Benchbook

Enterprise agreements

About this benchbook

This benchbook has been prepared by staff of the Fair Work Commission (the Commission) to assist parties bargaining, making and lodging enterprise agreements under the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material before the Commission.

Disclaimer

The content of this benchbook should be used as a general guide only. The benchbook is not intended to be an authority to be used in support of a case at hearing.

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this benchbook or on any linked site.

The information provided, including cases and commentary, are considered correct as of the date of publication. Any changes to legislation and case law will be reflected in updates to this benchbook.

This benchbook is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this benchbook may inadvertently contain such names.

Case examples

Individual cases have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

The case examples used in this benchbook are interpretations of the decisions by Commission staff on specific issues which are addressed within the text. The case examples may not reflect all of the issues considered in the relevant decision. In the electronic version of the benchbook the original text of the decision can be accessed by clicking the link.

Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

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Part 1 – How to use this benchbook

About the Fair Work Commission

The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country's oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal, currently known as the Fair Work Commission, and its predecessors have made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act). The Commission has powers to:

- make, vary and terminate enterprise agreements
- make majority support determinations, scope orders, bargaining orders and serious breach declarations
- deal with bargaining disputes, and
- make workplace determinations in certain circumstances in which enterprise bargaining parties have been unable to reach agreement.

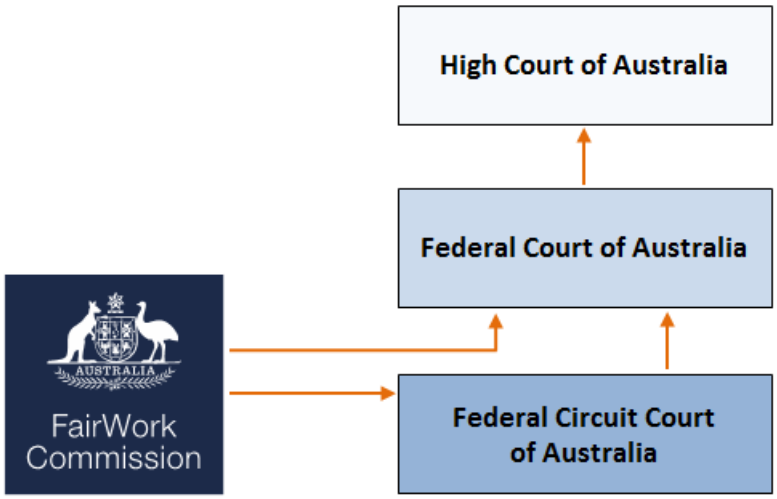
Relationship between the Fair Work Commission and the Courts

 See Fair Work Act ss.563–568.

The High Court of Australia is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

The Federal Court of Australia is a superior court of record and has a broad jurisdiction including over all civil and criminal matters arising in the Fair Work jurisdiction. The Court also has a substantial and diverse appellate jurisdiction, including dealing with applications for judicial review of certain Commission decisions.

Some matters lodged with the Commission are first conciliated at the Commission. If the matter does not settle there an applicant can then apply to start proceedings in the Federal Court or the Fair Work Division of the Federal Circuit Court.



The Commission structure

The Commission is headed by a President, who is also a Judge of the Federal Court of Australia. Commission Members perform quasi-judicial functions under the Fair Work Act, including conducting public hearings and private conferences for both individual and collective matters. They also perform certain functions under the Registered Organisations Act, including determining applications for registration and cancellation of registration and for alterations to eligibility rules of employee and employer organisations. Commission Members are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government. A number of different titles may apply to Commission Members:

- President
- Vice President
- Deputy President
- Commissioner
- Expert Panel Member

Appearing at the Commission

There are standards for the conduct of all people attending a hearing or conference at the Commission. The standards help the Commission to provide fair hearings for all parties.

Providing fair hearings involves allowing all parties to put their case forward, and to have their case determined impartially and according to law.

The Commission and all parties appearing before it, including representatives, have responsibilities to each other and in providing a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing because proceedings begin on time
- notify the Commission staff upon arrival by approaching them in the hearing or conference room
- if delayed it is important that contact is made with the appropriate Commission staff before the hearing is due to start
- switch off mobile phone or other electronic devices in the hearing or conference room
- address the Member of the Commission by his or her title (for example Deputy President or Commissioner)
- in a hearing, stand when addressing the Member of the Commission or to question a witness, and

- bring enough copies of documents so everyone involved can have a copy (three copies: one to keep, one for the other party and one for the Member).

Name of the Tribunal

The name of the national workplace relations tribunal has changed a number of times throughout its history. For consistency, in this document, it has been referred to as the 'Commission'. The table below outlines the name of the national workplace relations tribunal at various times.

Name	Short title	Dates
Fair Work Commission	The Commission	1 January 2013–ongoing
Fair Work Australia	FWA	1 July 2009–31 December 2012
Australian Industrial Relations Commission	AIRC, the Commission	1989–2009
Australian Conciliation and Arbitration Commission	The Commission	1973–1989
Commonwealth Conciliation and Arbitration Commission	The Commission	1956–1973
Commonwealth Court of Conciliation and Arbitration		1904–1956

Workplace relations legislation, Regulations and Rules

The following table sets out Commonwealth legislation dealing with workplace relations and the dates that the law was in operation. The current legislation is the Fair Work Act.

Name of legislation	Operative dates
Fair Work Act 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Workplace Relations Act 1996 **(Cth) (Incorporating the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth))**	27 March 2006
Workplace Relations Act 1996 **(Cth)**	25 November 1996
Industrial Relations Act 1988 **(Cth)**	1 March 1989
Fair Work Regulations 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Fair Work Commission Rules 2013	6 December 2013

Coverage of national workplace relations laws

See Fair Work Act s.14

Only national system employees and national system employers are covered by the enterprise agreement provisions of the Fair Work Act.[1]

A **national system employee** is an individual employed by a national system employer.[2]

A **national system employer** is an employer covered and bound by the national workplace relations laws (see below).

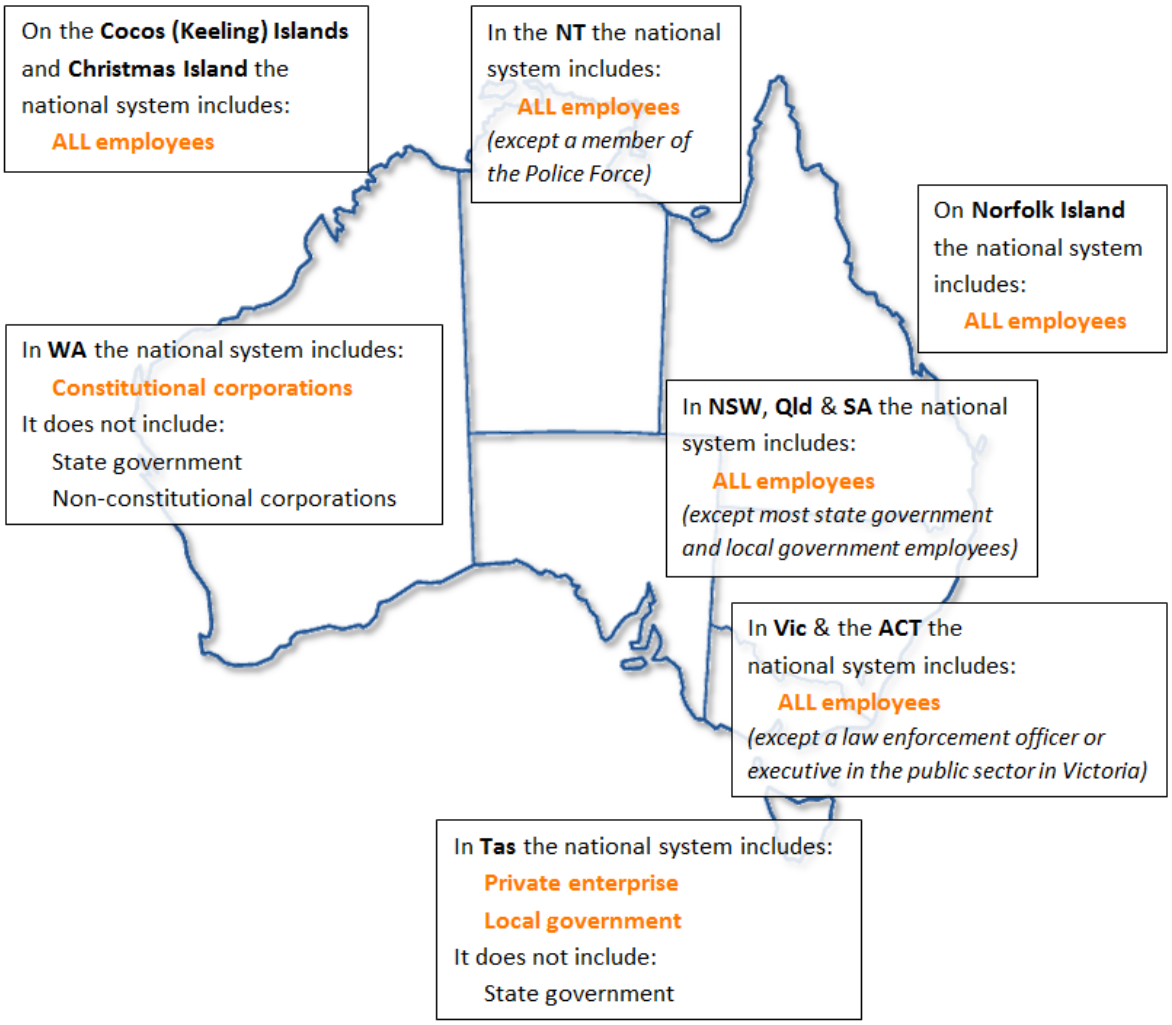
Who is covered by national workplace relations laws?

The national workplace relations system covers:

- all employees in Victoria (with limited exceptions in relation to State public sector employees and law enforcement officers), the Northern Territory (with the exception of police officers) and the Australian Capital Territory
- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- employees employed by private enterprise in New South Wales, Queensland, South Australia and Tasmania
- employees employed by local government in Tasmania
- employees employed by a constitutional corporation in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- employees employed by the Commonwealth or a Commonwealth authority, and
- waterside employees, maritime employees or flight crew officers in interstate or overseas trade or commerce.

[1] Fair Work Act s.170.
[2] Fair Work Act s.13.

Who does the national system include?



Case law

Case law is comprised of previous decisions made by courts and tribunals which help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A **precedent** is a legal decision which provides guidance for future, similar cases.

An **authoritative** decision is one that must be followed on questions of law by lower courts and tribunals.

Referencing

References in this benchbook use the following formats.

Note: In the electronic version of the Benchbook the cases referenced in the footnotes have all been hyperlinked and the cases can be accessed by clicking the links.

Cases

[41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) at para. 13.
[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].
[43] Ibid.
[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23, [(1995) 185 CLR 410 at p. 427].

The name of the case will be in italics.

The link will be to the original reference. If a case has been reported then there will also be a reference to the journal the case has been reported in. For example, some of the abbreviations used are:

- 'HCA' for 'High Court of Australia'
- 'FCAFC' for a 'Full Court of the Federal Court of Australia'
- 'FWCFB' for a 'Full Bench of the Fair Work Commission'
- 'FWA' for 'Fair Work Australia'
- 'IR' for 'Industrial Reports'
- 'CLR' for 'Commonwealth Law Reports'

Page or paragraph numbers are included at the end of the reference to provide a pinpoint in the document where appropriate.

If a reference is identical to the one immediately before, the term 'ibid.' is commonly used.

Where one case refers to another case, the term 'citing' is used.

Item	Example
Case names	*Elgammal v BlackRange Wealth Management Pty Ltd* *Visscher v The Honourable President Justice Giudice*
Link to case	[2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007) [2009] HCA 34 (2 September 2009), [(2009) 239 CLR 361]
Paragraph number	[2008] AIRCFB 1088 … at para. 22.
Page number	(1995) 185 CLR 410 at p. 427
Identical reference	[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361]. [43] Ibid.
Reference to other case	[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23.

Legislation and Regulations

[3] *Acts Interpretation Act 1901* (Cth) s.36(2).
[4] Fair Work Act s.381(2).
[5] Fair Work Regulations reg 6.08(3).
[6] *Police Administration Act* (NT) s.94.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[9] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation or regulations will be in italics unless a shortened version is being used.

The jurisdiction of the legislation or regulations is included in brackets if the full name is cited. For example, some of the abbreviations used are:

- '(Cth)' is a Commonwealth law
- '(ACT)' is an Australian Capital Territory law
- '(NSW)' is a New South Wales law
- '(NT)' is a Northern Territory law
- '(Qld)' is a Queensland law
- '(SA)' is a South Australian law
- '(Tas)' is a Tasmanian law
- '(Vic)' is a Victorian law
- '(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

Item	Example
Legislation or regulation name	*Acts Interpretation Act 1901* Fair Work Act Fair Work Regulations *Industrial Relations (Commonwealth Powers) Act 2009*
Jurisdiction	*Acts Interpretation Act 1901* (Cth) *Police Administration Act* (NT) *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
Section number	*Acts Interpretation Act 1901* (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(3)

Guide to symbols

The symbols used in this benchbook are designed to provide assistance with identifying specific issues or to point to additional information that may assist the reader with their understanding of a particular issue.

Important information.

Related information – Links to information on related topics.

Helpful information.

Links to sections of legislation.

Links to forms.

Glossary of terms

The glossary explains common terms used throughout this benchbook. Other terms are defined in the relevant sections.

Naming conventions

Employees, employers and employee organisations etc.

The separate parties involved in making enterprise agreements are referred to in this benchbook as 'employee' and 'employer', or 'union' where appropriate. At times the use of 'employee', 'employer' or 'union' may also be a reference to 'employees', 'employers' or 'unions' if that is appropriate.

Employee organisations are generally referred to as unions, given the general use and understanding of that term.

Enterprise-level agreements

The name of enterprise agreements has changed with the different Commonwealth legislation in force from time to time (for example, 'certified agreement', 'collective agreement' and 'enterprise agreement'). In this benchbook all such agreements are referred to as 'enterprise agreements' or just 'agreements'.

Any enterprise agreement which has not yet been made is referred to as a 'proposed enterprise agreement'.

Adjournment	To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely.
Appeal	An application for a Full Bench of the Commission to review a decision of a single member of the Commission and determine if the decision was correct. A person must seek the permission of the Commission to appeal a decision.
Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. An application can only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth).
Arbitration	The process by which a member of the Commission will hear evidence, consider submissions and then make a decision in a matter. Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses.
Bargaining	Bargaining is the process by which the parties to a proposed enterprise agreement negotiate the coverage and terms and conditions of the agreement.

Bargaining representative	A bargaining representative is a person nominated to participate in bargaining for a proposed enterprise agreement. A bargaining representative can be an employer or an employee, or a union or industrial association. A union is the default bargaining representative for an employee if: • the employee is a member of the union, and • the union is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement. However, the union will not be the employee's bargaining representative if: • the employee revokes the status of the union as his or her bargaining representative, or appoints another person, or appoints himself or herself, as bargaining representative for the agreement.[3]
Civil remedy provision	A provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the person who contravened the provision of the Act, or any other order the Court considers appropriate such as an injunction.
Commission Member	Someone appointed by the Governor-General as a Member of the Commission. A member may be a Commissioner, a Deputy President, a Vice President or the President.
Conference	A proceeding conducted by a Commission Member which is generally held in private.
Court	In this benchbook, a reference to 'Court' generally means the Federal Court or Federal Circuit Court.
Day	What is a day? Understanding what constitutes a 'day' is important regarding any legal process with requirements to meet specific timelines. Section 36(1) of the *Acts Interpretation Act 1901* (Cth)[4] deals with the manner in which time is to be considered in interpreting the Fair Work Act. It reads: *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.* This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred.[5]

[3] Fair Work Act s.176(1)(b).
[4] As in force 25 June 2009 (see Fair Work Act s.40A).
[5] *Re White's Discounts Pty Ltd t/as Everybody's IGA Everyday and Broken Hill Foodland* PR937496 (AIRCFB, Giudice J, Drake SDP, Lewin C, 12 September 2003) at paras 15–16, [(2003) 128 IR 68].

Decision	A determination made by a single member or Full Bench of the Commission[6]. A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Discontinue	To formally end a matter before the Commission. A discontinuance can be used during proceedings to stop the proceedings or after proceedings to help finalise a settlement. Once a matter has been discontinued it cannot be restarted.
Employee organisation	See **union**
Employer organisation	An organisation which represents the interests of employers which has been registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).
Enterprise agreement	An enterprise agreement is an agreement made at the enterprise level and enforceable under legislation which sets out terms and conditions of employment of employees and their employer (or employers). An enterprise agreement sets out rights and obligations of the employees and the employer(s) covered by the agreement. An enterprise agreement must meet a number of requirements under the Fair Work Act before it can be approved by the Commission.
Error of law	An error of law is a common ground for legal review. It occurs when a member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.
Evidence	Information which tends to prove or disprove the existence of a particular belief, fact or proposition. Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence. Evidence is usually set out in an affidavit or given orally by a witness in a hearing.
Explanatory Memorandum	An Explanatory Memorandum is a document that provides additional information about how proposed legislation is expected to operate and details about individual sections and provisions of that legislation.
Fair Work Act	The *Fair Work Act 2009* (Cth) is Commonwealth legislation dealing with workplace relations laws in Australia.
Fair Work Regulations	The *Fair Work Regulations 2009* (Cth) is supporting legislation for the Fair Work Act.

[6] The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the Fair Work Act may also make a decision.

Fair Work Act	*Fair Work Act 2009* (Cth).
First instance	A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.
Full Bench	A Full Bench of the Commission comprises at least three Commission members, one of whom must be a presidential member. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the Fair Work Act. A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.
Greenfields agreement	An agreement relating to a genuine new enterprise (including a new business, activity, project or undertaking) which is made at a time where the employer or employers have not yet employed any of the persons who will be necessary for the normal conduct of the enterprise and who will be covered by the agreement.
Hearing	A proceeding or arbitration conducted before the Commission which is generally open to the public.
Industrial instrument	A generic term for a legally binding industrial document which details the rights and obligations of the parties bound by the document, such as an enterprise agreement or award.
Injunction	An injunction is a legal remedy imposed by a court and requires a person to do a specific thing or more commonly to refrain from beginning or continuing a specific action.
Jurisdiction	The scope of the Commission's power and what the Commission can and cannot do. The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.
Lodge	The act of delivering an application or other document to the Commission.
Matter	Cases at the Commission are referred to as matters.
Mediation	A method of dispute resolution promoting the discussion and settlement of disputes.
Member	See **Commission Member**
Minister	The Federal Minister for Employment.

National Employment Standards NES	Minimum standards that apply to the employment of all national system employees. They are set out in Part 2–2 of the Fair Work Act and relate to: • maximum weekly hours • requests for flexible working arrangements • offers and requests for casual conversion • parental leave and related entitlements • annual leave • personal/carer's leave and compassionate leave • community service leave • long service leave • public holidays • notice of termination and redundancy pay, and • the Fair Work Information Statement The National Employment Standards are minimum standards that apply to the employment of employees which cannot be displaced. The NES are set out in Part 2–2 of the Fair Work Act
Nominal expiry date	The date specified in an enterprise agreement which indicates the period of time that the parties intended the agreement to operate. The nominal expiry date cannot be more not more than four years after the day the Commission approves the agreement. An enterprise agreement has continuing operation, and continues to apply even after it has passed its nominal expiry date.
Notice of Listing	A formal notification sent by the Commission setting out the time, date and location for a matter to be heard. A Notice of Listing can also include specific directions or requirements.
Notified negotiation period	The six month period within which the parties to a proposed single-enterprise agreement that is a greenfields agreement have to bargain.
Order	A formal direction of the Commission which gives effect to a decision and is legally enforceable.
Organisation	See **union** or **employer organisation**
Outworker	A person who performs work at residential premises or at other premises that would not conventionally be regarded as being business premises.
Party	A person or organisation involved in a matter before the Commission.
Pecuniary penalty	An order to pay a sum of money which is made by a Court as a punishment.

Procedural fairness	Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made. Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself. The terms 'procedural fairness' and 'natural justice' have similar meaning and can be used interchangeably.
Proposed enterprise agreement	An agreement that an employer, an employee or a bargaining representative proposes that will cover an employer and an identified group of employees. The phrase 'proposed agreement' or 'proposed enterprise agreement' is used to describe an enterprise agreement before it is made by a vote of employees or, in the case of a greenfields agreement before it is signed by the employer and a relevant registered organisation.
Quash	To set aside or reject a decision or order, so that it has no legal effect.
Referred state	States that have referred some workplace relations matters to the Commonwealth to allow the Commonwealth to make laws with respect of those matters. All states except Western Australia have referred some matters.
Respondent	A party responding to an application made to the Commission.
Representative	A person who acts on a party's behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else. Generally, a lawyer or paid agent can only represent a party before the Commission with permission of the Commission.
Respondent	A party responding to an application made to the Commission.
Service (Serve)	Service of a document means delivering the document to another party or their representative, usually within a specified period. Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Serving documents	See **service**
Transitional Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).
Union	An organisation which represents the interests of employees which has been registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). A union can also be referred to as an employee organisation.

Workplace determination	Terms and conditions of employment determined by a Full Bench of the Commission. The Commission can make: • low-paid workplace determinations • industrial action related workplace determinations, and • bargaining related workplace determinations. An industrial action related workplace determination must be made where protected industrial action has been terminated by the Commission or the Minister and the bargaining representatives have not settled all of the matters at issue during the post-industrial action negotiating period.[7] A workplace determination includes a nominal expiry date set by the Commission.

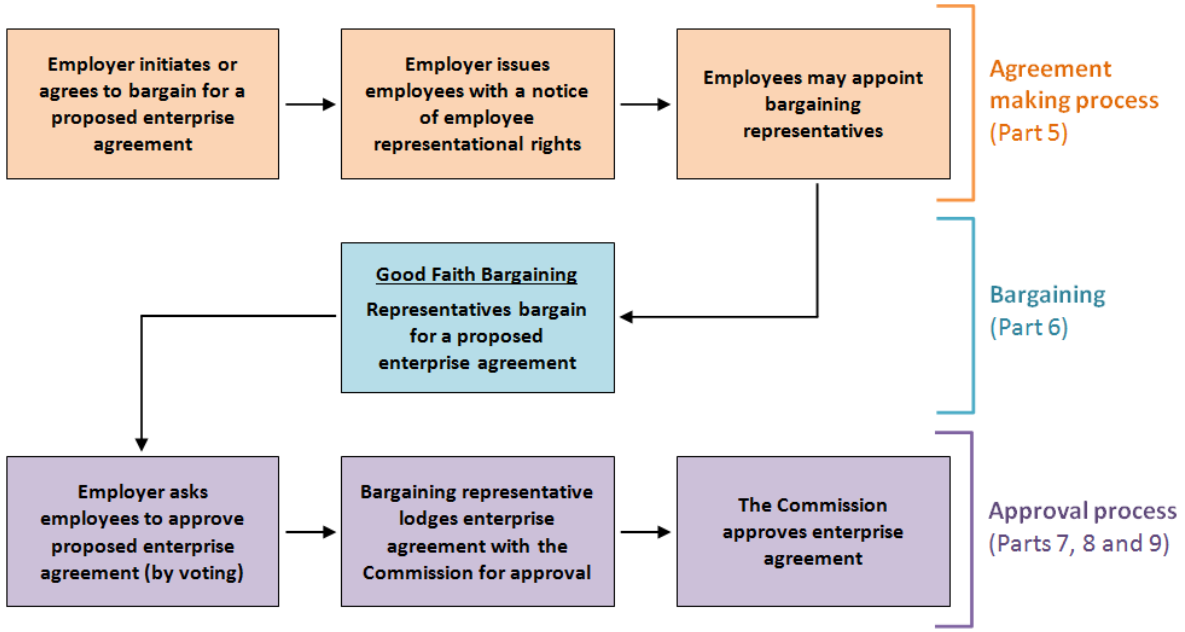
[7] See Fair Work Act s.266.

Part 2 – Overview of benchbook

This benchbook has been arranged to reflect the process users would follow when bargaining for, and making an enterprise agreement. Issues that may arise at a certain point during the agreement making process will be addressed as they come up. As a result, this benchbook may not deal with these issues in the same order as the *Fair Work Act 2009* (the Fair Work Act).

Bargaining process under the Fair Work Act

Note: The diagram below sets out bargaining process as it applies in general terms. However, this diagram does **not** relate to the process for making a greenfields agreement.



To assist readers this diagram is reproduced in various parts of this benchbook to illustrate the step(s) in the bargaining process being discussed.

In some cases, the bargaining process can involve other steps, including applications to the Fair Work Commission (the Commission) in relation to the commencement of a bargaining process or applications to deal with an issue arising between the bargaining participants during the bargaining process. In these circumstances, the Commission may be able to assist the parties to address the issue.

Who can bargain for an enterprise agreement under the Fair Work Act?

See Fair Work Act s.14

Only an employer who is a **national system employer** can bargain for an enterprise agreement under the Fair Work Act.

A **national system employer** is an employer covered and bound by the national workplace relations laws.

Whether an employer is a national system employer depends on the location of the employment relationship (State or Territory) and, in some cases, the legal status and business of the employer.

Who is covered by national workplace relations laws?

In broad terms the national workplace relations system covers:

- all employers and employees in Victoria (with limited exceptions in relation to some State public sector employees), the Northern Territory and the Australian Capital Territory
- all employers and employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- private enterprise employers and employees in New South Wales, Queensland and South Australia
- private enterprise employers and employees and local government employers and employees in Tasmania
- employers that are constitutional corporations and their employees in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- the Commonwealth and Commonwealth authorities and their employees, and
- the employers of waterside employees, maritime employees and flight crew officers in interstate or overseas trade or commerce and these employees.

Part 3 – What is an enterprise agreement?

This Part deals with the types of enterprise agreements that can be made and approved under the *Fair Work Act 2009* (the Fair Work Act). Information about the content of enterprise agreements and the approval process is set out in Parts 4, 8 and 9 of this benchbook respectively.

What is an enterprise agreement?

See Fair Work Act s.172(1)

An enterprise agreement is an agreement made at the enterprise level that contains terms and conditions of employment, including wages, for a period of up to four years from the date of approval.

Whilst an enterprise agreement must have a nominal expiry date within four years, under the legislation the agreement will continue to operate after that date until it is replaced by a new enterprise agreement or terminated by the Fair Work Commission (the Commission).

The Fair Work Act sets out requirements for bargaining for a 'proposed enterprise agreement'. This term describes an agreement that is proposed to be negotiated, or is being negotiated, with a view to it being approved by the Commission 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 be a proposed enterprise agreement for the purposes of the Fair Work Act.[8]

Types of agreement

There are two main types of enterprise agreements that can be made under the Fair Work Act:

- a single-enterprise agreement, or
- a multi-enterprise agreement.

Single-enterprise agreement

See Fair Work Act s.172(2)

An employer, or two or more employers that are single interest employers, may make an enterprise agreement with the employees who are employed at the time the agreement is made and who will be covered by the agreement.

Single interest employers

Two or more employers are **single interest employers** if the employers are:

- engaged in a joint venture or common enterprise, or
- related bodies corporate, or

[8] Explanatory memorandum to Fair Work Bill 2008 at para. 643; See also discussion in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737 at paras 55–56; [(2004) 138 IR 362].

- specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.[9]

A **joint venture** is an association of persons for particular trading, commercial, mining, or other financial undertakings or endeavours with a view to mutual profit. Each participant usually, but not necessarily, contributes money, property or skill.[10]

A **common enterprise** was defined by Mason J in *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission*:[11]

> *An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other by B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts of profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise.*

The term **body corporate** covers any artificial legal entity having a separate legal personality. These entities have perpetual succession; they also have the power to act, hold property, enter into legal contracts and sue and be sued in their own name.

Related bodies corporate refers to all bodies in the situation where one is a holding company of another body corporate, or a subsidiary of another body corporate, or a subsidiary of a holding company of another body corporate.[12]

Related information

- Single interest employer authorisations

Multi-enterprise agreement

See Fair Work Act s.172(3)

Two or more employers that are not single interest employers may make an enterprise agreement with the employees who are employed at the time the agreement is made and who will be covered by the agreement.

A special stream of bargaining for multi-enterprise agreements is available to enable low-paid employees who have not historically participated in enterprise-level collective bargaining to make a multi-enterprise agreement. The Commission can make low paid authorisations that allow access to this stream.

Related information

- Low-paid authorisations

[9] Fair Work Act s.172(5).
[10] *Butterworths Australian Legal Dictionary*, 1997, 645.
[11] *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex Rel Corporate Affairs Commission* [1981] HCA 49 (18 September 1981) at para. 133, [(1981) 148 CLR 121].
[12] *Corporations Act 2001* (Cth) s.50.

Differences between single and multi-enterprise agreements

The key differences between a single-enterprise agreement and a multi-enterprise agreement are:

Bargaining for a multi-enterprise agreement can only occur where two or more employers voluntarily agree to bargain together

A majority support determination is not available in respect of a multi-enterprise agreement. This means that, apart from in the low-paid bargaining stream, bargaining for a multi-enterprise agreement can only occur where two or more employers voluntarily agree to bargain together for a multi-enterprise agreement.

Bargaining orders are not available in respect of a multi-enterprise agreement

Bargaining representatives for both single-enterprise agreements and multi-enterprise agreements must meet the good faith bargaining requirements. However, apart from in the low-paid bargaining stream, a bargaining representative for a multi-enterprise agreement cannot make an application for a bargaining order.

A single-enterprise agreement can replace a multi-enterprise agreement before the multi-enterprise agreement has passed its nominal expiry date.

In general, a new enterprise agreement will not apply to an employee until an earlier enterprise agreement that applies to the employee has passed its nominal expiry date. However, a multi-enterprise agreement may be replaced by a single-enterprise agreement before the multi-enterprise agreement has passed its nominal expiry date.[13]

Related information

- Majority support determinations
-
- Bargaining orders
- Interaction between one or more enterprise agreements

[13] Fair Work Act s.58(3).

Greenfields agreement

See Fair Work Act ss.172(4), 178B

A **greenfields agreement** is an enterprise agreement relating to a genuine new enterprise (including a new business, activity, project or undertaking) which is made at a time when the employer or employers have not yet employed any of the persons who will be necessary for the normal conduct of the enterprise and who will be covered by the agreement.[14]

When referring to a location, 'greenfields' relates to a location for a business where there has not previously been any building, or relating to any enterprise which is becoming active in a market where there has been little or no previous activity.

Important

If work beyond preparatory work, in establishing the genuine new enterprise, commences before the application for a greenfields agreement is made to the Commission, the Commission may not be satisfied that the employer was establishing or proposing to establish a genuine new enterprise.[15]

Single-enterprise greenfields agreements

An employer, or two or more employers that are single interest employers, may make a single-enterprise greenfields agreement with one or more relevant unions if:

- the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish, and
- 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 the agreement.

Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement

If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:

- to each union that is a bargaining representative for the agreement, and
- stating that the period of six months beginning on a specified day is the **notified negotiation period** for the agreement.

The specified day must be later than:

- if only one union is a bargaining representative for the agreement – the day on which the employer gave the notice to the union, or
- if two or more unions are bargaining representatives for the agreement – the last day on which the employer gave the notice to any of those unions.

Multiple employers – Agreement to giving of notice

If two or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

[14] Fair Work Act, Note to s.172(2) and 172(3).
[15] See for example *Applications by CPB Contractors Pty Limited & John Holland Pty Ltd* [2019] FWC 1122 (Gostencnik DP, 21 February 2019).

The **notified negotiation period** is the six month period within which the parties to a proposed single-enterprise agreement that is a greenfields agreement have to bargain.

If the parties cannot come to an agreement at the end of the notified negotiation period then the employer may apply to the Commission to approve the agreement.

Multi-enterprise greenfields agreements

Two or more employers that are not all single interest employers may make a multi-enterprise greenfields agreement with one or more relevant unions if:

- the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish, and
- 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 the agreement.

The expression **genuine new enterprise** includes a genuine new business, activity, project or undertaking.[16]

A **relevant union** means a union that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement.[17]

Before approving a greenfields agreement, the Commission must be satisfied that:

- the relevant union(s) that will be covered by the agreement (as a group) are entitled to represent the industrial interests of a majority of employees who will be covered by the agreement, and
- it is in the public interest to approve the enterprise agreement.[18]

[16] Fair Work Act, Note to s.172(2) and 172(3).
[17] Fair Work Act s.12.
[18] Fair Work Act s.187(5).

Limitations relating to greenfields agreements

See Fair Work Act s.255(A)

If a proposed single-enterprise agreement is a greenfields agreement and there has been a notified negotiation period for the agreement which has ended:

- then the following provisions of the Fair Work Act do not apply in relation to the agreement at any time after the end of the notified negotiation period:
  - section 228 (which deals with good faith bargaining requirements)
  - sections 229 and 230 (which deal with bargaining orders)
  - sections 234 and 235 (which deal with serious breach declarations)
  - section 240 (which deals with bargaining disputes), and
- a bargaining order that relates to the agreement ceases to have effect at the end of the notified negotiation period.

Note: The provision relating to bargaining orders has effect despite anything in section 232 (which deals with the operation of bargaining orders).

