Strategies for Building Contractors to ensure industrial arrangements are Building Code 2016 compliant

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From today, no building contractor will be eligible to tender for Commonwealth funded building work unless their industrial instrument is compliant with the requirements of the *Code for the Tendering and Performance of Building Work 2016* ("**Code 2016**").

This alert will examine options available to building contractors for ensuring their industrial instrument is Code 2016 compliant in light of two recent decisions of the Fair Work Commission ("**FWC**").

OBSTACLES TO CODE 2016 COMPLIANCE

From 2 December 2016, building contractors submitting expressions of interest or tenders for work on projects with certain levels and forms of funding from Commonwealth government entities will become covered by Code 2016, regardless of whether or not the contractor is actually awarded the contract. In order to be eligible to tender for and be awarded building work to which Code 2016 applies, a contractor and its employees must be covered by an industrial instrument that is compliant with Code 2016. Certain industrial instruments are deemed to be compliant with Code 2016, including all modern awards and registered enterprise agreements made before 25 April 2014.

However, many contractors in the building industry are subject to an enterprise agreement made on or after 25 April 2014. From 1 September 2017, those contractors will be ineligible to tender for building work to which Code 2016 applies if the enterprise agreement contains a clause that contravenes the prohibited content provisions at section 11 of Code 2016. The majority of the content prohibited by section 11 is what is colloquially known as "union friendly" clauses, being content that is commonly found in the template enterprise agreements offered to contractors by unions such as the Construction, Forestry, Mining and Energy Union ("**CFMEU**").

Examples of prohibited content include clauses in enterprise agreements that grant union officials unfettered access to building sites, require contractors to consult with the union before engaging subcontractors or that otherwise restrict the contractor's ability to determine when, where and by whom work is performed within the contractor's business.

If a contractor is currently covered by an enterprise agreement with prohibited content made on or after 25 April 2014, what options are available to them for securing an industrial instrument that is compliant with Code 2016?

VARYING OR REPLACING A NON-COMPLIANT ENTERPRISE AGREEMENT

One option available to contractors covered by an enterprise agreement with prohibited content is to seek to vary the existing agreement to remove the non-compliant content, or replace the agreement entirely with a new, Code 2016 compliant enterprise agreement. When determining whether to vary or replace a non-compliant enterprise agreement, consideration should be given to

whether the existing agreement has passed its nominal expiry date ("**NED**"). Where the agreement has passed its NED, it should be replaced by a new agreement.

However, if the existing agreement has not yet passed its NED, it will be simpler to seek to vary the agreement than to go through the process of replacing it with a new, Code 2016 compliant agreement.

AMENDMENT CLAUSES

Commonly, the CFMEU will be covered by existing agreements that are non-compliant with Code 2016. Until recently, the CFMEU was refusing to negotiate with contractors to vary existing agreements to achieve compliance with Code 2016. This was in spite of the CFMEU previously agreeing to include a clause in several versions of its template enterprise agreement issued after 25 April 2014 that committed to making any amendments necessary to ensure the agreement complied with future versions of the building code ("**Amendment Clause**").

In the recent decision of *Laing O'Rourke Australia Construction Pty Ltd T/A Laing O'Rourke v Construction, Forestry, Mining and Energy Union*[1], a contractor attempted to rely on an Amendment Clause in its existing enterprise agreements in a novel manner.

After making an unsuccessful attempt to negotiate the necessary variations with the CFMEU, Laing O'Rourke applied to the FWC seeking a determination that, consistent with the commitment of the parties embodied in the Amendment Clause, all clauses in the existing agreements that had been identified by the Australian Building and Construction Commission ("**ABCC**") as non-compliant with Code 2016 should be interpreted in future to operate in such a manner as to make them compliant with Code 2016.

Essentially, Laing O'Rourke were seeking an order that the existing agreements be interpreted as though the non-compliant clauses had been varied to make the agreements Code 2016 compliant without requiring the parties to go through a formal application to vary the existing agreements. Laing O'Rourke relied upon the presence an Amendment Clause in both agreements as its basis for seeking the determinations.

Applying the established rules for interpreting enterprise agreements at common law, the FWC ruled that it could only apply the interpretation sought by Laing O'Rourke to the non-compliant clauses if the wording of those clauses permitted such an interpretation. Regrettably for Laing O'Rourke, the FWC determined that no such interpretation of the non-compliant clauses was possible in this case.

