that "for the avoidance of doubt they did not wish to participate in the bargaining process for a single interest agreement", we considered not to include the ASU in the final form distribution.

[13] A series of communications occurred between 8 and 10 July 2025 involving the Council and the chambers of the Commissioner in which additional information and clarification was sought in relation to the approval of the 2025 Agreement. On 10 July 2025, the Commissioner issued his decision. The Commissioner approved the Agreement subject to certain undertakings in relation to trainee rates, supported wage rates and the consultation term.[3] The Commissioner's decision did not note that the 2025 Agreement covers any employee organisation.

[14] Also on 10 July 2025, Jasmine De Palma (Legal Administration Officer) emailed the Commission on behalf of the ASU and stated that the ASU wished to file a Form F18 (Union declaration) in relation to the application for approval of the 2025 Agreement. Ms De Palma

enquired as to which member of the Commission had been allocated the matter. On 18 July 2025, a member of the Commission's Agreements Team responded to the ASU and indicated that the 2025 Agreement had been approved by Commissioner Redford on 10 July 2025, and provided a link to the decision.

[15] On 25 July 2025, the ASU requested a copy of the Commission's file in relation to the decision to approve the 2025 Agreement. On 29 July 2025, the ASU received a copy of the file. Mr Cherry states that, as a result, he became aware for the first time that, on or about 27 June 2025, the Council lodged the application for approval of the 2025 Agreement. The ASU then filed its notice of appeal on 31 July 2025.

Statutory provisions

[16] Part 2-4 of the Act deals with enterprise agreements. When an enterprise agreement that is not a greenfields agreement is made, a bargaining representative is required, by s 185(1), to apply to the Commission for approval of the Agreement. The Commission must approve the agreement if it is satisfied that the requirements in ss 186 and 187 of the Act are met. Those requirements include, among other things, that, if the agreement is not a greenfields agreement, the agreement has been genuinely made by the employees covered by the agreement (s 186(2)(a)) and that the agreement passes the better off overall test (s 186(2)(d)).

[17] Section 183 provides:

> **183 Entitlement of an employee organisation to have an enterprise agreement cover it**
> (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.
> (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.
> *Note: The FWC must note in its decision to approve the enterprise agreement that the agreement covers the employee organisation (see subsection 201(2)).*

[18] Section 183(1) permits an employee organisation that was a bargaining representative for the proposed agreement to give notice that it wants to be covered. Relevantly, s 176(1)(b) provides that an employee organisation is a bargaining representative of an employee if the employee is a member of the organisation unless the employee has appointed another representative.

[19] If an employee organisation gives notice under s 183(1) and the Commission approves the agreement, s 201(2) requires that the Commission must note in its decision that the agreement covers the organisation. The consequence of the Commission noting that an agreement covers an employee organisation is significant. For an enterprise agreement that is not a greenfields agreement, s 53(2) provides that the agreement covers an organisation if the Commission has noted in its decision to approve the agreement that the agreement covers the organisation. Otherwise, the agreement does not cover the organisation and cannot apply to the organisation.

[20] Rule 21 of the FWC Rules make provision for the service of documents filed with the Commission in the following terms:

> **21 Serving documents lodged with the FWC**
> If a document of a kind mentioned in column 3 of an item of the table in Schedule 1 is lodged with the FWC, a copy of the document must be served:
> (a) by the person mentioned in column 5 of the item (which may be the FWC); and
> (b) on each person (if any) mentioned in column 6 of the item, excluding themselves; and
> (c) at the time, or within the period, mentioned in column 7 of the item.

[21] Relevantly, the table in schedule 1 to the FWC Rules requires that an application for approval of an enterprise agreement (Form F16) be served by the applicant on, among other people, each employee organisation that was a bargaining representative as soon as practicable after lodgement with the Commission. It also requires that an employer's declaration in support of an application for approval of a single-enterprise agreement (Form F17B) be served by the employer on, among other people, each employee organisation that was a bargaining representative, again as soon as practicable after lodgement with the Commission. Rule 36 also requires the applicant or employer to serve copies of any documents that were lodged with the application or declaration.

Permission to appeal

[22] A person aggrieved by a decision of the Commission may appeal only with permission under s 604(1) of the Act. The Commission is required, by s 604(2), to grant permission to appeal if it is satisfied it is in the public interest to do so and otherwise has a general discretion as to whether to grant permission to appeal.

[23] The Council submits permission to appeal should be refused on the basis that there is no public interest in the relief sought by the ASU in circumstances in which it knew its members would be covered by the Agreement, elected to engage in a "no campaign" and the effect of quashing the Agreement would be to create uncertainty for the Council and for relevant employees. The ASU submits that it is in the public interest for permission to appeal to be granted. It submits that the integrity of the scheme for the approval of enterprise agreements under the Act turns on parties being given an opportunity to be heard in relation to an application for approval.

