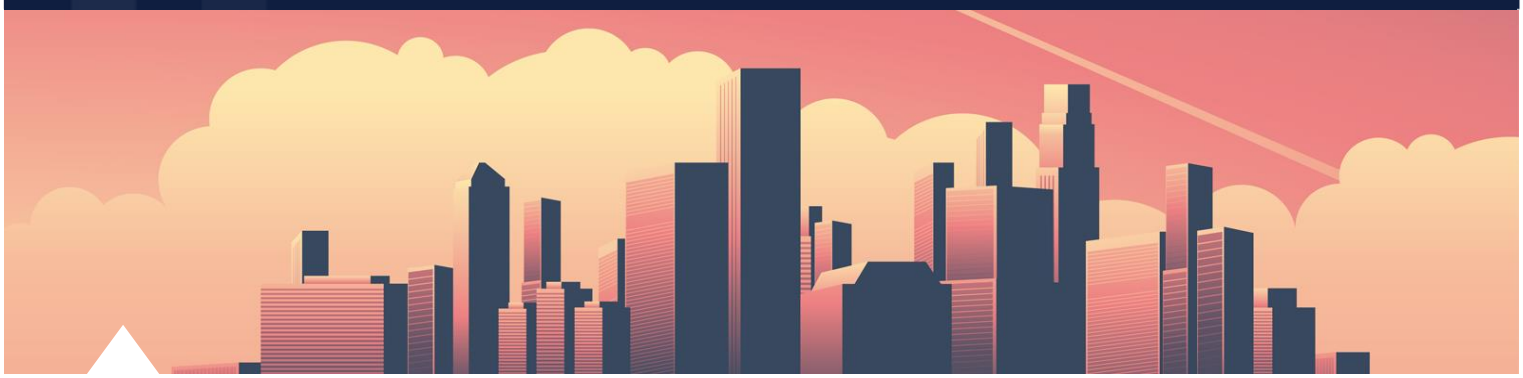

ENTERPRISE AGREEMENTS – THE END OF AN ERA?

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Are enterprise agreements on the way out? The Fair Work Commission's Annual Report 2016-17 highlighted:

- Fewer businesses are making enterprise agreements;
- The FWC are approving fewer enterprise agreements;
- The number of enterprise agreement applications being withdrawn have increased;
- The number of agreements being approved with undertakings has increased; and
- The number of applications for termination of enterprise agreements after their nominal expiry date has doubled since 2014.

Historically, to be approved (or 'certified') by the Commission, enterprise agreements had to pass a "no disadvantage test", as against a relevant award.

Fast forward to 2009, and the Labor Government introduced a "better off over all test" (or **BOOT**) in the *Fair Work Act* 2009 (**FW Act**), meaning agreements could only be approved if employees (employed at the time the agreement was made and in the future) were better off under the agreement than if their employment was subject to the modern award.

When submitting an agreement for approval, employers must complete a statutory declaration setting out any parts of the agreement which make employees better off or worse off when compared to the relevant modern award. In conducting the BOOT, the FWC is required to conduct an "overall" assessment, by analysing terms of the agreement which are less beneficial and more beneficial and making an assessment.

It is the way in which the FWC is now approaching the BOOT test which is causing headaches across Australia.

INTRODUCTION OF TRIAGE APPROACH

From 2009 to 2014, applications for approval of enterprise agreements would be assigned to a Commissioner to deal with and determine as they deemed appropriate. However, in 2014 the FWC introduced a "triage" approach, whereby applications for approval of enterprise agreements are first assigned to a team of administrative staff, who review the agreement against the relevant awards and against a checklist prepared by Commission members.

An issue with the checklist is that it only compares the minimum award entitlements against the agreement; it does not provide an option for more beneficial terms in an agreement not otherwise contained in an award. It appears to have resulted in a somewhat "line by line" or "overly theoretical" approach to the BOOT by the FWC. Employers have been required to provide undertakings

before having the agreement approved, sometimes in respect of scenarios which may never arise.

In 2015, the Productivity Commission found that the BOOT was having the practical effect of discouraging enterprise bargaining and recommended that the BOOT test be replaced with a no disadvantage test –this was never adopted. The Productivity Commission was correct – this is reflected in the fact fewer people are bargaining, and more agreements are being terminated as evidenced in the FWC Annual Report.

Further, although the Explanatory Memorandum for the FW Act contemplated that non monetary benefits may be brought into account in assessing the overall benefit and detriment to employees, in *Hart v Coles Supermarkets Australia Pty Ltd* [2016] FWAFB 2887, the Full Bench noted that some non-monetary benefits were not capable of quantification. This suggests the only way an employee will be "better off" is the payment of more money.

The *Hart* decision also left open the question as to whether the FWC is required to actively seek out individual employees to provide evidence in respect of the BOOT; this may result in an increased burden and cost for employers in having an enterprise agreement approved.

It all sounds very complicated – and it is.

Currently, the Full Bench of the FWC are hearing disputes about "loaded rates" in agreements, and whether the payment of a loaded rate inclusive of allowances and loadings sufficiently compensates employees when compared to the modern award. The result could have significant implications for all employers and the future of enterprise agreements.

One thing is for sure - the benefits for employers being covered by enterprise agreements may be too small when compared to the increased costs employers are facing. Employers should:

- Consider the end result they want to achieve, and whether an enterprise agreement is required
- Ensure a thorough review of the relevant awards has been conducted against the proposed enterprise agreement
- Take your time to complete the employer statutory declaration filed with an enterprise agreement – you don't want to be criticised for inadvertently leaving out matters which the FWC finds was missing
- Be prepared for an overly stringent analysis of the BOOT, potentially taking into account hypothetical scenarios that may not even be likely to arise.

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