



Enterprise Bargaining

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Enterprise bargaining is the process of negotiation generally between the employer, employees and their bargaining representatives with the goal of making an enterprise agreement. The *Fair Work Act 2009* establishes a set of clear rules and obligations about how this process is to occur, including rules about bargaining, the content of enterprise agreements, and how an agreement is made and approved.

What is an agreement?

A registered agreement sets out the terms and conditions of employment between an employee or group of employees and one or more employers.

Under the national workplace relations system there are two categories of agreements:

- enterprise agreements
- agreement-based transitional instruments.

Agreement-based transitional instruments include various individual and collective agreements that could be made before 1 July 2009 under the former *Workplace Relations Act 1996*. They also include Individual Transitional Employment Agreements (ITEAs) that were made during the 'bridging period' (1 July 2009 – 31 December 2009). These agreements will continue to operate as agreement-based transitional instruments until terminated or replaced.

Agreement-based transitional instruments include:

- collective agreements
- pre-reform certified agreements (i.e. those made before 27 March 2006)

- preserved individual and collective State agreements
- Individual Transitional Employment Agreements (ITEAs)
- Australian Workplace Agreements (AWAs)

For more information on agreement-based transitional instruments including the variation and termination of these agreements, go to www.fairwork.gov.au

What is an enterprise agreement?

On 1 July 2009, the various types of collective and individual workplace agreements that existed under the previous workplace relations system were replaced by a single type of agreement: an 'enterprise agreement'. This is simply an agreement between one or more national system employers and their employees, as specified in the agreement. Enterprise agreements are negotiated by the parties through collective bargaining in good faith, primarily at the enterprise level. Under the *Fair Work Act 2009*, an enterprise can mean any kind of business, activity, project or undertaking.

Under the *Fair Work Act 2009*, the following new enterprise agreements can be made:

- **Single-enterprise agreement**

A single-enterprise agreement is made between a single employer (or two or more single interest employers) and employees employed at the time the agreement is made, and who will be covered by the agreement. Single interest employers are employers that are in a joint venture or common enterprise or are related corporations. They can also be employers authorised as single interest employers by Fair Work Australia, which may be either franchisees or other employers where the Minister for Employment and Workplace Relations has made a declaration.

- **Multi-enterprise agreement**

A multi-enterprise agreement is made between two or more employers (that are not all single interest employers) and employees employed at the time the agreement is made and who will be covered by the agreement.

- **Greenfields agreement**

A greenfields agreement is an enterprise agreement that is made in relation to a new enterprise of the employer or employers before any employees are employed.

This can either be a single enterprise agreement or a multi-enterprise agreement. The parties to a greenfields agreement are the employer (or employers in a multi-enterprise greenfields agreement) and one or more relevant employee associations (usually a trade union).

What terms must be included in an enterprise agreement?

An enterprise agreement is an agreement about permitted matters which are:

- terms about the relationship between each employer and the employees covered by the agreement
- terms about the relationship between each employer and any employee organisations (e.g. a trade union) who will be covered by the agreement
- deductions from wages for any purpose authorised by an employee covered by the agreement
- how the agreement will operate.

An enterprise agreement must contain the following terms:

- a nominal expiry date for the agreement which is no longer than four years from the date Fair Work Australia approves the agreement
- a dispute settlement procedure, which must authorise either Fair Work Australia or someone else that is independent of those covered by the agreement to settle disputes about any matters under the agreement in relation to terms of a modern award or the National Employment Standards ('NES')
- a flexibility term that allows for the making of individual flexibility arrangements (IFAs) for the purpose of meeting the genuine needs of the employer and employees. These are arrangements between an employer and an individual employee that vary the operation of the enterprise agreement in relation to the employee (see *What is an Individual Flexibility Agreement?* below)

- a consultation term, which requires the employer to consult their employees about any major workplace changes that are likely to have a significant effect on them and allows the employees to have representation in that consultation. If there is no such consultation term, the model consultation term will apply.

You can access the model dispute settlement, flexibility and consultation terms from the Fair Work Australia website at www.fwa.gov.au

The rate of pay for an employee under an enterprise agreement cannot be less than the relevant rate of pay under the modern award that would apply to the employee or under a national minimum wage order.

What can't be included in an enterprise agreement?

An enterprise agreement cannot include any unlawful content.

This includes:

- a discriminatory term
- an objectionable term (which are terms that require or allow payment of a bargaining services fee, or a contravention of the general protections provisions of the *Fair Work Act 2009*)
- a term that confers an entitlement or remedy in relation to unfair dismissal before the employee has completed the minimum employment period
- a term that excludes, or modifies, the application of unfair dismissal provisions in a way that is detrimental to, or in relation to, a person
- a term that is inconsistent with the industrial action provisions
- a term that provides for an entitlement to right of entry
- a term that allows for the exercise of any State or Territory OHS legislative right of entry in a manner different to the rights set out in the right of entry provisions of the *Fair Work Act 2009*.