[24] We are satisfied that it is in the public interest to grant permission to appeal and, in any event, would exercise the Commission's residual discretion to grant permission. As is conceded by the Council, the ASU was not served with the application for approval or the Council's employer declaration as required by the FWC Rules. It is appropriate for permission to appeal to be granted to permit the Full Bench to consider the consequences that should flow from the Council's failure to comply with the FWC Rules. We also note that the ASU has been disadvantaged as a result of the failure to serve the application and declaration at least by being denied the opportunity to give notice to the Commission that it wanted to be covered by the Agreement and, potentially, to put forward evidence and submissions in relation to whether the Agreement should be approved.

Consideration of the appeal

[25] The notice of appeal contains a single ground. The ASU contends that it was denied procedural fairness by reason of the Council's failure to serve its Form F16 application and Form F17B declaration on the ASU in accordance with the FWC Rules. The notice of appeal contends that, as a result, the ASU was denied the opportunity to adduce evidence and make submissions in relation to the approval of the Agreement and to give notice under s 183(1) of the Act that it wanted the Agreement to cover it.

[26] The factual foundation for the ground of appeal is plainly established. The Council accepts that the ASU was a bargaining representative for the proposed agreement. Rule 5 of the ASU's rules states that eligibility for membership of the union extends to employees of local government authorities. The evidence of Mr Cherry establishes that the ASU had members who are covered by the Agreement and who had not appointed another bargaining representative. The consequence is that rule 21 and schedule 1 of the FWC Rules required that the Council serve the application for approval and the employer's declaration on the ASU. It did not do so. The Council failed to comply with the Rules and, as a result, the ASU was not on notice that the application for approval had been made or of the material relied upon by the Council in support of the application.

[27] Mr Utri described the reasons of the Council for not serving the application or employer's declaration on relevant unions as follows:

> On 27 June 2025, the Council lodged its F16 and F17B applications with the Fair Work Commission. To my knowledge, the Council did not serve the Unions with these documents. In effect, this is the result of the Unions' decision to not participate in the preparation of the Enterprise Agreement. At the same time, the Unions were aware of the Enterprise Agreement and ran its own campaign against the Enterprise Agreement.

[28] To the extent that the Council understood that the requirement to serve the application and employer's declaration depends on the practical involvement of a bargaining representative in the bargaining, it was wrong to do so. An employee organisation which is a bargaining representative may be involved in bargaining to a greater or lesser degree depending on the circumstances.[4] It might oppose approval of the agreement. The organisation nonetheless remains a bargaining representative. The FWC Rules require that the documents be served on the organisation and s 183(1) permits the organisation to give notice that it wants to be covered by the agreement.

[29] In its written submissions on appeal, the Council describes the failure to serve the application and the employer's declaration as a "technical deficiency" and that the "technical deficiency" should be balanced against the considerable information provided to the ASU by Mr Utri in relation to the bargaining. The Council asks, rhetorically, "what more could the [Council] have done, to inform the ASU, than it did?". The short, and sufficient, answer is that it could have complied with the FWC Rules by serving the application and the employer's declaration. That is the mechanism by which it is intended that an employee organisation will become aware of the application, have the opportunity to give notice under s 183(1) and, if so advised, make submissions or put forward evidence in relation to whether an agreement should be approved by the Commission. The requirement to serve the application and the employer's declaration is not a mere technicality.

[30] The capacity of an employee organisation to give notice that it wants to be covered by an enterprise agreement is an important right conferred by the Act.[5] Section 51(2) provides that an enterprise agreement "does not give a person an entitlement unless the agreement applies to the person". Although the 2025 Agreement confers certain entitlements on a number of unions, including the ASU, it is not clear that those provisions have effect given the terms of s 51(2) if the ASU is not covered.[6] In addition, being covered by an enterprise agreement permits an organisation to directly enforce the agreement under s 539(2)(item 4) and to participate in dispute resolution provisions incorporated in the agreement under s 186(6).

[31] Mr Utri says he informed an organiser of the ASU by telephone on 23 June 2025 of the outcome of the vote to approve the 2025 Agreement. We do not consider that was sufficient to avoid practical injustice to the ASU by reason of the failure to serve it with the application. The time period within which an application for approval of the enterprise agreement must be made is, under s 185(3)(a), within 14 days of the agreement being made. The Council had until 7 July 2025 to make the application. It was reasonable for the ASU to expect that it would be served with the application when it was made. Having heard nothing, the ASU made inquiries with the Commission in relation to the application on 10 July 2025, that is, three days after the application was required to be filed. We do not accept the submission that the ASU acted unreasonably or sat on its hands.[7]

[32] The Council also submits that the Full Bench should waive compliance with the FWC Rules to relieve it of the obligation to serve the application and other documents on the ASU to regularise the creation of the 2025 Agreement. It relies on rule 7(1) which permits the Commission to dispense with compliance with any provision of the FWC Rules, either before or after the occasion for compliance arises. The submission relies on the assertion that its non-compliance was a technicality. As will be apparent, we do not accept that characterisation. The failure to serve the documents denied the ASU the opportunity to be covered by the 2025 Agreement and to object to its approval because it was unaware that the application had been made. The Commission was unaware that the ASU was a bargaining representative because the application wrongly omitted this information. Waiving the Council's non-compliance with the FWC Rules would serve no purpose because it would not cure the practical consequence of the non-compliance, namely, that the Commission approved the 2025 Agreement without hearing from the ASU and thereby denied it procedural fairness.

