The Resource Industry Employer Group

AMMA MEDIA RELEASE

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Fair Work Act in need of urgent overhaul

In the wake of a Full Bench majority decision handed down by Fair Work Australia today (December 23), resource industry employer group, AMMA has called on the Federal Government to urgently review its federal IR legislation to avert the 'strike first, commence bargaining later' approach the tribunal has endorsed.

While the Full Bench today quashed the original decision in which a Commissioner found the Transport Workers Union (TWU) could take protected industrial action despite bargaining not having commenced, it was a hollow victory for employers in that the commissioner's central finding was upheld by the majority.

AMMA chief executive Steve Knott, while pleased the original decision was overturned, said the findings of the majority were worrying.

"The threat of strike action and strike action itself is a serious issue for the capital-intensive resource industry, and should only occur if the majority of the workforce agrees and a formal bargaining process has commenced."

The findings of the majority have facilitated "moving straight to strike ballots and strike action before bargaining formally commences, and risk a return to a culture of strike first, ask questions later", Knott said.

AMMA intervened to support employer JJ Richards & Sons' appeal of the original decision on the grounds it raised significant public interest considerations.

In the original case, the union had failed to apply for a "majority support determination" before successfully applying for a secret ballot order for protected industrial action. A majority support determination is the mechanism by which Fair Work Australia determines if the majority of the workforce want to bargain with their employer.

AMMA argued before the Full Bench that a majority support determination should be a pre-requisite for taking protected industrial action because otherwise there was no evidence of support for bargaining.

The Commissioner at first instance found the TWU had met the test of "genuinely trying to reach an agreement with the employer", despite finding bargaining had not commenced.

In the majority decision handed down today, Vice President Michael Lawler and Commissioner Michelle Bissett quashed the original decision, but on a technicality. They found the union's application for a secret ballot should never have been approved because it was the NSW branch of the union that was seeking to make an agreement with the employer, whereas it was the federal branch of the union that had applied for the secret ballot order.

The majority decision upheld the finding that an employee bargaining representative can be genuinely trying to reach an agreement in circumstances where the employer has refused to bargain.

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AMMA welcomes dissenting decision

AMMA welcomes the minority decision of Senior Deputy President Matthew O'Callaghan, who also upheld the employers' appeal but rejected the other findings of the majority.

SDP O'Callaghan highlighted flaws in the construction of the Fair Work Act in that its provisions relating to agreement making and protected industrial action resided in different parts of the Act and were not "cross-referenced" to link the taking of protected industrial action to a specific point in the agreement-making process.

"In my opinion, the Fair Work Act, taken as a whole, and in the context of these Full Bench decisions, requires that bargaining be occurring before a protected action ballot can be granted," SDP O'Callaghan said.

"The Fair Work Act provides a mechanism whereby employers can be required to bargain, if the majority of employees confirm through a majority support determination, that they wish to bargain. I consider that it logically follows that where an employer has declined to bargain, a bargaining representative who is genuinely trying to reach an agreement should then establish that there is employee support for bargaining for an agreement because, absent that support, no agreement is possible."

He supported AMMA's submission that there was no evidence the TWU's log of claims would not have included unlawful items. If the union had later pursued unlawful terms, the union would not have been genuinely trying to reach an agreement, he said. There was no way of knowing what the union would have pursued during bargaining and therefore the TWU's secret ballot application should never have been approved, he said.

SDP O'Callaghan also upheld AMMA's arguments that the Explanatory Memorandum to the Fair Work Act and its Second Reading Speech showed the intention of the legislation was to provide for agreements to be made through mandatory employee representation arrangements and "a series of mechanisms designed to facilitate bargaining processes". These mechanisms, all of which were absent in this case, included a majority support determination, the issuing of a notice of representational rights, or the making of a scope order or a low-paid authorisation depending on the industry.

"The use of protected industrial action outside of a bargaining situation appears counter intuitive, inconsistent with the objective intention of the Fair Work Act as a whole and inconsistent with the intention of the legislation," the SDP said.

AMMA calls on the Federal Government to amend the Fair Work Act to recognise that the only way in which an agreement can ultimately be achieved is consistent with s.236 under Part 2-4 of the Act, which provides the mechanisms to deal with an employer's refusal to bargain and the capacity to require an employer to bargain. A failure to utilise such legislated mechanisms is inconsistent with genuinely trying to reach an agreement and the legislation should be amended accordingly.

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