Accordingly, any attempt to vary or replace an existing enterprise agreement with non-compliant content must follow the formal processes set out in the *Fair Work Act 2009* (Cth) ("**FW Act**"), regardless of whether or not the existing agreement contains an Amendment Clause.

TERMINATING A NON-COMPLIANT AGREEMENT

As an alternative to varying or replacing an existing enterprise agreement with non-compliant content, contractors could consider terminating the existing agreement and reverting to the coverage of an applicable modern award.

Once again, the question of whether or not the existing agreement has passed its NED has an impact on the termination process. Where an enterprise agreement has not yet passed its NED, an employer must ask its employees to approve the proposal to terminate the agreement before applying to the FWC for an order terminating the agreement. However, where the agreement has already passed its NED, the employer can apply directly to the FWC for a termination order.

The FW Act sets out a range of criteria the FWC must consider when deciding whether to approve an application to terminate an enterprise agreement, which relevantly includes the likely effect a termination will have on all parties to the agreement. Accordingly, the FWC will generally invite all affected parties, including employees covered by the agreement and relevantly named unions, to express their views regarding the proposed termination.

Recent case law suggests that in order for an application for termination to be successful in these circumstances, it will be necessary for the employer to satisfy the FWC that there will be a significant threat to the financial viability of the employer's business if it is unable to tender for building work to which Code 2016 applies.

In the decision of *Grandstand Scaffold Services Pty Ltd*[2], the employer, Grandstand Scaffold Services Pty Ltd ("**Grandstand**"), made an application to the FWC to approve the termination of an enterprise agreement that had only commenced to apply to Grandstand employees in August 2016. As the agreement had not passed its NED, Grandstand held a vote of affected employees seeking their approval of the proposal to terminate the agreement. Grandstand asserted that the employees approved the proposal by a narrow margin.

The CFMEU was also covered by the agreement and objected to Grandstand's application to terminate it. In addition to a range of concerns regarding the employee ballot process, the CFMEU alleged that the proposed termination would result in a considerable reduction in

[1] [2017] FWC 4050.

[2] [2017] FWCA 3980.

take home wages for a number of employees covered by the agreement, making any termination unfair. The CFMEU also asserted that the proper course of action was for Grandstand to negotiate with employees and the union to vary the existing agreement to achieve compliance with the requirements of Code 2016.

Grandstand's directors gave evidence that the rates of pay required under the agreement had made the company uncompetitive in the market, resulting in significant financial losses requiring a capital injection from both directors. The directors claimed that without the ability to tender for projects to which Code 2016 applied in the immediate future, Grandstand could not afford to maintain its workforce at its current levels. The directors also detailed their previous unsuccessful attempts to negotiate variations to the existing agreement with the CFMEU to achieve Code 2016 compliant status.

In approving Grandstand's application to terminate the agreement, the FWC placed greater significance on the potential loss of employment for existing employees than the possibility of a substantial reduction in their take home wages in the event Grandstand elected to revert to paying the minimum modern award wages. The FWC also reasoned that there was no guarantee negotiations with the CFMEU and employees to vary the existing agreement would result in Grandstand's industrial instrument achieving Code 2016 compliant status in sufficient time to ensure the financial viability of the business.

TIPS FOR BUILDING CONTRACTORS

When considering what action to take in order to ensure that their applicable industrial instrument is compliant with Code 2016, building contractors should consider the following:

- What clauses in their existing enterprise agreement breach the prohibited content provisions in Code 2016? Contractors should note that the ABCC will assess existing and draft enterprise agreements for compliance with Code 2016 at no cost to the contractor.
- Has the existing non-compliant enterprise agreement passed its NED, or is it about to do so in the near future?
- Is the CFMEU or any other union covered by the existing agreement? If so, has the contractor consulted with them to ascertain their willingness to negotiate a Code 2016 compliant agreement?
- If a union that is covered by the existing agreement is prepared to negotiate variations to the agreement, or a new agreement, that will achieve Code 2016 compliance, can the contractor accommodate any concessions the union may be seeking in return for its cooperation (eg. increases in hourly rates and allowances)? If the contractor believes it is not financially capable of accommodating the concessions sought, what evidence can the contractor put forward to the FWC in support of this position?
- If the contractor is considering terminating the existing agreement and reverting to employing staff pursuant to the applicable modern award, can the contractor produce evidence that an inability to tender for Code 2016 covered work will have a significant impact on the financial viability of the contractor's business in the immediate future?

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