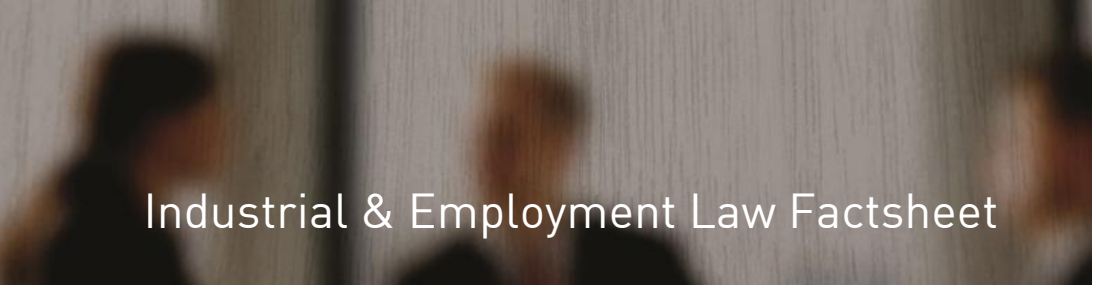

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Enterprise Agreements: Content and procedural requirements for approval

As explained in our second IR fact sheet, the Fair Work Act 2009 (Cth) sets out the good faith bargaining rules and obligations which apply to the parties and their the bargaining representatives when negotiating for an enterprise agreement. In addition, the Fair Work Act contains strict rules about what content must, can and cannot be included in an enterprise agreement and prescribes other pre-approval requirements to be satisfied before any agreement made by the parties can be lodged for approval with the Fair Work Commission.

Aside from these important content rules and pre-approval steps, an employer should ensure that the negotiated enterprise agreement reflects current practices in the workplace and adequately supports the future growth and needs of the business.

Mandatory and permitted content

An enterprise agreement must include mandatory terms dealing with the following:

- the **nominal expiry date** for the life of the agreement (no more than four years from the date of approval);
- a **dispute settlement procedure** outlining how disputes relating to either the operation of the agreement or the application of the NES are to be resolved, including a right of representation for employees and an ability for the Fair Work Commission or another independent body to settle the dispute;
- a **flexibility term** allowing for the making of individual flexibility arrangements between an individual employee and the employer to accommodate their genuine needs (if a flexibility term is not included in the agreement, the model flexibility term will apply which is contained in the *Fair Work Regulations 2009* (Cth)); and
- a **consultation term** requiring the employer to consult with employees about major workplace changes which are likely to have a significant effect on them (if a consultation term is not included in the agreement, the model consultation term will apply which is also contained in the *Fair Work Regulations*).

An enterprise agreement may contain other terms provided that they fall within the meaning of "**permitted matters**" which:

- pertain to the relationship:
    - between the employer and the employees to be covered by the agreement;
    - between the employer and the trade union/s to be "covered" by the agreement (if any);
- deal with permissible deductions from wages; and
- concern how the agreement will operate in practice (machinery provisions).

Unlawful content

An enterprise agreement must not include unlawful terms containing content which:

- is discriminatory on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- is objectionable for certain specified reasons (for example, requiring or allowing for the payment of bargaining related service fees, such as, those services rendered by a trade union);

- allows for an employee to opt-out of the coverage of the agreement;
- provides for an unfair dismissal remedy before the employee has completed the minimum employment period or alternatively excludes or detrimentally modifies the operation of the unfair dismissal provisions in the Fair Work Act;
- is inconsistent with the industrial action provisions in the Fair Work Act;
- confers on individuals rights of entry inconsistent with the provisions in the Fair Work Act;
- requires contributions to be made to a superannuation fund other than a fund which:
    - offers a MySuper product;
    - is an exempt public sector scheme, or
    - a fund of which a relevant employee is a defined benefit member.

An enterprise agreement also cannot contain terms which contravene the safety net of minimum conditions in the NES or undercuts the base rates of pay in the relevant reference instrument/s (an award covering the employment relationship or otherwise the national minimum wage order).

Tailoring the content to meet your enterprise's business objectives

Before commencing bargaining for either a new or replacement enterprise agreement, it is important for an employer to carefully consider what it wants to achieve in terms of both shorter and longer term outcomes.

An employer should consider, at least, the following questions:

- Who should the agreement cover and are there any classes of employees that you want to exclude from the scope of the agreement, for example, there may be strategic reasons to separate a certain group who could be difficult to bargain with or would be better employed under individual common law agreements?
- Do you want the maximum length of four years duration to apply to avoid the costs of frequent bargaining rounds and associated industrial action, as well as providing greater certainty in respect of projecting future labour costs; or are there good reasons for justifying a shorter term, such as, a significant downturn in market conditions warranting the adoption of interim pay and working arrangements to avoid redundancies?
- How can you increase productivity, provide greater flexibility or otherwise better meet the needs of the business, through working arrangements or other remuneration models to be adopted in the agreement?
- Can your present enterprise agreement be more concise or otherwise improved (for example, by excluding terms which are best left covered by the NES or a common law contract)?

Making an enterprise agreement (pre-approval requirements)

The bargaining process formally commences on the employer giving a notice of employee representational rights (NERR) to all employees who will be covered by the proposed enterprise agreement.

The NERR must be given to the employees as soon as practicable and not later than 14 days after the "notification time" – which is usually when the employer agrees to bargain or initiates bargaining for the agreement.

The timing of the giving of the NERR is important as an employer may not ask employees to approve a proposed agreement until at least 21 days have expired after the last NERR has been given.

An employer and its employees may appoint bargaining representatives and must commence bargaining in accordance with the good faith bargaining rules.

Once the bargaining process is successfully concluded or negotiations are effectively exhausted and the employer is of the view that the majority of employees covered by the agreement will vote in favour of it, the employer can start the process of putting the agreement to the vote.

All reasonable steps must be taken to notify the employees to be covered by the agreement of the time and place of the vote, and the voting method to be used at least seven days before the voting process commences (which is called the "access period").

Importantly, during the access period the employer must ensure that employees are given a copy of the agreement and any material which has been incorporated into the agreement by reference. The employer must ensure that the terms of the proposed enterprise agreement (and importantly the effect of those terms) are explained to the employees in an appropriate manner. Consideration should be given to any factors which might influence an employee's ability to understand the proposed enterprise agreement, for example young employees or those from cultural diverse backgrounds, to ensure that the terms explained and understood by those employees.

An enterprise agreement will ordinarily be "made" when the majority of the employees, who cast a valid vote, vote in favour of the proposed agreement.

Approval by the Fair Work Commission

Once an agreement has been made, the next step is usually for the employer to apply to the Commission for the approval of the enterprise agreement. This application must be lodged with the Commission within 14 days of the agreement being made by the parties.

An application form and supporting declaration are required to be provided by the employer to the Commission before it will approve the agreement, essentially addressing whether the enterprise agreement:

- covers a group of employees who have been fairly chosen;
- has been made with the genuine agreement of the parties;
- passes the better off overall test in comparison with the applicable reference instruments;
- does not include any unlawful terms; and
- provides for any mandatory content.

In some cases (for example, where the approval is opposed by a trade union), it will be necessary for the parties to attend a hearing of the Fair Work Commission and to make submissions about the above matters. In most cases, however, the approval of the enterprise agreement is usually determined "on the papers" by the Fair Work Commission following correspondence with the parties, including about any appropriate undertakings to be provided by the employer.

For information on how to make an enterprise agreement, please refer to our fact sheet *Enterprise Agreements – How to make one?*

You may also wish to contact HopgoodGanim's Industrial and Employment Law team for advice specific to your business needs.