DECISION

Fair Work Act 2009
s.185 - Application for approval of a single-enterprise agreement

PHI International Australia Pty Ltd
(AG2024/3886)

DEPUTY PRESIDENT ROBERTS SYDNEY, 12 DECEMBER 2024

Application for approval of the PHI International Australia Broome and Truscott Helicopter Pilots Enterprise Agreement 2024 – dispute settlement procedure in proposed agreement – whether Commission satisfied proposed agreement includes a term described in s.186(6)

[1] An application has been made for approval of an enterprise agreement known as the *PHI International Australia Broome and Truscott Helicopter Pilots Enterprise Agreement 2024* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by PHI International Australia Pty Ltd (the Applicant). The Agreement is a single enterprise agreement.

[2] The Australian Federation of Air Pilots (AFAP) is a bargaining representative for the Agreement. They filed a Form F18 indicating that they supported the approval of the Agreement. They also provided written submissions dealing with various issues with the application and addressing some preliminary issues that had been raised by me relating to that application.

[3] The Applicant also provided written submissions and proposed undertakings in response to the preliminary issues that the Commission had identified. After receipt of those submissions, the matter was listed for conference to hear from the parties on outstanding concerns. Following the conference, an opportunity was provided for the filing of written submissions. The Applicant, AFAP and a group of employees who described themselves as the PHI Broome Pilot Committee (Committee) and who were comprised of employees to be covered by the Agreement, each availed themselves of that opportunity.

[4] One of the issues raised by AFAP was whether, having regard to clause 39 of the Agreement, *Disputes & Grievance Procedure* (DGP), the Commission could be satisfied that the Agreement includes a term that meets the description in s.186(6) of the Act. Clause 39 provides as follows:

> *39 DISPUTES & GRIEVANCE PROCEDURE*
>
> *39.1 Preamble and principles of the Disputes Resolution Process (DRP)*

39.1.1 In the event of a disagreement about any matter arising under the Agreement or the NES, including a dispute regarding the interpretation or application of this Agreement, the NES, a matter pertaining to the employer-employee relationship, or any other work-related matter, the parties to the dispute will attempt to resolve the dispute in accordance with the following DRP.

39.1.2 The parties agree to participate in the DRP in good faith and in recognition that the satisfactory resolution of any dispute is in the interests of all parties to, or covered by, this Agreement.

39.1.3 A Pilot or a Pilot's representative acting on their behalf, subject to this Agreement, may initiate a dispute at any time.

39.1.4 A party to a dispute covered under the Scope and Application of this Agreement, as set out in clause 2 of this Agreement, may appoint and be accompanied and represented at any stage by another person, organisation or association, including a Union representative or PHI or non-PHI association in relation to the dispute. Ready access to the Pilot shall be provided to the Pilot's nominated representative so that relevant information and instructions can be provided. However not at a time such that it will impact with PHI's normal contracted operations.

39.2 Disputes Resolution Process

39.2.1 Once a dispute has been initiated, the Pilot shall notify the Human Resources Department who shall refer the dispute to the appropriate person with the management structure who shall, unless otherwise agreed, meet and confer with the Pilot within a reasonable period at a mutually agreeable location, by a mutual agreeable method of communication, in an attempt to resolve the dispute.

39.2.2 The Pilot must not unreasonably fail to comply with any direction given by PHI about performing work. If the dispute is not resolved under Clause 39.2.1, the dispute may be referred to the Fair Work Commission (FWC) for resolution by mediation and/or conciliation and arbitration. If arbitration is necessary the FWC may exercise its procedural powers in relation to hearings, witnesses, evidence, and submissions which are necessary to make the arbitration effective.

39.2.3 While the dispute resolution procedure is being conducted work shall continue normally, unless a Pilot or PHI has a reasonable concern about an imminent risk to their health or safety, and pending the resolution of the dispute the subject matter of the dispute shall be preserved and the status quo retained.

39.3 Appeal rights of the Parties

39.3.1 The decision of the FWC will bind the parties, subject to either party exercising a right of appeal against the decision to a Full Bench of FWC. For clarity it is a term of this Agreement that the parties do have a right of appeal.

39.4 Powers of FWC

39.4.1 All Parties agree that the FWC can deal with this matter as per the provisions of the Fair Work Act.

39.4.2 FWC shall be provided access to the workplace to inspect or view any work, material, machinery, appliance, article, document, or other thing or interview any Pilot who is usually engaged in work at the workplace.

39.4.3 The parties agree that FWC may give all such directions and do all such things as are necessary for the just resolution and determination of the dispute. This includes but is not limited to mediation or conciliation or arbitration.

39.5 Alteration of Rights

39.5.1 The parties agree that to the extent that any decision of the FWC alters the rights and responsibilities of any of the parties to the Agreement that those rights are so altered and are enforceable in a court of competent jurisdiction.

