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DISCUSSION DRAFT

Our Ref: MDH:cp:20041459:SydDocs:251143_3.DOC

18 November 2004

PRIVATE & CONFIDENTIAL

Mr John Mulcahy
Chief Executive Officer
Suncorp
Suncorp Centre
36 Wickham Terrace
BRISBANE QLD 4000

Dear John

Re: Workplace Relations Amendment (Agreement Validation) Bill 2004

We refer to recent correspondence in which we have asked for consideration for an extension of the above Bill to cover agreements that were in train at the date of the High Court decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116.

You have asked about the process which would need to be followed if a Member of the Australian Industrial Relations Commission ("AIRC") were to decide that Suncorp's enterprise agreement could not be certified because one or more clauses did not meet the tests set out by the High Court in the decision in the *Electrolux* case. We set out a brief description of this process.

The process was described in a decision of Vice President Ross in *KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004* on 22 October 2004 (PR952656). His Honour held that if an agreement requires amendment because it was affected by the *Electrolux* decision, it would be necessary to again comply with subsections 170LJ(2) and (3) of the *Workplace Relations Act 1996*. In coming to that decision, his Honour followed two Full Bench decisions of the AIRC, *Re Atlas Steels Metals Distribution Certified Agreement 2001-2003* ((2002) 114 IR 62) and *Re Independent Supermarkets Certified Agreement 2002* (25 September 2002, Guidice P, McCarthy DP and Gay C, PR922821).

The AIRC in *KL Ballantyne* expressly rejected suggestions that something less than proper approval would suffice. The Vice President stated (at paragraph [264]):

> What is required is that the relevant employees genuinely consent to the changes made. That is, the amendments are affirmatively approved by a valid majority not merely that a majority of employees have not expressed their objection to the proposed amendments.

The relevant clauses of the section of the Act to which the Vice President refers (sections 170LJ(2) and (3)) read as follows:

> (2) The agreement must be approved by a valid majority of the persons employed at the time whose employment will be subject to the agreement.
>
> (3) The employer must take reasonable steps to ensure that:
>
> (a) at least 14 days before any approval is given, all the persons either have, or have ready access to, the agreement, in writing; and
>
> (b) before any approval is given, the terms of the agreement are explained to all the persons.

Those provisions correspond to s170LK(1) and (2) of the Act which will apply to the s170LK agreement sought by Suncorp and its staff.

Accordingly, you can see that Suncorp, after extensive consultation and meetings with its in excess of four thousand staff (involving in excess of one thousand face to face meetings) would need to not just amend the Agreement, but would also need to:

1 give all its staff a copy of, or ready access to, a copy of the Agreement "in writing";

2 ensure that the terms of the Agreement are explained by Suncorp to all its employees;

3 wait at least fourteen days from the circulation of the Agreement;

4 after that period of time has elapsed, seek approval (usually by way of secret ballot) of a "valid majority" of the persons employed by Suncorp at the time who will be covered by the Agreement;

5 come back to a formal hearing of the AIRC for approval of the amended Agreement.

Given the number of employees and the large number of sites from which Suncorp conducts its business, this process will be a major logistical exercise both for Suncorp as an employer and for its staff, who have participated in an extensive process leading to the formation of the Agreement..

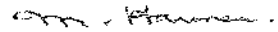
We understand that it has been suggested that Suncorp proceed by placing the *Electrolux*-impacted clauses into a common law agreement. Such a process would not avoid the necessity for the residual certified agreement to undergo the extensive steps outlined above. We further understand that an additional suggested alternative is that Suncorp merely proceed on the basis of a common law arrangement dealing with the entire Agreement. Obviously such an arrangement would not have the benefit of any of the provisions of the Act, relating to

enforcement or otherwise, leaving Suncorp exposed to union claims and protected industrial action which would be available under the Act in the absence of a formal certified agreement.

In the circumstances, it can be seen that absent the requested amendment to the Act, Suncorp and its employees, who were in the final stages of progressing their Agreement in accordance with the requirements of the Act at the time of the High Court's decision in *Electrolux*, will be adversely impacted. The amendment requested is not only desirable, but essential to ensure ongoing industrial stability.

Please do not hesitate to contact us in the event you wish to further discuss any aspect of this issue.

Yours faithfully
HARMERS WORKPLACE LAWYERS
Per:



Michael Harmer

Partner