Related information

- Additional requirements for greenfields agreements
- Good faith bargaining requirements

- Bargaining orders
- Serious breach declarations
- Bargaining disputes

Case example: **Agreement a single-enterprise greenfields agreement – Genuine new enterprise and existing employees**

National Union of Workers (NSW) v HP Distribution Pty Ltd [2013] FCA 139 (4 February 2013), [(2013) 210 FCR 250].

The Woolworths Ltd group of companies established a subsidiary (HP Distribution) to arrange for the distribution of goods for three of its significant business units from one distribution centre, in a manner that had never previously been undertaken. Prior to employing staff to work at the site, HP Distribution entered into an enterprise agreement with the SDA. The Commission approved the agreement at first instance as a 'greenfields agreement'.

The NUW appealed to the Full Bench of the Commission, arguing that the Commission made an error in finding that the agreement was a greenfields agreement because the agreement did not meet the statutory criteria. The NUW submitted that the distribution centres to be covered by the agreement were already carrying out distribution functions prior to the agreement being made and that people who became employees of HP Distribution were already working as storepersons at this time. After hearing fresh evidence and submissions from the NUW and further evidence from the other parties (including that staff working at the site were casual labour hire staff not intended to be covered by the agreement and that one of the distribution centres was only being prepared for future work) the Full Bench affirmed the Commission's initial decision.

The NUW commenced proceedings in the Federal Court seeking review of the Full Bench's decision.

The Court was satisfied that the business, activity, project or undertaking established at the distribution centre was genuinely new and different from an existing enterprise. The statutory criteria in s 172(2)(b) of the Fair Work Act envisaged that a holding company (Woolworths) may do significant preparatory work to establish or propose to establish a genuine new enterprise that it intends will be conducted by a subsidiary that will be incorporated shortly before a greenfields agreement is made with a relevant union.

The Court upheld the Commission's decision to approve the enterprise agreement as a greenfields agreement.

Case example: **Agreement a single-enterprise greenfields agreement – Genuine new enterprise and existing employees**

Re John Holland Pty Ltd [2011] FWAA 5724 (Ryan C, 16 September 2011).

An application was made for approval of an enterprise agreement known as the *Abigroup, John Holland and the Australian Workers' Union - Regional Rail Link Footscray to Sunshine Project Agreement 2011-2015*. The CFMEU, the RTBU and the AMWU wrote to the Commission seeking to intervene in the matter. The agreement was made at a time when John Holland and Abigroup acting as a joint venture had tendered for work on the Regional Rail Link Project. The tender had not been awarded at the date of the making of the agreement.

The challenge by the CFMEU was that John Holland and Abigroup as joint venturers could not meet the test in s.172(3)(b)(i) because there was not a genuine new enterprise that the employers were establishing or proposing to establish. The CFMEU submitted that the joint venturers would only commence a genuine new enterprise if and when their tender was successful.

The Commission noted that the size and complexity of some tenders means that tenderers need to make substantial commitments in time, money, staff and other resources to submit a tender. On that basis, the Commission was satisfied that the joint venturers were establishing, or proposing to establish, a genuine new enterprise and that the agreement related to that genuine new enterprise.

The CFMEU, the RTBU and the AMWU also challenged the application for approval on the basis that the agreement could not be a greenfields agreement because the employers have employed persons who will be necessary for normal conduct of the enterprise and who will be covered by the agreement.

The Commission was satisfied that neither of the employers had employed any of the persons who would be necessary for the normal conduct of the enterprise and who would be covered by the agreement. The Commission drew a distinction between employees who were indispensable to the normal conduct of the enterprise and existing employees who may have skills which might lead to them subsequently being employed in the enterprise. The agreement was approved.

Case example: **Agreement NOT a single-enterprise greenfields agreement – Not a genuine new enterprise**

Applications by CPB Contractors Pty Limited & John Holland Pty Ltd [2019] FWC 1122 (Gostencnik DP, 21 February 2019).

The West Gate Tunnel Project is a major Victorian infrastructure project being undertaken in partnership between the Victorian Government and one of the world's largest toll-road operators, Transurban. CPB Contractors Pty Ltd and John Holland Pty Ltd (collectively 'Joint Venture Partners') were announced as the preferred tenderer in April 2017 and confirmed as the winning bidder in December 2017.

Since being announced as preferred tenderer and thereafter being confirmed as the winning bidder, the Joint Venture Partners sought to negotiate and make greenfields agreements to cover the works for which they were engaged to perform. Whilst the proposed greenfields agreements were being negotiated, the Joint Venture Partners and several of their subcontractors undertook design work, geological testing, service relocations and other works.

On 9 November 2018 the Joint Venture Partners applied to the Commission for the approval of the *West Gate Tunnel Project (Tunnelling) Greenfields Agreement 2018* and the *West Gate Tunnel Project (Civil Surface Works) Greenfields Agreement 2018* (collectively 'the Agreements'). The unions involved opposed the approval of the Agreements.

After consideration the Commission found that by 9 November 2018 the delivery of the package of works that the Joint Venture Partners had been contracted to design and construct had well and truly commenced, in both a design and construction sense.

The Commission found that the actual activity undertaken by the Joint Venture Partners was undertaken for the purpose delivering the package of works they were contracted to deliver, and for commercial reward. The enterprise was established.

The Commission concluded that as at 9 November 2018, the Joint Venture Partners were not establishing or proposing to establish a genuine new enterprise to which the Agreements related. The applications were dismissed.

Case example: **Agreement NOT a single-enterprise greenfields agreement – Employees necessary for normal conduct of enterprise employed**

Tutt Bryant Group Limited T/A Tutt Bryant Heavy Lift and Shift [2014] FWC 1119 (Gostencnik DP, 14 February 2014).

See also ***Tutt Bryant Group Limited T/A Tutt Bryant Heavy Lift and Shift*** [2014] FWCFB 4342 (Acton SDP, McCarthy DP, Cloghan C, 1 July 2014).

TBG made a greenfields agreement with the AWU and the AMWU in respect of a new project or undertaking (the AMC Project).

In October 2013, before the greenfields agreement was made, a number of persons were given letters from TBG containing an offer of employment for work at the AMC Project. Between 18 and 25 November 2013, six of these persons commenced employment with TBG at another site. The six employees commenced work at the AMC Project on 5 December 2013, after the greenfields agreement had been made.

The Commission found that whilst an employer may take preparatory steps to ensure that the new enterprise is successful, including identifying and even securing sources of labour, if a person is employed in any capacity by the employer and it is known that employee will be necessary for the usual conduct of the new enterprise and will be covered by the agreement, the employer cannot make a greenfields agreement.

TBG appealed to the Full Bench. The Full Bench held that TBG failed to establish any appellable error of law in the Commission's decision at first instance. Permission to appeal was refused and the appeal was subsequently dismissed.

Case example: **Agreement NOT a single-enterprise greenfields agreement – Not a genuine new enterprise**

Construction, Forestry, Maritime, Mining and Energy Union v CPB Contractors Pty Ltd and The Australian Workers' Union [2018] FWCFB 3702 (Hamberger SDP, Gostencnik DP, Harper-Greenwell C, 22 June 2018).

Decision at first instance [2018] FWCA 1187 (McKinnon C, 22 June 2018).

At first instance the Commission approved the *CPB Contractors (Victoria) Civil Framework Agreement 2017* (Agreement) made by CPB Contractors P/L (CPB), formed after the merger of the construction divisions of Leighton Contractors Pty Ltd and Thiess Pty Ltd, and the Australian Workers' Union.

CPB said that its new workforce would undertake a defined subset of general award-covered civil construction and water industry works on Victorian projects, rather than relying chiefly on third party contractors. It maintained the Agreement would therefore cover a 'genuinely new' enterprise, despite the company's involvement in a similar civil construction and water works business.

The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) opposed the approval of the Agreement. The CFMMEU was not a bargaining representative but was permitted to make submissions and appear at the appeal hearing.

The question on appeal was whether enterprise was a 'genuine new' enterprise. The Full Bench found that the evidence supported that the enterprise existed at the time the Agreement was made. It was not a genuine new enterprise. The Full Bench held that the jurisdictional fact in s.172(2)(b)(i) of the Fair Work Act was not made out. The appeal was upheld and the approval decision quashed. The application to approve the Agreement was dismissed.

Part 4 – Content of an enterprise agreement

This Part deals with the content of enterprise agreements. It outlines the types of terms that can, must or cannot be included in an enterprise agreement. It also explains the consequences if an enterprise agreement contains terms that it should not contain, or does not contain terms that it should contain.

What are 'permitted matters'?

See Fair Work Act s.172(1)

The *Fair Work Act 2009* (the Fair Work Act) sets out matters which are permitted to be included in an enterprise agreement.

A term of an enterprise agreement has no effect to the extent that it is not a term about a permitted matter.[19] However, the inclusion of such a term in an enterprise agreement does not prevent the Fair Work Commission (the Commission) from approving the agreement as an enterprise agreement.[20]

The following matters are permitted matters:

- matters pertaining to the employer–employee relationship
- matters pertaining to the employer–union relationship
- terms about deductions from wages, and
- terms about how the agreement will operate.

Matters pertaining to the employer–employee relationship

An enterprise agreement may contain terms about matters pertaining to the relationship between an employer and the employees who will be covered by the enterprise agreement. For example, terms relating to:

- wages and allowances, hours of work and shift patterns
- leave and leave arrangements
- staffing levels (particularly if aimed at ensuring health and safety of employees), and
- the employment of casual employees and casual conversion provisions.

Whether a particular clause in an enterprise agreement pertains to the relationship depends upon the form of the clause, its content and effect, the precise construction and circumstances surrounding the particular employment relationship.[21]

Matters pertaining to the employer–union relationship

An enterprise agreement may contain terms about matters pertaining to the relationship between the employer or employers, and union or unions that will be covered by the enterprise agreement. For example, terms:

[19] Fair Work Act s.253(1)(a).
[20] Fair Work Act s.253(2); see for example *Re Construction, Forestry, Mining and Energy Union* [2013] FWC 912, (Richards SDP, 26 February 2013) at para. 26.
[21] *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004* PR956575 (Giudice J, Lawler VP, Simmonds C, 18 March 2005) at paras 47–48, [(2005) 142 IR 289].

- about union training leave and leave for training conducted by a union (such as work health and safety training)
- that provide for employees to have paid time off to attend union meetings or participate in union activities, and
- that provide for union involvement in dispute settlement procedures.[22]

For an enterprise agreement term to pertain to the relationship between the employer and union, the term needs to relate to the union's legitimate role in representing the industrial interests of the employees to be covered by the enterprise agreement.[23]

Terms about deductions from wages

An enterprise agreement may contain terms about deductions from wages for any purpose authorised by an employee who will be covered by the enterprise agreement.

Deduction terms will not have effect if:

- they benefit the employer and they are unreasonable in the circumstances, or
- if the employee is under 18 years – without a parent, or guardian's agreement.[24]

Terms about how the agreement will operate

An enterprise agreement may contain terms about how it is intended to operate. For example:

- terms setting out how and when the negotiations for a replacement enterprise agreement will be conducted or
- terms specifying who the enterprise agreement will cover.[25]

[22] Explanatory Memorandum to Fair Work Bill 2008 at para. 676.
[23] Explanatory Memorandum to Fair Work Bill 2008 at para. 675.
[24] Fair Work Act s.326.
[25] Explanatory Memorandum to Fair Work Bill 2008 at para. 681.

Coverage of agreements

See Fair Work Act s.53

Requirement that there be at least two employees

An enterprise agreement cannot be made with a single employee.[26]

Case example: **Agreement made with single employee**

Re Construction, Forestry, Mining and Energy Union [2013] FWC 3143 (Watson SDP, 23 May 2013).

The CFMEU made an application for the approval of the *Exactacut Pty Ltd and the CFMEU Concrete Sawing and Drilling Enterprise Agreement 2011-2015*. On the information provided with the application only one employee was covered by the agreement at the time it was made and it was only that single employee who was involved in the agreement making process and voting for approval of the agreement.

Whilst it was accepted that in the future other employees may be employed and they would be covered by the agreement, at the time it was made, the agreement was made with a single employee and could not be approved.

Coverage of employees and employers

An enterprise agreement **covers** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.

'Covers'

An enterprise agreement can be expressed to cover all employees of the employer or just a group of employees (provided that the group of employees is fairly chosen). Individual employees are not generally named in the coverage clause.

The words 'however described' (above) take into account the situation where the people drafting the agreement do not use the technical terms 'cover' and may describe different categories of employees to be covered by the agreement in different ways.

Any reference in the Fair Work Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment – the work that the employee performs under the terms and conditions of the enterprise agreement.

The coverage of an enterprise agreement can also be affected by an order of the Commission or a court.

An enterprise agreement should **clearly set out who is covered** by its terms and conditions.

[26] Fair Work Act s.172(6).

Example coverage clause

2 Scope

(a) This agreement will cover:

(1) BHP Billiton Minerals Pty Ltd ACN 008 694 782 (**Company**) in respect of its employees at the Cannington Mine who are covered by this Agreement;

(2) Employees of BHP Billiton Minerals Pty Ltd at the Cannington Mine who are covered by the classifications set out in clause 7(a) of the Agreement undertaking mining activities of any kind (including underground and open cut) (**Employees**); and

(3) The Australian Workers' Union (**AWU**), provided written notice is given in accordance with section 183(1) of the Fair Work Act 2009 (Cth) (**FW Act**) and the Fair Work Commission (**FWC**) notes in the document to approve the Agreement that the Agreement covers the AWU.[27]

'Applies'

An enterprise agreement only confers rights and imposes obligations on a person if it **applies** to that person.[28]

For an enterprise agreement to apply to an employee and his or her employer, it must be in operation and cover the employee and employer and there must be no other provision of the Fair Work Act having the effect that the agreement does not apply.

Example

The Fair Work Act provides that if an employee and employer remain covered by an individual agreement made under previous laws, an enterprise agreement that is in operation and that covers the employee will not apply to the employee unless or until the individual agreement is terminated.

Only one enterprise agreement can apply to an employee in relation to particular employment at any time. However, if an employee has two jobs with two different employers, there could be different agreements applying to the employee in relation to the different jobs. In this instance, each job is treated separately in determining the employee's entitlements and each job can potentially be covered by a separate agreement.

An enterprise agreement can also apply to an employee's employment with one employer in some circumstances but not in others (for example, if the agreement is site-specific and the location of the employee's work changes). The question of when the agreement applies will be determined by reference to the scope and coverage terms in the agreement itself.[29]

[27] Excerpt from *BHP Billiton Cannington Enterprise Agreement 2013* [AE401373 PR537120].

[28] Fair Work Act s.52.

[29] *Re Cimeco Pty Ltd* [2012] FWA 526 (McCarthy DP, 16 January 2012) at para. 28; see also *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206 (Ross J, Hamilton DP, Spencer C, 12 April 2012).

On-hire employees

An enterprise agreement does not cover on-hire employees unless it is expressed to cover the firm that employs the on-hire employees (sometimes referred to as an **'employment agency'** or **'labour hire firm'**) and the on-hire employees.

If the employment agency or labour hire firm is not covered by the enterprise agreement, its employees will not have the benefit of the agreement (even if terms of the agreement are expressed as giving entitlements to 'on-hire' or 'labour hire' employees or 'contractors').

Coverage of employee organisations (unions)

An enterprise agreement **covers** a union that was a bargaining representative of an employee who will be covered by the agreement if, before the Commission approves the agreement, the union makes an application to be covered by the agreement.[30] The Commission will note in its approval decision that the agreement covers the union.[31]

When an agreement covers (and applies to) a union, the union will have certain entitlements that it would not otherwise have. For instance, the union will be able to enforce the terms of the agreement.[32]

A union is covered by a greenfields agreement if the union is entitled to represent employees who will be covered by the agreement and was a party to the making of the agreement.

Related information

- Types of agreement
- Meaning of 'fairly chosen'
- Entitlement of a union to have an enterprise agreement cover it

When an agreement ceases to cover an employee, employer or union

Ceasing to operate

An enterprise agreement continues to operate after its nominal expiry date unless it is replaced by a new enterprise agreement or terminated by the Commission.

An enterprise agreement that has ceased to operate does not cover any employee, employer or union.[33]

Terminating an agreement

An application can be made to the Commission for termination of an enterprise agreement prior to its nominal expiry date, where this has been agreed to by the employer and a majority of the employees covered by the agreement. Alternatively, an application to terminate an enterprise agreement that has passed its nominal expiry date can be made by any person covered by it, including a union.

[30] Fair Work Act s.183.
[31] Fair Work Act ss.201(2)–(2A).
[32] Fair Work Act s.539, table item 4; see also Explanatory Memorandum to Fair Work Bill 2008 at para. 753.
[33] Fair Work Act s.53(5).

Terms and conditions of employment after termination

After an enterprise agreement has been terminated, if there is no replacement agreement approved by the Commission, the minimum terms and conditions of employment are determined by the applicable modern award.[34]

If there is an approved enterprise agreement to replace the existing agreement, the replacement agreement cannot apply until the existing agreement is terminated or its nominal expiry date has passed.[35]

Effect of an employee being covered by an enterprise agreement

 See Fair Work Act s.57

An employee can be covered by both a modern award and enterprise agreement, however only one instrument can apply to the employee in relation to particular employment at a particular time. If an employee is covered by an enterprise agreement, a modern award can continue to cover the employee, but does not apply to the employee in relation to the employment.

There may be multiple enterprise agreements covering an employee with the terms of the enterprise agreement itself defining when the agreement applies.[36] Only one agreement can apply to an employee in relation to particular employment.[37]

A modern award may cover the employer and employees in an enterprise **other** than those covered by an approved enterprise agreement.

Scope – Who will be covered?

 See Fair Work Act ss.186(3)–(3A)

The group of employees to be covered by a proposed agreement is chosen when the employer and the employee bargaining representatives agree on a particular scope or the bargaining representatives commence bargaining on a shared assumption as to scope.[38]

The group of employees to be covered by a proposed agreement (ie the scope of the agreement) will typically be chosen at or shortly after the commencement of bargaining. If there is disagreement between bargaining representatives on the scope of the agreement, then the scope itself will become a matter for bargaining.[39]

Before approving an agreement, the Commission must be satisfied that the group of employees the agreement covers was fairly chosen.[40]

Meaning of ‘fairly chosen’

Whilst the Commission’s decision as to whether or not the group of employees covered by the agreement was ‘fairly chosen’ involves a degree of subjectivity or value judgement,[41] in circumstances

[34] Fair Work Act s.47(1).
[35] Fair Work Act s.58.
[36] *Re Cimeco Pty Ltd* [2012] FWA 526 (McCarthy DP, 16 January 2012) at para. 27.
[37] Fair Work Act s.58.
[38] *Re ANZ Stadium Casual Employees Enterprise Agreement 2009* [2010] FWAA 3758 (Lawler VP, 26 May 2010) at para. 28.
[39] Ibid., at para. 29.
[40] *Aerocare Flight Support Pty Ltd t/a Aerocare Flight Support v Transport Workers' Union of Australia; Australian Municipal, Administrative, Clerical and Services Union* [2017] FWCFB 5826 (Hatcher VP, Binet DP, Cambridge C, 27 November 2017).
[41] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206 (Ross J, Hamilton DP, Spencer C, 12 April 2012) at para. 8.

where an agreement does not cover all of the employees of the employer(s) covered by the agreement, the Commission must consider whether the group of employees covered by the agreement is:

- geographically
- operationally, or
- organisationally distinct.

Geographical distinctness is concerned with the geographical separateness of the employer's various worksites or work locations, rather than a separation of workplaces within the same worksite.[42]

Factors to be considered

Generally, the selection of the group of employees to be covered by an agreement on some objective basis (as opposed to an arbitrary or subjective basis) is likely to point to a conclusion that the group was fairly chosen.[43]

However, depending on the circumstances of the particular case, there may be more than one way of fairly choosing the group of employees to be covered by a proposed enterprise agreement.[44] Different scope provisions may be equally described as fair in the sense that no obvious unfairness arises from their application.

The role of the Commission is not to determine the scope of the agreement, but rather to guard against unfairness by being satisfied that the group can be described, in all the circumstances as fairly chosen.[45]

When determining whether a group of employees has been fairly chosen, the Commission may have regard to matters such as:

- the way in which the employer has chosen to organise its enterprise, and
- whether it is reasonable for the excluded employees to be covered by the enterprise agreement, having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the enterprise agreement.

If a group of employees covered by the agreement are geographically, operationally or organisationally distinct, this would point in favour of a finding that the group of employees was fairly chosen. However, whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations.[46]

[42] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 (Catanzariti VP, Lawler VP, Lewin C, 3 April 2014) at para. 13.
[43] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206 (Ross J, Hamilton DP, Spencer C, 12 April 2012) at para. 16.
[44] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 (Catanzariti VP, Lawler VP, Lewin C, 3 April 2014) at para. 14.
[45] *Construction, Forestry, Mining and Energy Union v ResCo Training and Labour Pty Ltd* [2012] FWAFB 8461 (Watson VP, Hamilton DP, Simpson C, 17 October 2012) at para. 35.
[46] *Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union* [2012] FWAFB 2206 (Ross J, Hamilton DP, Spencer C, 12 April 2012) at paras 19–20.

An illustrative example is provided in the Explanatory Memorandum:[47]

A single employer operates five organisationally distinct units within its enterprise. The employer makes an agreement with all of the employees in two organisationally distinct units, as well as ten employees who are the only non-union members within … another organisational unit that has a total of 30 employees. The Commission is required to decide whether the group of employees covered by the agreement is fairly chosen.

In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees were unfairly chosen.

Related information

- Types of agreement
- Coverage of agreements
- Scope orders

Case example: **Employees fairly chosen – Three distinct occupational groups of employees**

Re ALDI Foods Pty Ltd [2013] FWC 3495 (Boulton J, 3 June 2013).

An application was made for the approval of three single-enterprise agreements, the *Minchinbury Agreement 2012*, the *Stapylton Agreement 2012* and the *Derrimut Agreement 2012.* The SDA supported the approval of each agreement. The NUW-NSW and the TWU-NSW opposed the approval of the Minchinbury Agreement. The TWU opposed the approval of the Derrimut Agreement and the Stapylton Agreement.

The objections of the TWU-NSW and NUW-NSW were mainly raised in relation to the Minchinbury Agreement, however they are also relevant to the consideration of the Stapylton Agreement and the Derrimut Agreement as all the Agreements had similar terms and conditions. It was recognised that there was sufficient commonality between the provisions of the Agreements such that if any of the objections and concerns raised prevented approval of the Minchinbury Agreement, the Commission would be bound to consider them in relation to the other agreements.

The TWU-NSW submitted that the group of employees covered by the Minchinbury Agreement was not fairly chosen. The agreement applied to three distinct occupational groups of employees: store employees, warehouse employees and transport operators. The agreement provided for some common provisions applicable to all employees (clauses 1-32) and then provided specific sets of conditions for store employees, warehouse employees and transport operators (Schedules 1-8).

Having regard to all the submissions and material, the Commission came to the conclusion that the group of employees covered by the Minchinbury Agreement was fairly chosen. The group of employees was operationally and organisationally distinct. The group was also geographically distinct from other ALDI employees in similar classifications in that they worked in ALDI's Minchinbury Region. The selection of the group was not based on employee characteristics such as date of employment, age or gender, and was not arbitrary or discriminatory.

The Commission found that merely because it is asserted that some of the transport employees or their union might have priorities which differ from other ALDI employees or other unions involved in the bargaining process, or that those employees might have done better in negotiations for a separate agreement, does not of itself warrant a conclusion that the group of employees was not fairly chosen or that the selection of the group had the effect of undermining collective bargaining. Agreements approved.

[47] Explanatory Memorandum to Fair Work Bill 2008 at para. 778.

Case example: **Employees fairly chosen**

Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd [2015] FCAFC 16 (24 February 2015).

John Holland Pty Ltd (the employer) made an application for approval of an enterprise agreement that, at the time of the application, would have covered only three employees. It contained a coverage term that specified that the agreement covered all employees of the employer, but did not cover employees covered by a project or site-specific agreement.

At first instance, the Commission approved the enterprise agreement. The CFMEU appealed that decision and the appeal was upheld by the Full Bench. In upholding the appeal, the Full Bench concluded that the group of employees was not fairly chosen, on the basis that:

- it would not be possible to identify with any certainty the group of employees to be covered by the agreement, and
- the three employees had bargained for an agreement which could potentially cover a very broad number of employees in future, and could potentially undermine those employees' rights to collectively bargain.

The employer applied to Federal Court, seeking judicial review of the Full Bench's decision. The Federal Court determined that the Full Bench had fallen into error in interpreting the relevant provisions of the Fair Work Act.

The Court took the view that, in determining if a group of employees was fairly chosen, 'the question is whether the parties that made the agreement acted fairly in choosing those employees to be covered by the agreement. The question of fairness of choice arises because those employees who are 'chosen' to be covered by the agreement will, *ex hypothesi*, be the better off overall than those employees who were not 'chosen' to be covered by the agreement'.

The Court also stated that the words 'was fairly chosen' should not be construed as meaning 'was chosen in a manner which would not undermine collective bargaining'. Accordingly, the Federal Court quashed the decision of the Full Bench.

The CFMEU then appealed to the Full Court of the Federal Court which upheld the decision of the Primary Judge and dismissed the appeal.

Case example: **Employees fairly chosen**

Re Stadium Australia Operations Pty Ltd T/A ANZ Stadium [2010] FWAA 3758
(Lawler VP, 26 May 2010).

Stadium Australia (the employer) made an application for approval of an enterprise agreement covering casual employees who undertook hospitality, retail, customer service and food and beverage activities. Food and beverage staff comprised three quarters of the employees covered, with the remaining staff being customer service orientated.

A number of customer service employees objected to the approval of the enterprise agreement. They submitted that the agreement would result in their pay decreasing compared to existing pay levels, while food and beverage employees received pay increases. They argued that they were subject to the *'*tyranny of the majority*'* in the sense that, even if all customer service staff voted no, the composition of the workforce was such that food and beverage staff were in a position to approve the agreement.

The Commission determined that the group chosen consisted of a series of operationally distinct subgroups all of whom work at the one geographical location. The Commission was not persuaded that the group covered was chosen with the intent of prejudicing customer service staff and therefore was satisfied that the group of employees had been fairly chosen.

The Commission stated that the appropriate remedy for the customer service staff, if they were being unfairly disadvantaged, was to apply for a scope order. The Commission noted that this was *'*cold comfort*'* to the customer service employees in this particular case, as scope orders are only available before an enterprise agreement has been made.

Case example: **Employees fairly chosen**

Cimeco Pty Ltd v Construction, Forestry, Mining and Energy Union [2012] FWAFB 2206 (Ross J, Hamilton DP, Spencer C, 12 April 2012), [(2012) 219 IR 139].

Cimeco made an application for the approval of the *Cimeco Pty Ltd Midwest and Goldfields Regional Construction Projects Agreement 2011.* The employees covered by the agreement were persons employed by Cimeco engaged to perform construction project works in a geographically distinct area. The geographically distinct area concerned was part of the Midwest and Goldfields Regions of Western Australia.

The Commission held that the practice of Cimeco was to deploy employees from site to site, finding that Cimeco wished to operate on both a site specific basis, and on a geographical basis. Given the history and practices of Cimeco, and their custom and practices for resource project construction work, the Commission considered that for Cimeco to make an agreement of a geographical nature, it should include a much more representative group of existing employees for that group to be regarded as fairly chosen. The Commission, at first instance, refused the application to approve the agreement.

On appeal the Full Bench considered the term 'fairly chosen' in detail and ultimately found that the first instance decision was erroneous. The Full Bench stated that whether or not the group of employees covered by the agreement is geographically, operationally or organisationally distinct is not decisive, rather it is a matter to be given due weight, having regard to all other relevant considerations. The other relevant considerations will vary from case to case.

The Full Bench also stated that, when considering the issue, it is not only the interests of employees who will be covered that are relevant, but also the interests of employees who are excluded from coverage.

Ultimately, the Full Bench determined that the Commission had fallen into error by concluding that, in order to be fairly chosen, the group should have been a much more representative group of existing employees. The Full Bench considered that the Commission should have focused on the group of employees that were covered by the agreement at the time of the vote, rather than to look at a 'future likelihood'.

The application for approval was remitted to a Commission member for determination.

Exclusions – Enterprise agreement will not apply to employees covered by individual agreements

If an employee is covered by an individual agreement made under previous laws, such as an Australian Workplace Agreement (AWA) or an Individual Transitional Employment Agreement (ITEA), then that individual agreement will continue to apply to them.[48] While such an individual agreement applies to an employee, or the employer in relation to the employee, an enterprise agreement does not apply to them.[49]

For an enterprise agreement to apply to the employee, it will be necessary for the individual agreement to be terminated or conditionally terminated.

Effect of individual agreements on bargaining

Certain employees may be covered by an individual agreement made under previous legislative schemes, such as an Australian Workplace Agreement (AWA) or an Individual Transitional Employment Agreement (ITEA).

[48] Transitional Act Sch 3, Item 3.
[49] Transitional Act Sch 3, Item 30.

As all individual agreements made under the *Workplace Relations Act 1996* (Cth) (and preserved individual State agreements) have passed their nominal expiry date, an employee who is covered by an individual agreement will be eligible to be represented in bargaining for the proposed enterprise agreement (and to vote on the proposed enterprise agreement).

However, for an enterprise agreement to apply to the employee, it will be necessary for the individual agreement to be terminated or conditionally terminated.

Related information

- Termination of individual agreements

Terms and conditions of employment

Awards cover a whole industry or occupation and, together with the National Employment Standards (NES), provide a safety net of minimum pay rates and employment conditions. Enterprise agreements can be tailored to meet the needs of particular businesses.

Enterprise agreements are agreements made at an enterprise level between an employer and its employees about the terms and conditions of their employment.

There are a number of terms that **may** be included in an enterprise agreement. These include terms relating to:

- ordinary hours
- rates of pay
- penalty rates and overtime
- allowances
- deductions authorised by an employee, and
- the operation of the agreement.

Related information

- What are ‘permitted matters’?

Better off overall

Before approving an enterprise agreement, the Commission must be satisfied that each award covered employee and prospective award covered employee will be better off overall under the proposed enterprise agreement than if the relevant modern award applied.

Parties must ensure that the terms and conditions included in the proposed enterprise agreement satisfy the ‘better off overall’ test for each award covered employee and prospective award covered employee.

Related information

- Better off overall test (BOOT)
- Who is an award covered employee?
- Who is a prospective award covered employee?

The National Employment Standards (NES)

See Fair Work Act Part 2–2

The NES are minimum standards that apply to all employees employed by a national system employer. However, only certain entitlements apply to casual employees.

It is not necessary for an enterprise agreement to expressly include each NES entitlement. Terms that are included in an enterprise agreement cannot be less beneficial than those provided in the NES. An enterprise agreement can provide more favourable entitlements than those provided in the NES.

Related information

- NES precedence term

Entitlements under the NES

The minimum standards under the NES relate to:

- maximum weekly hours
- requests for flexible working arrangements
- offers and requests for casual conversion
- parental leave and related entitlements
- annual leave
- personal/carer's leave, compassionate leave and unpaid family and domestic violence leave
- community service leave
- long service leave (under State or Territory laws or as a preserved award-derived or agreement-derived entitlement)
- public holidays
- notice of termination and redundancy pay, and
- provision of a Fair Work Information Statement.

Further information in relation to NES entitlements is available from the Fair Work Ombudsman's website.

Related information

- Common defects & issues – Definition of shiftworkers
- Common defects & issues – Annual leave
- Common defects & issues – Personal/carer's leave
- Common defects & issues – Compassionate leave
- Common defects & issues – Parental leave
- Common defects & issues – Public holidays
- Common defects & issues – Notice of termination and redundancy
- Common defects & issues – Flexible working conditions

Base rate of pay

See Fair Work Act s.206

If an employee is covered by a modern award

The base rate of pay for an employee in an enterprise agreement that applies to the employee cannot be less than the base rate of pay the employee would receive under the modern award which covers the employee.

If the base rate of pay in the enterprise agreement is less than the employee would receive under the modern award that covers the employee, the enterprise agreement will have effect as if the agreement rate were equal to the award rate.[50]

Related information

- Coverage of agreements

Example (Rate correct as at 1 July 2018)

The rate of pay for an employee engaged as a panel beater under the terms of an enterprise agreement is $827.28 per week.

Under the Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089] the comparable skill level for a panel beater is **Vehicle industry RS&R – tradesperson or equivalent Level I R6** – the minimum weekly wage is $837.40.

Therefore, the employee must be paid the $837.40 minimum weekly wage from the modern award, even though the enterprise agreement says the employee should be paid only $827.28 per week.

If an employee is NOT covered by a modern award

If an employee:

- is not covered by a modern award, and
- the national minimum wage order would require the employer to pay the employee a base rate of pay that at least equals a national minimum wage set by the order;

the base rate of pay for the employee in an enterprise agreement that applies to the employee cannot be less than the base rate of pay set by the national minimum wage order.

If the base rate of pay in the enterprise agreement is less than the employee would receive under the national minimum wage order, the enterprise agreement will have effect as if the agreement rate were equal to the rate set out in the minimum wage order which covers the employee.[51]

The National Minimum Wage is available from the Fair Work Ombudsman's website.

[50] Fair Work Act s.206(2); see also *Ferrymen Pty Ltd v The Maritime Union of Australia* [2013] FWCFB 8025 (Ross J, Booth DP, McKenna C, 17 December 2013) at para. 18.
[51] Fair Work Act s.206(4).