[5] Section 186(6) of the Act provides:

(6) The FWC must be satisfied that the agreement includes a term:

(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:

(i) about any matters arising under the agreement; and

(ii) in relation to the National Employment Standards; and

(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

[6] Section 186(1) provides that if an application for the approval of an agreement is made under ss.182(4) or s.185, the Commission must approve the agreement under that section if the requirements of the section and s.187 are met. AFAP submitted that clause 39 was not a term that met the description in s186(6). Specifically, AFAP submitted that subclause 39.1.3 of the DGP was inconsistent with the requirements of the section when read with the decision in *Energy Australia Yallourn Pty Ltd v. Automotive, Food, Metal, Engineering. Printing and Kindred Industries Union*[1] (*Yallourn*). They said that the words in that subclause referring to a '*Pilot or a Pilot's representative acting on their behalf*' made it clear that AFAP as an organisation was unable to initiate the dispute resolution process under that clause unless they were authorised to do so by a pilot to whom the Agreement applied. AFAP urged the Applicant to deal with the issue by way of undertaking under s.190 of the Act.

[7] The Applicant submitted that clause 39 satisfied the requirements of s186(6). They said that the decision in *Yallourn* and other cases referred to by AFAP were not relevant to the

[1] [2018] FCAFC 146.

approval process and that it was inappropriate for AFAP to continue to pursue a point that had been agitated in other proceedings. They said that clause 39 complies with s186(6) in the same way the model term in schedule 6.1 of the *Fair Work Regulations* 2009 does and that both give an employee who is party to a dispute the right to appoint a representative for the purpose of the dispute procedure. Although I expressed a concern that the proposed term may not meet the requirements of s 186(6), the Applicant declined to provide an undertaking in relation to clause 39.

[8] The Committee submitted that they opposed the position advanced by AFAP and that if there were any changes to the proposed agreement which they had approved made by way of undertaking, they would not accept them and would 'protest (the Agreement's) approval.'

[9] The situation with which the Full Court was dealing in *Yallourn* concerned a question as to whether unions covered by an existing agreement could raise a dispute and have it dealt with under the dispute settlement provisions of the agreement other than as a representative of an employee or employees involved in a dispute. The determination of that question involved the construction of the dispute settlement clause in question. The plurality (Rares and Barker JJ) rejected the argument by Energy Australia that a union as a 'party' to an agreement, only has the right to enforce the agreement under s.539(2) but not to use the dispute procedure mandated by s.186(6). They concluded that an agreement that provides for a union to be a party confers all the rights of a party subject to any limitation on those rights as the agreement provides.[2] Their Honours went on to conclude that on a proper reading of the dispute settlement clause, each of the five unions had a right to initiate a dispute about category 1 matters that could be conciliated and arbitrated by the Commission.[3] In the course of so concluding their Honours said:

> *63. Since each of the five unions had a right to initiate proceedings in the Court, s 186(6) required cl 28 to provide a procedure to resolve a dispute that would be litigated in such a matter, because that dispute would arise under the Yallourn agreement, even if no individual employee had initiated a complaint, provided that Energy Australia had contravened its obligations under cl 5.3 in respect of one or more casual employees (see s 540(2)).*
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> *64. Here, cll 28.2(e) and 28.3(b) provided that "the Parties" (being the persons defined as such in cl 2) would be bound by the decision of the Commission in an arbitration under that dispute resolution clause. Although the Yallourn agreement appears to have switched freely between referring to all persons who were in a legal sense parties to it (employees, Energy Australia and the five unions) as "parties" and the defined term "the Parties", cl 28.2(e) could not operate to cause a decision of the Commission to bind "the Parties" if the five unions had no right to raise, or be a legal party to, the dispute. That consequence bespoke the importance of providing a dispute resolution process in which disputes involving any one of the five unions, including in disputes between them, could be resolved, as well as disputes involving employees who were members of or eligible to be members of the relevant unions.*

[2] Ibid at [77].

[3] Ibid at [74].

