‘WE’LL CUT YOU SOME SLACK’:

Recent FWC decisions demonstrate a willingness to overlook minor errors in agreement-making

CORRS CHAMBERS WESTGARTH lawyers

By **Paul Burns** (Partner), **Amanda Loftus** (Senior Associate), **Anthony Forsyth** (Consultant) & **Mairead O’Connor** (Paralegal)

A number of recent decisions demonstrate the kind of errors in the agreement-making process that the Fair Work Commission (FWC) is willing to overlook as purely ‘minor procedural or technical’ when approving enterprise agreements, following a late 2018 amendment to the *Fair Work Act*.

Section 173 of the *Fair Work Act 2009* (Cth) (**FW Act**) requires an employer that will be covered by a proposed enterprise agreement to take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement (Notice of Employee Representational Rights or **NERR**).

In January 2012, the FW Act was amended to provide that the NERR must:

- contain specific content;
- be in the form prescribed by the *Fair Work Regulations*; and
- contain no other material.

This change was intended to address union concerns that some employers had been modifying the content of the NERR to undermine employees’ representational rights.

However, this led to a series of decisions in which the FWC took an extremely strict and technical approach that produced, in some cases, absurd results. This was epitomised by the Peabody Moorvale[1] decision, in which the FWC Full Bench concluded that an NERR was invalid because it was stapled to two other documents.

As a result of *Peabody Moorvale* and subsequent decisions, technical invalidities in the NERR or certain other aspects of the agreement-making process would mean the FWC would not approve a proposed agreement. Employers would therefore have to begin the bargaining process all over again.[2]

In 2017, the *Fair Work Regulations* were amended to clarify and simplify certain content in the required form of the NERR.

The 2018 amendment

In 2015, the Productivity Commission recommended a change to the FW Act to allow the FWC to overlook minor procedural or technical errors when approving an agreement.[3] Legislation to implement this change was introduced into Parliament in March 2017, and was finally passed in December 2018.[4]

The relevant amendment involved adding a new sub-section to section 188 of the FW Act, which sets out the circumstances in which employees will be considered to have ‘genuinely agreed’ to an enterprise agreement – one of the requirements for approval of an agreement (section 186(2)(a)).

1 *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042. See: https://www.corrs.com.au/publications/corrs-in-brief/because-of-a-staple-the-agreement-was-lost-the-need-for-a-proper-notice-of-employee-representational-rights/

2 See: https://www.corrs.com.au/publications/corrs-in-brief/representation-notices-get-them-right-or-start-bargaining-all-over-again/

3 Productivity Commission, *Workplace Relations Framework: Final Report* (Recommendation 20.1).

4 *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth).

In addition to the existing criteria in section 188(1), new section 188(2) now provides that an agreement will also be genuinely agreed to if the FWC is satisfied that:

- the agreement would have been genuinely agreed to (within the meaning of section 188(1)) but for minor procedural or technical errors made in relation to the requirements regarding the NERR, the pre-approval steps or the voting process through which employees approve a proposed agreement; and
- the employees covered by the agreement were not likely to have been disadvantaged by the errors in relation to these requirements.

How is this new provision being applied?

There have already been a number of decisions made by the FWC in which it has considered what constitutes a 'minor procedural or technical error' for purposes of section 188(2).

The table below summarises the types of errors that have been considered. It shows that the overwhelming majority of errors reviewed in the decisions have been found to meet the section 188(2) threshold, and therefore have not prevented approval of the agreements in question.

There are, however, two instances of error that were **not** found to be minor and were likely to have disadvantaged employees (highlighted in red).

Errors relating to Notice of Employee Representational Rights

Error	Case examples	Decision re: section 188(2)
Out-of-date version of the NERR provided to employees	*Kmart Australia Ltd* [2019] FWCA 1089 A version of the NERR prior to the 2017 amendment to its required content was given to employees. However this was substantially the same as the correct version and the core content requirements of the NERR were unchanged.	Minor error that is unlikely to disadvantage employees.
Content of the NERR altered by omitting union's role in the bargaining process	*AG2018/6614 –Application by The Trustee for the Neish-King Family Trust T/A Kew Swimming Pools*	This is a core requirement of the NERR's content designed to ensure employees are fully aware of their representational rights. **Unlikely to be considered a minor error.**[5]
Other content alterations to the NERR	*AG2018/6679 – Application by Royal Automobile Club of Victoria (RACV) Limited* Final paragraph altered from 'speak to your employer' to 'speak to your manager: Brad or Damien'.	Minor error; whether unlikely to disadvantage employees will depend on further examination of circumstances.[6]
	Alice Springs Town Council [2019] FWCA 560. Section 174 requires the NERR to contain a reference that an agreement can set the wages and conditions of employment for up to 4 years. Employer amended this period to reflect the agreement duration it was seeking.	Minor error that is unlikely to disadvantage employees.

5 *Huntsman Chemical Company Australia Pty Ltd* [2019] FWCFB 318 at [142].
6 Ibid at [148].