Fair Work Australia will review enterprise agreements for any unlawful content. Fair Work Australia cannot approve an enterprise agreement that contains unlawful content.

Terms in an enterprise agreement, transitional instruments (award or agreement-based), and modern awards cannot exclude the NES and will have no effect.

How is an enterprise agreement made?

The *Fair Work Act 2009* provides a simple, flexible and fair framework that assists employers and employees to bargain in good faith to make an enterprise agreement.

Employers, employees and their bargaining representatives are involved in the process of bargaining for a proposed enterprise agreement. An employer must notify their employees of the right to be represented by a bargaining representative during the bargaining of an enterprise agreement (other than a greenfields agreement) as soon as possible, and not later than 14 days after the notification time for the agreement (usually the start of bargaining). The notification should be given to each current employee who will be covered by the enterprise agreement.

Who can be a bargaining representative?

A bargaining representative is a person or organisation that each party to the enterprise agreement may appoint to represent them during the bargaining process.

The *Fair Work Act 2009* identifies the following as bargaining representatives:

- an employer that will be covered by the agreement
- a trade union who has a member that would be covered by the agreement (unless the member has specified in writing that he or she does not wish to be represented by the trade union, or has appointed someone else)
- a trade union that has applied to Fair Work Australia for a low paid authorisation that relates to the agreement
- a person specified in writing as their bargaining representative by either an employer or employee who would be covered by the agreement.

For employees, the default bargaining representative is a trade union. However, employees can generally appoint whoever they wish as their bargaining representative, including themselves.

What are the requirements of good faith bargaining?

Bargaining representatives are required to act in good faith in the process of bargaining for a proposed enterprise agreement.

The following are the good faith bargaining requirements that a bargaining representative must meet:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals made by other bargaining representatives for the agreement in a timely manner
- giving genuine consideration to the proposals made by other bargaining representatives, and giving reasons for any responses to those proposals
- not behaving in a capricious or unfair way that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement, or reach agreement on the terms that are to be included in the agreement.

Before Fair Work Australia approves an enterprise agreement, they must be satisfied that approving the agreement would not undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement.

In addition, a bargaining representative of an employee who will be covered by the agreement must not engage in pattern bargaining in relation to the agreement. Pattern bargaining is when a bargaining representative is representing two or more proposed enterprise agreements and seeks common agreement terms with two or more employers. However, it is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement.

What are the steps to seek approval of an enterprise agreement?

Once bargaining is complete and a draft enterprise agreement has been made, it must be submitted to a vote by the employees who will be covered by the agreement.

Before a vote can occur for employee approval, the employer must ensure that:

- during the seven day period before voting for the agreement, employees are given a copy of the agreement and any other material incorporated in the enterprise agreement. The employer must also notify employees of the time and place the vote will occur and the voting method that will be used
- they take all reasonable steps to ensure that the terms of the enterprise agreement, and the effect of those terms, are explained to the employees, and
- the explanation is provided in an appropriate manner (e.g. appropriate for young employees, employees from culturally diverse backgrounds or employees who did not have a bargaining representative).

Employees must endorse the agreement by voting for it. The vote cannot occur until at least 21 days from the date employees were notified of their right to have a bargaining representative.

When is a vote successful?

The vote is successful when one of the following occurs:

- Single-enterprise agreement - a majority of the employees of the employer (or employers if there is more than one single interest employer) who cast a valid vote endorse the agreement.
- Multi-enterprise agreement - a majority of the employees of at least one of the employers, who cast a valid vote endorse the agreement. A multiple enterprise agreement only covers employers whose employees have voted to approve the agreement. Therefore, after the vote the agreement must be varied to remove those employers whose employees have not voted to approve the agreement.
- Greenfields agreement - it has been signed by each employer and each relevant employee organisation that the agreement covers.

Applying for Fair Work Australia approval

The application for a proposed enterprise agreement must be lodged with Fair Work Australia within 14 days of the agreement being made or within such further period as Fair Work Australia allows.

The application must be accompanied by:

- a signed copy of the agreement
- any declarations that are required by Fair Work Australia to accompany the application.

To approve an enterprise agreement, Fair Work Australia must be satisfied that:

- the agreement has been genuinely agreed to by the employees covered by the agreement
- in the case of a multi-enterprise agreement, the agreement has been genuinely agreed to by each employer covered by the agreement and that no person coerced, or threatened to coerce, any employers to make the agreement
- the agreement passes the Better Off Overall Test (BOOT)
- the agreement does not include any unlawful terms, terms that are inconsistent with the NES, or terms about textile clothing or footwear (TCF) outworkers
- the group of employees covered by the agreement was fairly chosen
- the agreement specifies a date as its nominal expiry date (not more than four years after the date of FWA approval)
- the agreement provides a dispute settlement procedure
- the agreement includes a flexibility clause and a consultation clause
- approval is consistent with good faith bargaining
- for multi-enterprise agreements, only employers whose employees have approved the agreement are included
- TCF outworkers do not have detrimental terms compared with those under awards or industrial instruments.

