hilliard and berry solicitors

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The Unionised Workforce

We have been fielding a number of questions from our clients regarding union involvement in the workplace.

We have set out below our responses to some of the top questions which we have received. It is important to note at the outset that the rights of unions to be involved in enterprise bargaining and the workplace in general, is already enshrined in the *Fair Work Act 2009 (Cth)* ('the Act'), irrespective of the new legislative amendments.

***Question One:* Will entering into a single enterprise agreement prevent an employer from being joined to a multi-enterprise agreement?**

The simple answer is yes.

Having a single enterprise agreement on foot, or where the agreement has not passed its nominal expiry date, would preclude an employer from being joined to a multi-enterprise agreement.

Negotiating an enterprise agreement can, however, be a difficult process.

If there is an enterprise agreement already on foot in the workplace then an employer is obliged to notify any unions and/or other parties, of their intention to re-negotiate an agreement. If there is not an enterprise agreement already on foot then an employer is required to provide each employee with a Notice of Representational Rights ('Notice').

The Notice must:

- Be in the form prescribed by the regulations; and
- Must specify that an employee may appoint a bargaining representative to bargain for the agreement and any proceedings related to the agreement;

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A bargaining representative would be, for example, a union or industrial organisation. Furthermore, if one employee is a member of a union then that union is automatically appointed as a bargaining representative.

Finally, when an enterprise agreement is approved it is publicly available and unions monitor the nominal expiry dates of the agreement to then become involved in the negotiation of the next enterprise agreement. The idea that bargaining for and introducing a single enterprise agreement will prevent unions from being involved in your workplace is not correct. If anything, bargaining for a single enterprise agreement is likely to increase the union presence at a workplace.

<u>Question Two:</u> What is the process of being joined to multi-enterprise agreement?

There are two ways in which an employer can be joined to a multi-enterprise agreement ('MEA'):

- Firstly, where there is not already an MEA in existence, the Commission can issue a single interest employer authorisation which requires the employer to bargain with their employees, a union organisation and other named employees.

- Secondly, if there is already an MEA in existence, then the Commission can vary an MEA to add an additional employer by also issuing a single interest employer authorisation.

In order to make a single interest employer authorisation in either of the scenarios outlined above, the Commission must be satisfied that:

- At least some of the employees that will be covered by the agreement are represented by an employee organisation;
- The employer and the bargaining representative have had the chance to express their views;
- The employer employs at least 20 people;
- There is no single enterprise agreement already in existence that has not nominally expired;
- The employer has not already agreed with a union or employee organisation in writing to bargain for an agreement which would cover the employees the subject of the proposed order;
- A majority of the employees who are employed by the employer and who will be covered by the agreement, want to bargain for the agreement;
- The employers concerned are either franchisees or 'common interest employers'; and
- It is not against the public interest to make the order.

As the changes have only just been drafted, there is a lot of uncertainty with these changes as well as a number of definitions within the changes, for example, when will a group of employers be considered 'common interest employers' and will this extend to entire sectors or industries. This currently subject to a number of cases before the Commission.

<u>Question Three:</u> If you commence negotiations for an enterprise agreement how do you ensure that unions won't be involved?

As outlined above, there is really no way to ensure that unions will not be involved in your workplace. The change of government has resulted in a number of changes to the legislation which attempts to increase the presence of and empower unions in Australian workplaces.

Certainly, if negotiations commence for a new enterprise agreement then there is an obligation on employers to notify employees that they are able to be represented by a union or employee organisation. It is also standard practice for unions to monitor those employers who have made application for approval of enterprise agreements through the Commission website.

The new legislative amendments give wider ranging powers to the unions. We do however note that the influence of a union in a workplace will very much be dictated by the extent to which the employees wish to engage with the unions.

<u>Question Four:</u> If you commence negotiations how long will it take and will these be concluded by 30 June 2024?

This is an incredibly difficult question to answer as it will very much be determined by the employees within the workplace and the level of union involvement.

The Commission, when approving an enterprise agreement, will also need to be satisfied that the employees pass the BOOT Test – that is, that they are 'better off overall' under the terms of any new enterprise agreement.

Sometimes an enterprise agreement can be approved relatively quickly, for example within 2 months. We do however note that at present there is a backlog within the Commission and it is taking up to 6 months for some enterprise agreements to be approved.

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