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## Enterprise Agreements

## 1 What are enterprise agreements?

An enterprise agreement is an agreement between an employer and its employees reached through a collective bargaining process. 'Collective bargaining' is a term which describes the process in which employers, employees and bargaining representatives (including unions) negotiate to create a set of employee entitlements that is distinct from a modern award that may otherwise apply.

The resulting set of entitlements is called an enterprise agreement by the *Fair Work Act 2009*. Enterprise agreements are not a new concept; collective bargaining was available in the *Workplace Relations Act 1996* and its predecessors, but in the past the resulting agreements were known by a variety of names, including collective agreements, workplace agreements, enterprise bargaining agreements or certified agreements. An enterprise agreement is a tool that allows employers and employees agree to entitlements that may better suit the needs of the individual workplace, providing that employees are 'better off overall' than under the award.

An enterprise agreement applies to every employee in the workplace that falls within the scope of the agreement, including employees who join the employer after the agreement has been made.

### 1.1 Types of enterprise agreements

There are several different types of enterprise agreements:

1.1.1 Single-enterprise agreements – between employees and a single employer or multiple employers that have a 'single interest'. Employers will have a 'single interest' where they are:

(a) joint ventures;
(b) common enterprises;
(c) related bodies corporate (such as a group of companies); or
(d) employers specified in a single interest employer authorisation or declaration.

1.1.2 Multi-enterprise agreements – between employees and multiple employers that do not have a 'single interest'; and

1.1.3 Greenfields agreements – between an employer and an employee organisation before the employer has engaged any employees who will be covered by the agreement. Greenfields agreements can be either single-enterprise or multi-enterprise agreements.

## 2 Process for making enterprise agreements

While the enterprise agreement that is the result of collective bargaining may look and act in a similar way to previous agreements, the Fair Work Act has made some notable changes to the way bargaining must be conducted.

### 2.1 Commencing bargaining

There are two main ways that bargaining may begin:

2.1.1 The employer and employees may agree to bargain; or

2.1.2 Where an employer refuses to bargain with its employees, an employee bargaining representative may ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement. If so, the employer will be required to bargain collectively with its employees in good faith.

It is also possible for an employee organisation (generally a union) to apply for a 'low paid bargaining authorisation' in some circumstances. Low paid bargaining authorisations will be discussed further at item 2.2 below.

The bargaining process will ordinarily start with the employer or the union initiating bargaining. In the first case, employers ordinarily do some preparatory work, then notify the employees that they wish to negotiate an agreement. In the second case, the union may approach the employer with a proposed agreement or list of demands (sometimes called a 'log of claims') setting out what they would like to see in the proposed agreement, or the changes they wish to make to an existing agreement.

Broadly speaking, if approached by the union or the employees, the employer *must* negotiate, and must do so in good faith. If the employer refuses to negotiate, the other party may apply to Fair Work Australia for a majority support determination, confirming that the majority of the relevant employees wish to bargain with the employer. Once a majority support determination has been made, the union or employees can force the employer to bargain in good faith by applying for a bargaining order as discussed at item 2.5 below.

Accordingly, it is generally best to respond to proposed bargaining by establishing your objectives for the negotiation, then engaging in the process.

### 2.2 Low-paid bargaining

The Fair Work Act provides a new scheme of bargaining for industries with low paid employees. To facilitate the entry of these types of employees and their employers into enterprise bargaining, the Act provides for a special low-paid bargaining stream.

Under this stream, protected industrial action is not available but Fair Work Australia has an obligation to facilitate the making of agreements and plays a hands-on role to get the parties bargaining (e.g., Fair Work Australia may convene and chair conferences and guide the parties through the negotiating process).

Fair Work Australia has the power to make a workplace determination in the low paid stream in two circumstances – by agreement, or if there is no reasonable prospect of an agreement being made.

## 2.3 Representational rights

The Fair Work Act has made substantial changes to the way people may be represented while making enterprise agreements.

When the bargaining process commences, the employer involved in the process must give a notice to each employee that will be covered by the proposed agreement that informs them of a number of rights. This notice is called a 'Notice of employee representational rights' and its format is set by the regulations, and available to download from the Fair Work Australia website here.