Nominal expiry date

See Fair Work Act s.186(5)

One of the requirements for the Commission to approve an enterprise agreement is the requirement that the enterprise agreement:

- specifies a date as its nominal expiry date, and
- the date will not be more than four years from the date the Commission approves the agreement.

Specifying a date

There are two ways the nominal expiry date can be expressed in an enterprise agreement:

- a specific date is chosen as the nominal expiry date, or
- a timeframe is given from the date of approval.

An enterprise agreement does not have to state a specific date to meet the requirements of s.186(5). An enterprise agreement can specify its nominal expiry date by reference to the end of a period of time after the agreement's commencement or approval.[52]

However, one of the issues with specifying a nominal expiry date by reference to the date of approval is that the parties do not know when the Commission may approve the agreement, so they do not control precisely when it will nominally expire.

Continuing operation of agreements

Important

Agreements **continue to operate** after their nominal expiry dates until they are replaced or terminated by the Commission.

This means that the provisions contained within an old enterprise agreement will continue to apply to the parties covered by the agreement after the nominal expiry date. These provisions are fully enforceable and must be applied, even if the nominal expiry date was several years before.

Minimum entitlements

When an approved agreement continues to operate, the provisions of the National Employment Standards (NES) will apply in circumstances where an entitlement in the agreement is less than that provided for by the NES.

Related information

- Better off overallThe National Employment Standards (NES)
- Common defects & issues – Nominal expiry date

[52] *Newlands Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* [2011] FWAFB 7325 (Hamberger SDP, McCarthy DP, Blair C, 15 December 2011) at paras 28–29.

Mandatory terms

The following terms must be included in all agreements:

A **coverage** term – the term in an enterprise agreement which identifies the employers, employees and work covered by the enterprise agreement.

A **nominal expiry date** – the date the agreement will nominally expire.

A **flexibility** term – a term that allows an employer and employee to make an individual flexibility arrangement (IFA) which varies the effect of terms of the enterprise agreement in order to meet the genuine needs of the employer and the individual employee. The flexibility term in an enterprise agreement must meet the requirements specified in the Fair Work Act. The Fair Work Regulations include a model flexibility term which meets the requirements of the Fair Work Act and can be used in an enterprise agreement.

A **consultation** term – a term which 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 must also allow for employees to be represented in any such consultation. The Fair Work Regulations include a model consultation term which meets the requirements of the Fair Work Act and can be used in an enterprise agreement.

A **dispute settlement** term – a term providing a procedure for settling disputes about matters arising under the enterprise agreement and in relation to the NES. The term must require or allow the Commission, or another person who is independent of those covered by the agreement, to settle a dispute. The term must also allow for the representation of employees during the dispute. The Fair Work Regulations include a model term about dealing with disputes which meets the requirements of the Fair Work Act and can be used in an enterprise agreement.

Flexibility term


See Fair Work Act ss.202–204

An enterprise agreement must contain a term that allows an employee and their employer to make an IFA which varies the effect of terms of the agreement in order to meet the genuine needs of the employer and the individual employee.[53] This is known as a flexibility term.

Requirements of a flexibility term

A flexibility term must meet a number of requirements, including that it must:

- set out the terms in the enterprise agreement the effect of which may be varied by an IFA[54]
- require the employer to ensure that any IFA only be about matters that would be permitted matters if included in an enterprise agreement
- require the employer to ensure that any IFA agreed to would not include a term that would be an unlawful term if included in an enterprise agreement
- require that any IFA be genuinely agreed to by the employer and employee
- require the employer to ensure that any IFA agreed to under the flexibility term must result in the employee being better off overall than the employee would have been if no IFA were agreed to

[53] Fair Work Act s.202(1).
[54] *Re Minister for Employment and Workplace Relations* [*Trimas*] [2010] FWAFB 3552 (Giudice J, Harrison SDP, Blair C, 19 May 2010) at para. 6, [(2010) 195 IR 138].

- not require any IFA to be approved or consented to by another person (that is, someone who is not the employer or the employee)
- require the employer to ensure that any IFA is able to be terminated by either the employer or the employee giving written notice of not more than 28 days, or at any time if both the employer and employee agree in writing to the termination
- require the employer to ensure that any IFA is agreed to in writing by the employer and employee (and by a parent or guardian if the employee is under 18 years of age), and
- that a copy of any IFA is given to the employee within 14 days after it is agreed to.

Related information

- What are 'permitted matters'?
- Unlawful terms
-
- Common defects & issues – Flexibility and consultation terms

Enforcing a flexibility term

If an employee or employer contravenes a term of an IFA they would be contravening a term of the agreement – so the IFA can be enforced as a term of the enterprise agreement.[55]

Application of model flexibility term

Where no flexibility term is included in the enterprise agreement, or one is included but it does not meet all the requirements, the model flexibility term set out in the Fair Work Regulations is taken to be a term of the agreement.[56]

Where the Commission approves an enterprise agreement and the model flexibility term is taken to be a term of the agreement, that fact must be noted in the decision approving the agreement.[57]

[55] Fair Work Act s.202(2); see also Explanatory Memorandum to Fair Work Bill 2008 at para. 861.
[56] Fair Work Act s.202(4).
[57] Fair Work Act s.201(1); see also *Re Minister for Employment and Workplace Relations* [*Trimas*] [2010] FWAFB 3552 (Giudice J, Harrison SDP, Blair C, 19 May 2010) at para. 7, [(2010) 195 IR 138].

Case example: **Model flexibility term NOT included – Inclusion of model flexibility term overturned on appeal**

***Re Minister for Employment and Workplace Relations* [*Trimas*]** [2010] FWAFB 3552 (Giudice J, Harrison SDP, Blair C, 19 May 2010), [(2010) 195 IR 138].

This was an application by the Minister for a review of one aspect of a decision approving an enterprise agreement. At first instance, the Commission decided that the flexibility term in the enterprise agreement did not meet the requirements of a flexibility term because it varied the terms of the enterprise agreement, rather than varying the effect of the terms of the enterprise agreement. Accordingly, the Commission decided that the model flexibility term would be part of the agreement.

The Minister submitted that the distinction drawn by the Commission between the variation of a term and the variation of the effect of a term was not a valid distinction. The practical effect of an individual flexibility arrangement made under a flexibility term was to vary the terms of an enterprise agreement in relation to the employer and the individual employee.

The Full Bench found that an individual flexibility arrangement made pursuant to a flexibility term in an enterprise agreement does not vary the terms of the agreement but the arrangement alters the legal rights of the parties to it in the relevant respects. That is, an individual flexibility arrangement alters the effect of a term of the enterprise agreement, rather than the term itself.

The failure to use the precise language of the Fair Work Act does not mean that a flexibility term is not a flexibility term within the meaning of the Fair Work Act as it is not appropriate to apply such high standards when interpreting enterprise agreements. An approach which takes the purpose of the provision into account is to be preferred and a liberal approach to the construction of the flexibility term was appropriate in light of the language of the model flexibility term.

However, a term which does not provide for change in the effect of any of the terms of the agreement cannot be a flexibility term.

Schedule 2.2 – Model flexibility term

(regulation 2.08)

Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances;

(v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and

(b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(3) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences.

(4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(5) The employer or employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or

(b) if the employer and employee agree in writing – at any time.

Consultation term

See Fair Work Act s.205

An enterprise agreement must contain a term that 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.

Requirements of a consultation term

The consultation term must require the employer to consult with employees about a major workplace change that is likely to have a significant effect on the employees.

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.

Representation

The consultation term must also allow for employees to be represented during consultation about a major workplace change or a change to the employees' regular roster or ordinary hours of work.

Application of model consultation term

If an enterprise agreement does not include a consultation term, or one is included but it does not meet all of the requirements in the Fair Work Act, or if the consultation term is an objectionable emergency management term, the model consultation term set out in the Fair Work Regulations is taken to be a term of the enterprise agreement.

Related information

- Common defects & issues – Flexibility and consultation terms

Case example: **Model consultation term included**

Construction, Forestry, Mining and Energy Union v St John of God Health Care Inc and Ors [2014] FWCFB 4011 (Harrison SDP, Blair C, Williams C, 17 June 2014).

An application was made for approval of the *St John of God Health Care Maintenance Caregivers Agreement 2013*, which included a clause that purported to deal with both consultation and redundancy benefits (relevant clause). However, the relevant clause did not apply to all employees and did not provide employees with the option to be represented during the consultation process.

At first instance, the Commission found that the relevant clause did not provide for representation of employees for the purposes of consultation. However, the Commissioner did not state in the decision the requirements of section 205(1) were not met. Instead, the decision stated that the employer conceded that the model consultation term applied to the extent of any inconsistency with the relevant clause.

The CFMEU appealed that decision, submitting that:

the Commissioner should have made a finding that the requirements of section 205(1) were not met

if the requirements of section 205(1) were not met, section 205(2) operated such that the model consultation term must apply. That is, the model consultation term cannot apply 'only to the extent of an inconsistency', and

- the Commissioner should have included a note in his decision stating that the model consultation term applied.

The Full Bench ultimately overturned the original decision, stating that once it had been decided that the consultation term did not meet the requirements of the legislation, the model term must be deemed to apply and a statement to this effect must be included in the approval decision.

Case example: **Model consultation term included**

Re Fairbrother Pty Ltd [Facility Management] [2014] FWCA 2491 (Lee C, 11 April 2014).

An application was made for approval of a single-enterprise agreement known as the *Fairbrother Pty Ltd [Facility Management] Tasmanian Enterprise Agreement 2014*. The application was made by Fairbrother Pty Ltd.

The Commission found that the consultation provision in the agreement did not specify that consultation must occur regarding a change to regular rosters, as required by the Fair Work Act. As a result, the model consultation term was taken to be a term of the agreement, and a copy was appended to the agreement.

Schedule 2.3 – Model consultation term

(regulation 2.09)

Model consultation term

(1) This term applies if the employer:

(a) has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees; or

(b) proposes to introduce a change to the regular roster or ordinary hours of work of employees.

Major change

(2) For a major change referred to in paragraph (1)(a):

(a) the employer must notify the relevant employees of the decision to introduce the major change; and

(b) subclauses (3) to (9) apply.

(3) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(4) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

(5) As soon as practicable after making its decision, the employer must:

(a) discuss with the relevant employees:

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the employees; and

(iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and

(b) for the purposes of the discussion – provide, in writing, to the relevant employees:

(i) all relevant information about the change including the nature of the change proposed; and

(ii) information about the expected effects of the change on the employees; and

(iii) any other matters likely to affect the employees.

(6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

(8) If a term in this agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the requirements set out in paragraph (2)(a) and subclauses (3) and (5) are taken not to apply.

(9) In this term, a major change is **likely to have a significant effect on employees** if it results in:

(a) the termination of the employment of employees; or

(b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or

(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or

(d) the alteration of hours of work; or

(e) the need to retrain employees; or

(f) the need to relocate employees to another workplace; or

(g) the restructuring of jobs.

Change to regular roster or ordinary hours of work

(10) For a change referred to in paragraph (1)(b):

(a) the employer must notify the relevant employees of the proposed change; and

(b) subclauses (11) to (15) apply.

(11) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(12) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative;

the employer must recognise the representative.

(13) As soon as practicable after proposing to introduce the change, the employer must:

(a) discuss with the relevant employees the introduction of the change; and

(b) for the purposes of the discussion – provide to the relevant employees:

(i) all relevant information about the change, including the nature of the change; and

(ii) information about what the employer reasonably believes will be the effects of the change on the employees; and

(iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and

(c) invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

(14) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(15) The employer must give prompt and genuine consideration to matters raised about the change by the relevant employees.

(16) In this term:

relevant employees means the employees who may be affected by a change referred to in subclause (1).

Term for settling disputes

See Fair Work Act s.186(6)

An enterprise agreement must contain a term that provides a procedure for settling disputes about matters arising under the enterprise agreement and in relation to the NES.

Requirements of a term for settling disputes

The term must provide a procedure to settle disputes about:

- any matters arising under the enterprise agreement, and
- in relation to the National Employment Standards.

It is permissible, but not necessary, for the term to provide for the settlement of disputes about other matters in addition.[58]

The term must require or allow the Commission, or a person independent of the employer(s), employees and union(s) covered by the enterprise agreement, to settle disputes.

An example is provided in the Explanatory Memorandum:[59]

A disputes procedure could not, for example, provide for disputes to be resolved by:

- the managing director of the employer; or
- a disputes board made up of officials of a union covered by the agreement.

Representation

The term must allow for employees to be represented when dealing with a dispute under the dispute settlement procedure.

Exclusion – Reasonable business grounds

The Commission (or another person required or allowed to settle disputes) cannot deal with disputes about whether an employer had reasonable business grounds under sections 65(5) or 76(4) of the Fair Work Act to:

- refuse a request for flexible working arrangements, or
- refuse to extend a period of unpaid parental leave;

unless the parties have agreed in the enterprise agreement (or a contract of employment or other written agreement) that the Commission (or other person) can deal with those disputes.[60]

No dispute settlement term or incorrect dispute settlement term

Where no dispute settlement term is included in the enterprise agreement, or one is included but it does not meet all the requirements in the Fair Work Act, the Commission may either:

- refuse to approve the enterprise agreement, or
- approve the enterprise agreement if a satisfactory undertaking is given.[61]

Related information

- Common defects & issues – Dispute settlement term

[58] *Boral Resources (NSW) Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 8437 (Lawler VP, Sams DP, Williams C, 1 November 2010).
[59] Explanatory Memorandum to Fair Work Bill 2008 at para. 783.
[60] Fair Work Act ss.739(2) and 740(2).
[61] Fair Work Act s.190(2).

Case example: **Dispute settling procedure included**

Woolworths Ltd trading as Produce and Recycling Distribution Centre [2010] FWAFB 1464 (Giudice J, Acton SDP, Hampton C, 26 February 2010).

An application was made for approval of an enterprise agreement known as the *SDAEA Mulgrave Produce and Recycling Enterprise Agreement 2009-2012* (the agreement).

The dispute settlement term in the agreement prohibited the Commission (then Fair Work Australia) arbitrating a dispute unless the Director of Human Resources of the employer and the employee or National Secretary of the Union agreed to arbitration taking place.

At first instance, the Commission found that this clause did not meet the requirements of section 186(6), on the basis that it restricted the circumstances in which arbitration was available. The application to approve the enterprise agreement was declined.

Woolworths sought permission to appeal the decision (which was granted) on the basis that section 186(6) of the Fair Work Act did not require the parties to include a term in an enterprise agreement that provided for arbitration. Rather, the parties were able to agree on the procedure for resolving disputes.

The Full Bench concluded that:

- arbitration of disputes is not an 'essential ingredient' that need to be included for a dispute settlement term to meet the requirements of section 186(6) of the Fair Work Act; and
- section 186(6) does not require the inclusion of a procedure that will guarantee a settlement in each case.

The Full Bench remitted the application for approval for further consideration.

Case example: **Dispute settling procedure NOT included**

Re NSW Teachers Federation [2014] FWCA 5483 (Bull C, 12 August 2014).

An application was made for approval of an enterprise agreement known as the *United Voice Union New South Wales and New South Wales Teachers Federation – Maintenance Agreement.*

The dispute settling procedure did not state that the procedure would apply to disputes arising in relation to the National Employment Standards and that employee's were entitled to representation during the dispute.

The Commission sought an undertaking from the applicant that the dispute procedure would include these matters. Once the applicant provided the undertakings, and the union had been consulted, the agreement was approved.

Schedule 6.1 – Model term for dealing with disputes for enterprise agreements

(regulation 6.01)

Model term

(1) If a dispute relates to:

(a) a matter arising under the agreement; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

(2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Commission.

(5) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note : If Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

(6) While the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(7) The parties to the dispute agree to be bound by a decision made by Fair Work Commission in accordance with this term.

Optional terms

NES precedence term

The increasing proportion of enterprise agreements requiring undertakings to address deficiencies is impacting on the time it is taking the Commission to finalise applications for approval of agreements.

Many of these undertakings are requested when an agreement provides entitlements that are inconsistent with, or less beneficial than the National Employment Standards (NES). In order to reduce the incidence of Members requesting undertakings, it may assist if a term is included in an enterprise agreement when it is made providing that where there is any inconsistency, more generous entitlements under the NES will prevail over provisions in an agreement.

An example of an NES precedence term that could be included in an agreement is set out below:

> This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.

Terms that cannot be included in an enterprise agreement

The Fair Work Act sets out several matters which cannot be included in an enterprise agreement. These include that the proposed enterprise agreement does not contain any unlawful terms or designated outworker terms.

Terms that exclude the NES

An enterprise agreement cannot contain a term that excludes the NES or any provision of the NES.[62]

Related information

- Incorporation of annual and personal/carer's leave in loaded rates

Unlawful terms

See Fair Work Act s.194

A term of an enterprise agreement is an unlawful term if it is:

- a discriminatory term
- an objectionable term
- an objectionable emergency management term
- a term that would allow an employee or employer to opt-out of coverage of the agreement
- a term, where an employee would be protected from unfair dismissal after completing the minimum employment period, that confers an entitlement or remedy in relation to unfair termination of the employee's employment before the employee has completed that period
- a term that excludes the application of the unfair dismissal provisions in Part 3-2 of the Fair Work Act to a person, or modifies the application of these provisions in a way that is detrimental to, or in relation to, a person
- a term that is inconsistent with a provision of Part 3-3 of the Fair Work Act (which deals with industrial action)
- a term that provides for an entitlement to enter premises for certain purposes, which is not in accordance with the right of entry provisions in Part 3-4 of the Fair Work Act

[62] Fair Work Act s.55.

- a term that provides for the exercise of a State or Territory OHS right other than in accordance with the right of entry provisions in Part 3-4 of the Fair Work Act, or
- a term that requires or permits superannuation contributions for a default fund employee to be made to a superannuation fund that does not satisfy one of the following:
  - offers a MySuper product
  - is an exempt public sector scheme, or
  - is a fund of which a relevant employee is a defined benefit member.

Related information

- Common defects & issues – Unlawful terms

Meaning of 'discriminatory' term

A **discriminatory term** is a term that discriminates against an employee covered by the enterprise agreement because of, or for reasons including race, colour, sex, sexual orientation, age, physical or mental disability, marital status, pregnancy, religion, family or carer's responsibilities, pregnancy, religion or political opinion, national extraction or social origin.[63]

A discriminatory term must discriminate against an employee because of, or for reasons including, one or more of the specified characteristics or attributes. It is not enough that the term be capable of indirectly discriminating, a term must actually do so.[64]

A term of an enterprise agreement does not discriminate against an employee:

- if the reason for the discrimination is the inherent requirements of the particular position concerned, or
- merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
  - in good faith, and
  - to avoid injury to the religious susceptibilities of adherents of that religion or creed.

A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

- all junior employees, or a class of junior employees, or
- all employees with a disability, or a class of employees with a disability, or
- all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

An **inherent requirement** is something essential to the position, rather than something added to it.[65]

Meaning of 'objectionable' term

As noted above, an objectionable term is also an unlawful term.

[63] Fair Work Act s.195.
[64] *Application by Metropolitan Fire and Emergency Services Board* [2019] FWC 106 (Gostencnik DP, 15 January 2019) at para. 176.
[65] *Qantas Airways Ltd v Christie* [1998] HCA 18 (19 March 1998) at para. 31, [(1998) 193 CLR 280].

An **objectionable term** is a term that requires or permits a contravention of the Fair Work Act's general protections provisions or the payment of a bargaining services fee.[66]

For a term to be objectionable, the term must require or permit (in the sense of authorise) etc taking adverse action for a proscribed reason in contravention of the general protections provisions.[67] A term of an agreement could be objectionable on the basis of indirect discrimination.[68]

It is not adverse action for a union to discriminate in favour of its own members and against non-members.[69]

A **bargaining services fee** is any fee payable to an industrial association, or to someone in lieu of an industrial association, for the provision of bargaining services. This does not include membership fees.[70] Industrial associations can offer bargaining services on a fee for service basis where an individual voluntarily enters into a contract.[71]

Meaning of 'objectionable emergency management' term

As set out above, a objectionable emergency management term is also an unlawful term. Employee claim action must not be in support of or seek to advance claims to include unlawful terms in an enterprise agreement.

A term of an enterprise agreement is an **objectionable emergency management term** if an employer covered by the agreement is a designated emergency management body and the term has, or is likely to have, the effect of:

- restricting or limiting the body's ability to do any of the following:
    - engage or deploy its volunteers
    - provide support or equipment to those volunteers
    - manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers
    - otherwise manage its operations in relation to those volunteers, or
- requiring the body to consult, or reach agreement with, any other person or body before taking any action for the purposes of doing anything mentioned in s.195A(1)(a), or
- restricting or limiting the body's ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community, or
- requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the law confers or imposes on the body a power, function or duty that affects or could affect its volunteers.[72]

However, a term of an enterprise agreement is not an **objectionable emergency management term** if:

- both of the following apply:
    - the term provides for the matters required by s.205(1)–(1A) (which deal with terms about consultation in enterprise agreements)

[66] Fair Work Act s.12.
[67] *Application by Metropolitan Fire and Emergency Services Board* [2019] FWC 106 (Gostencnik DP, 15 January 2019) at para. 262.
[68] Ibid at para. 276; citing *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (8 January 2015) at paras 229–230.
[69] Ibid at para. 275; citing *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 (8 January 2015) at para. 228.
[70] Fair Work Act s.353(2).
[71] Explanatory Memorandum to Fair Work Bill 2008 at para. 1436.
[72] Fair Work Act s.195A.

  - the term does not provide for any other matter that has, or is likely to have, the effect referred to in s.195A(1), or

- the term is the model consultation term.

Sections 195A(1)(a), (b), (c) and (d) do not limit each other.

Meaning of designated emergency management body

A body is a **designated emergency management body** if:

- either:
  - the body is, or is a part of, a fire-fighting body or a State Emergency Service of a State or Territory, or
  - the body is a recognised emergency management body that is prescribed by the regulations[73] for the purposes of s.195A(4), and
- the body is, or is a part of a body that is, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

However, a body is not a **designated emergency management body** if the body is, or is a part of a body that is, prescribed by the regulations[74] for the purposes of this subsection.

Meaning of volunteer of a designated emergency management body

A person is a **volunteer** of a designated emergency management body if:

- the person engages in activities with the body on a voluntary basis (whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity), and
- the person is a member of, or has a member-like association with, the body.

Limited application of objectionable emergency management term for certain terms

If:

- a term of an enterprise agreement deals to any extent with the following matters relating to provision of essential services or to situations of emergency:
  - directions to perform work (including to perform work at a particular time or place, or in a particular way)
  - directions not to perform work (including not to perform work at a particular time or place, or in a particular way), and
- the application of s.195A(1) in relation to the term would (apart from this subsection) be beyond the Commonwealth's legislative power to the extent that the term deals with those matters;

then s.195A(1) does not apply in relation to the term to that extent.

Note: See paragraph (l) of the definition of **excluded subject matter** in s.30A(1) and s.30K(1).

[73] As at the date of publication of this Benchbook no regulations have been made.
[74] As at the date of publication of this Benchbook no regulations have been made.

Case example: **NO unlawful terms included – Discriminatory term**

Re The University of Melbourne [2014] FWCA 1133 (Bissett C, 13 February 2014).

An application was made for the approval of an enterprise agreement known as the *University of Melbourne Enterprise Agreement 2013*. The NTEU, CEPU, CPSU, CFMEU and United Voice were all bargaining representatives.

The unions argued that the parental leave clause was discriminatory against birth fathers who take partner leave, when compared to male carers of an adopted child or, males who take permanent care leave. This was because only birth fathers were not entitled to the return to work bonus.

The Commission found that, in accordance with the Sex Discrimination legislation, it was incorrect to compare birth fathers with men who take adoption and permanent care leave. Correctly, these employees should be compared with a person without family responsibilities. In this case, no person taking partner leave, regardless of gender, is entitled to the bonus. Therefore, the Commission found that term was not discriminatory and the agreement was approved.

Case example: **Unlawful term included – Right of entry**

Re Australian Industry Group [2010] FWAFB 4337 (Giudice J, Watson SDP, Blair C, 11 June 2010), [(2010) 196 IR 125].

Pacific Brands Limited t/a Dunlop Foams sought approval of an agreement that contained a clause dealing with right of entry. The clause entitled an authorised representative of the union to enter the employer's premises at all reasonable times to interview employees but not so as to interfere unreasonably with the employer's business.

At first instance, the agreement was approved. However, AIG appealed the decision on basis that the Commission should not have approved the agreement because it contained an unlawful right of entry term. To be unlawful, the agreement term must have three elements: it must provide for an entitlement; the entitlement must be to enter premises for a purpose referred to in s.481 (investigation of suspected contraventions) or to hold discussions of a kind in s.484, and the term must purport to permit entry other than in accordance with Part 3–4.

The Full Bench found that the right of entry clause provided for an entitlement, that entitlement related to entering premises and holding discussions and had been drafted so as to apply in a manner clearly inconsistent with the Part 3–4. The Full Bench found that the right of entry clause was unlawful and quashed the approval of the agreement.

Requirement that an enterprise agreement does not include any designated outworker terms

An enterprise agreement cannot include any designated outworker terms.[75]

The following terms, so far as they relate to outworkers in the textile, clothing or footwear industry, are designated outworker terms:

- a term that deals with the registration of an employer or outworker entity
- a term that deals with the making and retaining of, or access to, records about work to which outworker terms of a modern award apply

[75] Fair Work Act s.186(4A).

- a term imposing conditions under which an arrangement may be entered into by an employer or outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers
- a term relating to the liability of an employer or outworker entity for work undertaken by the outworker. This includes a term that provides for the outworker to make a claim against the employer or outworker entity
- a term requiring minimum pay or other conditions, including the NES, to be applied to an outworker who is not an employee[76]
- a term that deals with the filing of records about work to which outworker terms of a modern award apply
- a term dealing with the provision of materials, or
- a term that is incidental to a designated outworker term, including a term dealing with the observance of the award.[77]

[76] Fair Work Act s.12
[77] Fair Work Regulations reg. 1.04.

Part 5 – Agreement making process

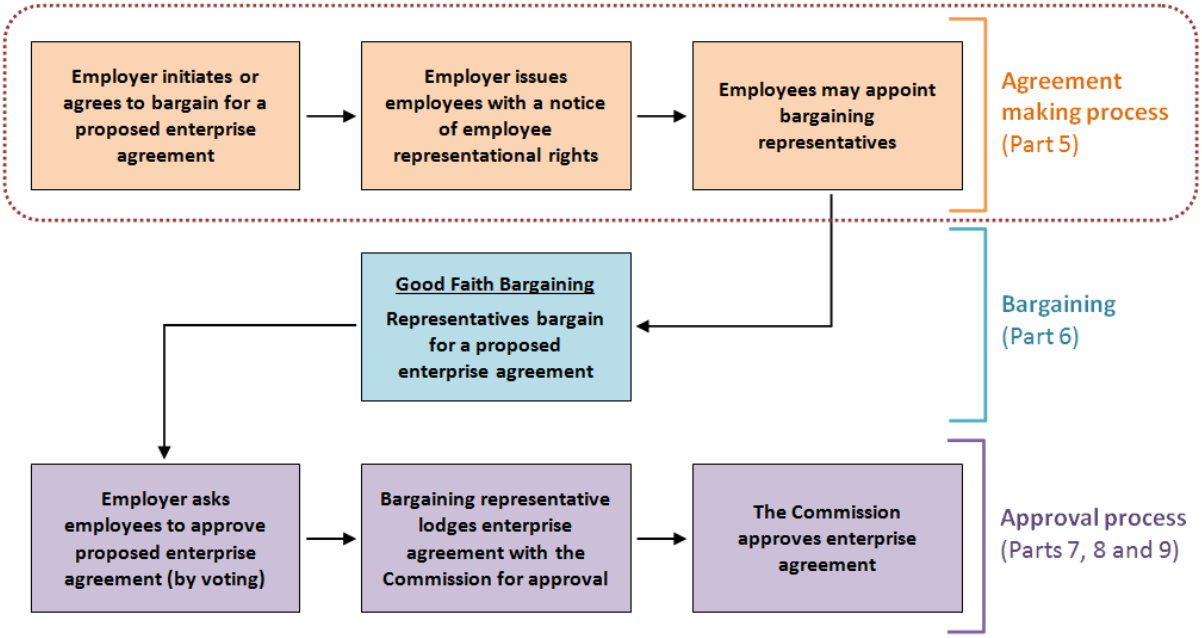
Starting point for bargaining

There are several mandatory steps that must be taken when starting to bargain for a proposed enterprise agreement. Some of these steps have specific timeframes set by the *Fair Work Act 2009* (the Fair Work Act) which must be met.

The point at which the parties start the bargaining and agreement making process, whether by agreement or order of the Fair Work Commission (the Commission), is the 'notification time'. This is the starting point for everything.There are no shortcuts

The process for making an enterprise agreement is set out in the Fair Work Act. If you do not meet the requirements of the Fair Work Act then the Commission **CANNOT** approve the agreement.

Stage in bargaining process



Notification time

See Fair Work Act s.173(2)

The **notification time** for a proposed enterprise agreement is the time when:

- the employer agrees to bargain, or initiates bargaining, for the proposed agreement
- a majority support determination in relation to the proposed agreement comes into operation
- a scope order in relation to the proposed agreement comes into operation, or
- a low-paid authorisation in relation to the proposed agreement that specifies the employer comes into operation.

Employer initiates or agrees to bargain

The employer can initiate the bargaining and agreement making process under the Fair Work Act.

Another possible option is that employees or their bargaining representative (for example a union) may approach the employer and suggest that they commence the bargaining and agreement making process. If the employer agrees, the process can start immediately. If the employer does not agree to bargain, one option available to employees is to apply to the Commission for a majority support determination.

Related information

- Majority support determinations
- Scope orders
- Low-paid authorisations

Representation

Who can be represented in bargaining?

An employee who will be covered by a proposed enterprise agreement has the right to appoint a bargaining representative to represent the employee in bargaining for the proposed agreement or in a matter before Fair Work Commission about bargaining for the agreement.

Employees must be notified of their right to be represented

Notice of right to be represented during bargaining

See Fair Work Act ss.173–174; Fair Work Regulations reg. 2.04, 2.05

An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

- will be covered by the agreement, and
- is employed at the notification time for the proposed agreement.

A notice of employee representational rights (Notice) does not have to be given in circumstances where the employer has already given the employee a Notice within a reasonable period before the notification time for the agreement.[78] For example, if an employer issues an employee with a Notice at the time the employer agrees to bargain, the employer is not required to issue another Notice to that employee if a scope order subsequently varies the group of employees who will be covered by the agreement, provided the Notice was issued within a reasonable period of the scope order.[79]

Exclusion – Greenfields agreements

There is no requirement for an employer (or employers) to give a Notice before negotiating a greenfields agreement. This is because there should be no employees employed. The persons who will be necessary for the normal conduct of the enterprise and will be covered by the agreement will be employed **AFTER** the greenfields agreement has been made.

[78] Fair Work Act s.173(4).
[79] Explanatory Memorandum to Fair Work Bill 2008 at para. 702.

An employer (or employers) negotiate a greenfields agreement with the relevant union (or unions).

Related information

- Greenfields agreement
- Common defects & issues – Notice of employee representational rights (NERR)

Time limit – Within 14 days of notification time

The Notice must be given to each employee who will be covered by the proposed enterprise agreement as soon as practicable, and no later than 14 days, after the notification time. If the Notice is issued after the 14 day period it may be invalid.[80]

What happens with new employees?

The Fair Work Act does not require that an employer provide the Notice to any employees who are employed after the notification time for the proposed enterprise agreement.[81]

Related information

What is a day?

-

- Genuine agreement

When is the last notice of employee representational rights given?

Only a notice of employee representational rights (Notice) that is issued as soon as practicable, and no later than 14 days after the notification period has commenced, can be taken to be a Notice for the purposes of section 173(1) of the Fair Work Act. Any other notice issued, even if it claims to have the required identity, is no more than a 'document without statutory standing'.[82]

Determining the exact date an employer agreed to bargain (the notification time) can be difficult as there is no requirement to provide a formal notice to initiate bargaining.

When determining whether the Notice has been issued in accordance with the Fair Work Act, the Commission generally relies on the information provided by the applicant in its declaration.

Related information

- Notification time
- Who can be represented in bargaining?

[80] *Transport Workers' Union of Australia v Hunter Operations Pty Ltd* [2014] FWC 7469 (Hatcher VP, 30 October 2014) at paras 69–79; *Uniline Australia Limited* [2016] FWCFB 4969 (Gostencnik DP, Riordan C, 25 August 2016) at paras 55–56, 110–113; see also *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019).
[81] Fair Work Act s.173(1)(b); *Re Walter Wright Cranes Pty Ltd* [2013] FWC 4168 (Richards SDP, 27 June 2013) at para. 17.
[82] *Re Walter Wright Cranes Pty Ltd* [2013] FWC 4168 (Richards SDP, 27 June 2013) at paras 32–33.

What are ‘all reasonable steps’?

