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"Ridiculous" matters pertaining rule will stop workplace climate change action, says academic

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The narrow scope of the Fair Work Act’s "matters pertaining" requirement will restrict the inclusion of environmental sustainability clauses in enterprise bargaining agreements, according to a legal academic.

Speaking at the Workplace Research Centre’s annual labour law conference in Sydney last week, Deakin University lecturer Victoria Lambropoulos reaffirmed that for a matter such as a commitment to carbon pollution reduction to be included in an agreement, it must have a direct impact on the employment relationship (s172(1)(a)).

She said a clause requiring an employer to reduce their carbon dioxide emissions would infringe the rule, because it imposes an obligation on the employer, but it doesn’t pertain to the relationship between the employer and the employee.

"However, if the clause obliged employees to participate in waste recycling strategies, or comply with a certain CO₂ target imposed by the employer, that would be OK," she said.

Lambropoulos was critical of the rule’s failure to allow for mutuality of obligations. She said that with agreements likely to make employees’ bonuses subject to environmental sustainability targets in the future, "you need to have a reciprocal obligation in an enterprise agreement that is enforceable, to ensure some comfort for employees."

"What about reciprocal obligations on employers to introduce capital equipment to ensure that employees meet their CO₂ targets?" she asked.

Lambropoulos said she felt the narrow formulation of the matters pertaining rule was "ridiculous", and would stop organisations and their employees from committing to innovative clauses aimed at addressing climate change and other issues.

Matters pertaining to employer and union relationship has ‘wider ambit’

Lambropoulos said the untested provision for matters pertaining to the relationship between the employer and a union (s172(1)(b)) is wider in its ambit.

"There is an argument that under [subsection] (1)(b) you may be able to negotiate consultation clauses with trade unions on matters that generally wouldn’t be allowed in [subsection] (1)(a), because it’s to do with the process of decision making rather than the substance of decision making," she said.

It is arguable that consultation between employers and unions on climate-change-related production issues or investment in green technologies could be permitted under this heading, she said.

Mandatory consultation clause may include environmental issues

Lambropoulos said climate change issues could potentially be covered by the mandatory consultation clause in all new enterprise agreements, which requires the employer to consult with the employees about major workplace change.

"If the employer is going to introduce new capital, new ways of producing goods in the workplace that are more environmentally sound, if that’s a significant effect on the employees, they have to comply with this procedure under section 205," she said.

"But it’s arguable as to what a major workplace change is."
Most environmental clauses in agreements currently toothless "motherhood statements"

Lambropoulos said commitments on climate change are currently more likely to be included in human resources and company policies and manuals. If they are included in agreements, they were usually only generic motherhood statements relating to the environment.

"They don't really have teeth, they don't really have direct positive obligations to meet certain targets. They just say the parties believe in sustainability."

But she said a recent agreement voted up by academic and general staff at the University of Ballarat went much further, containing a direct obligation on the university to keep staff and unions regularly informed about carbon emissions, water and energy consumption levels.

Leave environmental issues out of agreements, says HR manager

Responding from the floor, National Tertiary Education Union industrial officer Jeane Wells rejected the view that "matters pertaining" stops employers and employees from committing to climate change initiatives. She said that from her experience, employers resist the inclusion of CO2 reduction measures in agreements simply because they don't want to make a commitment to a set target.

Jennifer Todd-Wilson, HR manager at PPG Industries, said she'd like to see environmental sustainability left out of agreements, but not because her company was unwilling to commit.

"If I'm going to put something on paper, I'm probably going to put a more conservative estimate down, and both of the companies I've worked for have well and truly exceeded what they would have otherwise been held accountable for in a legal document by pursuing their own aggressive strategies," she said.

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