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ENTERPRISE BARGAINING AGREEMENTS - ARE THEY WORTH THE PAIN OR NOT?

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WHAT THE WEBINAR WILL COVER:

- The different types of EBAs; and
- The advantages and the disadvantages of EBAs; and
- Benefits for employers and employees;
- EBAs -vs- Modern Awards; and
- Future Landscape.



WHAT IS AN ENTERPRISE BARGAINING AGREEMENTS

- ▶ An Enterprise Bargaining Agreement (EBA) is an agreement that is subject to an employees terms and conditions of employment.
- ▶ Certain conditions include employee wages where the period of employment may occur up to **4 years** from the date of approval.
- ▶ The *Fair Work Act 2009* (Cth) sets out the requirements for Employees and Employers for bargaining a *proposed enterprise agreement*.
- ▶ The term describes an agreement that is proposed to be negotiated, or is in the negotiation phase, with a view of seeking approval from the Commission (Fair Work) as an enterprise agreement.
- ▶ A series of claims on behalf of a group of employees whose bargaining representatives seek to negotiate with the employer could proposed enterprise agreement for the purpose of the *Fair Work Act*.



WHAT IS AN ENTERPRISE BARGAINING AGREEMENTS

- ▶ Enterprise Agreements have nominal expiry dates.
- ▶ The term of an enterprise agreement is generally 4 years.
- ▶ The agreement does not terminate automatically and will continue to apply post the expiry date unless;
 - ▶ An application is made to the Commission to.
 - ▶ terminate the agreement; or
 - ▶ vote to replace it.



TYPES OF ENTERPRISE BARGAINING AGREEMENTS

Enterprise Bargaining Agreements are a legal document that sets out minimum employment terms and conditions that covers employers and employees.

There are 3 main types of EBA's, these include:

- Single Enterprise Agreements
- Multi-Enterprise Agreements
- Greenfield Agreements



SINGLE ENTERPRISE AGREEMENT

A single enterprise agreement is defined under the *Fair Work Act 2009* (Cth), section 172 (2):

*An Employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a **single-enterprise agreement**):*

- (a) *With the employees who are employed at the time the agreement is made and who will be covered by; or*
- (b) *With one or more relevant employee organisations if:*
 - (i) *the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and*
 - (ii) *the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by an agreement.*

Note that the expression genuine new enterprise includes a genuine new business, activity, project or undertaking.



SINGLE ENTERPRISE AGREEMENT

A **single interest employer** is two or more employers if they are:

- engaged in a joint venture or common enterprise, or
- related bodies corporate, or
- specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

More than two employees

- ▶ There is a requirement that there must be at least more than two employees for a single bargaining enterprise agreement.
- ▶ In *Re Construction, Forestry, Mining and Energy Union* [2013] FWC 3143 (Watson SDP, 23 May 2013) an Agreement was made with a single employee.
 - ▶ The CFMEU made an application for the approval of the Exactacut Pty Ltd and the CFMEU Concrete Sawing and Drilling Enterprise Agreement 2011-2015.
 - ▶ At the time it was made, the application identified that only one employee was covered by the agreement. The single employee was the only person involved in the agreement making process and the only employee who voted for the approval of the agreement.
 - ▶ The Commissioner held that in the future, there may be other employees, however at the time the agreement was made it was only with a single employee and therefore could not be approved.



MULTIPLE ENTERPRISE AGREEMENT

A multiple enterprise agreement is defined under the Fair Work Act (2009, no. 28), section 172 (3):

*Two or more employers that are not all single interest employers may make an enterprise agreement (a **multi-enterprise agreement**):*

- (a) *with the employees who are employed at the same time the agreement is made and who will be covered by the agreement; or*
- (b) *with one or more relevant employee organisations if:*
 - (i) *the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and*
 - (ii) *the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by an agreement.*

Note that the expression genuine new enterprise includes a genuine new business, activity, project or undertaking.



What do Enterprise Agreements need to include?

- Consultation terms
- Flexibility Term
- Coverage
- Nominal Expiry Date
- Dispute settlement term

Consultation Term

- ▶ An enterprise agreement must contain a consultation term. The consultation term requires the employer to consult with employees about:
 - ▶ *a major workplace change that is likely to have a significant effect on the employees, or*
 - ▶ *a change to their regular roster or ordinary hours of work.*
- ▶ The consultation term to be included in an EBA must require the employer to consult the employees about a *major workplace change*.
- ▶ The consultation term must require that for a change to the employees' regular roster or ordinary hours of work, the employer must:
 - ▶ provide information to the employees about the change
 - ▶ invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities), and
 - ▶ consider any views given by the employees about the impact of the change.

Consultation Term

- ▶ **Representation**

- ▶ The consultation term must allow employees to be represented during consultation.

- ▶ **Application of Model Consultation term**

- ▶ In the event an EBA does not include a consultation term, or if one is included and does not meet all the requirements in the Fair Work Act, the model consultation term as set out in the Fair Work Regulations will be taken in place of the one in the EBA.