An employer must take all reasonable steps to provide a Notice to each employee.[83]

What is a ‘reasonable’ step will depend upon the circumstances of the employer and employee.[84] Once an employer has decided what steps they consider are reasonable in the circumstances, they may adopt one or more of the steps. The Commission has taken the view that the reference in the legislation to ‘all reasonable steps’ is not a requirement that employers undertake each and every reasonable step to provide the Notice.[85]

How the Notice is given

Each of the following methods is a way in which the employer for a proposed enterprise agreement may give an employee who will be covered by the agreement the Notice. The employer may:

- give the Notice to the employee personally
- send the Notice by pre-paid post to the employee’s residential address or a postal address nominated by the employee
- send the Notice (or an electronic link that takes the employee directly to a copy of the Notice on the employer’s intranet) to the employee’s email address at work or another email address nominated by the employee
- fax the Notice to the employee’s fax number at work, at home or to another fax number nominated by the employee, or
- display the Notice in a conspicuous location at the workplace that is known by and readily accessible to the employee.

The employer is not prevented from using another manner of giving the Notice to the employee.[86]

Content and form of the Notice

The Notice must contain only the content prescribed by the Fair Work Regulations (Regulations) and be in the form prescribed in Schedule 2.1 to the Regulations.[87] The prescribed Notice is set out in full below.[88]

Related information

- **Error! Reference source not found.**

[83] Fair Work Act s.173(1); see also *Uniline Australia Limited* [2016] FWCFB 4969 (Watson VP, Gostencnik DP, Riordan C, 25 August 2016).
[84] *Re University of New South Wales* [2010] FWAA 9588 (Lawler VP, 16 December 2010) at para. 24; affirmed by *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011), [(2011) 210 IR 244].
[85] *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011) at para. 13, [(2011) 210 IR 244].
[86] Fair Work Regulations reg. 2.04.
[87] Fair Work Act s.174(1A).
[88] Fair Work Regulations reg. 2.05.

Important

The employer must **NOT** change the content of the Notice by adding or removing any text, apart from inserting the employer's name and other details which are specifically required to be included.

If the employer varies the content of the Notice, the Fair Work Commission cannot approve the enterprise agreement.

Employee may appoint a bargaining representative

The Notice must specify that the employee may appoint a bargaining representative to represent the employee in bargaining for the proposed enterprise agreement.

Default bargaining representative

The Notice must explain that:

- if the employee is a member of union that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the proposed enterprise agreement, and
- the employee does not appoint another person as his or her bargaining representative;

the union will be the bargaining representative of the employee.

Bargaining representative if a low-paid authorisation is in operation

If the Commission has made a low-paid authorisation in relation to the proposed enterprise agreement, the Notice must explain that the union that applied for the authorisation will be the bargaining representative of the employee unless the employee appoints another person as his or her bargaining representative.

Copy of instrument of appointment to be given

The Notice must explain that if an employee appoints another person as his or her bargaining representative, a copy of the instrument of appointment must be given to the employee's employer.

Providing additional information

Section 174(1A) of the Fair Work Act states that the Notice must not contain any other content.

In considering the meaning of section 174(1A), the Full Bench of the Commission has stated that the section is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them. Section 174(1A) is directed at the form and content of the Notice. It does not require the Notice to be provided in isolation and to construe the provision in that way would produce some absurd results, for example, it would prevent an employer from providing employees with a simple covering letter or an offer of interpreter services.[89]

These problems are avoided if section 174(1A) is interpreted as a means of curing the mischief to which it was directed, namely, ensuring that the actual Notice is not amended in form or content from the template provided in Schedule 2.1 of the Regulations.[90]

Where additional material accompanies a document which contains the content, and is in the form, prescribed in the Regulations, the issue to be determined is what purports to be the Notice.[91] Where additional material is provided with the Notice and that material has the character of being, for example, misleading or intimidatory, then this will be relevant to the Commission's assessment of

[89] *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 (Ross J, Hatcher VP, Asbury DP, Gostencnik DP, Simpson C, 2 April 2014) at para. 67.
[90] Ibid., at para. 68.
[91] Ibid., at para. 69.

whether the enterprise agreement had been 'genuinely agreed' by the employees. However, it is not a basis for finding that a Notice has not been given in accordance with the Fair Work Act.[92]

Case example: **Form and content of notice of employee representational rights correct – Application of the *Acts Interpretation Act 1901* (Cth)**

Serco Australia Pty Limited v United Voice and the Union of Christmas Island Workers [2015] FWCFB 5618 (Hatcher VP, Lawrence DP, Riordan C, 2 September 2015).

At first instance the Commission had dismissed an application for approval of an enterprise agreement on the basis that the notice of representational rights (the Notice) issued by Serco to its employees did not conform to the prescribed form of the notice, did not therefore comply with the requirements of section 174(1A), and was invalid as a result.

The only difference between the Notice issued and the prescribed form (set out in Schedule 2.1 of the Fair Work Regulations) as being that where the prescribed form refers to the 'Fair Work Commission', the Notice referred to 'Fair Work Australia'.

Section 25B(1)(b) of the *Acts Interpretation Act* provides that where an Act alters the name of a body or an office, in any instrument under an Act 'a reference to the body or the office under the former name shall … be construed as a reference to the body or the office under the new name.'

The Full Bench concluded that section 25B(1)(b) of the *Acts Interpretation Act* operated in respect of the Notice to make it compliant with section 174(1A). The reference to 'Fair Work Australia' in the Notice should be read as if the reference was to the 'Fair Work Commission'.

[92] Ibid., at para. 70.

Case example: **Form and content of notice of employee representational rights correct – Coverage of proposed agreement**

Australian Maritime Officers' Union v Harbour City Ferries Pty Ltd; Maritime Union of Australia; Australian Institute of Marine and Power Engineers [2015] FWCFB 3337 (Harrison SDP, Smith DP, Johns C, 15 May 2015).

The Australian Maritime Officers' Union v Harbour City Ferries Pty Ltd [2016] FWCFB 1151 (Hatcher VP, Booth DP, McKenna C, 15 April 2016).

An application was made for approval of the *Harbour City Ferries Maritime Agreement 2014* and the agreement was approved. The AMOU appealed the decision. It contended in the appeal that the notice of employee representational rights (NERR) issued by Harbour City Ferries (HCF) at the commencement of the negotiations failed to identify the coverage of the proposed agreement and was therefore fatally defective. A Full Bench upheld this ground of appeal and quashed the decision approving the 2014 Agreement.

Three days after the appeal decision, HCF issued a new NERR. This described the coverage of the new agreement proposed by HCF as '... employees that are currently covered by the *Sydney Ferries Maritime (AMOU and MUA) Enterprise Agreement 2012*'. The AMOU indicated that it did not agree with the coverage of the proposed agreement and advocated for the negotiation of a separate agreement to cover ferry masters and engineers.

HCF advised that there would be a vote in respect of its proposed new agreement. The terms of the 2015 Agreement were the same in substance as those of the 2014 Agreement. The vote proceeded and the result was 115-64 in favour of the 2015 Agreement. HCF lodged its application for approval of the 2015 Agreement. The Commission approved the *Harbour City Ferries Maritime Agreement 2015*.

The AMOU appealed on grounds including that HCF had not issued a valid NERR which accurately set out the coverage of the proposed agreement as required by the form prescribed under s.174(1A). The AMOU submitted that any misdescription of the coverage of the proposed agreement constituted a failure to comply with s.174(1A) and thereby rendered the NERR invalid. The Full Bench accepted that any 'non-trivial' misdescription of coverage would render a NERR invalid with the consequence that any subsequent enterprise agreement would be incapable of approval.

The Full Bench did not consider that there was any basis for the proposition that the NERR misdescribed who would be covered by the proposed agreement. There was no suggestion in the evidence or submissions that any actual employee or job which was covered by the 2012 Agreement was not covered by the 2015 Agreement, or that any actual employee or job not covered by the 2012 Agreement became covered by the 2015 Agreement. That some employees were given a different classification description for pay purposes was beside the point. The coverage was the same. The Commission's conclusion at first instance was correct and no error had been demonstrated. Permission to appeal was refused.

Case example: **Form and content of notice of employee representational rights NOT correct – Additional material accompanying a Notice**

Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU) [2014] FWCFB 2042 (Ross J, Hatcher VP, Asbury DP, Gostencnik DP, Simpson C, 2 April 2014).

The employer stapled two additional pages (containing forms for nominating a bargaining representative for the proposed enterprise agreement) to the notice of employee representational rights which was provided to employees. The Full Bench was required to considered whether section 174(1A) precluded an employer providing additional material to its employees when the Notice is given.

The Commission confirmed that failing to provide a Notice which complies with the requirements of section 174(1A) means that the Commission cannot approve the enterprise agreement.

The Full Bench concluded that section 174(1A) is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the Notice is given to them. However, the employer cannot add additional content to the Notice itself. The question for the Commission will then be what constitutes the Notice itself and what is 'additional material'.

In this case, the employer provided all three pages together to the Commission when filing the relevant statutory declaration for approval of the enterprise instrument. The Full Bench was satisfied, on the evidence, that in this case the Notice was all three pages.

Accordingly, the Notice was not valid and the enterprise agreement could not be approved.

Case example: **Form and content of notice of employee representational rights NOT correct – Notice included timeframe to appoint bargaining representative**

Cement Australia Pty Limited [2011] FWA 6917 (Ryan C, 14 October 2011).

Cement Australia Pty Ltd (the employer) made an application for approval of the *Cement Australia Packaged Products Operators West Footscray (Vic) Collective Agreement 2011* (the agreement). The statutory declaration in support of the application included a copy of the notice of employee representational rights, which was generally in the form required, with the exception that it contained an additional requirement that employees who wished to nominate a bargaining representative do so by 'Monday 15 August 2011'.

The Commission stated that the additional requirement left employees with the impression that, if they did not appoint a bargaining representative by 15 August 2011, they would not be able to have a bargaining representative.

The Commission concluded that the time limit on appointing a bargaining representative meant that the Notice was not in the form prescribed by the Fair Work Act. Accordingly, the agreement could not be approved, and the application was dismissed.

Case example: **Form and content of notice of employee representational rights NOT correct – Incorrect website reference**

Re Transit (NSW) Services Pty Ltd T/A Transit Systems [2016] FWC 2742 (Bull DP, 3 May 2016).

The prescribed form for the notice of employee representational rights (NERR) contains a reference to a website 'www.fairwork.gov.au' that must be included in the NERR. This is the website of the Fair Work Ombudsman. The NERR provided to employees by Transit made reference to a different website 'www.fwc.gov.au', this is the website of the Fair Work Commission. The website link reference was to a different website, which takes an employee to a different institution, the Fair Work Commission instead of the required website of the Fair Work Ombudsman. Both bodies have separate and distinct roles and responsibilities.

The Commission held that the website that Parliament intended be referred to in the NERR was the Fair Work Ombudsman's, in this case that was not done and Parliament's intentions were not met.

Transit, whilst acknowledging that the NERR contained a reference to the incorrect website, urged the Commission to consider the error as being a matter of such insignificance it would not be appropriate to allow such an error to prevent the agreement's approval.

The Commission accepted that minor typographical or insignificant errors would not on the face of it render a NERR invalid, however the Commission could not accept that providing an incorrect website reference could be described as being insignificant, minor or inconsequential.

The Commission found that s.181(2) has not been complied with as employees had been directed to an incorrect website. Therefore the Commission could not be satisfied that the agreement had been genuinely agreed to as no valid notice was provided. The application for approval of the agreement was dismissed.

Schedule 2.1 – Notice of employee representational rights

(regulation 2.05)

Fair Work Act 2009, subsection 174(1A)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement *([name of the proposed enterprise agreement])* which is proposed to cover employees that *[proposed coverage]*.

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies – include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative.

[If a low-paid authorisation applies to the agreement – include:]

Fair Work Commission has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union's status as your representative, or you are a member of another union that also applied for the authorisation.

[if the employee is covered by an individual agreement-based transitional instrument – include:]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.

Bargaining representatives

Employers and employees may appoint any person as their bargaining representative for a proposed enterprise agreement. Bargaining representatives are entitled to bargain for enterprise agreements and depending on the type of agreement will usually be entitled to apply to the Commission for orders and determinations relating to enterprise bargaining. Bargaining representatives are also entitled to represent a person in other types of matter before the Commission.

Bargaining representatives are required to meet the good faith bargaining requirements. Non-compliance with these requirements exposes a bargaining representative to bargaining orders. (This only applies to bargaining representatives for a single-enterprise agreement or bargaining representatives for multi-enterprise agreements in the low-paid bargaining stream.)

Once bargaining for a proposed enterprise agreement has commenced, all bargaining representatives are required to recognise and bargain with the other bargaining representatives for the proposed agreement.[93]

Related information

- Good faith bargaining requirements
- Bargaining orders

Who can be a bargaining representative?

 See Fair Work Act ss.176–177

For a proposed single-enterprise agreement (that is not a greenfields agreement)

The following people can be bargaining representatives for a proposed enterprise agreement:

- an employer that will be covered by the agreement
- a representative appointed by an employer
- an employee that will be covered by the agreement
- a representative appointed by an employee, or
- a union (by default if an employee is a member).[94]

Employee may appoint himself or herself

An employee who will be covered by the agreement may appoint himself or herself as his or her bargaining representative for the proposed agreement.

Role of unions

A union is the default bargaining representative for an employee if:

- the employee is a member of the union, and
- the union is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

[93] Fair Work Act s.228(1)(f).
[94] Fair Work Act s.176.

However, the union will not be the employee's bargaining representative if:

- the employee revokes the status of the union as his or her bargaining representative; or
- appoints another person, or appoints himself or herself, as bargaining representative for the agreement.[95]

A union or an official of a union (whether acting in that capacity or not) cannot be a bargaining representative of an employee unless the union is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.[96]

> **An example** is provided in the Explanatory Memorandum:[97]
>
> This means, that during bargaining, an employee who is a member of a union may appoint their own bargaining representative with the effect that the automatic appointment of the union as that employee's bargaining representative will cease to apply.

For a proposed single-enterprise agreement that is a greenfields agreement

The following persons can be bargaining representatives for a proposed enterprise agreement that is a greenfields agreement:

- an employer that will be covered by the agreement
- a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement
- a union:
    - that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement, and
    - with which the employer agrees to bargain for the agreement.[98]

For a proposed multi-enterprise agreement if a low-paid authorisation is in operation

If a union applied for the authorisation and the union would not otherwise be a bargaining representative of an employee who will be covered by the agreement, the union is taken to be a bargaining representative of the employee unless the employee:

- is a member of another union that also applied for the low-paid authorisation
- has appointed another person as his or her bargaining representative, or
- has revoked the status of the union as his or her bargaining representative.[99]

[95] Fair Work Act ss.176(1)(c) and 176(3).
[96] Fair Work Act s.176(3).
[97] Explanatory Memorandum to Fair Work Bill 2008 [716].
[98] Fair Work Act s.177.
[99] Fair Work Act ss.176(1)(b) and 176(2).

Nominating a bargaining representative

See Fair Work Act s.178

Notification in writing

For a person to be recognised as a bargaining representative for a proposed enterprise agreement, they **must** be appointed in writing (by an instrument of appointment), except in the case of a union that is a default bargaining representative.

A copy of the instrument of appointment must:

- for an appointment made by an employee who will be covered by the agreement – be given to the employee's employer
- for an appointment made by an employer that will be covered by a proposed enterprise agreement (that is not a greenfields agreement) – be given, on request, to a bargaining representative of an employee who will be covered by the agreement, and
- for an appointment made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement – be given, on request, to a union that is a bargaining representative for the agreement.

When appointment of a bargaining representative comes into force

An appointment of a bargaining representative comes into force on the day specified in the instrument of appointment.

No limitations

There is no limitation within the Fair Work Act on when a person may appoint or change or revoke the appointment of a bargaining representative.

Independence

A bargaining representative of an employee must be free from control by or improper influence from the employee's employer or another bargaining representative.[100]

Revoking the appointment of a bargaining representative

See Fair Work Act s.178A

For a proposed enterprise agreement (that is not a greenfields agreement)

The appointment of a bargaining representative for a proposed enterprise agreement, and the default representation by a union of a member, may be revoked by written instrument.

A copy of a revocation instrument:

- made by an employee who will be covered by the agreement – must be given to the employee's employer, and
- made by an employer that will be covered by a proposed enterprise agreement, other than a single-enterprise agreement that is a greenfields agreement – must be given to the bargaining representative and, on request, to a bargaining representative of an employee who will be covered by the agreement.

[100] Fair Work Regulations reg. 2.06.

For a proposed single-enterprise agreement that is a greenfields agreement

The appointment of a bargaining representative made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement may be revoked by written instrument.

A copy of a revocation instrument must be given to the bargaining representative and, on request, to a union that is a bargaining representative for the agreement.

Case example: **Able to act as a bargaining representative**

Uniting Church in Australia Property Trust (Q) T/A Blue Care and Wesley Mission Brisbane v Queensland Nurses' Union of Employees [2014] FWCFB 1447 (Acton SDP, Drake SDP C, Booth C, 24 March 2014).

The employer engaged two types of employees, nurses and support and care employees, covered by two separate enterprise agreements. During bargaining for a new enterprise agreement in relation to care and support employees, the Commission made a bargaining order following an application from the Queensland Nurses' Union of Employees (QNU).

The employer appealed the decision to make the order on the basis the Commission had erred in finding that QNU was a bargaining representative for the proposed enterprise agreement.

At first instance, the Commission undertook an analysis of QNU's eligibility rules and concluded that the work performed by the two employees who were members of the QNU was of a type that entitled QNU to represent those employee's industrial interests.

The employer argued that the Commission had mischaracterised the work performed by the two QNU employees and that it could not meet the definition of the relevant work within the QNU's eligibilty rules. On that basis, the employer argued, QNU was not entitled to represent the industrial interests of the two employees.

In finding that QNU was entitled to represent the industrial interests of the two employees, the Full Bench considered the work to be performed by the employees under the proposed enterprise agreement. The Commission was satisfied that the classification structure in the proposed agreement provided enough flexibility that the work to be performed by the two employees would include work that met the relevant definition in QNU's eligibility rules. QNU was therefore a bargaining representative for the proposed enterprise agreement.

Case example: **NOT able to act as a bargaining representative**

First application – Appeal: ***Kaizen Hospitals (Essendon) Pty Ltd v Australian Nursing Federation*** [2012] FWAFB 8866 (Boulton J, Kaufman SDP, Cribb C, 18 October 2012), [(2012) 224 IR 400].

Second application – Approval decisions: ***Re Australian Nursing Federation*** [2012] FWAA 10420, [2012] FWAA 10505, [2012] FWAA 10511 (Hamilton DP, 20 December 2012).

Appeal: ***Re Kaizen Hospitals (Malvern) Pty Ltd T/A Malvern Private Hospital and Others*** [2013] FWCFB 1846 (Watson SDP, Hamberger SDP, Cargill C, 26 March 2013).

Judicial review: ***Kaizen Hospitals (Essendon) Pty Ltd v Australian Nursing and Midwifery Federation*** [2014] FCA 428 (2 May 2014).

Full Court appeal: ***Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd*** [2015] FCAFC 23 (5 March 2015).

The Commission, at first instance, approved three enterprise agreements covering nurses at the Essendon Private Hospital, Malvern Private Hospital and Melbourne Eastern Private Hospital in Victoria. In relation to the original applications, each application:

- was made in the name of the employing company at the relevant hospital
- identified SIAG Pty Ltd as the applicant's representative
- stated that the applicant company appointed SIAG as its bargaining representative, and
- was signed by a representative of SIAG in the capacity/position as 'Employer Bargaining Representative'.

The appellants contended that the Commission erred in approving the agreements, because the hospitals did not agree to the terms of the relevant agreements, did not appoint the employer bargaining representative (SIAG) which made the applications for the approval of the agreements, and did not authorise the company representative who made the statutory declarations in support of approval to do so.

The Full Bench found that the applications for approval were not validly made. If the applications were made by an employer bargaining representative, then they were made by one who was not validly appointed in accordance with the Fair Work Act. There was no instrument of appointment or other written document or any other evidence produced in the appeal proceedings to show that SIAG had been appointed as the employer bargaining representative for the agreements. The mere lodgement of an application in the name of an employing entity but without authorisation to do so is not sufficient to meet the requirements of the Fair Work Act. Accordingly permission to appeal was granted in each matter, the appeals were allowed and the approval of the agreements set aside.

The Australian Nursing and Midwifery Federation (ANMF) made a second application, on the basis that the employers were acting as their own bargaining representatives. These were again approved at first instance. A Full Bench of the Commission denied the hospitals' permission to appeal. The hospitals then applied to the Federal Court for a judicial review which found an absence of authority for the agent to sign agreement on behalf of the employers, the approval by the Commission at first instance was quashed.

A subsequent appeal was made to the Full Court of the Federal Court by the ANMF. The Full Court found that the employer bargaining representative was acting within the scope of his 'apparent authority' and as a consequence each agreement could be considered signed by the employer as a matter of law. The Full Court upheld the appeal and set aside the orders made by the judge in the judicial review.

Case example: **NOT able to act as a bargaining representative – Union had no member who would be covered by the agreement**

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Inghams Enterprises Pty Ltd [2011] FWAFB 6106 (Acton SDP, Hamilton DP, Simpson C, 8 September 2011), [(2011) 212 IR 351].

The AMWU gave notice to Inghams of its intention to make an enterprise agreement with Ingham Enterprises Pty Ltd in respect of employees at Grant Road, Somerville covered by the Metal, Engineering and Associated Industries Award. Inghams replied to the AMWU advising that it only had two employees in its maintenance department and both employees were covered by individual agreement-based transitional instruments with nominal expiry dates that had not yet passed. Inghams went on to advise it did not agree to commence bargaining for an enterprise agreement.

Some time subsequently Inghams initiated bargaining with two of its employees employed to conduct engineering maintenance and repairs at its Somerville plant. The two employees each appointed a person other than the AMWU as a bargaining representative. The Somerville Agreement was made as a result of the two employees voting to approve it. The application for approval was accompanied by a conditional termination instrument.

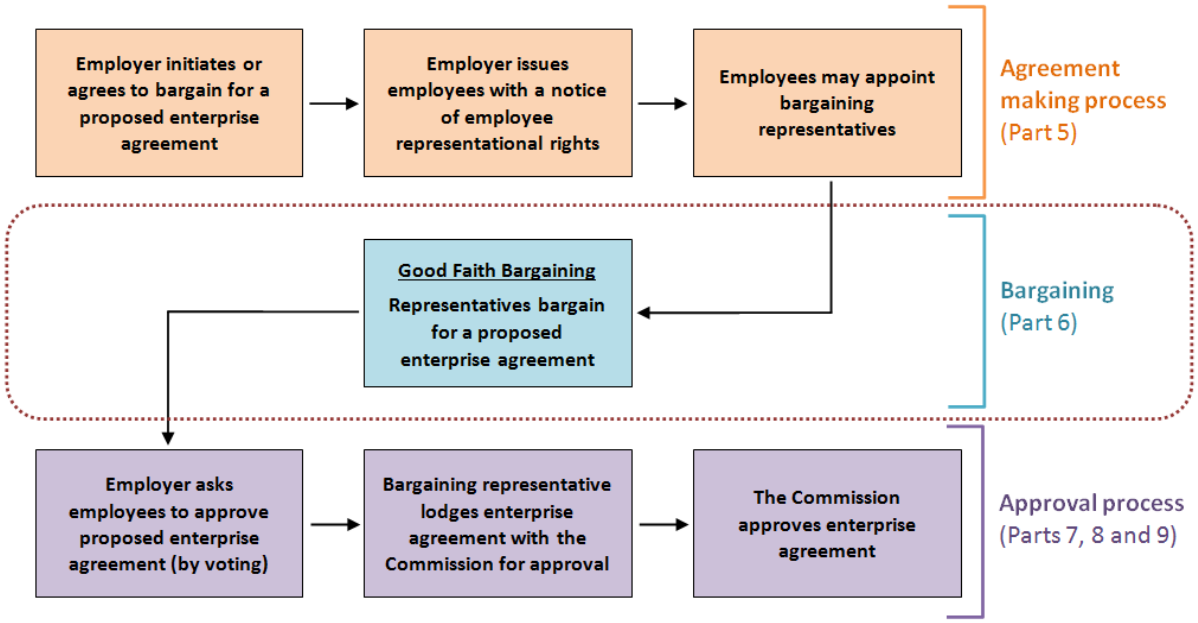
The AMWU submitted it had a right to be notified of and/or appear in the proceedings before the Commissioner for approval of the Somerville Agreement and it was not notified of or given the opportunity to appear in those proceedings.

To be a bargaining representative, the AMWU had to have at least one member who would be covered by the agreement. Evidence indicated the AMWU had no such member. As a result the Commission was not satisfied the AMWU was a bargaining representative.

Part 6 – Bargaining

In many cases, bargaining commences consensually at the invitation of either an employee bargaining representative or the employer, and negotiations between bargaining representatives proceed in good faith.[101]

Stage in bargaining process



Good faith bargaining requirements

See Fair Work Act s.228

One of the objects of Part 2-4 of the *Fair Work Act 2009* (the Fair Work Act) is to provide a framework that enables collective bargaining in good faith, particularly at the enterprise level.

The Fair Work Act sets out the good faith bargaining requirements in section 228:

> ***228 Bargaining representatives must meet the good faith bargaining requirements***
>
> *(1) The following are the **good faith bargaining requirements** that a bargaining representative for a proposed enterprise agreement must meet:*
>
> *(a) attending, and participating in, meetings at reasonable times;*
>
> *(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
>
> *(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;*
>
> *(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;*

[101] *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 22 December 2010) at para. 64, [(2010) 202 IR 180].

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements)

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

What does it mean?

The good faith bargaining requirements are generally self-explanatory.[102] They are designed to facilitate agreement making and assist bargaining representatives to bargain effectively.

The good faith bargaining system recognises that most employers and employees voluntarily and successfully bargain collectively in good faith and that most employers respect their employees' right to bargain collectively.[103]

In general, the legislative scheme might be described as one which seeks to promote agreement making but which does not compel parties to make concessions or to reach agreement. There is nothing inconsistent about encouraging parties to make agreements – and imposing an obligation upon them to try to do so – but at the same time not compelling parties to make concessions in bargaining. An agreement remains what the name implies.[104]

What is good faith bargaining?

Good faith bargaining requirements aim to ensure that all bargaining representatives act in an appropriate and productive manner. The requirements also seek to facilitate improved communication between bargaining representatives, which is expected to reduce the likelihood of industrial action.[105]

The Fair Work Act emphasises that there is an obligation to bargain in 'good faith'. Bargain means to discuss the terms of any transaction. Discuss means to engage in conversation, examine by argument – to debate. At its most fundamental, enterprise bargaining is about communication both before and during formal negotiations. Each requirement for good faith bargaining has as its aim, purposeful or meaningful communication.[106]

Determining whether a bargaining representative is meeting the good faith bargaining requirements requires an objective assessment of the actions of the bargaining representatives.[107]

The good faith bargaining requirements do not require a bargaining representative to make concessions. A bargaining representative can meet the good faith bargaining requirements, whilst also adopting a 'hard line'.

Equally, the good faith bargaining requirements do not imply moderation of demands. The good faith bargaining requirements imply a preparedness to genuinely consider offers and proposals made by

[102] Explanatory Memorandum to Fair Work Bill 2008 at para. 951.
[103] Explanatory Memorandum to Fair Work Bill 2008; Financial Impact Statement at para. 155.
[104] *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (Collieries' Staff Division)* [2012] FWAFB 1891 (Boulton J, Harrison SDP, Deegan C, 22 March 2012) at para. 27, [(2012) 217 IR 131].
[105] Explanatory Memorandum to Fair Work Bill 2008; Financial Impact Statement at para. 161.
[106] *Fair Work Australia v Union of Christmas Island Workers; Phosphate Resources Limited* [2012] FWA 1081 (Cloghan C,16 February 2012) at para. 72, [(2012) 218 IR 182].
[107] Ibid., [74].

other bargaining representatives and to take account of the bargaining representatives' reasons for their proposals. If, having done these things, a bargaining party is unmoved, it may still be bargaining in good faith. The inability of parties to reach an agreement is not evidence that either party is not meeting the good faith bargaining requirements.[108]

What is capricious or unfair conduct?

The requirement in section 228(1)(e) ('refraining from capricious or unfair conduct ...') is intended to cover a broad range of conduct. For example, conduct may be capricious or unfair if an employer:

- fails to recognise a bargaining representative
- does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees
- dismisses or engages in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining, or
- prevents an employee from appointing his or her own representative.[109]

Whether conduct is capricious or unfair can only be ascertained by an examination of all of the circumstances in a particular case.[110]

Capricious is defined as 'guided by caprice; readily swayed by whim or fancy; inconstant' and **caprice** as 'an unaccountable change of mind or conduct…' in The New Shorter Oxford English Dictionary as cited in *Liquor, Hospitality and Miscellaneous Union v Foster's Australia Ltd*.[111]

What happens if the good faith bargaining requirements are not followed?

It is anticipated that most bargaining representatives will bargain voluntarily and cooperatively without the need for assistance or intervention from the Fair Work Commission (the Commission). In the occasional cases where this is not occurring, the Fair Work Act provides mechanisms for the Commission to facilitate bargaining and, where necessary, make orders to ensure the integrity of the bargaining process.[112]

If bargaining representatives are not effectively bargaining together, an application can be made to the Commission for a bargaining order to be issued requiring bargaining representatives to bargain in good faith.[113]

Related information

- Bargaining orders

[108] *Re Public Transport Industry* Print L5622 (AIRC, Hancock SDP, 30 September 1994), at p. 3; see also *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* [1999] FCA 310 at p. 45.
[109] Explanatory Memorandum to Fair Work Bill 2008 at para. 951.
[110] *Construction, Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (Giudice J, McCarthy DP, Larkin C, 5 May 2010) at para. 7, [(2010) 195 IR 58].
[111] [2009] FWA 750 (Kaufman SDP, 28 October 2009) at para. 13.
[112] Explanatory Memorandum to Fair Work Bill 2008 at para. 946.
[113] Explanatory Memorandum to Fair Work Bill 2008; Financial Impact Statement at para. 159.

Case example: **Parties NOT meeting good faith bargaining requirements – No real intention to negotiate**

'Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (Collieries' Staff Division [2012] FWAFB 1891 (Boulton J, Harrison SDP, Deegan C, 22 March 2012).

Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia [2012] FWAFB 1891 (Boulton J, Harrison SDP, Deegan C, 22 March 2012), [(2012) 217 IR 131].

Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia and Another [2012] FCA 764 (19 July 2012), [(2012) 206 FCR 576].

Endeavour Coal conducts coal mining activities at the Appin Mine in New South Wales and employs a range of staff employees who are engaged in supervisory, professional, administrative, clerical or technical duties. APESMA represents the industrial interests of such employees and had been seeking to negotiate an enterprise agreement to cover those employees. A majority support determination was issued requiring Endeavour Coal to bargain for a proposed enterprise agreement covering the employees.

At least 12 bargaining meetings were held between Endeavour Coal and APESMA over a twelve month period. APESMA produced various draft agreements for discussion. An impasse was reached in the negotiations. APESMA submitted that the impasse arose because the real position of Endeavour Coal was that it was never going to agree to an enterprise agreement covering the staff employees and that it therefore did not matter what concessions or changes to proposals APESMA made in the negotiations. Endeavour Coal submitted that the impasse was the result of APESMA not changing its position on various issues so as to address the concerns and objections raised by Endeavour Coal.

APESMA made an application to the Commission for a bargaining order against Endeavour Coal. The grounds for the application included that the conduct and actions of Endeavour Coal did not meet the good faith bargaining requirements and undermined the collective bargaining process. At first instance and on appeal, the Commission was satisfied that Endeavour Coal was not meeting the good faith bargaining requirements. The unwillingness of Endeavour Coal to enter into enterprise agreement negotiations with APESMA had continued in modified form after the making of the majority support determination. In particular, it was noted that Endeavour Coal had refused during the bargaining process to make any substantive contribution to the possible content of an enterprise agreement or to put any proposals of its own.

The Commission concluded that Endeavour Coal was bargaining with APESMA with no real intention to negotiate an enterprise agreement and contrary to the good faith bargaining requirements, and made a number of bargaining orders. On appeal, the Full Bench agreed with the Commission's conclusion and adopted all but one of the orders. Endeavour Coal sought judicial review of the Full Bench's decision. The Federal Court agreed with the conclusion that Endeavour Coal was not meeting the good faith bargaining requirements in certain respects, but ultimately concluded that some of the orders made were outside the power of the Commission to make.

Case example: **Capricious or unfair conduct**

Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Ridders Fresh Pty Ltd T/A Tibaldi Smallgoods; Australasian Meat Industry Employees' Union, The-Victorian Branch v Ridders Fresh Pty Ltd T/A Tibaldi Smallgoods [2013] FWC 1250 (Roe C, 27 February 2013).

The employer commenced enterprise bargaining with employees and the AMEIU in late 2012. A number of meetings were held and some issues agreed upon.

On 7 February 2013, the employer was advised that a number of employees to be covered by the proposed enterprise agreement had joined the AMWU (there was no dispute regarding the eligibility of the employees to do so) and that those employees wished to be represented by the AMWU with respect to bargaining for the proposed enterprise agreement.

On 11 February 2013, an AMWU representative met with the employer to discuss the proposed enterprise agreement and it was agreed that the parties would meet again on 15 February 2013 to discuss the possibility of a separate enterprise agreement for maintenance employees (who were AMWU members) and the AMWU's log of claims.

At the meeting on 15 February 2013, the employer advised the AMWU that the proposed agreement would be put to a vote on 21 February 2013.

The AMWU made an application for bargaining orders to prevent the vote taking place before the AMWU had the opportunity to advance its log of claims and receive a response on those claims from the employer.

