

Fair Work | Case Study



Enterprise Agreements - Case Study 1

A New South Wales company, DCo Pty Ltd, carries on a manufacturing business from a site in Homebush. DCo employs 14 employees in the warehouse, about 70 employees in production and about 20 employees in administration.

In December DCo decided it wanted to make an enterprise agreement. On 14 December 2009 DCo issued a notice of the right to be represented by a bargaining representative to all of its employees in administration, as well as 5 non-union employees each from production and warehousing.

On 1 January 2010 the following modern awards began applying to DCo employees:

- Clerks - Private sector award covers administration employees;
- Manufacturing and Associated Industries and Occupations covers production employees; and
- Storage Services and Wholesale Award covers warehousing employees.

DCo drafted an enterprise agreement that provided for 5 classifications, each broadly correlating to classifications under the relevant awards. The proposed agreement incorporated by reference sections from those awards.

On 5 January 2010 DCo gave those employees who received a notice regarding the right to be represented a copy of the proposed enterprise agreement and informed them that on 13 January 2010 a ballot box will be placed in each of the 3 parts of the business between 7am and 7pm for them to place a completed ballot paper indicating whether they approve of the agreement.

On 13 January 2010, 13 of the 25 of employees who cast a valid vote approved the agreement.



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DCo must lodge the agreement with FWA by 27 January 2010. FWA must then determine whether it meets statutory requirements.

At least 2 issues are likely to arise for FWA in respect of this agreement.

Firstly, because the agreement does not cover all of DCo's employees, FWA must be satisfied that the group of employees covered by the agreement was fairly chosen. It is unlikely that the agreement will meet that requirement because the agreement does not cover all employees in the warehouse and production and there does not appear to be any operational rationale for that approach.

Secondly, because the agreement incorporates provisions of the modern award it is not clear that DCo gave those employees to be covered by the agreement copies of those awards at the same time as it gave them the proposed agreement.

FWA must also determine whether the agreement passes the 'better off overall test' (BOOT). If the agreement had been approved on or before 31 December 2009 the Transition Act provides that the no-disadvantage test must be applied. The no-disadvantage test requires that the agreement not result, on balance, in a reduction in the overall terms and conditions of the employment of the employees to be covered by the agreement under the awards that preceded the modern awards.

However, because the approval occurred on or after 1 January 2010 the BOOT is the relevant test. The BOOT requires that FWA be satisfied that, at the time, the agreement is lodged with FWA, the employees it covers would be better offer overall if they were employed under the agreement than under the relevant modern awards.

In applying the BOOT, FWA could assess a hypothetical DCo employee in each of the classifications under the agreement against the relevant classification under the modern award, rather than be required to enquire into each employee's individual circumstances. In other words, because there will be a number of DCo employees within each classification under the agreement and the agreement affects each employee within a classification in the same way, FWA could group employees together when assessing the employees against the BOOT.

FWA is also required to enquire into the circumstances of a class of employees who would be employed under a classification in the agreement, even if at the time the agreement is lodged the employer does not employ anyone in that classification.



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