Error	Case examples	Decision re: section 188(2)
Legal name of the employer incorrect	*AG2018/4986 – N T Seaman T/A United Wolves* The legal name of the employer was replaced with its trading name in the NERR. *AG2018/6679 – Application by Royal Automobile Club of Victoria (RACV) Limited* RACV used acronym instead of full legal name in the NERR	Both minor errors that are unlikely to disadvantage employees.[7]
Fields in the NERR left blank	*AG2018/5778 – Application by CMTP Pty Ltd* (application withdrawn) First paragraph did not identify the name of the employer, the name of the proposed agreement, or the proposed coverage. NERR was accompanied by a cover letter containing this information.	Would **ordinarily not be a minor error** given the purpose of the paragraph is to inform employees that the employer is bargaining and which employees are proposed to be covered by the agreement. In the circumstances, however, the cover letter remedied this error.[8]
Coverage of employees contained in the NERR different from that in the final agreement	*Spotless Facility Services Pty Ltd* [2019] FWC 1331 NERR specified that the agreement would cover employees at four sites (two future sites and two existing sites). The final agreement specified that it covered three sites, and broadened the scope of the type of work covered.	Removal of one site specified in the NERR was a procedural or technical error. However, broadening the scope of the work from that specified in the NERR was **not** a minor procedural or technical error. It brought within the scope of the agreement 'a new group of employees working in roles different to those in existence at the time the NERR was issued'.
Employees initially overlooked in NERR distribution	*Sibelco Australia Ltd* [2019] FWC 1523 NERR distributed by hand on site. Two employees on long term absences were overlooked. Employer sent NERR by post to these employees, but 2 weeks after the 14-day time limit in section 173(3).	Minor error that was unlikely to disadvantage employees.
NERR printed under employer letterhead/logo	*AG2018/6550 – Application by Axis Plumbing Services WA Pty Ltd* NERR provided by the employer to employees as a memorandum on company letterhead. Content was otherwise unchanged. *Woolworths Group Limited T/A Woolworths* [2019] FWCA 7 NERR was issued under Woolworths logo.	Both minor errors that were unlikely to have disadvantaged employees.[9]

7 Ibid at [157], [160].
8 Ibid at [161]-164].
9 Ibid at [152]-[153].

Errors relating to voting procedure for employee approval of agreement

Error	Case examples	Decision re: section 188(2
Voting commenced less than 7 days after employees were notified of vote and given access to copy of agreement	*Huntsman Chemical Company Australia Pty Ltd* [2019] FWCFB 318 Time between notification of vote and the voting commencing was less than the mandated 7–day access period under section 180(3).	Considered to be a minor procedural error in respect of 3 proposed agreements. However, factors including clear majority in favour of agreement, large voter turn-out and voting taking place over a number of days led to conclusion that the short notice had not disadvantaged employees in each instance.[10]
	SAF Holland (Aust) Pty Ltd [2019] FWCA 1309 One absent employee was not provided access to a copy of the agreement throughout the entire 7-day period before voting (as required by section 180(2) and (4)).	Minor error unlikely to have disadvantaged the employee.
Vote commenced less than 21 clear days after the last NERR was issued	*Grizzly Engineering Pty Ltd Enterprise Agreement 2018* (V2) [2019] FWCA 805 Employer requested employee approval 20 days after the last NERR was given (contrary to section 181(2)).	Approval 1 day too early was a minor error unlikely to have disadvantaged employees.

Key takeaways

What becomes clear from these decisions is that the most important consideration in applying section 188(2) is the actual effect an error had, or is likely to have had, on employees in the bargaining process.

The same error may be categorised as minor and unlikely to have impacted employees in one set of circumstances (e.g. if there is a history of bargaining at the enterprise), and in another set of circumstances be deemed to have affected employees' ability to 'genuinely agree' to the proposed agreement (e.g. if it is a first agreement and employees are mainly from a non-English speaking background).[11]

Employers should therefore continue to be cautious not to make any amendments to the NERR issued to employees at the start of bargaining, that could be understood as substantially affecting their understanding and awareness of their representative rights.

Any mistakes or omissions in terms of the content of the NERR or the manner of its distribution should be rectified as soon as possible, through the issuing of a new NERR. However this will re-commence the bargaining process and the applicable statutory time-frames.

With regard to the voting process, employers should continue to adhere to the timelines prescribed in the FW Act. The less time between notifying employees of the time/location of the vote and the vote taking place, and the less time allowed for voting, the more likely that the FWC will determine that employees were disadvantaged.

While the amendment to accommodate 'minor technical or procedural errors' is welcome and provides some comfort to bargaining participants in relation to some inadvertent errors discovered late in the agreement-making process, absolute compliance should remain the objective of employers.

This will ensure employers are able to successfully navigate the stage of approval of a proposed agreement by the FWC.

10 Ibid at [169]-[173].
11 Ibid at [117].

This publication is introductory in nature. Its content is current at the date of publication. It does not constitute legal advice and should not be relied upon as such. You should always obtain legal advice based on your specific circumstances before taking any action relating to matters covered by this publication. Some information may have been obtained from external sources, and we cannot guarantee the accuracy or currency of any such information.