The Commission concluded that, in the circumstances, the employer's decision to proceed with the vote was capricious and unfair as it was directly inconsistent with the understanding of the AMWU and its members regarding the purpose of the meeting on 15 February 2013. The Commission concluded that the conduct of the employer effectively denied the AMWU recognition and any real opportunity for bargaining.

The Commission ordered that the employer refrain from holding a vote and that two further bargaining meetings be held.

Case example: **NOT capricious or unfair conduct – Parties unable to agree after very long period of negotiation**

Construction, Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd [2010] FWAFB 3510 (Giudice J, McCarthy DP, Larkin C, 5 May 2010), [(2010) 195 IR 58].

At first instance, the Commission refused an application by the CFMEU for a bargaining order directed to Tahmoor Coal.

The Commission found that the order as sought would limit Tahmoor's ability to communicate directly with its employees in relation to the matters which were the subject of bargaining. It would also stop Tahmoor putting a proposed enterprise agreement to the employees for a vote for 60 days unless the bargaining representatives agreed to the terms of the proposed agreement or the Commission had determined that the negotiations had reached an impasse.

The Full Bench found that the Commission was entitled to conclude that after a very lengthy period of negotiations the parties were simply unable to agree. In those circumstances, it was open to the Commission to conclude that it was not capricious or unfair conduct for the respondent to seek to explain its negotiating position to the employees directly, or to put its proposed agreement to the employees at a ballot. There was no error in the finding that Tahmoor Coal did not breach the good faith bargaining requirements.

How long does bargaining take?

The Fair Work Act requires that a minimum of 21 clear days pass between the issue of the last notice of employee representational rights and the employer requesting that employees approve the agreement by voting. The Fair Work Act does not otherwise regulate the length of time for bargaining to take place.

The length of bargaining will vary depending on a number of factors, such as the nature of the relevant industry, the number of bargaining representatives and the number of issues about which the representatives can agree.

In some circumstances, where an employer requests employees to vote to approve a proposed agreement, employees may vote not to approve the agreement. Bargaining can continue after employees have voted not to approve the agreement.

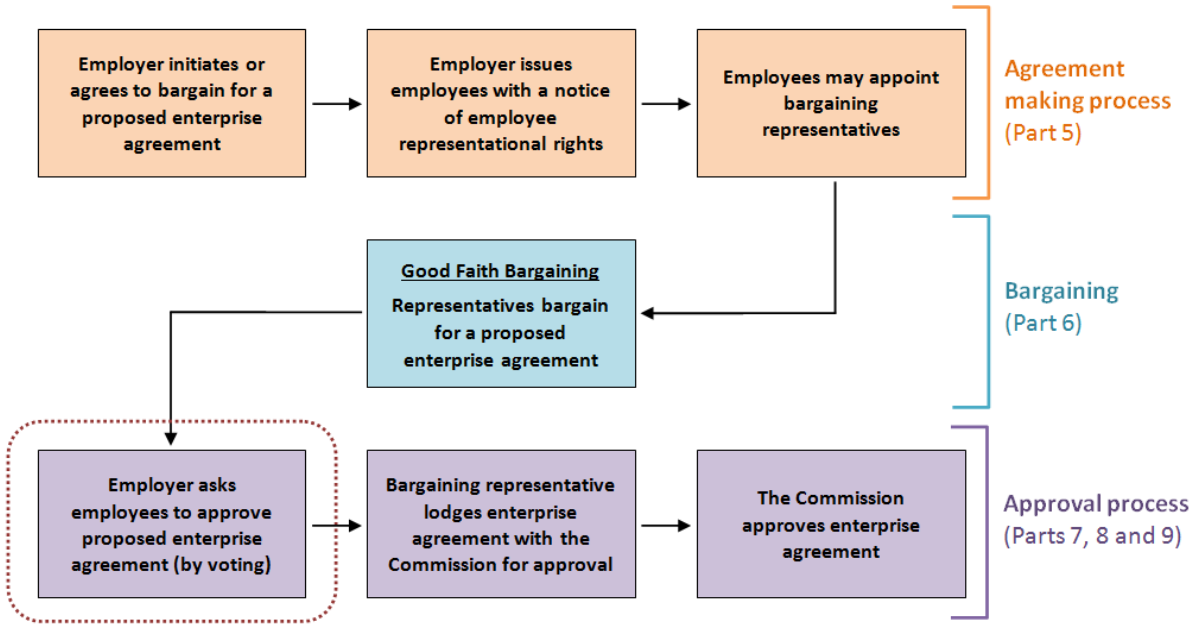
Related information

What is a day?

-

Part 7 – Enterprise agreement approval process – Voting

Stage in bargaining process



Preparing to vote

See Fair Work Act s.181

When an employer believes a suitable proposed enterprise agreement has been negotiated with the other bargaining representatives, the employer may put the proposed enterprise agreement to a vote of the employees to be covered by the agreement.

Before an employer requests that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with certain requirements set out in the *Fair Work Act 2009* (the Fair Work Act).

Access period

See Fair Work Act s.180

Important

The **access period** for a proposed enterprise agreement is the **7-day period ending immediately before the start of the voting process** to approve the proposed enterprise agreement.

The access period consists of seven clear calendar days.[114]

Example

If an employer plans to request that employees vote on the proposed agreement on Wednesday 25 February 2015, the access period will run from after midnight Tuesday 17 February 2015 to midnight Tuesday 24 February 2015.

Related information

What is a day?

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Employees must be given a copy of the proposed enterprise agreement

The employer must take all reasonable steps to ensure that:

- during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:
  - the written text of the agreement, and
  - any other material incorporated by reference in the agreement;[115] or

the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.[116]

Employees must be notified about the voting process

The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:

- the time and place at which the vote will occur, and
- the voting method that will be used.[117]

[114] *Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd* [2018] FWCFB 2732 (Hatcher VP, Dean DP, Hunt C, 21 June 2018) at para. 42.
[115] See for example *Construction, Forestry, Maritime, Mining and Energy Union v Dawsons Maintenance Contractors Pty Ltd* [2018] FWCFB 2992 (Catanzariti VP, Hamilton DP, Wilson C, 11 July 2018).
[116] Fair Work Act s.180(2).
[117] Fair Work Act s.180(3).

Neither of subsections 180(2) and (3) of the Fair Work Act require the employer to do, in absolute terms, the things set out in those subsections. What is required by each subsection is for the employer to **'take all reasonable steps'** to do the things required.

As a result it may be, in a particular case, that an employer has notified some or all of the employees of the date, place and method of voting after the start of the access period, but on the facts of the particular case, the Commission might not be satisfied that the employer took all reasonable steps to do so by the start of the access period.[118]

What is the voting process and when does it begin?

The 'voting process' described in s.181(1) of the Fair Work Act is the process that is characterised by an employer that will be covered by a proposed enterprise agreement requesting 'the employees employed at that time who will be covered by the agreement to approve the agreement by voting for it'. The request made by the employer is to approve the agreement **by voting for it**.[119]

An agreement may only be approved through a vote of employees employed at the time of the vote who will be covered by the agreement. The request to approve the agreement and the vote are not separate stages of the voting process. The voting process starts when an employee is first able to cast a valid vote to approve the agreement and not at some earlier time when an employer may provide to employees the ballot paper.[120]

Terms of the agreement must be explained

See Fair Work Act s.180(5)

For the Commission to be satisfied that there was genuine agreement the employer must take all reasonable steps before requesting that the employees vote to ensure that:

- the terms of the agreement, and the effect of those terms, are explained to the relevant employees, and
- the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees. The following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with this requirement:
    - employees from culturally and linguistically diverse backgrounds
    - young employees, and
    - employees who did not have a bargaining representative for the agreement.

The purpose of this explanation is to enable the employees to cast an informed vote, so that they know what it is they are being asked to agree to, and to help them to understand how their wages and working conditions might be affected if they vote in favour of the agreement.[121]

[118] *Australian Municipal, Administrative, Clerical and Services Union v TAB Agents Association (SA Branch) Inc.* [2015] FWCFB 3545 (Boulton J, Gostencnik DP, Blair C, 17 July 2015) at para. 12.
[119] *Australian Municipal, Administrative, Clerical and Services Union v TAB Agents Association (SA Branch) Inc.* [2015] FWCFB 3545 (Boulton J, Gostencnik DP, Blair C, 17 July 2015) at para. 18.
[120] Ibid., at para. 20.
[121] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 115.

Providing evidence

In order for the Commission to determine whether the employees had genuinely agreed to the agreement, it needs to consider whether the employees were likely to have understood its terms and effect.[122]

Without knowing the content of the explanation, the Commission cannot be satisfied that all reasonable steps have been taken to ensure that the terms and their effect had been explained to the employees who voted on the agreement, or that they have genuinely agreed to the agreement.[123]

A simple statement by an employer that an explanation has been given is not enough to satisfy the Commission that the requirement to explain the terms of the agreement has been met. In order to be satisfied, the Commission must consider the content of the explanation and the way it was given, having regard to all the circumstances and needs of the employees, and the nature of the changes made by the agreement.[124]

Related information

- Employer requirements
- Common defects & issues – Explanation of effect of the agreement
- Common defects & issues – Access to copy of agreement and incorporated material

Case example: **Employees given copy of agreement or other material – NES and Long Service Leave Act available in public domain**

Re McDonald's Australia Pty Ltd [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010), [(2010) 196 IR 155].

In the first instance decision, the Commission decided to dismiss the application to approve the proposed enterprise agreement because (amongst other things) the employers did not provide employees with a copy of the National Employment Standards or a copy of long service leave legislation referenced in the agreement. The Commission determined that this amounted to non-compliance with section 180(2) of the Fair Work Act.

On appeal, the employer challenged the Commissioner's finding that the Fair Work Act required certain documents to be provided. The Full Bench agreed, confirming that the Fair Work Act only requires that reasonable steps be taken to provide certain documents.

The Full Bench also concluded that, in this case, the employer's obligation did not extend to taking further steps to ensure that employees had access to legislation as it was freely available in the public domain.

[122] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 172.
[123] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 113.
[124] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 112.

Case example: **Employees given copy of agreement or other material – Information about the voting process provided by employer**

Re McDonald's Australia Pty Ltd [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010), [(2010) 196 IR 155].

The employer also appealed the first instance finding that it had not appropriately provided information to employees regarding the voting process. Varying information was posted on an electronic notice board called 'Metime' as well as employee notice boards. Three posters were used to convey elements of the information about the voting process as required by the Fair Work Act.

The Full Bench found the requirement was that the employer take all reasonable steps to notify employees of the time, place and voting method for a ballot prior to the access period for the agreement. The employer adopted a variety of means of communication and provided extensive details of these communications. The Full Bench was satisfied that the employer and the union adopted a collaborative approach to communicating to employees about the voting process. In the Full Bench's view, the approach was detailed, thorough and comprehensive.

Case example: **Employees given copy of agreement or other material – Provision of documents during multiple access periods**

Re MSS Security Pty Limited [2013] FWCA 1474 (Lee C, 8 March 2013).

An application was made for the approval of an enterprise agreement, which was made after two previous 'no' votes.

The proposed enterprise agreement contained references to the NES and incorporated some terms of previous enterprise agreements. United Voice objected to the approval of the enterprise agreement, alleging that MSS Security had failed to take reasonable steps to give employees copies of, or access to, relevant provisions of the NES and the previous enterprise agreements during the access period.

The Commission was satisfied that the terms of the NES were simply referred to and not incorporated. In relation to the incorporation of terms from the previous enterprise agreement, MSS Security argued that it had taken reasonable steps to provide employees with access to this material, as it was open to employees to obtain or view the material during the previous access periods (which had resulted in 'no' votes). The Commission was not satisfied that this met the requirements of the Fair Work Act. However, the Commission was satisfied that the existence of hardcopies of the relevant agreements at each guardhouse was sufficient.

Case example: **Employees NOT given copy of agreement or other material – Not all employees received a copy of additional documents**

Re Healthcare Imaging Services [2010] FWA 3473 (McKenna C, 4 May 2010).

During the access period the applicant did not take any steps, reasonable or otherwise, to ensure the employees at one of the workplaces covered by the agreement and an employee on maternity leave were provided with information and materials consistently with the timeframes required by the Fair Work Act. Neither the applicant nor the union provided any evidence on which the Commission could determine the workplaces covered by the Agreement.

As the pre-approval requirements of the Fair Work Act had not been met, the agreement was incapable of approval.

Case example: **Employees NOT notified about voting process – Notification did not occur before the start of the 'access period'**

Re Concept Engineering (Aust) Pty Ltd [2014] FWC 4227 (Ryan C, 27 June 2014).

Application was made for approval of the *Concept Engineering (Aust) Pty Ltd Metals Labour Hire Agreement 2013-2016.* The employer had advised employees by mail on 1 May 2014 that the voting method would be by postal vote and this correspondence included a voting slip and return envelope.

The Fair Work Act provides that an employer cannot request employees to vote on an enterprise agreement until the employer has undertaken three actions, namely:

- giving a copy of the enterprise agreement and any material incorporated into the agreement to employees
- providing access to a copy of the agreement and any material incorporated into the agreement for a defined period, and
- notifying employees of the time and place of the vote and voting method that will be used.

Each of these three actions has to occur within a set time. The requirement to give a copy of the agreement must occur sometime during the access period. The requirement to provide access to a copy of the agreement must occur throughout the access period. The requirement to notify employees of the voting process must occur before the start of the access period. The 'access period' is defined as being 'the 7 day period ending immediately before the start of the voting process'.

The employer had at the very least commenced the 'voting process' on 1 May 2014 by sending to employees the covering letter for the vote, the ballot paper and the return envelope for the ballot paper, the access period was therefore the 7 day period ending immediately before 1 May 2014.

The employer had not complied with the requirements of the Fair Work Act and as such there was no valid application before the Commission.

Case example: **Terms of agreement explained to employees – The terms of the agreement, and the effect of those terms, were explained**

Re McDonald's Australia Pty Ltd [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010), [(2010) 196 IR 155].

The employer also appealed the finding that employees were not provided with relevant information as required by section 180(5).

The Full Bench found a number of errors with the first instance approach. The Fair Work Act only requires reasonable steps to be taken to ensure that the terms and conditions are explained to employees. In addition, there is no requirement in the Fair Work Act for the employer to provide a full explanation of the terms of a proposed agreement before requesting that employees vote on the agreement.

In considering the evidence, the Full Bench was satisfied that the employer took reasonable steps to ensure that the agreement was explained to employees. The documents produced by the union and the employers were comprehensive and detailed.

Case example: **Terms of agreement explained to employees – The terms of the agreement, and the effect of those terms, were explained**

National Tertiary Education Industry Union v University of New South Wales [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011) [(2011) 210 IR 244].

At first instance, the NTEU contended that the University had not adequately explained the terms of the agreement and the effect of those terms as required by the Fair Work Act because it had not identified certain disadvantageous changes from an earlier agreement made in 2006.

The Commission found that a practical approach needs to be adopted in relation to these obligations. Obviously, the nature of the explanation provided to employees who will be covered by an agreement, and the steps that will constitute 'all reasonable steps' will vary according to the circumstances of the employer and employees covered by the agreement and the complexity of the agreement. In this case, the proposed agreement was lengthy and complicated. The Commission found that the employer was not required to explain every single feature or every single clause in the agreement.

On appeal, the Full Bench did not identify any error in the Commission's approach. The Full Bench agreed with the employer's submission that the obligation on an employer to explain the terms of the agreement and the effect of those terms to employees does not require an explanation of every clause in the agreement.

Employers may request that employees vote

See Fair Work Act s.181(1)

An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time, and who will be covered by the agreement, to approve the agreement by voting for it.

Who can vote?

The employees who can participate in the vote for a proposed enterprise agreement must be:

- employed by the employer at the time of the vote, and
- covered by the proposed enterprise agreement.

Who is employed at the time?

The class of employees that can be requested to approve an agreement is described in section 181 of the Fair Work Act as 'the employees employed at the time who will be covered by the agreement'.

Related information

- Common defects & issues – Notification of vote

Example

In National Tertiary Education Industry Union v Swinburne University of Technology[125], Swinburne University requested that its 'cohort' of employees vote on a proposed enterprise agreement. The vote was held before the commencement of the 2014 academic year. The 'cohort' of employees included casual and sessional employees who had been engaged during the 2013 academic year, but who were not currently engaged and who had not yet been engaged for the 2014 academic year.

The majority of the Full Court of the Federal Court found that only employees employed at the time the employer requests the employees to approve the agreement (the time of voting) are eligible to vote. As a result, the casual and sessional employees who were engaged during the 2013 academic year, but who were not currently engaged, were not eligible to vote.

Who is covered?

Example

A mining company employs miners on various mine sites and clerical workers in the head office in the capital city. The company has been negotiating with the clerical staff for a proposed enterprise agreement which covers the clerical employees. When it is time to vote only the clerical employees who are employed at that time can vote, because the miners will **NOT** be covered by the proposed enterprise agreement they do not have a right to vote on that proposed enterprise agreement.

The intention of the legislature in using the expression 'employed at the time who will be covered by the agreement' was to ensure that the employer could only make an agreement with those employees who were named or described in the agreement and whom the agreement purported to cover.[126]

Should casual employees vote?

Casual employees are able to be covered by enterprise agreements and so must be included in votes to approve agreements. The question is how to determine which casual employees are properly included.

The general contractual characteristics of casual employment is that a person who works over an extended period of time as a casual employee will be engaged under a series of separate contracts of employment on each occasion a person undertakes work, however, they will not be engaged under a single continuous contract of employment.[127]

The majority of the Full Court of the Federal Court in *National Tertiary Education Industry Union v Swinburne University of Technology*[128] (*Swinburne*) found that only employees who are employed at

[125] [2015] FCAFC 98 (17 July 2015).
[126] *Construction, Forestry, Mining and Energy Union v Deputy President Hamberger* [2011] FCA 719 (24 June 2011) at para. 79, [(2011) 195 FCR 74].
[127] *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224 (Gostencnik DP, Binet DP, Lee C, 31 December 2018) at para. 21; citing *Predl v DMC Plastering Pty Ltd & Anor* [2014] FCCA 1066 (28 May 2104).
[128] [2015] FCAFC 98 (17 July 2015), [(2015) 232 FCR 246].

the time the employer requests that employees vote upon a proposed enterprise agreement are eligible to vote. Therefore, in order to be able to vote, a casual must be employed at that time.

The effect of the Full Court's reading of s.181(1) in *Swinburne* is that an employer should only make a request under s.181(1) to employees who are employed 'at the time', as opposed to those who are not employed at the time but who might otherwise be regarded as 'usually employed'.[129]

A person who is a casual employee but who is not working on a particular day or during a particular period, is unlikely to be 'employed' on that day or during that period.[130]

In *Swinburne* the relevant casual employees were engaged by the University as sessional employees during the 2013 academic year and were likely to be engaged as sessional employees during the 2014 academic year. Because the casual employees were not employed at the time the University requested employees to vote, they were not eligible to vote.

In *McDermott Australia Pty Ltd v AWU & AMWU*,[131] a Full Bench of the Commission held that casual employees who had accepted ongoing employment with McDermott to work on the construction of an offshore gas facility were employed by McDermott at the time they were requested to vote on the enterprise agreement, notwithstanding the fact that no work was completed at the time of the vote.[132]

Exception – Greenfields agreement

This approval step is not relevant for a greenfields agreement. This is because a greenfields agreement, by definition, relates to a genuine new enterprise where the employer or employers have not yet employed any persons who will be necessary for the normal conduct of the enterprise.[133]

Timeframe for vote

Important

An employer cannot request that a vote to approve a proposed enterprise agreement be held until at **21 clear days after the day on which the last notice of employee representational rights** (in relation to the proposed enterprise agreement) **was given**.[134]

Note: See above the separate requirements for commencing an access period before the employer requests that employees vote on the proposed agreement.

[129] *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224 (Gostencnik DP, Binet DP, Lee C, 31 December 2018) at para. 19; citing *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98 (17 July 2015) at paras 24, 27, 38, [(2015) 232 FCR 246].
[130] *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224 (Gostencnik DP, Binet DP, Lee C, 31 December 2018) at para. 22.
[131] [2016] FWCFB 2222 (Catanzariti VP, Bull DP, Williams C, 19 April 2016).
[132] Decision in *McDermott Australia Pty Ltd v AWU & AMWU* considered by Full Bench in *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry* [2018] FWCFB 7224 (Gostencnik DP, Binet DP, Lee C, 31 December 2018) at para. 32.
[133] Explanatory Memorandum to Fair Work Bill 2008 at para. 744.
[134] *Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd* [2018] FWCFB 2732 (Hatcher VP, Dean DP, Hunt C, 21 June 2018) at para. 39.

Example

If the employer gave the last Notice on Wednesday 3 February 2016, the employer cannot request that employees vote to approve the proposed agreement until at least Thursday 25 February 2015.

Simply, when calculating 21 'days', the day on which you gave the last notice of employee representational rights is not included – it is 21 clear days after that day.

Related information

What is a day?

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Interaction between access period timeframe and timeframe for vote

The 7-day access period can run concurrently with the 21-day period (between the day the last Notice was given and the vote for approval). The shortest period between the day on which an employer gives the last Notice to its employees and the day that the employer requests the employees to vote on the agreement is 21 days.[135]

Voting

See Fair Work Act s.182

A single-enterprise agreement that is not a greenfields agreement is made if the employees who will be covered by the agreement approve the proposed agreement with a majority vote.

A majority vote occurs when a majority of employees who cast a valid vote, vote to approve the enterprise agreement.

[135] Explanatory Memorandum to Fair Work Bill 2008 at para. 737.

Case example: **Employees genuinely agree**

Re Penrhos College [2012] FWAA 210 (Cloghan C, 2 April 2012).

Penrhos College made application for approval of a single-enterprise agreement to be known as the *Penrhos College Teaching Staff Enterprise Bargaining Agreement 2012*. The Independent Education Union of Australia WA Branch did not support approval of the agreement on the basis that it was not approved by a valid majority of those employees who cast a valid vote.

Of the 57 employees who cast a valid vote, 29 voted to approve the agreement. The union argued that the Commission could not be satisfied that employees genuinely agreed to the agreement because the Fair Work Act requires that a majority of employees must vote to approve the agreement. The union argued that this required 50% of employees plus 1 additional employee. The union argued that for a majority to exist in this case, it was necessary for 30 employees to vote to approve the agreement. The union calculated this number by taking 50 percent of the employees who voted (28.5), rounding this number up to 29 and adding an additional employee.

The Commission found that if the Fair Work Act had provided for a definition of majority to require a 'rounding up' rule, it would have been inclined to favour the union's approach. However, in the absence of such a definition, the Commission found that a simple majority or the greatest number of valid votes prevails over the lesser number. Accordingly, the agreement was approved.

Voting methods

The Fair Work Act does not prescribe any particular voting method. The Fair Work Act contemplates that a vote could occur by ballot, by an 'electronic method' or by some other method. The voting method is at the discretion of the employer or can be by agreement between bargaining representatives. Some commonly used voting methods are set out below.

Attendance voting

The employees vote for the proposed enterprise agreement either by completing a ballot form and placing it in a ballot box, or by a show of hands at a meeting.

Postal voting

The employees vote for the proposed enterprise agreement by completing a ballot form which has been posted to a nominated address, and is returned by return post. Postal voting is often used for employees who are absent from work on leave at the time when an attendance vote occurs.

Online voting

The employees vote for the proposed enterprise agreement by completing an electronic ballot form which may be sent to them via email, or be hosted on the employer's intranet or on an internet page.

Telephone voting

The employees vote for the proposed enterprise agreement by either phoning a telephone number and voting by using the IVR (interactive voice response) or by calling a 'yes' phone number or a 'no' phone number.

Related information

- Common defects & issues – Notification of vote

When an enterprise agreement is 'made'

Single-enterprise agreement that is not a greenfields agreement

If the employees of the employer (or each employer) who will be covered by a proposed single-enterprise agreement have been asked to approve the agreement, the agreement is **made** when a majority of those employees who cast a valid vote approve the agreement.[136]

The question of when an agreement is **made** determines the timeframe for making an application to the Commission to approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

In relation to multi-enterprise agreements, each of the employers bargaining for the multi-enterprise agreement asks their employees to vote to approve the agreement.

If the employees of each of the employers that will be covered by a proposed multi-enterprise agreement have been asked to approve the agreement, and a majority of the employees **of at least one of those employers** who cast a valid vote have approved the agreement, the agreement is **made** immediately after the end of the voting process.[137]

The emphasis on the end of the voting process reflects the fact that for a multi-enterprise agreement there may be some enterprises where the vote is against approval of the agreement and some where the vote is to approve the agreement. In such a case, the multi-enterprise agreement is only made in relation to those employers a majority of whose employees approved the agreement.[138]

Multi-enterprise agreement to be varied if not all employees approve agreement

If a multi-enterprise agreement is made but the agreement was **not** approved by employees of all of the employers proposed to be covered by the agreement, then a bargaining representative must vary the agreement so that the agreement is expressed to cover only each employer whose employees did approve the agreement and their employees.[139]

The bargaining representative who varies the agreement must give written notice of the variation to all the other bargaining representatives for the agreement of whom that bargaining representative is aware. The notice must specify the employers and employees that the agreement as varied covers.[140]

Greenfields agreement

Made by signing

A greenfields agreement is **made** when it has been signed by each employer and each relevant union that the agreement is expressed to cover (which need not be all of the relevant unions for the agreement).[141]

[136] Fair Work Act s.182(1).
[137] Fair Work Act s.182(2).
[138] Fair Work Act s.184.
[139] Fair Work Act ss.184(1)–(2).
[140] Fair Work Act ss.184(3)–(4).
[141] Fair Work Act s.182(3).

Made by lodgment after end of notified negotiation period

If a proposed single-enterprise agreement is a greenfields agreement that has not been made by being signed by each employer and each relevant union that the agreement is expressed to cover, and:

- there has been a notified negotiation period for the agreement which has ended, and
- the employer or employers that were bargaining representatives for the agreement (the **relevant employer or employers**) gave each of the unions that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement, and
- the relevant employer or employers apply to the Commission for approval of the agreement;

then the agreement is taken to have been **made** by the relevant employer or employers, with each of the unions that were bargaining representatives for the agreement, when the application is made to the Commission for approval of the agreement.[142]

Related information

- Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement

What happens if the parties cannot agree?

The Fair Work Act aims to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.[143] However, sometimes parties may not be able to reach agreement in relation to an enterprise agreement.

Continuation of bargaining

If a proposed enterprise agreement has been voted on and a majority of employees do not approve the agreement, the bargaining process can continue until such time as a majority of employees vote to approve the agreement. The Fair Work Act does not limit the number of times that a proposed enterprise agreement can be put to the vote.

Each time the proposed enterprise agreement is put to a vote, the relevant requirements regarding the voting process (including the requirement for an access period) must be met.

Assistance from the Commission

The Fair Work Act provides a way for parties to seek assistance from the Commission when negotiating a new enterprise agreement, this is done by making an application to deal with a bargaining dispute.[144]

In dealing with a bargaining dispute, the Commission can provide parties with guidance and assistance, to help them reach agreement.[145]

Related information

- Bargaining disputes

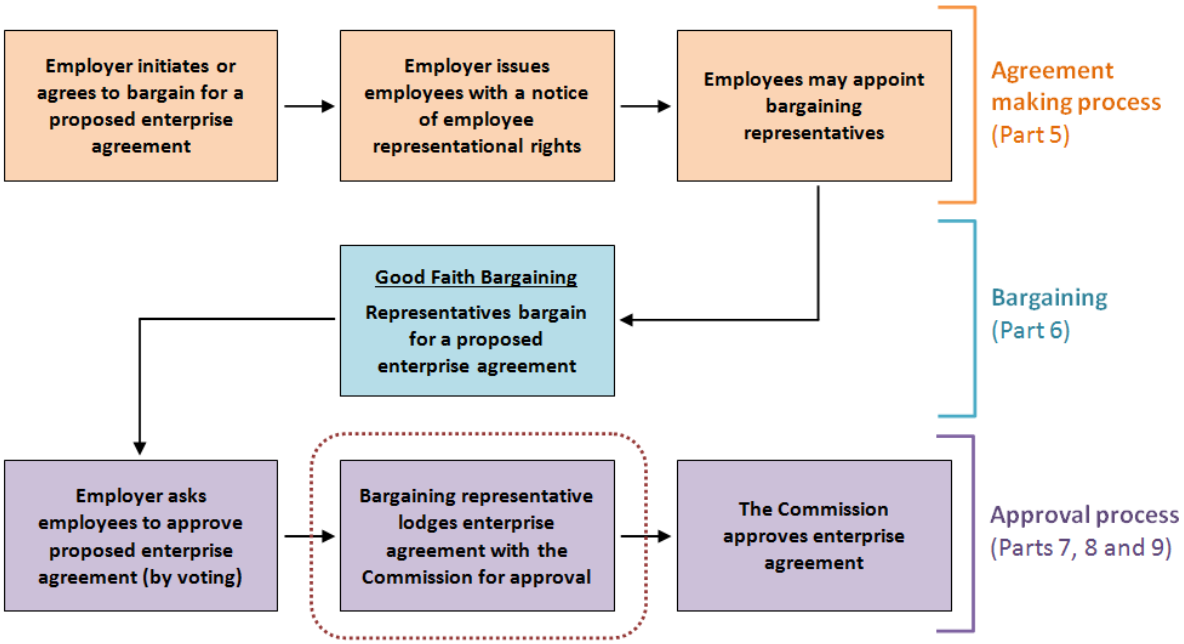
[142] Fair Work Act s.182(4).
[143] Fair Work Act s.171.
[144] Fair Work Act s.240.
[145] Fair Work Act s.595(2).

Part 8 – Enterprise agreement approval process – Making an application

See Fair Work Act s.185

Once an enterprise agreement has been made, an application must be made to the Fair Work Commission (the Commission) for approval.

Stage in bargaining process



Making compliant agreement applications

The making and approval of agreements involves some complexity. The Commission is required to ensure that each agreement and approval application fully complies with the procedural and substantive requirements of the Fair Work Act.

Additionally, from time to time decisions of the Commission, the Federal Court of Australia and the High Court of Australia mean that the Commission is required to apply the Fair Work Act in a different way. This can mean that following such a decision, approval applications are required to include additional information before a Member can be satisfied that they should be approved.

For example to address the issue raised in the *One Key*[146] decision, the Commission may ask for information regarding how the effect of the terms of an agreement were explained to the employees.

Most agreements and approval applications either do not fully comply with the statutory requirements at the time they are lodged with the Commission or require additional information to be provided to assess compliance (non-compliant agreement applications).

The Commission could deal with non-compliant agreements and approval applications more quickly by dismissing them; however this would not assist the parties who have made an enterprise

[146] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018).

agreement. Instead, the Commission seeks to assist the parties by seeking further information and/or undertakings, in order to be able to approve the agreement.

Related information
- Undertakings

Common defects & issues

Analysis of finalised approval applications reveals the common mistakes or defects that have been made. These common defects are set out below, along with information on how to avoid them.

Agreement making – the National Employment Standards (NES)

The National Employment Standards (NES) are minimum employment standards that apply to all national system employees. Before approving an agreement, the Commission must be satisfied that the terms of the agreement do not exclude the NES or any provision of the NES. Agreements can include terms that are the same or substantially the same as the NES, or that supplement the NES by providing more favourable entitlements. Terms in agreements can also interact with the NES in certain permitted situations (such as to allow the cashing out of annual leave).[147]

Common defects & issues – Definition of shiftworkers

Defect or issue	Requirement
The agreement does not describe or define an employee as a shiftworker for the purposes of the NES, but the modern award that covers the employee does so.	An agreement must define or describe an employee as a shiftworker **for the purposes of the NES**, if the modern award does so.[148]

When defining those employees who are entitled to an extra week of annual leave use wording such as:

'*For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is {insert relevant definition of shiftworker as found in the award}.*'

Common defects & issues – Annual leave

Defect or issue	Requirement
Annual leave entitlements in the agreement are expressed in hours or days (rather than weeks) and equate to less than 4 weeks' paid annual leave. For example: the agreement states that 'a day worker's annual leave entitlement is 152 hours', but provides for working days of over 7.6 hours.	An employee (other than a casual employee) is entitled to 4 weeks' paid annual leave (5 weeks' for shiftworkers). In the NES a 'week' of annual leave is an authorised absence from work during the working days falling in a seven day period.

[147] Fair Work Act Part 2-2 (including ss.55 and 56), ss.186(2)(c) and 253.
[148] Fair Work Act ss.187(4) and 196.

The agreement provides that annual leave accrues at a certain point in time. For example: 'annual leave will be credited on the anniversary of your appointment'.	Annual leave accrues progressively during a year of service.[149]
The agreement's cashing out provisions do not contain the safeguards found in the NES.	A cashing out term in an agreement must meet the requirements specified in s.93(2).[150] (The safeguards in the cashing out provision in the relevant modern award should also be considered, as this will be relevant to assessing whether the agreement passes the BOOT).