Greenfields agreements are approved if the employee organisations covered by the agreement are entitled to represent the interests of a majority of the employees and it is in the public interest.

An enterprise agreement comes into operation seven days after approval by Fair Work Australia, or at a later date as specified in the agreement. From this date on, an employee's terms and conditions are derived from the enterprise agreement.

What if there is a bargaining dispute?

Bargaining disputes may arise for a number of reasons, for example, a party may not be bargaining in good faith. If there is a bargaining dispute which cannot be resolved between the bargaining representatives, one or more bargaining representatives involved may apply to Fair Work Australia for assistance in resolving a dispute.

Where necessary, Fair Work Australia may issue a bargaining order in relation to the proposed agreement. A bargaining order will include the actions that Fair Work Australia require to be taken, actions that are not to be taken and other matters that Fair Work Australia considers necessary to promote fair and efficient bargaining.

When making a bargaining order, Fair Work Australia must be satisfied that:

- the applicant has notified the relevant bargaining representative of their concern (unless Fair Work Australia considers it is appropriate that this has not happened) and *either*:
 - one or more of the relevant bargaining representatives for the agreement have not met the good faith bargaining requirements
 - the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.

What if someone contravenes a bargaining order?

The Fair Work Ombudsman can investigate contraventions of a good faith bargaining order. Where a person contravenes a bargaining order, the Fair Work Ombudsman may take legal action for penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

Alternatively, if a bargaining representative contravenes one or more bargaining orders, a bargaining representative can apply to Fair Work Australia to assist in resolving the dispute.

What happens if the parties are unable to reach agreement?

Where parties are unable to reach agreement on the terms and conditions of a proposed enterprise agreement, a bargaining representative can make an application to Fair Work Australia requesting assistance.

Fair Work Australia can make a workplace determination, which prescribes terms and conditions for those employees to whom it applies. In addition, if there is a serious and sustained contravention of a bargaining order that has significantly undermined bargaining, Fair Work Australia can make a serious breach declaration. If matters are not then settled after 21 days, Fair Work Australia can make a workplace determination.

Employees are able to initiate industrial action when bargaining for a proposed enterprise agreement. There are strict rules which govern industrial action under the *Fair Work Act 2009*, including the rights, responsibilities and obligations of employers, employees and their organisations. For more information, please see the *Fair Work Ombudsman Fact Sheet - Industrial Action*.

What assistance is there for low paid workers?

A bargaining representative or a trade union can apply to Fair Work Australia to get a low-paid bargaining authorisation. Fair Work Australia can institute a low-paid authorisation where it believes it is in the public interest to do so.

In deciding this, Fair Work Australia looks at factors including:

- whether the employers and their employees are bargaining for the first time, or if they face difficulties in bargaining
- the current terms and conditions of employment of the employees
- whether it will help identify productivity and service delivery improvements
- the bargaining strength of the employers and employees involved.

Fair Work Australia can then help certain low-paid employees and their employers negotiate a multi-enterprise agreement and make a determination in certain circumstances.

What is an individual flexibility arrangement?

While there are no longer statutory individual contracts under the *Fair Work Act 2009*, an employee and employer can enter into an individual flexibility arrangement (IFA) which varies the terms and conditions of an enterprise agreement in order to meet the genuine needs of the employee and employer.

Every enterprise agreement must contain a flexibility term that provides for individual flexibility arrangements.

When an employer and an employee enter into an IFA, it must:

- be genuinely agreed to by the employer and the employee
- result in the employee being better off overall than the employee would have been if no IFA was made
- be signed by both the employer and employee
- be signed by a parent or guardian of the employee in the case where the employee is under 18 years of age
- a copy of the IFA must be provided to the employee within 14 days of agreement.

If an IFA does not adhere to these terms it will still have effect. However, it may be in contravention of the *Fair Work Act 2009*. There are also strong protections which prevent undue influence or pressure being applied to an employee to get them to enter into an IFA. Penalties of up to \$6,600 for an individual and \$33,000 for a corporation can apply.

An IFA can be terminated either by mutual agreement in writing between the employer and the employee, or by either the employer or employee, by giving written notice of not more than 28 days.

For more information on IFAs, please see the *Fair Work Ombudsman Best Practice Guide - Use of Individual Flexibility Agreements*.

Further information

For further information on how to bargain in good faith and best practice enterprise bargaining, please see the *Fair Work Ombudsman Best Practice Guide – Improving workplace productivity in bargaining*.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Monday to Friday, between 8.00am–6.00pm

Fair Work Australia website: www.fwa.gov.au

FWA Help Line: **1300 799 675**

Monday to Friday, between 9.00am–5.00pm

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94