The notice of employee representational rights must be provided to the employees as soon as practicable after the commencement of bargaining ,or at the latest, within 14 days of the bargaining commencing. It is important to keep a record of when and how the notice was given, as it will be necessary to provide that information to Fair Work Australia when lodging the agreement. If an employee wishes to appoint a bargaining representative, they must give notice of this in writing to the employer. A person may appoint themself as their bargaining representative. If an employee is a member of a union, the union will automatically be appointed as their bargaining representative unless the employee chooses to appoint someone different.

The employer may also represent itself or appoint a bargaining representative to in writing. A copy of this appointment must be given to any employee bargaining representative that requests it.

## 2.4 Industrial action during the bargaining process

It may be lawful for the employees and their representatives to take industrial action, such as a strike, during the course of bargaining for an enterprise agreement, however there are a number of limitations on that action:

2.4.1 Employees cannot engage in industrial action if they are still covered by an existing agreement which has not passed its nominal expiry date.

2.4.2 Employees cannot engage in industrial action until that action has been authorised by a ballot of the relevant employees.

2.4.3 The employees must be able to demonstrate that they have been genuinely trying to reach agreement with the employer.

2.4.4 The employees must give at least 3 days' notice of the industrial action before it commences.

Fair Work Australia must make an order stopping industrial action if it is satisfied that it is not lawful industrial action, or if it considers that the industrial action is likely to cause substantial loss or damage to the employer. It must also make an order suspending industrial action if it is concerned that there is a risk of endangering public health or safety or the economy, or harm to a third party.

Additional information in relation to taking, suspending and stopping industrial action is available here.

## 2.5 Good faith bargaining

The Fair Work Act has introduced a new obligation to bargain in good faith. Once bargaining commences, each bargaining representative (of which there may potentially be many) must bargain in 'good faith.' The good faith bargaining requirements are to:

- Recognise and bargain with the other bargaining representatives involved;
- Attend and participate in meetings at reasonable times;
- Disclose relevant information in a timely manner (this excludes confidential or commercially sensitive information);
- Respond to proposals made by the other bargaining representatives in a timely manner;
- Genuinely consider the proposals of the other bargaining representatives and provide reasons for the responses; and
- Refrain from behaving in a way that undermines freedom of association or collective bargaining.

The good faith bargaining requirements **do not require** a bargaining representative to make concessions during bargaining or to reach agreement on the terms that are to be included in the agreement. Parties are entitled to take a tough stance in negotiations.

Where one or more of the bargaining representatives do not bargain in good faith, a bargaining representative can give a written notice setting out their concerns to the relevant bargaining representatives. If the relevant bargaining representatives don't reply within a reasonable time, the concerned bargaining representative may apply to Fair Work Australia for a bargaining order. A bargaining order may specify actions that the bargaining representatives must take, or impose requirements on them. A failure to comply with a bargaining order may expose the bargaining representative to a fine of up to $6,600.

If the bargaining representative continues to contravene the bargaining order in a serious and sustained way that undermines the bargaining process and the other bargaining representatives have exhausted all other reasonable alternatives, a 'serious breach declaration' may be sought from Fair Work Australia.

If a bargaining representative ignores a serious breach declaration, after 21 days the other party may apply to Fair Work Australia to intervene and to make a workplace determination that sets out employment terms that are binding on employers and employees. This is to ensure there is no advantage to be gained by flouting the law.

**2.6 Permitted content**

Not everything can be regulated by enterprise agreements. The Fair Work Act restricts the content of enterprise agreements to 'permitted matters,' namely:

- Matters pertaining to the relationship between an employer or employers and employees;
- Matters pertaining to the relationship between an employer or employers and an employee organisation or organisations;
- Deductions from wages authorised by an employee; and
- How the agreement will operate.

As can be seen, these permitted matters are fairly broad, and their main purpose is to ensure that matters that do not relate to the employment relationship are not included in enterprise agreements.

**2.7 Mandatory Content**

In order to be approved by Fair Work Australia, an enterprise agreement must contain certain terms:

- A flexibility term that allows individual flexibility arrangements (see individual flexibility arrangements below);
- A dispute settlement process that must involve either Fair Work Australia or another person or body independent of the parties and that provides for the representation of employees in the process; and
- A term providing for consultation with employees about major workplace changes and that provides for the representation of employees in that process.

**2.8 Unlawful Content**

Certain terms may not be included in enterprise agreements. The Fair Work Act refers to these as 'unlawful terms'. Unlawful terms consist of the following:

- A term that discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- An term that requires or allows payment of a bargaining services fee, or a contravention of the general protections provisions of the Fair Work Act;
- 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 in the Fair Work Act;
- A term that provides for an entitlement to right of entry that is inconsistent with the right of entry in the Fair Work Act; or
- A term that allows for the exercise of any State or Territory OHS legislative right of entry that is inconsistent the right of entry provisions of the Fair Work Act.