Common defects & issues – Personal/carer's leave

Defect or issue	Requirement
The personal/carer's leave entitlement in the agreement is expressed in hours rather than as days, and equates to less than the NES entitlement.	An employee (other than a casual employee) is entitled to 10 days' paid personal/carer's leave for each year of service and 2 days' unpaid carer's leave for each occasion (provided paid personal/carer's leave is not available). In the NES a 'day' of personal/carer's leave is an authorised absence from the working time in a 24 hour period.
The agreement provides that personal/carer's leave accrues at a certain point in time. For example: 'on the anniversary of your appointment'.	Personal/carer's leave accrues progressively during a year of service.[151]
The agreement limits the amount of personal leave that can be taken as carer's leave.	All accrued personal/carer's leave may be taken as carer's leave.[152]
The agreement does not provide carer's leave for casual employees.	Casual employees are entitled to 2 days' unpaid carer's leave per occasion.[153]

[149] Fair Work Act s.87(2).
[150] Fair Work Act s.93(1)–(2).
[151] Fair Work Act s.96(2).
[152] Fair Work Act s.97(b).
[153] Fair Work Act s.102.

Common defects & issues – Compassionate leave

Defect or issue	Requirement
Compassionate leave in the agreement is expressed as an entitlement per year rather than per occasion.	An employee (other than a casual employee) is entitled to 2 days' paid compassionate leave for each occasion.[154]
The agreement does not provide compassionate leave for casual employees.	Casual employees are entitled to 2 days' unpaid compassionate leave for each occasion.

Common defects & issues – Parental leave

Defect or issue	Requirement
Parental leave provisions in the agreement provide lesser entitlements than the NES. For example: the adoption leave clause does not allow leave to be taken in relation to the placement of any child who is under 16 years of age (s.68).	The parental leave provisions in an enterprise agreement must not be detrimental to an employee in any respect, when compared to the NES.[155]
The agreement does not permit an employee to request a further 12 months' parental leave in addition to the first 12 months of leave (s.76).	An employee may request their employer to agree to an extension of unpaid parental leave for a further period of up to 12 months immediately following the end of the 'available parental leave period' (which is 12 months, less any periods specified in s.75(2)).[156]

Common defects & issues – Public holidays

Defect or issue	Requirement
The agreement lists 'all' public holidays but does not include other State/Territory public holidays	The NES includes as public holidays days or part-days declared or prescribed by State or Territory law as public holidays, and substituted public holidays under State or Territory laws.[157] Any definition or list of all public holidays in an agreement must include 'holidays declared or prescribed by, or under, a law of a State or Territory' in which the agreement operates.

[154] Fair Work Act ss.104–106.
[155] See Fair Work Act ss.67–85.
[156] Fair Work Act s.76.
[157] Fair Work Act s.115.

Common defects & issues – Notice of termination and redundancy

Defect or issue	Requirement
The agreement provides lesser termination or redundancy entitlements than in the NES.	The NES sets out requirements for notice of termination by an employer and redundancy pay. An agreement must provide the same or more beneficial termination and redundancy entitlements compared to the NES.[158]
Apprentices have been excluded from notice of termination entitlements.	Apprentices must not be excluded from notice of termination requirements in the NES.
Abandonment of employment The agreement states that an employee will forfeit their right to payment on termination of employment if they do not attend work for a given number of days.	An agreement cannot remove an employee's entitlement under the NES to notice of termination or payment in lieu where their employment is terminated by the employer.[159]

Common defects & issues – Flexible working conditions

Defect or issue	Requirement
The agreement limits the right to request part-time employment to the first year following a period of maternity leave.	Under the NES, employees who have worked for their employer for a continuous period of at least 12 months (and certain casual employees) are entitled to request flexible working conditions (including part-time hours) where the employee: • is a parent, or has responsibility for the care of a child who is of school age or younger • is a carer, as defined • has a disability • is 55 or older • is experiencing violence from a member of their family, or • provides care or support to a member of their immediate family or household who requires care or support because they are experiencing violence from the member's family.

[158] Fair Work Act ss.117–123.

[159] See *Bienias v Iplex Pipelines Australia Pty Limited T/A Iplex Pipelines Australia* [2017] FWCFB 38 (Hatcher VP, Gostencnik DP, Cribb C, 13 January 2017) for guidance on when an employee has abandoned their employment.

Many issues in relation to the NES may be addressed by including an 'NES precedence' term in the agreement that provides that in the event of any inconsistency with the NES, the more beneficial term will apply to the extent of that inconsistency. An example of such a clause is:

'*This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency*.'

Agreement making – the Better Off Overall Test (BOOT)

An enterprise agreement passes the BOOT if the Commission is satisfied, at the test time, that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee. It is not sufficient that a majority of the employees would be better off.

Performing the BOOT requires the identification of those terms of an agreement that are more beneficial and those that are less beneficial to an employee than the relevant award. An agreement may pass the BOOT even if some award entitlements have been reduced, as long as overall those reductions are more than offset by the benefits of the agreement. Each employee must be *better off* under the agreement, not just receive benefits equivalent to what they would have received under the relevant award.

Where an award entitlement has no counterpart in the agreement or the corresponding entitlement under the agreement is less beneficial or more restricted in application than in the award, this will affect the Commission's assessment of whether the agreement passes the BOOT.[160]

Common defects & issues – Reduced or omitted award entitlements

Defect or issue	Requirement

Some examples of omitted award entitlements:
• Casual and part-time employment entitlements including:
  ○ entitlement to overtime
  ○ minimum engagement periods
• Allowances
• Overtime and shift penalties, including payment of any accrued TOIL (time off instead of overtime) accrued on termination
• Cashing out annual leave safeguards, and
• Rates of pay for juniors, apprentices or under the Supported Wage System.
	When performing the BOOT, the Commission will consider whether any entitlement under a relevant award is reduced or omitted, or its application is more restricted, under the agreement.

[160] Fair Work Act ss.186(2)(d) and 193.

Make sure all award conditions that are excluded from the agreement are identified in question 13 of the Form F17.

The Commission must consider all award entitlements, even if the enterprise does not presently operate in a way where all entitlements are enlivened.

For example: if an agreement does not include weekend rates of pay provided in the award because the enterprise does not currently open on weekends, the employer may be requested to give an undertaking to pay the relevant award rates if the enterprise were to begin operating on weekends in the future.

Related information

- Better off overall test (BOOT)

Common defects & issues – Loaded rates

Defect or issue	Requirement
An enterprise agreement can include 'loaded rates' of pay which compensate for benefits under the relevant modern award that are not separately identified in the agreement. Typical award benefits that may be incorporated into a loaded rate include allowances, penalties and overtime.	When considering the BOOT the Member must be satisfied that all employees will be better off under the agreement working any pattern of hours permitted by the agreement. The Commission is required to not just consider current actual working arrangements in assessing the BOOT.[161] In determining three of the applications in that case, the Commission found there is difficulty in establishing a loaded rate structure for casual employees which is capable of passing the BOOT.

Including a reconciliation term in an agreement that provides for an audit or reconciliation of employees' earnings under the agreement compared to what their earnings would have been under the relevant modern award may sometimes be useful however the term must specify:

- that reconciliations will be carried out in a timely manner, and
- if a shortfall is identified, the requirement for the employer to compensate the employee must be enforceable.

Any shortfall paid as a result of the reconciliation must ensure the employee is better off and not just 'no worse off'. That is, the compensation cannot merely equal the amount an employee would have been entitled to under the award.[162]

Related information

- Loaded rates & the BOOT

[161] See *Loaded Rates Agreements* [2018] FWCFB 3610 (Hatcher VP, Catanzariti VP, Gostencnik DP, Lee C, Harper-Greenwell C, 28 June 2018).

[162] See for example *Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery* [2017] FWCFB 1664 (Hatcher VP, Gostencnik DP, Bissett C, 6 April 2017); see also *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association* [2017] HCA 53 (6 December 2017).

Agreement making – Mandatory terms

All agreements must include a coverage term; a nominal expiry date; a flexibility term; a consultation term and a dispute settlement term.

Common defects & issues – Dispute settlement term

Defect or issue	Requirement
The agreement does not include a dispute settlement term that meets the requirements in the Fair Work Act and Fair Work Regulations. For example: it does not expressly: • allow settling disputes in relation to the NES • allow the representation of employees in a dispute, or • provide for the Commission or another independent person to settle disputes.	The dispute settlement term in an agreement must: • provide a procedure to settle disputes about any matters arising under the agreement and **in relation to the NES**, and • require or allow the Commission or another independent person to settle such disputes, and • allow for representation of employees if there is a dispute. The model term in Schedule 6.1 of the Fair Work Regulations may be used. If a term is not included or does not meet the Fair Work Act's requirements, the Commission must reject the agreement or require an undertaking.[163]

Download the model term here:

Model term for dealing with disputes for enterprise agreements

Related information

- Term for settling disputes

[163] Fair Work Act ss.186(6) and 737; Fair Work Regulations reg 6.01 and Sched 6.1.

Common defects & issues – Flexibility and consultation terms

Defect or issue	Requirement
The agreement does not include a flexibility term or a consultation term that meets the requirements in the Fair Work Act and Fair Work Regulations. A flexibility term allows an employer and employee to make an individual flexibility arrangement (IFA) which varies the effect of terms of the agreement, in order to meet their genuine needs. A 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. For example; an agreement may contain a flexibility term that does not provide for the employer or employee to terminate an IFA by giving not more than 28 days' notice.	An agreement must contain a flexibility term that complies with the requirements in ss.202 and 203 of the Fair Work Act, and a consultation term that complies with s.205 of the Fair Work Act. Agreements may use the model terms in Schedules 2.2 and 2.3 of the Fair Work Regulations. Where an agreement does not include a flexibility or consultation term or includes a non-compliant term, the model terms will apply. However, it may take longer to process an agreement application where the Commission must decide whether a flexibility or consultation term in the agreement is compliant in all respects.

Download the model terms here:

Model flexibility term

Model consultation term

Related information

- Flexibility term
- Consultation term

Agreement making – Other terms of the agreement

Common defects & issues – Nominal expiry date

Defect or issue	Requirement
The agreement states that the nominal expiry date is 4 years from commencement of operation of agreement.	The nominal expiry date of an agreement must be no more than 4 years after the date the agreement was approved by the Commission.[164] As the earliest commencement date of an agreement is 7 days after it is approved, a nominal expiry date of 4 years '*from commencement*' will exceed this.

Make your nominal expiry date 4 years from the date of approval.

[164] Fair Work Act ss.54(1) and 186(5).

Related information

- Nominal expiry date

Common defects & issues – Unlawful terms

Defect or issue	Requirement
An agreement cannot include any unlawful terms such as discriminatory or objectionable terms, a term that is inconsistent with the industrial action provisions of the Fair Work Act or a term that provides for a right of entry other than in accordance with the Fair Work Act.	The Commission will review agreements for unlawful content and cannot approve an agreement that contains unlawful terms.[165]
Example unlawful terms: • the agreement includes a superannuation default fund term that specifies a fund that does not offer a MySuper product, and • the agreement contains terms that deal with the rights of officials or employees of employee organisations to enter the employer's premises other than in accordance with Part 3-4 of the Fair Work Act.	Agreements cannot include a term that requires superannuation contributions for default fund employees to be made to a superannuation fund, unless that fund offers a MySuper product (or is an exempt public sector scheme or is a fund of which a relevant employee is a defined benefit member). An agreement must not include right of entry terms that are inconsistent with the Fair Work Act.[166]

Related information

- Unlawful terms

Common defects & issues – Incorporating the award into an agreement

Defect or issue	Requirement
The agreement states that it 'should be read in conjunction with the award' or uses other language which does not clearly indicate whether the parties intend for the award to be incorporated or not.	The agreement should clearly state whether or not the award is incorporated into the agreement. If the award is incorporated into the agreement, the agreement should make clear whether the agreement or award clause will apply where the clauses are inconsistent in any way. Otherwise, it may be unclear to the Commission whether the employees properly understood the terms of the agreement at the time of voting for it, and how the Commission is to apply the BOOT.

If the agreement relies on provisions from an award, make it clear that the agreement **incorporates** either those provisions or the entire award (rather than 'is to be read in conjunction with the award').

[165] Fair Work Act ss.186(4), 194–195A, 253(1)(b) and (2).
[166] Fair Work Act ss.186(4) and 194(f)–(g).

Agreement making – Pre-approval requirements

In deciding whether to approve an agreement, the Commission will consider whether the prescribed pre-approval steps, including the provision of a valid notice of employee representational rights (NERR), were taken in accordance with statutory timeframes.

Since 12 December 2018, the Commission may be satisfied that an agreement has been genuinely agreed to, despite minor procedural or technical errors in relation to certain pre-approval requirements including the form of the NERR and certain legislative timeframes, if it is satisfied that the employees covered by the agreement were not likely to have been disadvantaged by the errors. This will be considered on a case-by-case basis depending on the circumstances of the matter.[167]

Where a pre-approval requirement has not been met in full, the Commission may ask for information explaining why a procedural or technical error may be considered minor and not likely to have disadvantaged the employees covered by the agreement.

[167] See *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019).

Common defects & issues – Notice of employee representational rights (NERR)

Defect or issue	Requirement
Form and content of NERR The NERR given by the employer to employees was not in the correct form. For example: • **both** paragraphs that refer to a union were omitted, or • the scope of the agreement described in the first paragraph of the NERR is narrower than or substantively different to the scope of the agreement.	The Notice of employee representational rights must be in form prescribed in Schedule 2.1 of the Fair Work Regulations.[168]
Provision of NERR	The NERR must be provided within the prescribed **timeframes**:
The employer did not take all reasonable steps to provide the NERR to all employees covered by the agreement and employed at the notification time (including employees on leave).	The employer must take all reasonable steps to give the NERR to each employee who will be covered by the agreement and is employed at the notification time for the agreement (generally, the time when the employer agrees to or initiates bargaining).[169]
The employer did not provide sufficient information in the Form F17 as to the steps taken to provide the NERR to employees.	The Form F17 requires the employer to provide information as to the steps taken and dates on which the NERR was provided to employees, so the Commission can be satisfied that the above requirement was met.[170]
The employer provided the NERR to employees more than 14 days after notification time.	Employees must be provided with the NERR as soon as practicable and not later than **14 days** after notification time.[171]
The last NERR was not given at least 21 days before voting.	Employees must not be requested to approve an agreement until at least 21 days after the day on which the last NERR is given.[172]

Use the NERR tool to generate a NERR in the correct form and to complete all necessary fields and use the Date Calculator.

Provide as much relevant information as possible when completing the application form and declaration. This includes:

- when and how the NERR was provided to employees
- when and how the agreement was explained to employees, and

[168] Fair Work Act ss.173–174; Fair Work Regulations reg 2.05 and Sched 2.1; Form F17, question 18.
[169] Fair Work Act s.173(1); Fair Work Regulations reg 2.04.
[170] Form F17, questions 18 and 19.
[171] Fair Work Act s.173(3); Form F17, questions 18 and 19.
[172] Fair Work Act s.181(2) (see also ss.186(2)(a) and 188(1)(a)(ii)); Form F17, questions 18 and 19.

- when and how employees were informed of the time and place of the vote, when the vote took place, and the method of voting.

Include copies of relevant documents such as emails to employees with the application.

Related information

- Notice of right to be represented during bargaining

Common defects & issues – Access to copy of agreement and incorporated material

Defect or issue	Requirement
The employer did not take all reasonable steps to ensure that employees were given or had access to a copy of the agreement **and incorporated material** in the access period.	The employer must take all reasonable steps to ensure the employees employed at the time who will be covered by the agreement are given the agreement and incorporated materials (including any policies incorporated into the agreement) during the 'access period' or have access to the agreement and those materials throughout the access period.[173] The access period is the 7-day period immediately before the day on which voting for the agreement starts.
The employer did not provide sufficient information in the Form F17 as to how they provided this material to employees.	The Form F17 requires the employer to provide information as to the steps taken and dates on which the materials or access to the materials was given to employees, so the Commission can be satisfied that the above requirement was met.[174]

Related information

- Access period

Common defects & issues – Notification of vote

Defect or issue	Requirement
The employer did not take all reasonable steps to inform employees of the voting time, place and method before the start of the access period for the agreement.	The employer must take all reasonable steps to inform employees of the voting time, place and method before the start of the access period for the agreement.[175]

[173] Fair Work Act s.180(2) (see also ss.186(2)(a) and 188(1)(a)(i)).
[174] Form F17, question 21.
[175] Fair Work Act s.180(3) (see also ss.186(2)(a) and 188(1)(a)(i)).

Defect or issue	Requirement
The employer did not provide sufficient information in the Form F17 as to how it notified employees of the voting time, place and method.	The Form F17 requires the employer to describe the steps taken and the information given to employees, and the dates on which the steps were taken, so the Commission can be satisfied that the above requirement was met.[176]

Use the Date calculator to check that your dates comply with the statutory requirements.

Related information

- Employers may request that employees vote
- Voting

Common defects & issues – Explanation of effect of the agreement

Defect or issue	Requirement
The employer did not take all reasonable steps to explain to employees the terms of the agreement and their effect.	The employer must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the employees in an appropriate manner.[177]
The employer did not provide sufficient information in the Form F17 as to how the effect of the terms of the agreement were explained to employees.	The Form F17 requires the employer to describe the steps taken and when they were taken, what was explained, and how the particular circumstances and needs of employees were taken into account, so the Commission can be satisfied that this requirement has been met.[178] More detailed information may be required where different awards cover different groups of employees who are covered by the agreement.[179]

Related information

- Terms of the agreement must be explained

Agreement making – Forms and lodgment

An application for the Commission to approve an enterprise agreement must be made to the Commission within 14 days after the agreement is made.

[176] Form F17, question 20.
[177] Fair Work Act ss.180(5)–(6) (see also ss.186(2)(a) and 188(1)(a)(i)).
[178] Form F17, questions 22, 23 and 24.
[179] See *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018).

The agreement is made when a majority of those employees who cast a valid vote approve the agreement.

The application must include the Form F16 application, a signed copy of the agreement and the Form F17 employer declaration (and its attachments). It may also be accompanied by other documents.

To avoid delays in the Commission's processing of the application, it is important that these documents are properly completed and lodged on time.

Common defects & issues – Signature and content requirements

Defect or issue	Requirement
The Agreement has not been signed properly. Addresses or position/title not included.	The agreement lodged must signed by the employer and at least one representative of the employees covered by the agreement and include: • the full name and address of each person who signs the agreement, and • an explanation of their authority to sign the agreement.[180]

As the agreement, including the signature page, will be published on the Commission website and forms may become publicly available, people signing the agreement and forms may prefer to use their business/work address and contact details rather than their home address and personal contact details.

Any Form F18 or F18A should be lodged as soon as possible after the agreement application is lodged and include the exact title as per the Form F16 and agreement title clause.

Related information

- Signing agreement

Common defects & issues – Identifying more and less beneficial terms

Defect or issue	Requirement
• The Form F17 does not list the terms that are **more or less beneficial than the relevant award.**	It is important to list in the Form F17 all terms and conditions that are more or less beneficial under the agreement than in the award, as well as any award terms that have been omitted.[181]

Make sure all award conditions that are excluded from the agreement are identified.

Providing detailed matching of classifications in the agreement against the award will assist the Commission to perform the BOOT assessment more quickly.

[180] Fair Work Act s.185; Fair Work Commission Rules 2013 r.24; Form F16.
[181] Form F17, questions 10, 11, 12, 13 and 14.

Related information

- Better off overall test (BOOT)

Common defects & issues – Lodgment

Defect or issue	Requirement
The application was lodged more than 14 days after the date voting concluded and no adequate explanation was provided.	The application must be lodged within 14 days after the agreement was made.[182] If an application is lodged late, an explanation must be provided so the Commission can consider whether it is fair to extend the lodgment period.[183]
Delay in lodging F18 and F18A.	Any Form F18 or F18A must be lodged before the Commission approves the agreement.[184]

Use the Commission's Date calculator to check dates comply with the Fair Work Act.

Related information

- Timeframe – Within 14 days of agreement being 'made'

Bargaining representative must apply

Single or multi-enterprise agreements

Only a bargaining representative can apply for the approval of a single or multi-enterprise agreement. This means that the application can be lodged by:

- an employer covered by the agreement
- a bargaining representative for the employer
- a bargaining representative for an employee,
- an employee organisation (such as a union).[185]

Greenfields agreements

Multi-enterprise agreements that are greenfields agreements

An application to approve a multi-enterprise agreement that is a greenfields agreement can only be made by either:

- an employer covered by the agreement, or
- a relevant union covered by the agreement.[186]

[182] Fair Work Act ss.182(1) and 185(3)(a).
[183] Fair Work Act s.185(3)(b); Form F16, question 1.4.
[184] Fair Work Commission Rules 2013 r.24(3)–(4).
[185] Fair Work Act s.185(1).
[186] Fair Work Act s.185(1A).

Single-enterprise agreements that are greenfields agreements

This does not apply to a proposed single-enterprise agreement that is a greenfields agreement made by lodgment after the end of notified negotiation period.

Related information

- Greenfields agreement

Timeframe – Within 14 days of agreement being 'made'

Single or multi-enterprise agreements

The application must be made within 14 days of an agreement being made. The 14 days can be extended by the Commission where, in all the circumstances, it considers it is fair to do so.[187] This will depend on the reason the application was lodged late.

Important

Section 36(2) of the *Acts Interpretation Act 1901* (Cth)[188] deals with when the end of a period of time occurs. It says:

> '*Where the last day of any period prescribed or allowed by an Act for the doing of anything falls on a Saturday, on a Sunday or on a day which is a public holiday or bank holiday in the place in which the thing is to be or may be done, the thing may be done on the first day following which is not a Saturday, a Sunday or a public holiday or bank holiday in that place.*'

This means that if the end of the 14 day period to lodge an agreement falls on a '*a Saturday, on a Sunday or on a day which is a public holiday or bank holiday*' then the application can be lodged on the next business day.

An application can be made any time within the 14 day period, including immediately after the agreement is made.[189]

Case example: **Application to extend timeframe dismissed**

Re Watsiana Pty Ltd T/A Austin Earthmoving [2011] FWA 1753 (Ryan C, 23 March 2011).

The agreement was lodged 16 months after it was made. No explanation was provided by the applicant. The Commission considered that it was not fair to extend the application period. The agreement was not approved.

[187] Fair Work Act s.185(3).
[188] As in force 25 June 2009 (see Fair Work Act s.40A).
[189] Explanatory memorandum to Fair Work Bill 2008 at para. 764.

Case example: **Application to extend timeframe dismissed**

Re Estate Agents Co-Operative Clerical, Pre-Press and Information Technology Employees Collective Agreement 2010 [2010] FWA 8937 (Cambridge C, 22 November 2010).

The agreement was lodged about 17 days late. The Commission raised numerous concerns regarding a number of clauses within the agreement that were confusing and ambiguous. The employer failed to address these concerns. In all the circumstances, the Commission did not consider it fair to extend the application period. The agreement was not approved.

Greenfields agreements

An application for the approval of a greenfields agreement must be made within **14 days** of the agreement being made.[190]

Important

The Commission cannot extend the 14 day period in which to make an application for approval of a greenfields agreement **in any circumstance**.

Related information

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Related information

- Common defects & issues – Notification of vote

- When an enterprise agreement is 'made'
- Common defects & issues – Lodgment

Material to accompany application

See Fair Work Commission Rules 2013 r.24

This section provides detailed guidance on the requirements for materials accompanying the application to approve an enterprise agreement.

Important

Completed Forms F16 (application form) and F17 (declaration) should be treated as documents that are freely available to any member of the public who wishes to see them, unless there are exceptional circumstances that would justify an order of confidentiality.[191]

[190] Fair Work Act s.185(4).
[191] *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413 (Hamberger SDP, Booth DP, Bissett C, 19 December 2016) at para. 28.

Single or multi-enterprise agreements

Employer requirements

An application for the approval of a single or multi-enterprise agreement made to the Commission must include the following documentation:

- a signed and dated copy of the agreement
- a completed and signed application form [Form F16], and
- a completed and signed declaration by each employer in support of the agreement [Form F17]. This must include a copy of the Notice of Representational Rights provided to employees.

Evidence that the terms of the agreement have been explained

A simple statement by an employer that an explanation has been given is not enough to satisfy the Commission that the requirement to explain the terms of the agreement has been met. In order to be satisfied, the Commission must consider the content of the explanation and the way it was given, having regard to all the circumstances and needs of the employees, and the nature of the changes made by the agreement.[192]

To help show that the employer has met this requirement they should provide:

- evidence of how the terms of the agreement, and the effect of those terms, were explained to the relevant employees
- copies of any comparison between the agreement and the relevant modern award, and
- evidence of how the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees.

Tip: Provide all supporting material

Related information

- Signing agreement
- Terms of the agreement must be explained

Bargaining representatives

Each union that is a bargaining representative, or each bargaining representative who has been appointed by one or more employees, who want to advise the Commission about whether they:

- support or oppose approval of the agreement
- agree with one or more statements in a declaration made by an employer, or
- have any concerns, issues or disagreements with the content of a declaration made by an employer;

must lodge a completed and signed declaration at any time before the Commission approves the agreement.

- A union bargaining representative completes [Form F18].
- A bargaining representative appointed by one or more employees completes [Form F18A].

[192] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 112.

Greenfields enterprise agreements

Greenfields agreement made by signing

An application for the approval of a greenfields agreement made to the Commission must include the following documentation:

- a signed and dated copy of the agreement
- a completed and signed application form [Form F19]
- a completed and signed declaration by each employer in support of the agreement. [Form F20], and
- a completed and signed declaration by each union [Form F21].

Greenfields agreement that has been made by lodgment after end of notified negotiation period

An application under subsection 182(4) for approval of an agreement made by lodgment after the end of notified negotiation period must be accompanied by:

- a copy of the agreement, and
- any declarations that are required by the procedural rules to accompany the application.[193]

Related information

- Greenfields agreement

Application form

An application for the approval of a single or multi-enterprise agreement must be made with a Form F16, and applications for approval of a greenfields agreement must be made with a Form F19. The application forms contain basic information, such as:

- contact details for the applicant, bargaining representatives and/or unions
- basic details of the agreement, such as its name and the industry of work it covers, and
- whether there are, or have been, any similar agreements lodged with the Commission for approval.

Links to forms

- Form F16 – Application for approval of enterprise agreement (other than a greenfields agreement)
- Form F19 – Application for approval of greenfields agreement made under subsection 182(3) of the Act

All forms are available on the Forms page of the Commission's website.

[193] Fair Work Act s.185A.

Application made by a bargaining representative

If an application is made by a bargaining representative appointed by an employer or by an employee rather than the employer covered by the agreement, the application must be accompanied by a copy of the written instrument of appointment of the bargaining representative.[194]

Declaration(s)

Declaration from employer

Any application form for the approval of an agreement must be accompanied by a declaration from each employer. For a single or multi-enterprise agreement this is made with Form F17, for a greenfields agreement it is made with the Form F20.

This declaration requires detailed information from the employer about the process that was followed in the making of the agreement, and how this process meets each pre-approval requirement in the legislation. The questions in the form must be answered truthfully and in sufficient detail to allow the Commission to determine whether the requirements of the Fair Work Act have been satisfied.

It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document in support of an application for approval of an enterprise agreement, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

The form also requires the employer to specify which modern award (or other reference instrument) would have applied to employees if not for the agreement and provide information about how the employees are better off overall under the agreement rather than that award.

As soon as possible after lodging the form with the Commission, a copy must also be served on:

- each employer that will be covered by the agreement, and
- each union that was a bargaining representative, and
- any other employee appointed bargaining representative that the employer is are aware of.

Links to forms

- Form F17 – Employer's declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement)
- Form F20 – Employer's declaration in support of an application for approval of greenfields agreement made under subsection 182(3) of the Act

All forms are available on the Forms page of the Commission's website.

[194] Fair Work Commission Rules 2013 r.24(6).

Case example: **Employer's statutory declaration NOT accepted – Unreliable statutory declaration**

Re Chirotherapy Pty Ltd [2011] FWA 4925 (McKenna C, 29 July 2011).

It appeared that the employer had used a template statutory declaration that had been used for numerous agreements in the past. Variants of the template had been the subject of concerns of the Commission, leading the Commission to require the employer to provide written undertakings. The particular template in this case appeared incomplete and did not contain information that could be considered to be reliable, accurate, complete or otherwise acceptable. The application was listed for hearing but the applicant did not attend. The application was dismissed and the agreement was not approved.

Declaration from union or bargaining representatives – Single or multi-enterprise agreements

A union can also lodge a declaration using Form F18. This form allows the organisation to advise the Commission whether it:

- supports the approval of the agreement
- has any concerns, issues or disagreements with the content of the employer's declaration, and
- whether it wishes to be covered by the agreement.

Similarly, a bargaining representative (such as another employee) who was appointed by one or more employees to represent their interests during bargaining can lodge a declaration using Form F18A. This form allows the bargaining representative to advise the Commission whether it:

- supports the approval of the agreement, or
- has any concerns, issues or disagreements with the content of the employer's declaration.

A copy of these forms must also be provided to the employer(s) covered by the agreement and all other bargaining representatives as soon as practicable after lodgement with the Commission.[195]

The declaration must be completed truthfully. It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document, in support of an application for approval of an enterprise agreement, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

Links to forms

- Form F18 – Declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement)
- Form F18A – Declaration of employee representative in relation to application for approval of an enterprise agreement (other than a greenfields agreement)

All forms are available on the Forms page of the Commission's website.

[195] Fair Work Commission Rules 2013 r.41.

Entitlement of a union to have an enterprise agreement cover it

See Fair Work Act s.183

If a union wants a single or multi-enterprise enterprise agreement to cover it, the union must notify the Commission in writing. **This notification is done by completing question 6 on Form F18.**

The notification must be given before the Commission has made its decision to approve the agreement. A copy of the notice must also be given to each employer covered by the agreement before the Commission approves the agreement.[196] The Commission will note in its approval decision that the agreement covers the union.[197]

When an agreement covers (and applies to) a union, the union will have certain entitlements that it would not otherwise have. For instance, the union will be able to enforce the terms of the agreement.[198]

Case example: **Union NOT covered by agreement – Union failed to provide its notification that it wishes to be covered by agreement to the employer**

RotoMetrics Australia Pty Ltd v Australian Manufacturing Workers' Union [2011] FWFB 7214 (Watson SDP, Richards SDP, Smith C, 27 October 2011), [(2011) 212 IR 373].

The AMWU notified the Commission that it wished to be covered by the agreement but failed to provide the notification to the employer. When it approved the enterprise agreement, the Commission noted in the decision that the AMWU was covered by the enterprise agreement.

The employer appealed this aspect of the approval on the basis that the AMWU had not provided the notification to the employer.

The Full Bench concluded that the requirement to provide the notification to the employer was a pre-condition to coverage, rather than simply a procedural requirement. Accordingly, given that the AMWU had not provided the employer with the notification, it could not be covered by the enterprise agreement.

Declaration from union – Greenfields agreements

For a greenfields agreement, a union covered by the agreement must lodge a declaration using Form F21. This form allows the union to advise the Commission whether it:

- supports the approval of the agreement, or
- has any concerns, issues or disagreements with the content of the employer's declaration.

Unlike the case of an application to approve a single or multi-enterprise agreement, a union will be covered by a greenfields agreement if it made the agreement.

Link to form

- Form F21 – Declaration of an employee organisation in relation to an application for approval of a greenfields agreement made under subsection 182(3) of the Act

All forms are available on the Forms page of the Commission's website.

[196] Fair Work Act s.183(2).
[197] Fair Work Act s.201(2)–(2A).
[198] Fair Work Act s.539, table item 4; see also Explanatory memorandum to Fair Work Bill 2008 at para. 753.

Declaration from bargaining representative

If a declaration is lodged by a bargaining representative appointed by an employer or by an employee, the declaration must be accompanied by a copy of the written instrument of appointment of the bargaining representative.[199]

Signing agreement

See Fair Work Act s.185(5) & reg 2.06A

An enterprise agreement must be signed before an employer or a bargaining representative can apply to the Commission for approval.

A copy of an enterprise agreement is a **signed copy** only if it has been signed by the **employer**, and **at least one representative of the employees**, covered by the agreement.

The signature of the representative does not bind the representative to the agreement, unless the representative is an employee who will be bound by the agreement.

While it is necessary to have at least one representative of the employees sign the agreement, it is not necessary for every representative to sign the agreement.

Important

The signed copy must include the **full name and address** of each person who signs the agreement; and an **explanation of the person's authority** to sign the agreement.

Requirements of regulation 2.06A

For the purposes of reg 2.06A(2)(b)(i) – which requires 'the full name and address of each person who signs the agreement' – a person can use his or her **work address**, and does not have to provide home address details.[200]

Related information

- Common defects & issues – Signature and content requirements

[199] Fair Work Commission Rules 2013 r.24(6).

[200] *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 (Ross J, Hatcher VP, Asbury DP, Gostencnik DP, Simpson C, 2 April 2014) at paras 87–102.

Case example: **Enterprise agreement NOT signed correctly – Name and address and authority to sign**

Re Malteurop Australia Pty Ltd [2014] FWC 2476 (Kovacic DP, 11 April 2014).

Malteurop Australia made an application for approval of the *Malteurop Australia Operators Enterprise Agreement 2014.*

The signed agreement attached to the application did not meet the requirements of s.185(2)(a) of the Fair Work Act as it did not include the full name and address of each person who signed the agreement nor an explanation of some of the signatories authority to sign the agreement as required by Regulation 2.06A.

Consequently the application was not a valid application and it was dismissed.

Employer must notify employees of application for approval of an enterprise agreement

See Fair Work Commission Rules 2013 r.40

Each employer that will be covered by an enterprise agreement must notify employees who will be covered by the agreement, through the usual means that are adopted by the employer for communicating with employees, that an application has been made to the Commission for approval of the enterprise agreement.