> *65. As s 172(1) of the Act provides, an enterprise agreement can be "about" matters pertaining to the relationship "between the employer … and the employee organisation or employee organisations, that will be covered by the agreement". A dispute about, or involving, that relationship is a subject-matter for which s 186(6) requires a dispute resolution process to be included in an enterprise agreement. However, neither cl 28.1(a) nor par (3) of the model term, in Sch 6.1 to the Regulations, expressly addresses whether a dispute that any of the five unions may have with Energy Australia, arising under the Yallourn agreement as to its interpretation or Energy Australia's compliance with its terms, can be addressed only by discussions between the employer and one or more employees, without the involvement of the union(s) concerned.*
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> *66. Clearly enough, the literal phrasing of each of par (3) of the model term and steps 1 and 2 in cl 28.1(a) is apposite to cover a dispute that involves only the employer and one or more employees. However, both the model term and cl 28 are intended to provide, as s 186(6)(a)(i) requires, "a procedure that requires or allows [the Commission] … to settle disputes … about* ***any matters*** *arising under the agreement" (emphasis added). Therefore, a literal construction of cl 28 that precluded any of the five unions that are parties to the Yallourn agreement from initiating a dispute about a matter arising under it for which it has a workplace right, would defeat the purpose which the first three paragraphs of cl 28 (preceding cl 28.1) and ss 186(6) and 341(1) required the dispute resolution process in the clause to serve.*
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> *67. Energy Australia's argument that the Yallourn agreement did not provide any basis for any of the five unions to raise a dispute under cl 28 must be rejected. That is because, if the five unions themselves could never raise or pursue a dispute about their workplace rights, as employee organisations, covered by the Yallourn agreement within the meaning of ss 53(2), 172(1)(b) and 186(6)(a)(i), then cl 28 would not provide a procedure to settle a class of category 1 matters that could arise under the enterprise agreement. Accordingly, cl 28 would not comply with s 186(6).*

[10] In *Construction, Forestry, Maritime, Mining and Energy Union v. Mechanical Maintenance Services Pty Ltd*[4] (Mechanical Maintenance Services) the Full Bench was dealing with 3 appeals by the union in relation to an application for the approval of an enterprise agreement, including the decision to ultimately approve the agreement in question. It was argued in that matter that a previous agreement conferred substantive rights on the appellant that were separate to those conferred on employees by the same agreement and that the approval decision affected those rights. The Full Bench cited the dispute settlement clause in the previous agreement which referred to the 'party with the grievance' being allowed to initiate the dispute settlement procedure. In construing the terms of the dispute settlement procedure in that agreement, the Bench said:

> *Though on one view of clause 31 the procedure is designed to resolve disputes between one or more aggrieved employees and their employer, a construction of the provision which has the result that the Appellant is unable to initiate a dispute under the procedure is untenable in light of what is said by the Full Court in Energy Australia Yallourn.*[5]

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[4] [2019] FWCFB 3585.

[5] At [37].

[11] Both *Yallourn* and *Mechanical Maintenance Services* dealt with the construction of the terms of an existing agreement. Neither were directly concerned with the operation of s186(6) during an agreement approval process. In each case the decisions analysed what the terms of the agreements said about the status of the unions as 'parties' to the agreement. In this case it is relevant to note that the proposed agreement at clause 2, *Scope and Application of Agreement*, says that the Agreement covers the Applicant, certain pilots engaged by the Applicant in the classifications referred to in the Agreement in a specified geographic area, and AFAP. 'Party' is not a term defined in the Agreement.

[12] The terms of the subclause 39.1 *Preamble and Principles,* of the DGP provide that in the event of a disagreement about *'any matter arising under the Agreement or the NES, including a dispute regarding the interpretation or application of this Agreement, the NES, a matter pertaining to the employer-employee relationship, or any other work-related matter',* the *'parties to the dispute'* will attempt to resolve the dispute in accordance with the procedure set out thereunder. It is apparent from the terms of this clause that the range of potential disputes with which the clause is concerned is very wide.

[13] Importantly, subclause 39.1.3 then describes who it is that may initiate a dispute under the procedure. Those who may do so are 'a pilot or a representative acting on their behalf'. That limitation conditions access to the balance of the dispute resolution process set out in in subclauses 39.2 to 39.5.

[14] It was accepted that the effect of clause 39 was that AFAP would have no capacity to initiate a dispute under this clause in its own right. None of the parties in this matter made a submission to the effect that the clause was to be read in any other way. The broader context in which subclause 39.1.3 appears does not support a different conclusion. On any objective reading, AFAP, even though it is an entity covered by the Agreement, would be unable to initiate the disputes process on its own account and, according to this clause, could only do so where it is representing a pilot or pilots covered by the Agreement.

[15] As was pointed out in *Yallourn,* s.186(a)(i) requires that an enterprise agreement includes a term that provides '*a procedure that requires or allows [the Commission] … to settle disputes … about* ***any matters*** *arising under the agreement'* (emphasis added). There are a range of matters which a union covered by an agreement may wish to agitate through a dispute settlement process both on its own account and by way of representing a particular member or members. In construing the dispute settlement clause in *Yallourn,* Flick J pointed out that there are many cases where it may be the union, rather than an individual employee, who may seek to have a dispute resolved, including a dispute as to the application or interpretation of an agreement.[6]

[16] Clause 39.1.3 excludes the capacity of the union to initiate the disputes process of the Agreement in their own right and thereby excises an entire category of disputes from the reach of the DGP in the Agreement. In the circumstances I am not satisfied that the Agreement includes a term that provides for a procedure to settle disputes about any matters arising under the Agreement.

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[6] Op cit at [130].

[17] The Applicant did not want to proffer an undertaking to attempt to address this issue.

[18] The application for approval of the Agreement is dismissed.

DEPUTY PRESIDENT

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