DISCUSSION PAPER

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ENTERPRISE BARGAINING: Notice of Employee Representational Rights

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1. INTRODUCTION

1.1. One of the first steps in the enterprise agreement bargaining process is the issuing by an employer of notices of employee representational rights ('**Notices**') to relevant employees.

1.2. The requirement to issue a Notice stems from section 173 of the *Fair Work Act 2009* (Cwlth) (the '**Act**').

1.3. Disputes often arise between employers and unions or other employee bargaining representatives with respect to the content and distribution of Notices.

1.4. The purpose of this paper is to summarise the purpose of a Notice and the procedural requirements that employers must adhere to when issuing Notices.

2. PURPOSE AND FORM OF NOTICES

2.1. The purpose of a Notice is to inform employees that:

(a) their employer has commenced bargaining with respect to the terms of an enterprise agreement; and

(b) they have the right to appoint a bargaining representative to represent their interests during the bargaining process, and in any proceedings that may occur before the Fair Work Commission with respect to the bargaining process.

2.2. Section 174 of the Act sets out strict rules with respect to the content and form of Notices.

2.3. These rules are reflected in the pro forma set out in Schedule 2.1 of Part 6.10 of the *Fair Work Regulations 2009* (Cwlth). Accordingly, the starting point for any employer is the pro forma wording and form set out in the aforementioned regulations.

3. WHEN DOES AN EMPLOYER NEED TO ISSUE A NOTICE?

3.1. Section 173 of the Act prescribes the following four (4) situations where an employer must issue a Notice:

(a) the employer has agreed to bargain, or initiates bargaining for, a proposed enterprise agreement; or

(b) a majority support determination in relation to a proposed enterprise agreement comes into operation; or

(c) a scope order in relation to a proposed enterprise agreement comes into operation; or

(d) a low-paid authorisation in relation to a proposed enterprise agreement that specifies the employer comes into operation.

3.2. Each of these individual triggers are referred to in this Act as a '*notification time*'. Each notification time is considered below:

(a) the first listed notification time is self-explanatory. For the vast majority of employers, the requirement to issue a Notice will accrue when an employer has agreed to a request to bargain, or has itself initiated bargaining for an enterprise agreement;

(b) a majority support determination is, in effect, an order that can be sought from the Fair Work Commission to force an employer to initiate bargaining with respect to a proposed new enterprise agreement. These orders are typically sought where an employer refuses to bargain. The application requirements and pre-conditions to obtaining a majority support determination are set out in sections 236 and 237 of the Act;

(c) scope orders are addressed in section 238 of the Act. As the name of the order suggests, a scope order is intended to define the scope of the employees to whom a proposed enterprise agreement will apply. Scope orders are intended to promote the fair and efficient conduct of bargaining and are obtained in order to break deadlocks between employers and employee bargaining representatives over the group of employees who will be covered by a proposed enterprise agreement; and

(d) low paid authorisations are a specific type of order targeted at facilitating enterprise bargaining for low-paid employees who often lack the skills, resources, bargaining strength and experience to collectively bargain with their employees. Sections 241 to 246 (inclusive) of the Act address the requirements for applying for and granting low paid authorisations.

3.3. Once an employer is required to issue a Notice, section 173(3) of the Act provides that the Notice must issue as soon as practicable but not later than fourteen (14) days after the relevant '*notification time*'.

4. WHICH EMPLOYEES ARE REQUIRED TO BE GIVEN NOTICE?

4.1. It is often the case that an employer initiates bargaining with an employee bargaining representative (e.g. a trade union) but then quickly reaches disagreement as to the scope of employee coverage sought by the representative. Because bargaining has commenced, section 173 of the Act requires the employer to issue a Notice as soon as practicable.

4.2. When faced with this scenario, employers must ask themselves the following question – who must be given a Notice if the scope of coverage of the proposed enterprise agreement is yet to be agreed?

4.3. Recent decisions of the Fair Work Commission have answered this question with a determination that can be summarised as follows: once bargaining has commenced, Notice must issue to every employee who is covered by the scope of the proposed enterprise agreement.

4.4. In the decision of *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWAFB 6519, the union acting as an employee bargaining representative sought an agreement to cover a broad group of MSS employees. MSS agreed to bargain only with respect to a narrower category of employees. Notices were issued by MSS only to those employees with whom MSS had agreed to bargain – Notices were not issued to all employees that fell within the scope of the union's proposed enterprise agreement.

4.5. In that decision, the Fair Work Commission stated at paragraphs [18] and [19] that:

> *"Where there is a continuing disagreement between the bargaining parties as to the scope of the proposed enterprise agreement, the remedy for the party who wants a narrower scope is to seek a scope order pursuant to s.238. In the absence of such an order, bargaining will proceed on the basis of the broader scope, save that the parties are entitled to continue bargaining over the scope itself until such time as the scope of the proposed agreement is settled through bargaining or by the making of a scope order.*
>
> *It follows from the scheme of the FW Act that the obligation under s.173 is to issue a notice of representational rights to the broader class of employees even though the employer does not wish to have an agreement that extends that far. If it were otherwise, it would mean that an employer could always prevent an agreement having a broader scope than it desired by simply refusing or failing to issue notices of representational rights outside its desired scope. Such an outcome is inconsistent with the scheme of the FW Act."*

4.6. The decision in *MSS Security Pty Ltd v LHMU* has been followed and endorsed in several subsequent decision, including the recent decision of *Mermaid Marine Vessel Operations Pty Ltd* [2014] FWCFB 1317 at paragraphs [43] and [55] – [62] inclusive.

4.7. Employers therefore fall into error if they, for example:

(a) only issue Notices to those employees that they wish to bargain with; or

(b) only issue Notices to those employees who are within the scope of an existing enterprise agreement where the proposed enterprise agreement has wider coverage.

4.8. One method of avoiding a scenario where an employer must issue Notices to employees with whom it does not wish to bargain is for the employer to clearly indicate that its agreement to commence bargaining is subject to the condition precedent that the scope of any agreement first be agreed.[1]

4.9. If the union or other employee bargaining representative does not accept that condition precedent as to scope, the employer can refrain from bargaining or agreeing to bargain.[2] This approach could cause the union or other employee bargaining representative to seek a majority support determination from the Fair Work Commission, however it could also have the desired effect of resolving the scope of a proposed enterprise agreement before bargaining commences.

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1 *MSS Security Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWAFB 6519 at [16]

2 Note 1

For further information in relation to the issues discussed in this paper, please contact Roger Curtis.