Examples of the **usual means** for communicating with employees are posting notices on employee notice boards and using email.

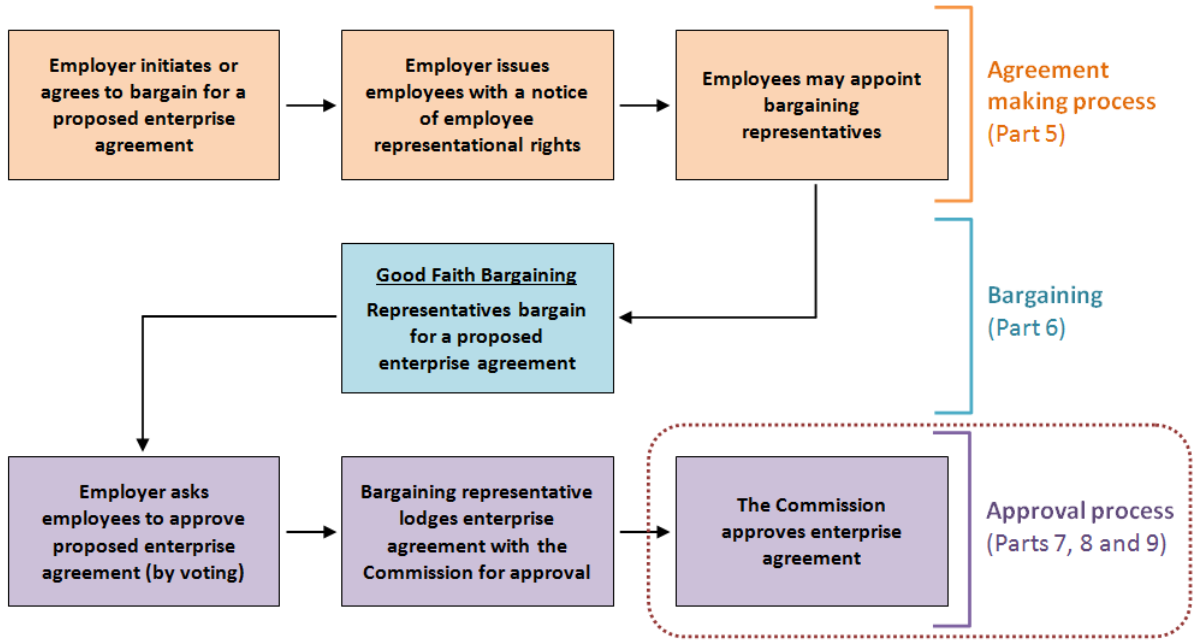
Part 9 – Enterprise agreement approval process – Commission process

An enterprise agreement must be approved by the Fair Work Commission (the Commission) before it can commence operation.

The approval process includes a point-in-time assessment, which requires that each employee will be better off overall under the enterprise agreement when compared to the relevant modern award.

The objects and the scheme of the *Fair Work Act 2009* (the Fair Work Act) imply that the requirements for approval of enterprise agreements are to be applied in a practical manner without unnecessary technicalities.[201]

Stage in the bargaining process



Requirements for approving an enterprise agreement

See Fair Work Act ss.186–187

If an application for the approval of enterprise agreement is made and the enterprise agreement meets the requirements in sections 186 and 187 of the Fair Work Act, the Commission must approve the agreement.

[201] *Re McDonald's Australia Pty Ltd* [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010) at para. 13, [(2010) 196 IR 155].

Additional requirements for multi-enterprise agreements

See Fair Work Act ss.184 and 187

If an application for the approval of a multi-enterprise agreement is made, and the enterprise agreement meets the requirements in sections 186 and 187 of the Fair Work Act, the Commission must approve the agreement.

Related information

- Multi-enterprise agreement to be varied if not all employees approve agreement

Additional requirements for greenfields agreements

See Fair Work Act ss.187(5)–(6)

If an application for the approval of a greenfields agreement is made, and the enterprise agreement meets the requirements in sections 186 and 187 of the Fair Work Act, the Commission must approve the agreement.

Where there are two or more unions that will be covered by the agreement, the Commission will consider whether the unions collectively are entitled to represent the industrial interests of a majority of employees who will be covered by the agreement.[202]

If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the Commission must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the Commission may have regard to the prevailing pay and conditions in the relevant geographical area.

Related information

- Greenfields agreement

Requirement for approval	Fair Work Act section	Link to related information
Requirements for ALL enterprise agreements		
The Commission must be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement (This does not apply to a greenfields agreement)	186(2)(a) and 188	Genuine agreement
The Commission must be satisfied that the group of employees covered by the agreement was fairly chosen	186(3)	Meaning of 'fairly chosen'

[202] *Re Baulderstone Pty Ltd* [2011] FWAA 9299 (Ryan C, 23 December 2011) at para. 4.

Requirement for approval	Fair Work Act section	Link to related information
The Commission must be satisfied that the agreement passes the 'better off overall test'	186(2)(d)	Better off overall test (BOOT)
The Commission must be satisfied that the agreement specifies a nominal expiry date	186(5)	Nominal expiry date
The Commission must be satisfied that the agreement includes a dispute settlement term	186(6)	Term for settling disputes
The Commission must be satisfied that the agreement does not include any unlawful terms	186(4)	Unlawful terms
The Commission must be satisfied that the agreement does not include any designated outworker terms	186(4A)	Requirement that an enterprise agreement does not include any designated outworker terms
The Commission must be satisfied that the enterprise agreement meets the requirements with respect to particular kinds of employees (shiftworkers, pieceworkers, school-based apprentices and school-based trainees and outworkers)	187(4)	Particular kinds of employees
Where a scope order is in operation, the Commission must be satisfied that approval of the agreement is not inconsistent with good faith bargaining.	187(2)	Where a scope order is in operation – Approval not inconsistent with good faith bargaining
Additional requirements for MULTI-ENTERPRISE agreements		
The Commission must be satisfied that the agreement has been genuinely agreed to by each employer covered by the agreement, and that no person coerced, or threatened to coerce, any of the employers to make the agreement	186(2)(b)	Genuine agreement
The Commission must be satisfied that if the agreement was *not* approved by the employees of *all* of the employers proposed to be covered – then the agreement has been varied so that it only covers those employers whose employees approved the agreement	187(3)	Multi-enterprise agreement to be varied if not all employees approve agreement

Requirement for approval	Fair Work Act section	Link to related information
Additional requirements for GREENFIELDS agreements		
The Commission must be satisfied that the relevant unions that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement	187(5)(a)	Greenfields agreement
The Commission must be satisfied that it is in the public interest to approve the agreement.	187(5)(b)	Greenfields agreement
The Commission must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work. **Note:** In considering the prevailing pay and conditions within the relevant industry for equivalent work, the Commission may have regard to the prevailing pay and conditions in the relevant geographical area.	187(6)	Greenfields agreement

Genuine agreement

See Fair Work Act s.188(1)

An enterprise agreement has been **genuinely agreed** to by the employees covered by the agreement if the Commission is satisfied that:

- the employer, or each of the employers, covered by the agreement:
  - took all reasonable steps to ensure that during the access period for the agreement, the employees were given a copy of the written text of the agreement, and any other material incorporated by reference in the agreement or that the employees had access through the access period to those materials
  - took all reasonable steps to notify the employees, by the start of the access period for the agreement, of the time and place at which the vote will occur and the voting method
  - took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the employees and the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees, and
  - did not request the employees to approve the enterprise agreement until 21 clear days after the last notice of employee representational rights was given;
- the agreement was made:
  - if the proposed agreement is a single-enterprise agreement – when a majority of those employees who cast a valid vote approved the agreement, or

- if the proposed agreement is a multi-enterprise agreement – when a majority of the employees of at least one employer who cast a valid vote approved the agreement; and

- there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

Evidence that the terms of the agreement have been explained

A simple statement by an employer that an explanation has been given is not enough to satisfy the Commission that the requirement to explain the terms of the agreement has been met. In order to be satisfied, the Commission must consider the content of the explanation and the way it was given, having regard to all the circumstances and needs of the employees, and the nature of the changes made by the agreement.[203]

To help show that the employer has met this requirement they should provide:

- evidence of how the terms of the agreement, and the effect of those terms, were explained to the relevant employees
- copies of any comparison between the agreement and the relevant modern award, and
- evidence of how the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees.

Tip: Provide all supporting material

Minor procedural or technical errors

 See Fair Work Act s.188(2)

The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (the Amending Act) has revised s.188 of the Fair Work Act to provide a mechanism for the Commission to conclude that an enterprise agreement has been 'genuinely agreed', within the meaning of s.186(2)(a), despite 'minor procedural or technical errors'.

Section 188(2) reads as follows:

> '(2) An enterprise agreement has also been **genuinely agreed** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the agreement would have been **genuinely agreed** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174.'[204]

The Amending Act received the Royal Assent on 11 December 2018 and the amendments to s.188 commenced on 12 December 2018.

[203] *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (25 May 2018) at para. 112.
[204] Fair Work Act s.188(2).

Examples of what may be considered 'minor procedural or technical errors' are provided in the Revised Explanatory Memorandum to the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017:[205]

Examples of minor procedural or technical errors could include (without limitation):

- employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the access period rather than by the start of the access period (subsection 180(3));
- employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given (subsection 181(2));
- the inclusion of the employer's company logo or letterhead on a Notice
- the inclusion of additional materials that are stapled with a Notice; or
- minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').

The proper construction of s.188(2)

The Full Bench of the Commission considered how the introduction of s.188(2) could be applied in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others*.[206]

The following propositions[207] emerged from the Full Bench's consideration of the proper construction of s.188(2):

1. Subsections 188(1) and (2) are to be approached sequentially. The first question is whether the Commission is satisfied as to the matters at s.188(1)(a) to (c). If it is so satisfied then the agreement has been *genuinely agreed* to and there is no need to consider s.188(2).

2. The reference to the 'employees covered by the agreement' in ss.188(1) and (2), is a reference to those employees employed and covered by the agreement at the time of the request to vote under s.181.

3. Subsections 188(1) and (2) both provide that an enterprise agreement has been genuinely *agreed* if the Commission is *satisfied* as to certain matters (ie those in s.188(1)(a) to (c) and ss.188(2)(a) and (b) respectively). The latitude as to the choice of the decision to be made by ss.188(1) or (2) is quite narrow in that the decision maker is required to conclude that the agreement was *genuinely made* if he or she forms a particular opinion or value judgment. Assessing the genuineness of agreement under ss.188(1) and (2) involves an evaluative assessment.

4. Section 188(2) is confined to circumstances where the Commission is *not* satisfied that an agreement has been *genuinely agreed* to within the meaning of s.188(1), as a result of 'errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights'.

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[205] Revised Explanatory Memorandum to Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 at para. 47.
[206] [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019).
[207] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019) at para. 117.

5. Section 188(2) does not extend to circumstances where the Commission is not satisfied that an agreement was *genuinely agreed* to in a more general sense, as might arise from a consideration of s.188(1)(c).

6. Section 188(2) does not apply to all procedural or technical requirements with which an employer must comply when bargaining for an enterprise agreement. The 'minor procedural or technical errors' referred to in s.188(2)(a) must be errors 'made *in relation to* the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights' (emphasis added).

7. The following table sets out the procedural or technical requirements to which s.188(2) applies:

Table 1: Scope of s.188(2)[208]

Section	Procedural or technical requirement
188(1)(a)	Comply with subsection 180(2) – take all reasonable steps to ensure that relevant employees are given the written text of the agreement and any materials incorporated by reference during the access period or that the relevant employees are given access to these materials throughout the access period
	Comply with subsection 180(3) – take all reasonable steps to notify the relevant employees of the time, place and method of vote, prior to the start of the access period
	Comply with subsection 180(5)(a) – take all reasonable steps to ensure the terms of the agreement and their effects are explained to the relevant employees
	Comply with subsection 180(5)(b) – take all reasonable steps to ensure the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees
	Comply with subsection 181(2) – the employer must not request that the employees approve a proposed agreement until at least 21 days after the day on which the last notice of employee representational rights (NERR) is given
188(1)(b)	The agreement must be made in accordance with subsection 182(1) or (2)
173(1)	Take all reasonable steps to give a NERR to each employee who will be covered by the agreement and is employed at the notification time for the agreement
173(3)	Issue the NERR as soon as practicable, no later than 14 days after the notification time
174(1A)(a)	The NERR must contain the content prescribed by the regulations
174(1A)(b)	The NERR must not contain any other content
174(1A)(c)	The NERR must be in the form prescribed by the regulations

[208] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019) at para. 52.

Section 188(2)(a): 'minor procedural or technical errors'

When considering the definition of 'minor procedural or technical errors' the Full Bench found the following:[209]

1. The adjective 'minor' qualifies both 'procedural' errors and 'technical' errors, such that the expression reads 'minor procedural *errors* or *minor* technical errors'. The word 'minor' is a limitation upon the type of errors contemplated by s.188(2)(a).
2. A failure to comply with a procedural requirement will constitute a 'procedural error' within the meaning of s.188(2)(a).

A **procedural requirement** is one which requires an employer to follow a particular process or course of action.

For example:

An example of a procedural requirement may be providing employees with a NERR as soon as practicable, and not later than 14 days after the notification time (s.173(3)), or ensuring there are at least 7 clear days between notifying employees of the voting process and the commencement of that process (s.180(3)).

3. A failure to comply with a technical requirement will constitute a 'technical error' within the meaning of s.188(2)(b).

A technical requirement includes an obligation to comply strictly with the form and content of an instrument, such as the NERR.

4. A single error may have both procedural and technical components.
5. The impact of the errors is to be assessed by reference to the objects of the requirements in ss.188(2)(a), 188(1)(b), 173 or 174.
6. What constitutes a 'minor' error calls for an evaluative judgment having regard to the underlying purpose of the relevant procedural or technical requirement which has not been complied with and the relevant circumstances.

   Table 2 (see below) examines each of the procedural or technical requirements, considers the underlying purpose of these requirements and outlines some ways in which employees might be disadvantaged by a minor technical or procedural error.
7. Generally speaking, the lower the level of non-compliance the more likely it is to be characterised as a 'minor error'.

For example:

Informing the employees of the time and place at which the vote will occur, and the voting method that will be used as per the requirements of ss.180(3)(a) and (b) just after the start of the 7 day access period (for instance 6 days before the start of the voting process) is likely to be a 'minor error' in most cases.

However this will depend on the circumstances.

[209] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019) at para. 117.

If it is the first agreement at the enterprise; the bargaining representatives are inexperienced and the employees are predominantly from a non-English speaking background, then it may not be a 'minor error'.

Conversely, only informing the employees of the time and place at which the vote will occur some 4 days before the voting process starts may be a 'minor error' where there is a history of bargaining at the enterprise; the agreement is, in effect, a 'roll over' agreement; the employer takes further active steps to remind employees of the time and date of the vote; and a high proportion of employees actually vote.

8. Whether an incidence of non-compliance is characterised as a 'minor error' also depends on the nature of the requirement which has not been complied with.

For example:

The need to inform employees of the time and date of the vote (s.180(3)(a)) is more significant than informing them of the 'voting method' (s.180(3)(b)) – the first requirement may impact on the employees' capacity to participate in the voting process, the second may not.

9. Some species of error are unlikely to be classified as 'minor'.

For example:

The deletion of the prescribed text of the NERR which deals with an employee's right to appoint a bargaining representative and the role of the unions as the default bargaining representatives. But, again, it may depend on the circumstances.

10. The test in s.188(2)(b) is whether the employees covered by the agreement were 'not likely to have been disadvantaged by **the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174**'(emphasis added).

    The impact of the errors is to be assessed by reference to the objects of those requirements and not by reference to any more general sense of 'genuine agreement'.

11. Cost or inconvenience to the employer and employee covered by an agreement associated with a delay in the approval of the agreement is *not* relevant to the question of whether the employees covered by the agreement 'were not likely to be disadvantaged by the errors'.

12. The test suggested by s.188(2)(b) is whether 'the employees covered by the agreement were not **likely** to have been **disadvantaged** by the errors'.

13. The word **likely** in s.188(2)(b) means **probable** in the sense that there is an odds-on chance of it happening, rather than merely being some possibility of it happening. The word **disadvantaged** suggests a deprivation which manifests in the employees covered by the agreement being prevented from substantively exercising their rights within the bargaining regime in Part 2-4 of the Fair Work Act.

14. In assessing whether employees were not likely to have been disadvantaged by an error, it may be necessary to consider the particular circumstances of the employees concerned at the time the error occurred and the impact of the error on the subsequent course of bargaining. This may include considering any steps taken by the employer to address the adverse impact of the non-compliance.

Table 2: Procedural or technical requirements covered by s.188(2) and potential ways in which employees may be disadvantaged in relation to minor errors[210]

Section	Procedural or technical requirement	Underlying purpose of requirement	How might employees be disadvantaged?
188(1)(a)	Comply with subsection 180(2) – take all reasonable steps to ensure that relevant employees are given the written text of the agreement and any materials incorporated by reference during the access period OR that the relevant employees are given access to these materials throughout the access period	To ensure employees have a reasonable chance to make an informed decision when voting	In the circumstances employees may not have had effective access to materials or insufficient time to consider them to make an informed decision when voting
	Comply with subsection 180(3) – take all reasonable steps to notify the relevant employees of the time, place and method of vote, prior to the start of the access period	To ensure employees are able to attend and participate in the voting process (should they choose to do so)	In the circumstances employees might be unaware of the voting process occurring thus preventing them from effectively participating in the voting process
	Comply with subsection 180(5)(a) – take all reasonable steps to the terms of the agreement and their effects are explained to the relevant employees	Ensure that employees understand the effect of the agreement that is to be voted on, enabling them to make an informed decision	In the circumstances the steps may have been taken such that the employees might not be in a position to make an informed decision about the terms of the agreement upon which they are eligible to vote
	Comply with subsection 180(5)(b) – take all reasonable steps to ensure the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees	Ensure that particular classes of employees are able to understand the agreement not withstanding any particular circumstances or needs	In the circumstances the employees may have received the explanation in a language they do not speak thus they may not be in a position to make an informed decision when voting

[210] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318 (Ross J, Hatcher VP, Saunders DP, 18 January 2019) at para. 74.

Section	Procedural or technical requirement	Underlying purpose of requirement	How might employees be disadvantaged?
	Comply with subsection 181(2) – the employer must not request that the employees approve a proposed agreement until at least 21 days after the day on which the last NERR is given	To provide the employees with a minimum period of time for the bargaining process to occur before voting on an agreement	In the circumstances the period is cut short preventing the employees from effectively appointing bargaining representatives and participating in genuine good faith bargaining
188(1)(b)	The agreement must be made in accordance with subsection 182(1) or (2)		
173(1)	Take all reasonable steps to give a NERR to each employee who will be covered by the agreement and is employed at the notification time for the agreement	To ensure that all employees are aware that their employer intends bargain for an enterprise agreement and that they are aware of their representational rights	In the circumstances the NERR may be so altered that employees fail to understand and exercise their representational rights and effectively participate in the bargaining process
173(3)	Issue the NERR as soon as practicable, no later than 14 days after the notification time	To ensure that the employees understand their representational rights within a reasonable period before bargaining commences thus allowing them to exercise those rights in a timely manner	In the circumstances the employees may have received the NERR later than the 14 days thus period preventing them from attending initial bargaining meetings and thus effectively influencing the bargaining process even after they do participate
174(1A)(a)	The NERR must contain the content prescribed by the regulations	To ensure that the employees understand the scope of the proposed agreement, who is the employer and what their representational rights are prior to the actual bargaining commencing	In the circumstances the employer may have been incorrectly named within a complex group of companies thus creating real confusion resulting in employees failing to effectively participate in the bargaining
174(1A)(b)	The NERR must not contain any other content		
174(1A)(c)	The NERR must be in the form prescribed by the regulations		

Case example: **Employees do NOT genuinely agree**

Ostwald Bros Pty Ltd v Construction, Forestry, Mining and Energy Union [2012] FWAFB 9512 (Watson VP, Watson SDP, Gooley C, 8 November 2012).

At first instance, the Commission declined to approve the enterprise agreement on the basis that the notice of employee representational rights (Notice) provided to employees did not meet the form and content requirements in the Fair Work Regulations because it did not give notice of the default bargaining representatives.

On appeal, the Full Bench was required to consider whether it could be satisfied that the agreement had been genuinely agreed where the Notice given to employees was not in the form required.

Permission to appeal was granted and the majority concluded, based on the statutory context, in order for an agreement to be genuinely agreed the last Notice issued in advance of a vote must meet the content requirements of section 174. That is, if the Notice did not meet the content requirements (for example, because it did not give notice of default bargaining representatives), the Notice was not valid. Accordingly, the Commission could not be satisfied that the agreement was genuinely agreed by employees and therefore could not approve the enterprise agreement.

The majority dismissed the appeal.

Case example: **Employees do NOT genuinely agree**

Re ENM Group Pty Ltd [2013] FWC 3035 (O'Callaghan SDP, 17 May 2013).

ENM Group Pty Ltd (trading as Eagle Boys Mawson Lakes) lodged an application seeking approval of the *ENM Group Enterprise Agreement*. The agreement proposed to cover 6 employees, 5 of whom were under 21 years of age.

The Commission found that the agreement only narrowly satisfied the BOOT. Transitional arrangements were shortly due to be varied which would have had the effect of increasing award entitlements.

On the information provided (and despite numerous requests to the employer to provide information to allay the Commission's concerns) the Commission was unable to establish what the employees understood or were told about the effect of the agreement. This was particularly the case in relation to the overall impact of the agreement on employees relative to their award entitlements.

The Commission was not satisfied that the agreement was genuinely agreed to by the employees and declined to approve the agreement.

Case example: **Employees do NOT genuinely agree**

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Mirait Technologies Australia Pty Ltd [2015] FWCFB 5078 (Hamberger SDP, Gostencnik DP, Riordan C, 27 July 2015).

Re Mirait Technologies Australia Pty Ltd [2015] FWC 8338 (Gostencnik DP, 1 December 2015).

At first instance the Commission approved the application for approval of the *Mirait Technologies Australia (MTA) Enterprise Agreement 2015 – 2019*. The decision was appealed on grounds that at the time the decision was made, there were reasonable grounds for believing that the agreement had not been genuinely agreed to for the purposes of s.188(c) and that the Commission could not have been satisfied as required by s.186(2)(a). Other grounds of appeal included the failure to convene a hearing and the adequacy of given reasons for the decision.

The Full Bench were able to dispose of the appeal on the ground of non-compliance with pre-approval steps. Two statutory declarations made by the employer in support of the application contained information that was different and inconsistent. The Full Bench was satisfied that the appeal raised important questions about the proper consideration and application of the pre-approval steps set out in the Fair Work Act.

Permission to appeal was granted and the appeal upheld. The decision at first instance was quashed and the application for approval of the agreement was remitted for determination.

Upon rehearing the Commission was not satisfied that the statutory requirements which would enable the agreement to be approved had been met, in that the employees covered by the agreement genuinely agreed to the agreement. The Commission found that the employer adopted a 'very convoluted and indirect method of communicating fairly simple information to relevant employees about the time and place of voting and the method of voting by passing on information to supervisors who, in turn, were encouraged or asked to pass on that information to relevant employees'. The Commission provided the employer with seven days to provide a satisfactory undertaking to address the issue. The employer advised that they would not provide an undertaking and the application for approval was dismissed.

Where a scope order is in operation – Approval not inconsistent with good faith bargaining

See Fair Work Act s.187(2)

Where a scope order is in operation, the Commission must be satisfied that approving an agreement would not be inconsistent with or undermine good faith bargaining for employees covered by the order.[211]

This section is intended to deal with a situation where the Commission has issued a scope order which states, for example, that the agreement can only cover certain employees and the agreement that is ultimately lodged with the Commission says that it will cover different employees. The Commission will not be able to approve this agreement unless it is satisfied that it is not inconsistent with or will not undermine good faith bargaining.

For instance, if the bargaining representatives have subsequently all agreed to make an agreement to cover a different scope of employees, this may not undermine good faith bargaining. However, if the employer has obtained employee approval for an agreement that does not cover the same scope of employees as the scope order requires, and this is against the wishes of a group of employees who were subject to the scope order, this may undermine good faith bargaining requirements.[212]

[211] Fair Work Act s.187(2).

[212] Explanatory Memorandum to Fair Work Bill 2008 at paras 788–789.

Related information

- Good faith bargaining requirements
- Scope orders
- Meaning of 'fairly chosen'

Particular kinds of employees

Shiftworkers

See Fair Work Act ss.87(1)(b) and 196

As part of the NES, certain employees (shiftworkers) are entitled to an additional week of annual leave if:

- a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES, or
- an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES, or
- the employee is an award or agreement free employee who meets the definition of 'shiftworker' in section 87(3) of the Fair Work Act.

If the proposed enterprise agreement will cover an employee who:

- is covered by a modern award, and
- is defined or described in that award as a shiftworker for the purposes of the NES;

the Commission cannot approve the enterprise agreement unless it is satisfied that the agreement also defines or describes the employee as a shiftworker for the purposes of the NES.

This has the effect that, if under a modern award an employee would be entitled to the additional week of annual leave, the employee must also be entitled to that additional week under the enterprise agreement.

The types of employees who are shiftworkers for NES purposes may differ depending on the modern award that covers the employee. Care should be taken to ensure that any employee covered by the enterprise agreement who falls within the relevant award definition of shiftworker for NES purposes is defined or described in the enterprise agreement as a shiftworker for the purposes of the NES.

The following example is from the *Storage Services and Wholesale Award 2010*:[213]

26.4 Definition of shiftworker

For the purpose of the additional week of annual leave provided for in s.87(1)(b) of the Act, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.

[213] *Storage Services and Wholesale Award 2010* [MA000084], Pt 6 – Leave and Public Holidays, cl. 26. Annual Leave.

Pieceworkers

See Fair Work Act ss.21, 197 and 198

A **pieceworker** is generally an employee who is paid a rate of pay calculated by reference to the employee's output (for example the number of articles produced, delivered or sold, kilometres travelled or the number of tasks performed), rather than a rate set by reference to a period of time worked.

There are additional approval requirements for an enterprise agreement covering an employee who is defined or described as a pieceworker in the enterprise agreement and/or the modern award. This is because a pieceworker's entitlements under the NES (for example payment for annual leave) are affected by the base rate of pay specified in the enterprise agreement or modern award.[214]

Pieceworkers – Where an employee is a pieceworker under the award and the agreement

Where an employee is a pieceworker under both the modern award covering the employee and the enterprise agreement, the Fair Work Act does not contain any additional approval requirements for the enterprise agreement. This is because the employee's base rate of pay under the agreement must not be less than the base rate payable to the employee under the relevant modern award.[215]

Pieceworkers – Where an employee is a pieceworker under the agreement

An enterprise agreement can include a term defining or describing an employee as a pieceworker for the purposes of the Fair Work Act (including the NES), even where a modern award covering the employee does not define or describe the employee as a pieceworker. However, before approving such an agreement, the Commission must be satisfied that each pieceworker does not suffer a detriment to his or her entitlements under the NES.

Pieceworkers – Where an employee is a pieceworker under the modern award

On the other hand, where an employee is defined or described as a pieceworker under the relevant modern award covering the employee but the enterprise agreement does not define or describe the employee as a pieceworker, the Commission must be satisfied that the omission of the pieceworker term does not cause the employee to suffer a detriment to his or her entitlements under the NES.

No detriment test

The no detriment test ensures that a pieceworker is entitled to the minimum entitlements provided by the NES.

[214] Fair Work Act s.16(2).

[215] Fair Work Act s.206; Fair Work Regulations reg 1.10.

An illustrative example is provided in the Explanatory Memorandum:[216]

Gita is employed as a grape harvester. Under the relevant modern award, Gita would be defined as a pieceworker. If the award applied to determine Gita's terms and conditions of employment, Gita's base rate of pay for the purposes of the NES would be the rate set out in the relevant modern award. This would be relevant, for example, when calculating the rate at which Gita must be paid during paid annual leave.

Under the enterprise agreement that applies to Gita, she is not defined as a pieceworker. Instead, she has an hourly rate of pay. The Commission would need to be satisfied that not defining Gita as a pieceworker under the agreement for the purposes of the NES would not be detrimental to her. For example, it would be detrimental to her if the base rate of pay under the agreement, which she would be paid at when taking paid annual leave under the NES, was less than the base rate of pay set out for pieceworkers in her classification under the relevant modern award.

Related information

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Related information

- Common defects & issues – Definition of shiftworkers
- Common defects & issues – Annual leave
- Common defects & issues – Personal/carer's leave
- Common defects & issues – Compassionate leave
- Common defects & issues – Parental leave
- Common defects & issues – Public holidays
- Common defects & issues – Notice of termination and redundancy
- Common defects & issues – Flexible working conditions

- Base rate of pay

School-based apprentices and school-based trainees

See Fair Work Act s.199

There are also additional approval requirements in relation to an enterprise agreement that covers school-based apprentices and/or school-based trainees.

Where a modern award covers the employees and provides for a loading to be paid to school-based apprentices or school-based trainees in lieu of paid annual leave, paid personal/carer's leave and/or public holidays, the enterprise agreement may also provide for paid loadings in respect of that matter (or those matters).

Where the enterprise agreement provides for a loading in lieu of paid annual leave, paid personal/carer's leave and/or public holidays, the Commission must be satisfied that the amount or rate of the loading is not detrimental to the employee when compared to the amount or rate of the loading provided under the award.

[216] Explanatory Memorandum to Fair Work Bill 2008 at para. 848.

Outworkers

See Fair Work Act ss.12 and 200

An **outworker** is an employee who performs work at residential premises or at other premises that would not conventionally be regarded as being business premises.

There are also additional approval requirements in relation to an enterprise agreement that covers employees who are outworkers if the employees are also covered by a modern award that includes outworker terms.

The Commission must be satisfied that the agreement includes outworker terms and that those terms are not detrimental to the employees in any respect when compared to the outworker terms of the modern award.

Better off overall test (BOOT)

See Fair Work Act s.193

An enterprise agreement that is not a greenfields agreement passes the better off overall test if the Commission is satisfied, as at the test time, that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant modern award applied.

When is the 'test time'?

The better off overall test is applied as at the **test time** – this is the time when the application for approval of the agreement was made (the date the application was lodged with the Commission).[217]

Who is an award covered employee?

An **award covered employee** for an enterprise agreement is an employee who:

- is covered by the agreement, and
- at the test time, is covered by a modern award that:
  - is in operation
  - covers the employee in relation to the work that he or she is to perform under the agreement, and
  - covers his or her employer.

Note: The enterprise agreement will only apply to an employee once it commences operation (ie after the agreement is approved by the Commission).

Who is a prospective award covered employee?

A **prospective award covered employee** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

- would be covered by the agreement, and
- would be covered by a modern award that:
  - is in operation
  - would cover the person in relation to the work that he or she would perform under the agreement, and

[217] Fair Work Act s.193(6).

- covers the employer.

Prospective award covered employees are considered in the application of the better off overall test because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time. Extending the application of the better off overall test to these types of employees guarantees the integrity of the safety net.[218]

A **prospective award covered employee** is a future employee – a person who will be employed under the terms of the enterprise agreement.

An illustrative example is provided in the Explanatory Memorandum:[219]

The Moss Hardware and Garden Supplies Pty Ltd Enterprise Agreement 2010 covers the classification of Assistant Store Manager. At the test time for the better off overall test, Moss Hardware and Garden Supplies Pty Ltd does not employ any Assistant Store Managers. However, it has recently announced that it will restructure its staffing arrangements to introduce this new position. The Assistant Store Manager classification is covered by the relevant modern award. Assistant Store Managers employed after the agreement commences operation would therefore be prospective award covered employees. The Commission would need to be satisfied that the agreement passed the better off overall test in respect of these persons.

What is the BOOT?

The better off overall test considers the terms that are more beneficial and less beneficial to employees in an agreement, compared to the terms in the relevant modern award.

The better off overall test requires the identification of agreement terms which are more beneficial, and the terms which are less beneficial, and then an overall assessment is made as to whether employees would be better off under the agreement than under the relevant award.[220]

The better off overall test is not applied as a line by line analysis. It is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees. The application of the better off overall test therefore requires the identification of the terms of an Agreement which are more beneficial to employees when compared to the relevant modern award, and the terms of an Agreement which are less beneficial and then an overall assessment of whether an employee would be better off under the Agreement.[221]

The Commission must be satisfied that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.[222]

The question posed by the better off overall test is not whether each employee is better off under the Agreement compared to their particular existing working arrangements but whether they are better off overall if the Agreement applied rather than the relevant modern award.[223]

[218] Explanatory Memorandum to Fair Work Bill 2008 at para. 824.
[219] Explanatory Memorandum to Fair Work Bill 2008 at para. 824.
[220] *Re Armacell Australia Pty Ltd* [2010] FWAFB 9985 (Giudice J, Acton SDP, Lewin C, 24 December 2010) at para. 41, [(2010) 202 IR 38].
[221] Ibid.
[222] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887 (Watson VP, Kovacic DP, Roe C, 31 May 2016) at para. 6.
[223] *Re Australia Western Railroad Pty Ltd T/A ARG – A QR Company* [2011] FWAA 8555 (Williams C, 14 December 2011) at para. 5.