If any unlawful terms are included in an enterprise agreement, Fair Work Australia will refuse to approve it.

### 2.9 Voting on the agreement

At least 21 days must have passed since the last notice of representational rights was given to employees (as discussed in step 2.3 above) before the proposed agreement can be put to a vote.

Once the agreement has been negotiated and is ready to be voted on, the employer must, at least 7 days before the vote:

2.9.1 provide the employees with a copy of the proposed agreement and any other material that is incorporated by reference into the agreement (such as the terms of an award);

2.9.2 notify the employees of the time and place of the vote, and the voting method that will be used; and

2.9.3 take all reasonable steps to ensure that the terms of the agreement and the effect of those terms have been explained to the employees in a manner that takes into account the particular circumstances of the employees (for example, age or understanding of English).

Again, it is important to keep records of the steps taken to comply with these requirements, so that this information can be provided to Fair Work Australia. The vote may take place by ballot or by electronic means. If a majority of employees support the agreement, the agreement is considered to have been made.

## 3 The Better Off Overall Test

In order for an agreement to receive approval, it must pass the 'better off overall test.' This replaces the previous 'no disadvantage test' that applied in the Workplace Relations Act.

The test is satisfied if "each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee." There is no further definition of what it means for an employee to be better off overall, and the particular boundaries of this definition are still being explored by cases before Fair Work Australia.

## 4 Getting the enterprise agreement approved by Fair Work Australia

An enterprise agreement does not have any legal effect until it is approved by Fair Work Australia. The enterprise agreement will begin operating 7 days after it is approved by Fair Work Australia, unless the agreement specifies a later commencement date.

### 4.1 What steps are required to seek approval by Fair Work Australia?

4.1.1 A bargaining representative (including an employer, employee or employee organisation) for the agreement must apply to Fair Work Australia for approval within **14 days** after the agreement is made.

4.1.2 The application must include:

(a) a copy of the agreement signed by the employer and at least one bargaining representative for the employees. The signatories must also include their full name and addresses, and an explanation of their authority to sign along with their signatures;

(b) a declaration by the employer in support of the agreement (F17 form) and the employee's bargaining representative(s) in support of the agreement (F18 form). The application form required and the necessary declarations may be downloaded here.

### 4.2 When will Fair Work Australia approve an agreement?

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

- the agreement has been made with the genuine agreement of those involved;
- the agreement passes the better off overall test;
- does not include any unlawful terms;
- 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 the mandatory terms discussed above( a dispute settlement procedure, flexibility clause and a consultation clause).

### 4.3 Approval with undertakings

If Fair Work Australia is uncertain as to whether the agreement satisfies the better off overall test, it may request written clarification and/or require a hearing to discuss to proposed agreement and the relevant award.
Fair Work Australia may approve an agreement which does not satisfy the better off overall test if Fair Work Australia is satisfied that written undertakings made by the employer will have the result that employees are in fact better off under the agreement.

## 5 How do enterprise agreements interact with other entitlements?

### 5.1 National Employment Standards

The National Employment Standards (“**NES**”) are a minimum safety net of entitlements that may not be diminished by another workplace instrument. Although an enterprise agreement may provide entitlements that are more favourable than the NES, if the agreement includes any term that is less favourable to an employee than the NES, that term has no effect.
In other words, an enterprise agreement may give an employee more than the minimum standards provided by the NES, but never less.

### 5.2 Modern Awards

Where an enterprise agreement applies to an employee, a modern award will not apply to that employee. That is, the enterprise agreement will effectively replace the modern award while the agreement is in effect.

### 5.3 Old Awards

If an enterprise agreement begins to cover an employee that was still on an old award, then the old award ceases to apply to the employee.

### 5.4 Old Agreements

Whether the enterprise agreement will apply to an employee on an old agreement will depend on the type of old agreement that applies to them. The two possible classes of old agreement create different outcomes as follows:

#### 5.4.1 Individual agreement-based transitional instruments

These are agreements that only apply to a single employee, such as an AWA or ITEA.

If an individual agreement applies to an employee, the enterprise agreement will not apply, and their employment conditions will continue to be derived from the individual agreement.

#### 5.4.2 Collective agreement-based transitional instruments

These are agreements that are expressed to cover multiple employees.

