

WHEN IS A RIGHT OF ENTRY NOT A RIGHT OF ENTRY?

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DISCUSSIONS WITH EMPLOYEES

Under the *Workplace Relations Act* (WRA), a union official may enter a site to hold discussions with employees if:

- the official holds a valid permit;
- an award applies to work being carried on at the site;
- the award is binding on the union; and
- employees on site are eligible to be members of the union.

If any one of these elements is missing, the union will not have a right of entry. In two recent decisions where all of the other criteria were met, the Commission has explored when an award applies at a site if the employer has a certified agreement or an Australian Workplace Agreement (AWA) in place.

A COLLECTIVE AGREEMENT

Ensham Resources refused an officer of the Construction, Forestry and Mining and Energy Union (the CFMEU) entry to its coal mine, even though:

- the officer had a valid permit; and
- Ensham (a respondent to an award binding on the CFMEU and that covers the work carried on there), employed workers eligible to be CFMEU members.

When the CFMEU asked the Commission to order Ensham to recognise its right of entry, Ensham argued that its certified agreement replaced the award completely, so no award applied to work being carried on at the site, and so a requirement of entry was missing. The Commission agreed, but the CFMEU appealed to the Full Bench.¹

According to two recent decisions of the Australia Industrial Relations Commission, union officials have no right to enter a site covered exclusively by Australian Workplace Agreements, but employers with certified agreements must offer unions the limited rights of entry granted by the *Workplace Relations Act*.

APPEAL

While a certified agreement operates, it prevails over an award.

The Full Bench looked at the language used in the WRA and agreed with the CFMEU submission that 'prevails over' does not mean 'excludes the operation of', and so the award continues to apply to the work performed, even though it lies dormant and the terms of the certified agreement prevail. Since the award applied, all requirements of entry were met, and so the union's right of entry was not removed by the existence of the certified agreement.

AN AWA-COVERED WORKPLACE

In similar circumstances, Aldi Foods refused entry to its warehouse to several National Union of Workers (NUW) officers a number of times. The officers all had valid permits and Aldi, a respondent to an award binding on the NUW, employed workers eligible to be NUW members within the scope of the award.

All of the employees at the warehouse site had signed AWAs. While an AWA operates, it excludes any award.

When the NUW asked the AIRC to order Aldi to recognise its right of entry, Aldi argued that the AWAs excluded the award completely, so the NUW had no right of entry. The Commission agreed, but the NUW appealed to the Full Bench.²

The Full Bench found that the NUW had no right of entry, agreeing with Aldi's submission and the original decision. The Full Bench ruled that in drafting the relevant sections of the WRA, the legislature had made a deliberate decision to say that an AWA 'operates to the exclusion of' any award, when it could have used the language of other sections of the WRA and say that an AWA merely 'prevails over' any award.

As a result, the AWAs excluded the operation of the award, and so a requirement of entry was missing. The Full Bench stressed that the reason for this finding was that all employees had signed AWAs, and noted that if even one of the employees had not signed an AWA, an award would apply to work being carried on at the site, and the NUW would have met all of the entry criteria.

IMPLICATIONS

Employers may use AWAs to stop unions from entering a site to have discussions with workers who are (or who are eligible to be) union members, and remove from those employees the right to have discussions with their union representatives at their workplace. However, an AWA will not have that effect unless all other employees at the site have also signed a current AWA.

By contrast, a certified agreement does not exclude an applicable award, and so will not affect a union's rights of entry, so long as all of the other entry criteria are met.

REFERENCES

1. *Construction, Forestry and Mining and Energy Union* (PR943725) 23 February 2004 Sydney (Justice Guidice, President, Senior Deputy President Harrison and Commissioner Cribb).
2. *National Union of Workers* (PR943894) 23 February 2004 Sydney (Justice Guidice, President, Senior Deputy President Harrison and Commissioner Cribb).

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