Consultation Term

► Case Example

- Re Fairbrother Pty Ltd [Facility Management] [2014] FWCA 2491 (Lee C, 11 April 2014).
- An application was made by Fairbrother Pty Ltd for approval of a single-enterprise agreement .
- The consultation provision did not specify that consultation must occur regarding a change to regular rosters, in accordance to the Fair Work Act.
- The Commission found that the consultation term originally drafted in the agreement would not apply and that the model consultation term was taken to be a term of the agreement. A copy of the model consultation term agreement was appended to the EBA.

What terms cannot be included in Enterprise Agreements?

- ▶ Terms which exclude the National Employment Standards;
- ▶ Unlawful Terms
- ▶ Section 5 of the *Fair Work Act 2009* (Cth)
 - ▶ *An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are **ancillary** or **supplementary** to the National Employment Standards*



WHAT IS A MODERN AWARD

- ▶ In simple terms, a modern award is a set of rules that explain what employees in Australia are entitled to in terms of things like pay and working conditions based on their industry and job.
- ▶ These rules cover things like the type of job, overtime pay, extra pay for working certain hours, how much they should be paid, benefits like retirement savings, and time off.
- ▶ These rules apply to all employees, unless they are under an EBA.
- ▶ However, some types of employees, like accountants, might not have their own set of rules. In a company, different employees might follow different sets of these rules depending on their job.



EBAS -vs- MODERN AWARDS

- ▶ An Enterprise Bargaining Agreement (EBA) replaces a standard award and sets different rules and guidelines for a specific organization or business.
- ▶ However, it cannot establish a base pay rate lower than what the modern award requires.
- ▶ EBAs still must adhere to the National Employment Standards and any terms related to outworkers (these are people who work mainly outside of a traditional office or business location), as outlined in the governing award.
- ▶ EBAs essentially serve as a more customized and flexible version of a modern award.
- ▶ While they maintain the basic requirements, they allow for terms and conditions that are better suited to the specific circumstances of the organization, reducing administrative burdens like frequent pay adjustments and specific leave policies.



EBAS -vs- MODERN AWARDS

- ▶ The key difference between a Modern Award and an Enterprise Agreement is that EBAs only apply to the employees of a single organization.
- ▶ They are tailored to fit that particular business and are negotiated internally and then approved by the Fair Work Commission (FWC).
- ▶ Modern Awards, on the other hand, are standardized and not open to negotiation.
- ▶ In summary, EBAs are like customized employment agreements, negotiated internally within an organization, and tailored to suit their specific needs while adhering to the minimum standards.
- ▶ In contrast, Modern Awards are industry-specific standards that apply uniformly to a particular sector without negotiation, providing a baseline for employment conditions.



ADVANTAGES OF EBAS

- Assists employers with the standard of workplace conditions and the type of work.
- It allows for employers and employees to agree on certain workplace conditions.
- Flexibility and consistency with the regard to employment terms and conditions such as:
 - Rostering staff
 - Hours of work
 - Employee standards
- Employer certainty of future wage growth and remuneration incorporating penalty rates and allowances.



ADVANTAGES OF EBAS

- Consolidation and simplification of terms and conditions for businesses who may have multiple awards covering their employees.
- Protection from industrial action and reduced risk of disputes particularly if unions have been involved in bargaining process.
- Competitive advantages for businesses tendering for work as they fix their costs.
- Employees are into the bargaining process, allowing them certainty of their employment terms and conditions.
- The employee is assured that they are better off than what they would've been under the applicable award, all of which may result in increased productivity and morale of employees.



DISADVANTAGES OF EBAS

- It creates complexity to calculate individual awards and allowances.
 - It is notably harder in the industries where numerous allowances may be applied to an employee.
- Minimal flexibility in terms of pay as an enterprise agreement cannot reduce monetary obligations under the NES or the applicable award.
- An agreement takes time to plan, create and negotiate, occasionally resulting in a costly process.
- Employees must be notified of employer intentions and can negotiate the terms of agreement.
- Employers are at the risk of the union becoming involved.
- The employer has limited control over the voting outcome and the involvement of unions.
- Termination of EBA's requires the agreement of the employee.
- May not keep up with changing industry standards over the four years.
- Not easy to vary throughout the four year period.



FUTURE LANDSCAPE

- EBA's have been decreasing in popularity since being introduced in 2009 with the *Fair Work Act (2009, no28)*.
- However, the recent amendments to the Fair Work Act are introducing reforms to certain EBAs, specifically multi-enterprise agreements for smaller businesses, introducing 3 new 'streams':
 - A supported bargaining stream
 - A cooperative workplaces bargaining stream.
 - A single-interest bargaining stream



CONCLUSION

In conclusion, there is more risk for the employer than the employee when engaging in Enterprise Bargaining Agreements. It is of high importance that human management across all industries is professional and that the described work environments are always acknowledged.

From an employee perspective, there is little risk when agreeing to enterprise terms and conditions. As long as the employee is acting appropriately and upholding all work expectations, minimal risk is involved.

So, are EBA worth it? Yes. Without workplace limitations and expectations in a lawful force, employees' understanding and respect for the employment boundaries would affect their performance.



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