Latest News

Contracting out, right of entry and union recognition clauses survive challenge

28 April 2011 5:31pm

Clauses in the pattern deal for the Victorian electrical contracting sector that require contracting out to be at agreement rates and conditions, oblige employers to promote union membership, and loosen right of entry rules for dispute resolution purposes have all survived a challenge.

In a decision handed down this afternoon, Senior Deputy President Jennifer Acton rejected AiG and ABCC arguments that the first of the deals lodged, covering ADJ Contracting Pty Ltd, should be rejected under s194 and s192 of the Fair Work Act on the basis that they contained objectionable terms and would result in the employer breaching another Commonwealth law (see Related Article 1 and 2).

In addition to the 850 employers and 12,000 employees in the Victorian electrical contracting sector who will come under the framework deal struck last year between the ETU (Victorian branch) and the state chapter of NECA, the effect of today's decision extends to other industries, particularly construction, where unions have with varying success sought to import similar provisions.

With contracting out, the clause in the agreement the AiG objected to (4.3b(v)) stipulates that employers could only contract out at rates and conditions that at a minimum matched the pattern deal.

The employer group argued that contractors and labour hire companies were legally entitled to apply their own enterprise agreement - the terms of which constituted a "workplace right" under s341(1)(a) of the Fair Work Act - and taking adverse action against them for doing so would breach the legislation's Part 3-1 general protections provisions.

But Senior Deputy President Acton dismissed the argument, saying that "the AiG's concern that clause 4.3(b)(v) requires ADJ to contravene s340(1) of the FW Act is unfounded. Clause 4.3(b)(v) requires ADJ to engage only contractors who apply wages and conditions no less favourable than those provided for in the ADJ Agreement. The clause is not concerned with whether or not an enterprise agreement or other workplace agreement covers the contractor."

She continued that her conclusion was consistent with the FWA full bench decision in *Asurco Contracting Pty Ltd v CFMEU*.

She also dismissed the ABCC's argument that clauses 4.3(b)(v) and (vi) were objectionable terms because they permitted a contravention of s354(1)(a)(iii) and (b)(ii) in Part 3-1, holding that the clauses were concerned with the wages and conditions paid by contractors and not with whether an enterprise agreement covered or didn't cover a contractor.

The AiG also argued that complying with the clause would result in the employer committing an offence against s45E of the Competition and Consumer Act, but Senior Deputy President Acton said the concern could be "readily dismissed".

"Section 45E is concerned with the making of certain contracts, arrangements or understandings between a person and a union, officer of a union or person acting on behalf of such an officer or union. It is not concerned with the person's compliance with such contract, arrangements or understandings," she said.

She also rejected the AiG's submission that clause 4.3(b)(vii) was an objectionable term because it didn't limit the Disputes Board's actions in respect of a contractor.

On right of entry for dispute resolution purposes (15.2(k)), the AiG and ABCC argued the clause was inconsistent with Part 3-4 of the Fair Work Act in that it didn't require that the union representative be a permit holder; it permitted entry at any time without a written notice; it didn't require production of authority documents; it enabled entry discussions outside working hours and meal breaks; and it prevented FWA from dealing with a right of entry dispute.

But Senior Deputy President Acton again dismissed their arguments, with the last paragraph of the clause the exception, saying the term was clearly different to that considered by the full bench decision in *Dunlop Foams* and it was not unlawful.

"While the clause provides for an entitlement, the entitlement is to enter premises for the purposes of representing an employee under the dispute resolution clause of the ADJ Agreement and not for either a purpose referred to in s481 or to hold discussions of a kind referred to in s484 or for the exercise of a State or Territory OHS right," she said.

On the last paragraph of the clause, Senior Deputy President Acton said she was concerned that it

provided for a right of entry dispute about the operation of Part 3-4 to be dealt with according to the clause, rather than Division 5 of Part 3-4 of the FW Act. She said, however, that she would approve the deal if ADJ gave a written undertaking that any dispute about right of entry for a purpose referred to in s481 of the Fair Work Act, or for discussion or OHS purposes would be dealt with in accordance with Part 3-4 of the Act.

On the union recognition clause in the agreement, the AiG and ABCC argued that clause 16.6 (b) - "Union membership shall be promoted by the Employer to all prospective and current Employees" - and 16.6(d) - "The employees who are members of the ETU shall be encouraged to participate in Union meetings and exercise their democratic rights" - were objectionable in that they required ADJ to induce its prospective and/or current employees to engage in membership action, in contravention of s350.

But Senior Deputy President Acton disagreed, saying "the word 'induce' in s350 does not mean 'promote' or encourage'".

It was always political: Mighell

ETU Victorian branch secretary, Dean Mighell told *Workplace Express* that the intervention by AiG and the ABCC was "always political" and "I'm obviously delighted with the Commission's ruling".

He said that the clause on contracting out was "fundamental to any notion of job security" and today's decision was an important precedent.

Mighell continued that the contracting out clause in the pattern deal was a "bloody minimalist position" compared to what the union used to negotiate in the pre-Howard years - "you've got to consult, and you can't have lesser wages and conditions than provided in the agreement, that's it".

He criticised the ABCC for intervening, saying it was "interesting" that it chose to spend tax-payers' money on "high-priced senior legal counsel" to oppose the certification, and that it intervened at the same time as it announced a crackdown on sham contracting.

"You've got to say there's no sincerity about anything the ABCC does to protect workers," he said.

The AiG, meanwhile, described this afternoon's decision as "disappointing".

National workplace relations director, Stephen Smith, said that the organisation intended to study it in detail over the coming days.

"While the Tribunal has held that a right of entry provision in the agreement is unlawful and has required undertakings to modify the operation of this provision, it has not agreed with our arguments that the clause which imposes restrictions on the engagement of independent contractors and on-hire employees is unlawful," he said.

"The decision highlights that the Government needs to change the Fair Work Act to stamp out clauses which impose restrictions on the engagement of independent contractors and on-hire employees.

"Rather than signing the Union's pattern agreement, the best approach for employers is to negotiate a genuine enterprise agreement which suits their enterprise and its employees," he said.

Contracting out clause spreading

The ETU contracting out, or "job security" clause, has also been pursued by unions in other sectors, particularly construction.

The CFMEU (construction and general division) in NSW has been signing employers up to a similar provision that sets agreement rates and conditions as the floor (see Related Article), while the issue is one of the few remaining sticking points in negotiations for a new deal between the construction union's Victorian branch and employers and the MBAV.

In Victoria, *Workplace Express* understands employers have strongly resisted the union's push to import the ETU clause - with the question over its lawfulness one of their concerns. They have, however, agreed that the pattern deal should be a tool for stamping out shonky contracting out practices, and have put an alternative provision to the union.

ADJ Contracting Pty Ltd [2011] FWA 2380 (28 April 2011)

See the transcript of the hearing.

PRINT PAGE

Further Information

Related Article	CFMEU pursuing 5% in NSW; Deals breach guidelines, warns MBA
Related Article	ABCC joins AiG in opposing ETU framework; AiG targets six more deals
Related Article	ETU and NECA forge industry deal; union to trial four day week
Related Article	AiG challenges Victorian electrical contracting deal

Advanced Search

Search for

Within From: Jan 01 1999
To: Jun 06 2011

Display 10 25

Words All words

Articles All Articles

SEARCH

Latest News | HR Stream | IR/HR Jobs | What's On | Resources | About Us
Free Trial | Subscribe | Feedback | RSS 1.0

Specialist News