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Practice Group:

*Labour, Employment
and Workplace Safety*

If It Feels Harder to Get Your Enterprise Agreement Approved by the Fair Work Commission, That's Because It Is...

By Elizabeth Ferrier

Over the last 12 months, we have assisted many clients with the negotiation, lodgment and approval of enterprise agreements made under the *Fair Work Act 2009* (Cth) (FW Act). Anecdotally, it appeared to us that employers were being asked to jump through more hoops, and provide ever more detailed explanation of the operation of their enterprise agreements, particularly in relation to the Better Off Overall Test. This view has been borne out by a recent submission by the Fair Work Commission to the Senate enquiry into the penalty rates.

Summary:

What do I need to know?

- the Commission has new processes in place which mean it is harder to get your enterprise agreement approved by the Fair Work Commission; enterprise agreements are being more closely analysed and scrutinised, particularly in relation to the Better Off Overall Test
- just because an enterprise agreement in similar terms has been approved by the Commission before, does not mean that it will be again
- whilst the Better Off Overall Test is a global test, the Commission in our experience tends to take a line by line approach in comparing enterprise agreements to the relevant award

What do I need to do?

- employers need to undertake detailed analysis of their enterprise agreement compared to the Award to ensure that all bases are covered;
- employers need to be very careful completing statutory declarations in support of the approval of enterprise agreements - particularly ensuring that all 'unders and overs' are listed
- employers should anticipate areas where the Commission may have concerns, and ensure that they are addressed upfront
- with approval of enterprise agreements becoming more difficult (with one in five enterprise agreements falling over at the approval stage) employers may wish to ask themselves whether negotiating a new enterprise agreement is worth the trouble, or whether it is time to move beyond enterprise bargaining.

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The Better Off Overall Test

The Better Off Overall Test operates to require that each employee (and prospective employee) would be better off overall if the enterprise agreement applied to the employee than if the relevant modern award applied to the employee.

Where the Commission has a concern that an enterprise agreement does not meet the requirements of the better off overall test, an employer can provide written undertakings that address that concern. This is an alternative to the enterprise agreement being rejected.

Sounds simple? With Modern Awards running to hundreds of pages and a potential myriad of roster arrangements in play in some workplaces - it's anything but.

Increased Scrutiny by the Fair Work Commission

Over the last 12-18 months, we have observed our clients receiving increased queries in relation to enterprise agreements submitted to the Fair Work Commission for approval, particularly in relation to the better off overall test. This has often led to the employer having to provide a sometimes complex set of undertakings which are then taken to form part of the agreement, to satisfy the Commission that the enterprise agreement passes the Better Off Overall Test.

This observation was recently borne out by a submission by the Commission to a Senate enquiry into penalty rates.

The Commission noted that it introduced a new 'triage' process, whereby enterprise agreement approval applications are reviewed by legally qualified staff prior to being referred to a member of the Commission. The aim of this process was to create a simpler, quicker and more consistent process for assessing agreements. What it did was to lead to a vast increase in enterprise agreements found to be wanting.

The introduction of this new process has led to a massive increase in employers having to give undertakings to the Commission in order to get their enterprise agreement approved or withdrawing their applications. The table below tells this story:

	Before new process	After new process
Agreement approved - no undertaking	74%	39%
Agreement approved - undertakings given	20%	43%
Agreement withdrawn	4%	17%
Agreement not approved	2%	1%

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What it all Means

These figures have some important messages for employers:

- It is now much more difficult to get an enterprise agreement approved by the Fair Work Commission
- almost one in five enterprise agreements that have been negotiated, voted on and agreed by the workforce fell at the last hurdle and be withdrawn or dismissed
- most enterprise agreements lodged with the Commission, will either be dismissed, withdrawn or undertakings given to support approval.

With approval of enterprise agreements getting more and more difficult, it may be inevitable that some employers take the view that it is not worth negotiating a new enterprise agreement, and look to ways to move beyond enterprise bargaining with their employees.

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