Once an enterprise agreement starts to cover an employee that was previously covered by a old collective agreement, the old agreement irrevocably ceases to cover the employee. Their employment conditions will be contained in the enterprise agreement, and if the enterprise agreement is terminated, the employees will be covered by the relevant modern award.

## 6 What are individual flexibility arrangements?

Individual flexibility arrangements ("**IFAs**") are a new concept under the Fair Work Act. Under the Fair Work Act, all modern awards and enterprise agreements must contain an individual flexibility term.

### 6.1 Individual flexibility terms in enterprise agreements

An individual flexibility term provides the mechanism for an employer and employer to negotiate changes to the enterprise agreement to suit individual needs. The extent to which changes to the agreement can be negotiated will depend on the individual flexibility term itself.

In the absence of a term being agreed by the parties, the enterprise agreement will be taken to contain the model flexibility term. The model term allows the parties to enter into an IFA to modify the following aspects of an enterprise agreement:

- working hours;
- overtime rates;
- penalty rates;
- allowances; and
- leave loading.

The parties to an enterprise agreement are not limited to the model flexibility term. When negotiating an enterprise agreement, the employer and employees may agree to make the flexibility term broader or narrower. The parties should consider the areas in which they may desire future flexibility, and draft the term accordingly.

The IFA must be 'genuinely agreed to' between employer and employee and the employer must ensure that the IFA passes the 'better off overall test.' There is no set of criteria defining when an employee will be better off overall under an IFA. Generally this will require the employer to consider a number of factors. Some factors that are likely to be relevant are:

- a comparison of the financial benefits that the employee would receive with the IFA and without the IFA;
- whether the employee receives significant non-financial benefits from entering into the IFA, for example by allowing them additional time with their family;
- whether the employer or employee proposed the agreement – it has been suggested that an employee is more likely to have considered themself better off overall if they were the one to propose the IFA.

## 6.2 An example of an individual flexibility arrangement

The following example of an IFA suggests an arrangement that may pass the better off overall test, and why:

Susan is a Registered Nurse at an aged care facility, who is also studying part-time at university. Her enterprise agreement provides that each year's accrued annual leave is to be taken in a single continuous period, but that by agreement it may be taken in two periods, as long as both periods were greater than one week. The enterprise agreement contains a flexibility term which, among other things, allows the parties to enter into an IFA dealing with any aspect of annual leave.

Susan requests that she be able to rearrange the timing of her annual leave so that she can take one week off during each exam period. The employer agrees to this arrangement, and the parties enter into an IFA.

This IFA is likely to pass the better off overall test. The relevant factors are:

- Susan proposed the arrangement;
- There is no financial benefit or detriment to Susan;
- Susan gains the non-financial benefit of being able to use her annual leave in the manner that best suits her.

### 6.3 Process for making an individual flexibility arrangement

The exact process involved in making an IFA is contained in the individual flexibility term of the relevant enterprise agreement. It is important to check the flexibility term in the relevant enterprise agreement to determine the exact process. However, there are some requirements specified in the Fair Work Act:

- The IFA must be limited to matters which would be permitted content as discussed in item 2.6 above.
- The IFA must not include a term which would be unlawful as discussed in item 2.8 above.
- The IFA must be capable of being terminated by either party giving no more than 28 days' written notice, or by the written agreement of the parties.

## 7 Breaches of enterprise agreement terms

If an employer does not comply with a enterprise agreement in relation to an employee, that employee can take legal action to recover compensation or obtain an order that the employer comply with the enterprise agreement. The legal proceedings may be issued in the Federal Court system, but proceedings may also be issued in some state courts (such as the Industrial Division of the Victorian Magistrates' Court). If there is any shortfall in payments, the employee can recover that money, plus interest. The court may also make an order for a penalty of up to $33,000 against a company, and up to $6,600 against an individual who has been involved in a breach.

While the employee may pursue this breach in person, through their union, or through legal representatives, they may instead choose to notify the Fair Work Ombudsman, which may conduct an investigation. If the Fair Work Ombudsman considers that a breach of the modern award has occurred, and the employer disputes that breach, the Fair Work Ombudsman may prosecute the employer in relation to that breach.

## 8 Further information

Further information about the enterprise agreements and the collective bargaining process can be found at the following links:

Enterprise bargaining
Bargaining representatives
The approval process at Fair Work Australia
Fair Work Australia's guide to making an enterprise agreement