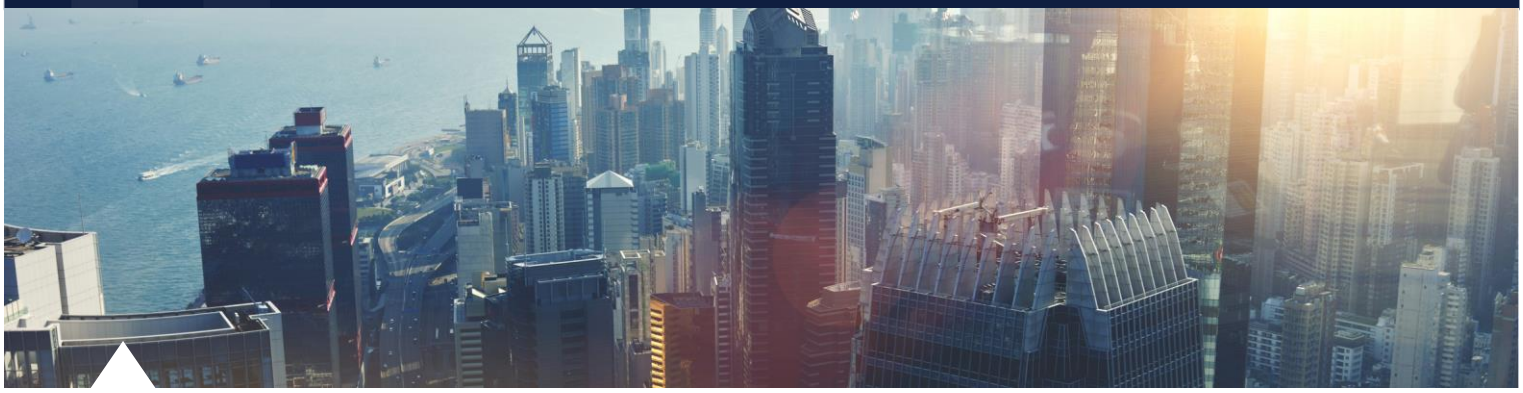

Amendments to Act to make enterprise bargaining less technical?

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The enterprise agreement making process requires adherence to strict legislative steps before employees are allowed to vote on an agreement. Some may recall the difficult lesson learned by Peabody Energy in 2014, when its hard fought enterprise agreement was scuttled by the Fair Work Commission because of a staple[1].

Since 2014, there have been other notable rejections by the Fair Work Commission of agreements that have otherwise been negotiated by 'sophisticated' bargaining parties, because of discrepancies in adhering to the relevant legislative steps. To name only a few, these have included:

- where the Notice of Employee Representational Rights was placed on company letterhead[2];
- a failure to allow nine days to pass in order to comply with the seven day notice period[3]; and
- a failure to issue the Notice of Employee Representational Rights as soon as possible after starting bargaining[4].

This overly technical approach has been taken by the Fair Work Commission because of the relevant statutory language, which makes certain pre-approval conditions mandatory in order for the Commission to be satisfied an agreement has met the definition of being "genuinely agreed", even if it has, genuinely, been agreed.

Relevantly, these conditions are:

1. for the employer to ensure it has taken reasonable steps to:
   - (a) give employees the Notice of Employee Representational Rights, at the "notification time" as defined in the Act, containing the information as specified the Act;
   - (b) give employees access to the written text of the agreement and copies of other material referred to in the agreement, during the seven days leading up to the vote;
   - (c) notify employees of the time and place for the vote, and the voting method,

[1] Peabody stapled a bargaining representative nomination form to the required "Notice of Employee Representation Rights", rendering the Notice non-compliant: *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042

[2] *DP World Brisbane Pty Ltd* [2016] FWC 385

[3] In a 15 page decision, the Full Bench of the Fair Work Commission found the seven day period does not include the day the notice is given or the day of the vote: *Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd* [2018] FWCFB 2732

[4] Re *Uniline Australia Limited* [2016] FWCFB 4969

before the start of the seven day period leading up to the vote; and

(d) explaining the terms of the agreement and the effect of the terms to employees, taking into account "*the particular circumstances and needs of the employees*", before the vote; and

2. for the Fair Work Commission to be satisfied that:

(a) all of the employees to be covered by the agreement were asked to vote for the agreement; and

(b) a majority of those employees who cast a "valid vote", voted in favour of the agreement.

If the Fair Work Commission is not satisfied that any one of the above conditions have been met, the Act requires the Commission to not approve the agreement.

Understandably, this has led to an overly technical and cautious approach by employers when going through the pre-approval requirements. Months, and sometimes years, of hard work in negotiating an agreement can be undone by the slightest misstep.

In response to these concerns, Federal Parliament has, in December 2018, sought to allow employers to overcome the rigorous standards being applied when making enterprise agreements by enacting changes permitting the Fair Work Commission to overlook "minor or technical errors" by an employer in the agreement pre-approval process.

Importantly, the Commission can only overlook errors that are:

- minor or technical; **and**
- do not disadvantage employees as a whole.

This is unlikely to allow an employer to ignore the statutory pre-approval steps, but it would allow, for example, minor procedural or technical errors such as:

- employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the access period rather than by the start of the access period;
- employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice of Employee Representational Rights was given, rather than at least 21 days after the day on which the last Notice was given;
- the inclusion of the employer's company logo or letterhead on a Notice;
- the inclusion of additional materials that are stapled with a Notice; or
- minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').

Despite the changes, it is difficult to see that enterprise bargaining will become any less fraught with operational and legal risk. Consider the size of your organisation's payroll. Say, 300 employees, at an average annual salary of, say $60,000? That means a four year enterprise agreement is a $72,000,000 contract. It just might be worth the external support.

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