[33] For these reasons, the single ground of appeal advanced by the ASU should be upheld. The ASU was denied procedural fairness albeit as a result of the failure of the Council to serve the application and employer's declaration and not by reason of any fault on the part of the Commissioner.

Conclusion and disposition

[34] The ASU seeks that the decision to approve the 2025 Agreement be quashed to allow it to give notice that it wants to be covered and to be heard in relation to whether it should be approved. The Council opposes that course. The Council expressed concern in relation to the uncertainty that would be caused by quashing the approval of an enterprise agreement which had been in operation for almost eight weeks, particularly given that the 2025 Agreement provides for increases in rates of pay for employees.

[35] The ASU did not provide, in its appeal submissions, any indication of the grounds upon which it might oppose approval of the 2025 Agreement beyond submitting that it was denied the opportunity to present any evidence or arguments directed at the better off overall test. The ASU submits that it is not required to demonstrate what it might have said or done if it had been given an opportunity to be heard.[8] It is correct that demonstration of materiality for the purposes of determining whether relief should be granted on account of a denial of procedural fairness requires no more than that a party has been denied a realistic possibility of a different outcome. A party is not required to articulate a specific course of action which could realistically have changed the result.[9] However, the Commission's consideration of whether to grant permission to appeal permits a broader assessment[10] as does, potentially at least, the discretion conferred by s 607(3) in relation to an appeal.

[36] We are, nonetheless, satisfied that it is necessary to quash the decision to approve the 2025 Agreement. The significant feature of this matter is that the ASU was denied the opportunity to give notice that it wanted to be covered by the 2025 Agreement. It is not clear how that situation can be addressed without quashing the decision. As has been observed, s 201(2) of the Act provides that the Commission must note that an employee organisation is covered by an agreement if it has given notice under s 183(1). The obligation on the Commission to note that an agreement covers an employee organisation only arises if the organisation was a bargaining representative and has given notice to the Commission that it wants to be covered.[11] As a result of the failure to serve the ASU, that had not occurred.

Orders

[37] The Full Bench makes the following orders:

(a) Permission to appeal is granted;
(b) The appeal is allowed;
(c) The decision [2025] FWCA 2248 of Commissioner Redford in matter number AG2025/2041 made on 10 July 2025 is quashed;
(d) The application for approval of the *Warrnambool City Council Enterprise Agreement No 10 2025* is remitted to the Commissioner.

VICE PRESIDENT

Appearances:

A White, of counsel, instructed by Imogen Szumer of Maurice Blackburn Lawyers for the appellant.
T Donaghey, of counsel, instructed by Paul Goddard of Meerkin & Apel Lawyers for the respondent.

Hearing details:

9 September 2025.
Melbourne (in person).

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[1] *Warrnambool City Council trading as City of Warrnambool* [2025] FWCA 2248.

[2] *Warrnambool City Council Enterprise Agreement No 10 2025*, clause 1.3.

[3] *Warrnambool City Council trading as City of Warrnambool* [2025] FWCA 2248 at [6]-[7].

[4] See, for example, *United Workers' Union v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane t/a Centacare* [2025] FWCFB 203 at [38].

[5] *Energy Australia Yallourn Pty Ltd v Automotive, Food, Metal, Engineering, Printing and Kindred Industries Union* [2018] FCAFC 146; (2018) 264 FCR 342 at [80] (Rares and Barker JJ).

[6] See, particularly, clause 3.2 (Workplace Representation).

[7] Cf. *United Workers' Union v Southern Cross Care (WA) Inc* [2020] FWCFB 5177 at [25]-[27].

[8] By reference to *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 276 CLR 80 at [33] (Kiefel CJ, Keane and Gleeson JJ); *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ).

[9] *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 276 CLR 80 at [1]-[2] (Kiefel CJ, Keane and Gleeson JJ).

[10] See, for example, *Construction, Forestry, Maritime, Mining and Energy Union v Ditchfield Mining Services Pty Ltd* [2019] FWCFB 4022 at [48].

[11] *Groote Eylandt Mining Company Pty Ltd T/A South32 GEMCO v Construction, Forestry, Mining and Energy Union* [2016] FWCFB 2432 at [46].