An agreement may pass the test even if some award benefits have been reduced, as long as overall those reductions are more than offset by the benefits of the agreement.[224]

Individual flexibility arrangements must be disregarded

When determining whether employees will be better off overall the Commission must disregard any individual flexibility arrangement agreed to by an employee and employer under the flexibility term in the relevant modern award.[225] This is because it is assumed that any arrangements made under the flexibility term in a modern award would be considered in the negotiating process, and potentially will form part of the agreement, or be negotiated again under the flexibility term in the agreement if approved.

When a non-greenfields enterprise agreement passes the BOOT

An agreement that is not a greenfields agreement passes the better off overall test when the Commission is satisfied that each present and prospective award covered employee would be better off overall if the agreement applied rather than the relevant modern award.[226]

The Commission needs to be satisfied that, weighing the agreement provisions as a whole with those in the award, an employee is better off overall.[227]

Related information

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Related information

- Common defects & issues – Definition of shiftworkers
- Common defects & issues – Annual leave
- Common defects & issues – Personal/carer's leave
- Common defects & issues – Compassionate leave
- Common defects & issues – Parental leave
- Common defects & issues – Public holidays
- Common defects & issues – Notice of termination and redundancy
- Common defects & issues – Flexible working conditions

- Base rate of pay

- Common defects & issues – Identifying more and less beneficial terms
- Common defects & issues – Reduced or omitted award entitlements

[224] Ibid., at para. 8.
[225] Fair Work Act s.193(2).
[226] Fair Work Act s.193(1).
[227] *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163 (Harrison SDP, Sams DP, Deegan C, 10 August 2011) at para. 47, [(2011) 210 IR 244].

Case example: **Passes the better off overall test**

Re Solar Systems Pty Ltd [2012] FWAFB 6397 (Watson VP, Sams DP, Deegan C, 24 August 2012).

At first instance, the Commission refused to approve the *Solar Systems Pty Ltd Enterprise Agreement 2011* on the basis that the agreement did not pass the BOOT.

The employer appealed the decision, asserting that the Commission erred in approaching and applying the BOOT and in determining that the agreement did not pass the BOOT.

In granting permission to appeal and quashing the first instance decision, the Full Bench affirmed the approach to the BOOT taken by the Full Bench in *Re Armacell Australia Pty Ltd* and stated that the task of applying the BOOT is best expressed as applying the words in s.193.

The Full Bench stated that, for the purposes of the BOOT, *'*a matter needs to be advantageous or disadvantageous. It is then a matter of balancing the items that fall within the two categories to come to an overall view.*'* The Full Bench was not satisfied that the first instance decision had done this. The Full Bench concluded that the Commission did not adequately or fairly apply the terms of the BOOT to the agreement, and placed little weight on the higher wages or further wage increases provided for in the agreement.

The Full Bench remitted the approval application to the Commission and the agreement was subsequently approved.

Case example: **Passes the better off overall test**

Re Datatech Australia Pty Ltd [2013] FWCA 2313 (Bull C, 16 April 2013).

An application was made for the approval of the *Datatech Australia Pty Ltd (NSW) Enterprise Agreement 2013–2017*. The agreement provided for an ordinary span of hours between 5:00 am and 7:00 pm. The relevant modern award provides for an ordinary span of hours from 6:00 am to 6:00 pm.

The Commission questioned the increase in the spread of hours compared to the relevant modern award and how employees covered by this agreement were better off overall. The applicant advised that the rates of pay in the agreement were significantly higher, and consequently compensate for the increase in the span of ordinary working hours.

The Commission was satisfied that the increase in the span of ordinary hours satisfied the better off overall test, the Agreement was approved.

Case example: **Passes the better off overall test**

Transport Workers' Union of Australia v Jarman Ace Pty Ltd T/A Ace Buses [2014] FWCFB 7097 (Catanzariti VP, Boulton J, Cambridge C, 28 October 2014).

An application was made seeking the approval of a single-enterprise agreement to be known as the *Ace Buses Enterprise Agreement 2014*. The agreement was to cover 69 casual employees, engaged as Bus Drivers (who transported school aged children with physical and intellectual disability between their homes and their school), Bus Supervisors (one of whom must accompany the Bus Driver on all trips) and administration staff.

At first instance, the Commission was satisfied that the agreement met the BOOT, and approved the agreement.

The TWU appealed, claiming that the Commission had erred in considering the benefits said to flow from the agreement and therefore had failed to apply the BOOT correctly. Specifically, the TWU was concerned about the Commission's characterisation of the following arrangements as 'non-monetary benefits':

- the commencement of work from home, rather than a centralised depot
- the use of buses for personal purposes, and
- the use of mobile phones for personal purposes.

In addition, the TWU contended that the split shift arrangements under the agreement were significantly less beneficial than those applying under the relevant modern award and that the Commission had not accounted for the situation of employees who did not receive the above benefits.

The Full Bench stated that the application of the BOOT is a matter that involves the exercise of discretion and a degree of subjectivity or value judgement.

The Full Bench determined that the TWU had not demonstrated any error in the first instance decision and accordingly, permission to appeal was refused.

Case example: **Does NOT pass the better off overall test**

Re The Andrew Crawford Group Pty Ltd T/A Crawford Group Security and Investigations [2013] FWC 5858 (O'Callaghan SDP, 19 August 2013).

An application was made for approval of *The Andrew Crawford Group Pty Ltd Enterprise Agreement 2013*. The agreement applied to employees who worked as static guards, crowd controllers or 'cash in transit escorts'.

The Commission did not consider that the agreement met the BOOT. Additional information provided by the employer addressed the concerns in relation to the agreement making process and the BOOT, with the exception of the Commission's concerns regarding pay rates for the crowd controller classification. For those employees, rates/penalties under the proposed agreement were higher than the award during the week but were lower for weekend and public holiday work. The majority of work for crowd controllers took place Thursday to Saturday.

The employer submitted that the agreement should be approved on the basis that the Commission had approved other agreements for its competitors with a similar discrepancy in rates.

The Commission was not satisfied that the agreement met the requirements of the BOOT with respect to the crowd controller classification. Following a conference, the employer offered an undertaking that the difference between the rates for weekend work under the relevant award and the agreement would not be more than the same difference under other agreements approved by the Commission.

Even with proposed undertaking, the Commission was not satisfied that the crowd controller employees received other benefits under the agreement to compensate for the lower weekend wages. Accordingly, the Commission was not satisfied that the agreement met the BOOT and the application for approval was refused.

Case example: **Does NOT pass the better off overall test – Agreement included contingency or discretionary clauses**

Re Glen Eden Thoroughbreds Pty Ltd T/A Ray White Shailer Park [2010] FWA 7217 (Asbury C, 16 September 2010).

An application was made for the approval of the *Ray White Shailer Park Enterprise Agreement 2010*. The application was opposed by the Property Sales Association of Queensland, Union of Employees (the PSAQ). The PSAQ submitted that the terms of certain provisions caused the agreement to fail the BOOT.

The Commission found that the agreement contained provisions usually found in common law contracts or implied into contracts by the common law (such as provisions dealing with restraint of trade, confidential information and intellectual property). Such provisions were not found in the award nominated for the purposes of establishing whether the agreement passed the BOOT. Generally, such provisions are not found in awards. In such cases the Commission can consider whether by including such terms in an enterprise agreement, employees are disadvantaged because the agreement imposes obligations or restrictions on them which are not imposed by a relevant award or under relevant common law principles.

The fact that agreement clauses involve contingent matters or discretion on the part of the employer that may or may not be exercised, should result in such clauses being viewed differently for the purposes of the BOOT. It must be assumed that contingent or discretionary clauses in agreements will be applied and they must be assessed against the terms of a relevant award on the same basis as other provisions of the agreement.

The Commission determined the inclusion of such terms was likely to result in a situation where award covered employees, both current and prospective, would not be better off overall if the agreement applied.

Case example: **Does NOT pass the better off overall test – Not better off overall even when base rates of pay applied**

Re KBK Security Services and Sentinel Traffic Control Service t/a KBK Enterprises Pty Ltd [2012] FWA 7336 (Asbury C, 27 August 2012).

An application was made for approval of the *Sentinel Traffic Control Services Enterprise Agreement 2011.* The primary activity of the employer was traffic control and security services. The AWU sought to be heard in relation to the application for approval of the agreement. The AWU also sought that the Commission refuse to approve the agreement on grounds including that it did not pass the BOOT.

The Commission found the agreement contained a number of terms that would result in award covered employees and prospective award covered employees not being better off overall. The effect of these terms did not appear to be balanced by corresponding benefits in the agreement.

The wage rates in the agreement were marginally above or marginally below the wage rates for corresponding classifications in each of the relevant awards. In the event the agreement was approved, s.206 of the Fair Work Act would operate so that the base rates in the agreement would not be less than the relevant modern award rate. However, even allowing for the effect of s.206, the rates in the agreement were not sufficient to offset the removal of other benefits in the awards.

The Commission was not satisfied that the BOOT had been met. The application for approval of the agreement was refused.

When a greenfields agreement passes the BOOT

A greenfields agreement passes the better off overall test if the Commission is satisfied, as at the test time, that each prospective award covered employee would be better off overall if the agreement applied than if the relevant modern award applied.[228]

Case example: **Passes the better off overall test – Greenfields agreement**

Re Meales Concrete Pumping (Qld) Pty Ltd [2012] FWAA 6089 (Sams DP, 19 July 2012).

An application was made for approval of a greenfields agreement to be known as the *Meales Concrete Pumping (QLD) Pty Ltd Ichthys Onshore Construction Greenfields Agreement*. The agreement was proposed to cover craft and construction employees on the Ichtys Onshore Construction Project engaged in on site construction work, on site commissioning work and onshore marine construction work and related activities at the marine offloading facility at Blaydin Point, Northern Territory. The agreement was negotiated with the AWU, AMWU, CFMEU and CEPU.

The agreement provided for a number of conditions which either replicated current industry standards, or were significantly in excess of or more beneficial than the terms of the relevant award. The Commission was satisfied that the agreement passed the BOOT.

Upon reviewing the terms of the preapproval process documentation and the agreement itself, the Commission was satisfied that all of the requirements of the Fair Work Act had been met, and that it was in the public interest to approve the agreement.

Classes of employees – Better off overall

The better off overall test does not require the Commission to enquire into each employee's individual circumstances.[229] The Commission may assume, in the absence of any evidence to the contrary, that where a class of employees to which an employee belongs is better off overall under the agreement, then the particular employee will be better off.[230]

The phrase **class of employees** is intended to refer to a group of employees covered by the enterprise agreement who share common characteristics that enable them to be treated as a group when the Commission applies the better off overall test.

An example is where the employees are in the same classification, grade or job level, with the same working patterns.[231]

[228] Fair Work Act s.193(3).
[229] Explanatory Memorandum to Fair Work Bill 2008 at para. 818.
[230] Fair Work Act s.193(7).
[231] Supplementary Explanatory Memorandum to Fair Work Bill at para. 124.

An illustrative example is provided in the Explanatory Memorandum:[232]

Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement and the agreement affects each employee within a classification in the same way, the Commission could group employees together when assessing the employees against the better off overall test. It is intended that the Commission could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

If the Commission were satisfied that the agreement affected each employee within the classification in the same way, and that the agreement passed the better off overall test for the hypothetical employee within the classification, the Commission could be satisfied that the agreement passed the better off overall test for each award covered employee and prospective award covered employee within that classification.

Case example: **Class of employees – NOT better off overall – Hours of work**

Re Turn Key Distribution Pty Ltd [2010] FWA 6987 (McKenna C, 21 September 2010).

Application for approval of an enterprise agreement titled the *Turn Key Distribution Pty Ltd Enterprise Agreement 2010*. The applicant traded as a tavern, restaurant and motel. The agreement included loaded rates of pay. The applicant provided modelling to illustrate how employees would be better off overall under the agreement compared to the modern award.

The Commission found that although the calculations in the spreadsheets were said to demonstrate the BOOT had been met for all classes of employees, modelling and analyses of the indicative rosters did not support that conclusion. While some employees identified as working the indicative rosters would be advantaged by the agreement at the test time, other employees would receive wages lower than they otherwise would be entitled to be paid were it not for the agreement.

Employees who did not work, on average, around 72 per cent of their hours between 7.00 am to 7.00 pm, Monday to Friday, were found to constitute a class of employees for whom the BOOT was not necessarily met in relation to the loaded rates. The Commission found that overall, each employee would not be better off under the agreement than under the award, the agreement was not approved.

[232] Explanatory Memorandum to Fair Work Bill 2008 at para. 818.

Case example: **Class of employees – NOT better off overall – Part-time employees**

Roseneath Aged Care Centre v NSW Nurses & Midwives' Association; Australian Nursing Federation–New South Wales Branch; Health Services Union [2013] FWC 4969 (Gooley DP, 24 July 2013).

Roseneath Aged Care Centre v NSW Nurses & Midwives' Association; Australian Nursing Federation - New South Wales Branch; Health Services Union - New South Wales Branch [2013] FWCFB 7430 (Hatcher VP, Booth DP, Bull C, 25 September 2013).

Re Roseneath Aged Care Centre [2013] FWCA 7456 (Gooley DP, 26 September 2013).

An application was made for approval of the *Roseneath Aged Care Centre NSWNMA & HSU NSW Branch Enterprise Agreement 2012*. The agreement did not provide for part-time aged care and health professional employees to be paid overtime if directed to work outside of their agreed hours and that may mean that the agreement would not pass the better off overall test.

The agreement provides that part-time aged care and health professional employees can be directed to work outside of their agreed hours at ordinary time until they have either worked 10 hours in a day or 38 hours in a week or 76 hours in a fortnight. The terms of the agreement are not consistent with the awards which provide that an employee directed to work outside his or her agreed hours is paid overtime at overtime rates. The agreement provision is clearly less beneficial to part-time employees.

The benefits for a part-time employee include a guaranteed minimum hours of work of three hours, higher severance payments, higher wages, service allowance payable for employees who have had more than 10 years' service and long service leave benefits. However, the Commission was not satisfied that the benefits in the agreement and other non-monetary benefits provided in the agreement compensate part-time employees who are required to work outside of their ordinary hours. In relation to part-time employees the agreement did not to pass the better off overall test.

Note: After subsequent proceedings the employer offered an undertaking in terms which would resolve the issue which gave rise to the Commission's decision to reject the application for approval of the agreement at first instance. The undertaking was accepted and as a result the agreement was approved.

What is an award?

Awards are enforceable documents containing minimum terms and conditions of employment in addition to any legislated minimum terms. Awards provide pay rates and conditions of employment such as leave entitlements, overtime and shift work, amongst other workplace related conditions.

Most modern awards relate to particular industries or occupations. There are currently 121 modern awards of general application.

A small number of enterprise and State reference public sector modern awards cover specific employers and their employees only.

Which award?

Before the better off overall test can be applied, it is necessary to correctly identify the modern award(s) that cover the employees and their employer(s) in relation to the work to be performed under the enterprise agreement.

A **relevant modern award** is a modern award that:

- is in operation, and
- covers (or would cover) the employee in relation to the work that he or she is to perform under the agreement, and
- covers the employer.[233]

If the Commission applies the better off overall test by reference to the incorrect award, this may constitute an error providing the basis for an appeal. *'The question of the applicable modern award is a mixed question of fact and law, though perhaps primarily a question of law.'*[234]

While only one modern award can cover an employee in relation to particular employment, when all of the employees employed in an enterprise and covered by an enterprise agreement are considered, there may be more than one relevant award.

The employer is required to identify the relevant modern award(s) for comparison when completing Form F17 – Employer's declaration in support of an application for approval of an enterprise agreement, which accompanies the agreement upon lodgement.

Related information

- Declaration from employer

Identifying a modern award

Modern awards contain interaction rules which govern situations where more than one award may appear to cover an employee. Coverage in most modern awards is defined according to industry however some modern awards apply on an occupational basis. The relevant modern award can be determined by considering the industry of the employer and comparing the duties performed by the employees to the classification definitions in the modern award.

The Commission is then required to consider the coverage of the relevant award at the test time and compare the terms of the agreement to the terms of the relevant award covering the employees at that time.[235]

To determine the award that covers an employee it may be necessary to examine the major, substantial or principal aspect of the work performed by the employee at test time, including the amount of time spent performing particular tasks, the circumstances of the employment and what the employee was employed to do. The question is one of fact to be determined by reference to the duties actually attaching to the position, rather than its title.[236]

[233] Fair Work Act ss.193(4)(b) and 194(5)(b).
[234] *Construction, Forestry, Mining and Energy Union v BJ Jarrad Pty Ltd* [2013] FWCFB 8740 (Boulton J, Asbury DP, Johns C, 28 November 2013) at para. 13; citing *Australian Workers' Union v Coffey Information Pty Ltd* [2013] FWCFB 2894 (Watson VP, Sams DP, Roberts C, 24 May 2013) at para. 18, [(2013) 232 IR 266]; and *Australian Municipal, Administrative, Clerical and Services Union v City of Fremantle* [2011] FWAFB 7161 (Giudice J, Drake SDP, Blair C, 22 November 2011) at para. 18, [(2011) 213 IR 223].
[235] Fair Work Act ss.193(1) and 193(6).
[236] *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 (28 February 2014) at para. 133; citing *Re City of Wanneroo v Michael Lindsay Holmes* [1989] FCA 369 (12 September 1989) at para. 45, [(1989) 30 IR 362 at p. 379]; and *Re Joyce v Christoffersen* [1990] FCA 253 (20 July 1990) at para. 48, [(1990) 26 FCR 261 at p. 278].

Related information

-
- What if ?

Case example: **Appropriate award identified**

Australian Workers' Union v Coffey Information Pty Ltd [2013] FWCFB 2894 (Watson VP, Sams DP, Roberts C, 24 May 2013), [(2013) 232 IR 266].

The Commission, in a decision at first instance, approved the *Coffey Materials Testing Services Agreement 2012-2016*. The AWU sought permission to appeal on the basis that the award used for purposes of the BOOT was not the relevant award. The Commission had used the *Manufacturing and Associated Industries and Occupations Award 2010*.

The approximately 330 employees to be covered by the agreement were engaged in the role of 'Testing Technician' and primarily performed geotechnical testing and analysis either at the employer's permanent laboratories or at temporary laboratories established at client sites. The AWU contended that the relevant award for the BOOT was the *Building and Construction General On-site Award 2010.*

Permission to appeal was granted. However, the appeal was dismissed.

When determining the correct award, the Full Bench considered the type of work performed by the employees and determined that the work fell within the classifications in the *Manufacturing and Associated Industries and Occupations Award 2010*. The Full Bench considered that the interaction between the two awards and determined that in their view, the provisions of the award established a priority in favour of the *Manufacturing and Associated Industries and Occupations Award 2010* covering the employees, and that it was the more appropriate award.

Case example: **Appropriate award NOT identified – Applicant contended employees were award free**

Re G.J.E. Pty Ltd [2013] FWCFB 1705 (Acton SDP, Smith DP, Ryan C, 3 April 2013).

An application was lodged for the approval of the *All Equipment Hire Enterprise Agreement 2012*. The employer conducted a general equipment hire business in South Australia at which the employees performed a customer service function and incidental duties (including cleaning, administration and basic equipment maintenance). Equipment was hired to both trade and personal customers.

The employer statutory declaration filed with the application contended the employees were award free.

The Commission did not agree that the employees were award free. The Commission found that the relevant award for the purpose of the BOOT was the *General Retail Award 2010* (Retail Award). By reference to the Retail Award, the Commission could not be satisfied that the agreement passed the BOOT and declined to approve the agreement.

The employer appealed the decision and submitted that the Commission made an error in concluding that the Retail Award was the relevant modern award.

The evidence before the Full Bench was that approximately 30% of the employer's revenue was derived from the hire of equipment to non-trade (and presumed domestic) customers. The Full Bench was satisfied that this was sufficient to meet the coverage definition set out in the Retail Award.

The Full Bench agreed with the Commission's finding that the agreement, based on the Retail Award, did not pass the BOOT and confirmed the Commission's decision not to approve the agreement.

What if employees are award free?

Where employees are covered by a transitional instrument which continues to operate, the better off overall test is applied by reference to the enterprise instrument or transitional award, rather than a modern award.[237]

Related information

- Public interest test

[237] Transitional Act Sch 7, Pt 4.

Case example: **Non-modernised award identified – Enterprise award applies**

Re Warner World Australia Pty Ltd and Village Theme Park Management Pty Ltd T/A Village Roadshow Theme Parks [2010] FWAA 5329 (Harrison SDP, 19 July 2010).

An application was made for approval of an enterprise agreement known as the *Village Roadshow Theme Parks – MEAA Entertainers Agreement 2010*.

The Commission was satisfied that each of the requirements of ss.186, 187 and 188 of the Fair Work Act as relevant to this application for approval had been met. The *Warner Bros Movie World – M.E.A.A. Entertainers Award 2001* [AP802563] was the relevant award for the application of the BOOT. This was an enterprise award and it contained a multi-hiring clause and banking of hours in similar terms to the enterprise agreement.

The Commission found that the better off overall test was satisfied. The agreement was approved with undertakings.

Case example: **Non-modernised award identified – Division 2B award applies**

Re MTC Trading Pty Ltd T/A Michel's Patisserie Golden Grove [2010] FWAA 8012 (Hampton C, 15 October 2010).

An application was made for approval of an enterprise agreement known as the *MTC Trading PL and Staff Enterprise Agreement 2010*.

The Commission applied the terms of the *Delicatessens, Canteens, Unlicensed Cafes and Restaurants etc Award* (the Delicatessens Award) for the purposes of the BOOT. The Delicatessens Award was a Division 2B Award and was applicable for this purpose as a result of a transfer of business to the employer, and the operation of s.312 of the Fair Work Act and the Transitional Act.

What if there are two or more relevant awards?

Multiple modern awards may need to be used to apply the better off overall test where different awards apply to different classes of employees to be covered by the enterprise agreement. The awards identified as relevant would be those that would cover the employer(s) and the employees in relation to the work to be performed under the agreement.

Case example: **Multiple modern awards identified**

ALDI Foods Pty Limited as General Partner of ALDI Stores (A Limited Partnership) [2012] FWA 161 (McKenna C, 19 March 2012).

ALDI Foods Pty Ltd v Transport Workers' Union of Australia; National Union of Workers, NSW Branch [2012] FWAFB 9398 (Boulton J, O'Callaghan SDP, Riordan C, 1 November 2012), [(2012) 227 IR 120].

An application was made for the approval of three single-enterprise agreements, the *Derrimut Agreement 2012*, the *Stapylton Agreement 2012* and the *Minchinbury Agreement 2012.* The TWU and NUW NSW raised objections.

The agreements concerned the pay and conditions for employees working in and from three of Aldi's distribution centres. The three agreements had broadly similar, but not identical, provisions. For example, there are different rates of pay in the agreements and other points of distinction.

In considering whether the agreements passed the BOOT, the Commission was required to consider the *General Retail Industry Award 2010*, the *Storage Services and Wholesale Award 2010*, the *Road Transport and Distribution Award 2010*, the *Manufacturing & Associated Industries and Occupations Award 2010* and the *Miscellaneous Award 2010*.

The Commission found, for various reasons, that the agreements did not meet the requirements for approval, and undertakings offered by the employer did not address the concerns of the Commission. The applications were dismissed.

On appeal, the Full Bench confirmed the decision not to approve the agreements.

Seeking advice from the Fair Work Ombudsman regarding whether an award covers an employer or employees

The Fair Work Ombudsman can provide advice in relation to award coverage for a particular employer or employees.

Links to the Fair Work Ombudsman website

The Fair Work Ombudsman has a dedicated webpage to provide assistance in determining the right award(s) that apply.

Finding the right award: www.fairwork.gov.au/awards-and-agreements/awards

Knowing the right award is important:

- to use as a basis for the content of an enterprise agreement, and
- for the application of the better off overall test.

The Fair Work Ombudsman website also provides pay guides that include minimum pay rates for full-time, part-time and casual employees in an award. They also include all the monetary allowances and the most frequently used penalty rates for each classification.

Pay guides: www.fairwork.gov.au/pay/minimum-wages/pay-guides

Loaded rates of pay

An agreement can include 'loaded rates' of pay which compensate for benefits provided for in the relevant modern award. In circumstances where an award benefit is incorporated into the agreement

hourly rate of pay, that rate will need to be increased to compensate for the removal of award benefits that would no longer apply.

In addition, the hourly rate of pay would need to reflect the work arrangements of an employee. For example, if an employee were to predominately work weekends, the employee's agreement rate of pay would have to be increased to take into consideration a greater proportion of weekend penalties to ensure that the employee was better off overall.

Benefits that can be incorporated into a loaded rate include:

- shift allowances
- weekend and public holiday penalties
- annual leave loading
- reasonable additional hours
- overtime – as well as overtime for work performed in addition to ordinary hours, instances where the agreement span of hours has been modified, the modern award generally applies overtime for work performed outside the span, which should be factored into the hourly rate, and
- work related allowances.

Incorporation of annual and personal/carer's leave in loaded rates

Loaded rates that provide for the pre-payment of paid annual leave or personal/carer's leave (except in accordance with cashing out terms in section 93 of the Fair Work Act) cannot be included in enterprise agreements as they contravene the NES.[238]

In *Re Canavan Building Pty Ltd*,[239] a Full Bench of the Commission found that terms that provide for pre-payment of paid annual leave exclude the NES entitlement to 'paid annual leave' in section 87(1) of the Fair Work Act and the requirement for payment in respect of annual leave in section 90(1). Section 55(1) of the Fair Work Act provides that a term of an enterprise agreement must not exclude the NES or any provision of the NES.

The Fair Work Act requires that the payment for annual leave be made at the employee's base rate as it is at the time the leave is taken.[240] A loaded rate which incorporates annual leave requires employees to fund any time taken off work, therefore excluding the NES provisions for annual leave.[241]

Additionally, the 'pre-payment' of annual leave constitutes cashing out of annual leave. The Fair Work Act specifies that a cashing out provision requires a minimum accrual of four weeks' paid leave to remain in place, and a written agreement between the employer and the employee in order for the cashing out to occur. The Full Bench in *Canavan* found that the terms providing for a loaded rate in relation to paid annual leave constituted a cashing out provision that was not in accordance with the requirements of section 93.[242]

Loaded rates & the BOOT

A test case of the Full Bench of the Commission in June 2018 looked at how the better off overall test is properly to be applied to agreements containing loaded rates.[243] The decision concerned five applications for the approval of enterprise agreements which provided for 'loaded' or higher rates of pay.

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[238] [2014] FWCFB 3202 (Ross J, Hatcher VP, Acton SDP, Cargill C, Wilson C, 29 May 2014) at paras 55–57.
[239] Ibid.
[240] Ibid., at para. 38.
[241] Ibid., at para. 55.
[242] Ibid., at para. 56.
[243] *Loaded Rates Agreements* [2018] FWCFB 3610 (Hatcher VP, Catanzariti VP, Gostencnik DP, Lee C, Harper-Greenwell C, 28 June 2018).

This issue became particularly pertinent since a first instance decision to approve an agreement applying to a major Australian retailer and its employees was quashed on appeal.[244] The agreement in question provided for loaded ordinary hourly rates which were higher than those in the relevant modern award and were intended to compensate for lower penalty rates for evenings, weekends and public holidays. The Full Bench found that the agreement did not pass the BOOT because the loaded rates in the agreement disadvantaged those employees who worked primarily at times which attracted lower penalty rates under the agreement as compared to the award.

Principles

The Full Bench held that the following 11 principles apply to the application of the BOOT to a loaded rates agreement:

> '(1) The BOOT requires *every* existing and prospective award covered employee to be better off overall under the agreement for which approval is sought than under the relevant modern award. If *any* such employee is not better off overall, the agreement does not pass the BOOT.
>
> (2) Section 193(7) permits the Commission to assume that if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, then the employee would be better off overall in the absence of evidence to the contrary. However the selection of class for the purpose of s 193(7) will only be of utility if the agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome. If the Commission is not satisfied on the evidence that an existing or prospective award covered employee is not better off overall, the Commission cannot approve the agreement, at least not without undertakings or in the confined circumstances set out in s 189.
>
> (3) The application of the BOOT to a loaded rates agreement will, in order for a meaningful comparison to be made, require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement. This will likely require classes to be identified based on common patterns of working hours, taking into account evening, weekend and/or overtime hours worked.
>
> (4) The starting point for the assessment will necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment for which the agreement provides or permits. For example if an enterprise agreement makes express provision for employees to be required to work ordinary hours on weekends, those provisions cannot be ignored for BOOT purposes simply because the employer asserts it does not currently utilise those working hours or roster patterns.
>
> (5) In the case of existing employees, this may involve an examination of existing roster patterns worked by various classes of employees as at the test time. The use of sample rosters to compare remuneration produced by a loaded rates pay structure compared to the relevant modern award may be an effective method of doing this. There may be objective evidence that a particular pattern of working hours or roster pattern permitted by an enterprise agreement is not practicable, or cannot or is unlikely to be worked.
>
> (6) In the case of prospective employees, the assessment will necessarily involve a degree of conjecture. In the case of an enterprise operating at a defined workplace or workplaces, the Commission may be in a position to make sensible predictions about the basis upon which prospective employees might be engaged based on the roster patterns worked by existing employees. However if a business is small and/or still at the development stage, or the agreement would cover a wider range of classifications, work locations and/or roster patterns that are not in existence as at the test time, useful predictions may not readily be drawn from the way in which the existing workforce operates. In that situation the assessment will require an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment which the agreement provides for or permits.

[244] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2016] FWCFB 2887 (Watson VP, Kovacic DP, Roe C, 31 May 2016).

(7) If the information concerning patterns of working hours needed to assess whether a loaded rates agreement passes the BOOT is not contained in the employer's Form F17 statutory declaration accompanying the approval application, it may be necessary for the Commission to request or require the production of such information.

(8) The BOOT involves the making of an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements which are more and less beneficial to the employee than under the relevant award.

(9) The overall assessment required will essentially be a mathematical one where the terms being compared relate directly to remuneration. The assessment will be more complex where the agreement contains some superior entitlements which are non-monetary in nature, accessible at the employee's option or which are contingent upon specified events occurring.

(10) In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees. In the case of a contingent benefit, it will be necessary to make a realistic assessment about the likelihood of the benefit crystallising during the period in which the agreement will operate.

(11) Where a loaded rates agreement results in significant financial detriment for existing or prospective employees compared to the relevant award, it is unlikely that a non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT.'[245]

Examples

Having regard to the above principles, it is possible to give examples of the type of loaded rate structures which are capable, on proper analysis, of passing the BOOT.

The examples below are based on the *Security Services Industry Award 2010* [MA000016] (*Security Award*), and use the Security Officer Level 1 classification rate for which the base ordinary rate at 1 July 2018 is $808.00 per week or $21.26 per hour rounded to the nearest cent.

In each case it is necessary to formulate a rate for a specific roster scenario. In no case is any amount of overtime incorporated into the loaded rate.[246]

The examples below are intended to illustrate the way in which loaded rates capable of passing the BOOT might be constructed.

For a proposed agreement in another industry, the entitlements under the relevant modern award would need to be substituted.

Related information

- Common defects & issues – Loaded rates

Examples and modelling – Methodology

Calculations

The loaded rate calculated in each of the roster scenarios 1 – 18 from the *Loaded Rates Agreements* decision[247] is the appropriate loaded rate that would be required to compensate employees for not

[245] *Loaded Rates Agreements* [2018] FWCFB 3610 (Hatcher VP, Catanzariti VP, Gostencnik DP, Lee C, Harper-Greenwell C, 28 June 2018) at para. 115.
[246] Ibid., at para. 116.
[247] *Loaded Rates Agreements* [2018] FWCFB 3610 (Hatcher VP, Catanzariti VP, Gostencnik DP, Lee C, Harper-Greenwell C, 28 June 2018).

receiving the following Penalty Rates contained in clause 22.3 of the *Security Award* when working on the stipulated roster in each scenario:

- Night shift penalties of 21.7% for working between 6pm to 12am and 12am to 6am Monday-Friday
- Permanent night shift penalty of 30% for working permanent nights under the Award. This means work performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary shifts include ordinary hours between 0000 hrs and 0600 hrs
- Saturday penalties of 50%
- Sunday penalties of 100%
- Public holiday penalties of 150%

Note: The Scenarios use the *Security Award* ordinary rates effective from 1 July 2018. Both the pay rates and the hours worked have been calculated to two decimal places.

Allowances

The loaded rates have been calculated assuming employees in the scenarios are not entitled to any award allowance including leading hand allowance, relieving officer's allowance and first aid allowance.

Annual leave

Employers must pay an employee their annual leave entitlements in accordance with clause 24.6 of the *Security Award*. The loaded rate may not adequately compensate employees for their annual leave entitlement under the *Security Award* if annual leave is paid at the loaded rate.

Casual loading

The loaded rate also takes into account the casual loading where applicable.

BOOT

The loaded rates in the scenarios would only be appropriate for the relevant roster scenario to pass the BOOT if employees otherwise are entitled under the hypothetical agreement to other terms or conditions of employment which are the same as or at least equally beneficial to those in the *Security Award*, and the agreement does not contain any other provision not contained in the *Security Award* which would be detrimental to employees.

Public holidays

Where the model makes provision for public holidays it is assumed that the public holidays are worked on a weekday.

Loading

The 'loading' is the difference between the notional weekly rate under each scenario *plus a 'buffer' amount of $5 or $10 (depending on the situation)*, and the award weekly minimum rate. This loading is converted to a percentage and rounded up to derive the loaded rate percentage, being the percentage the rate needs to be above the *Security Award* rate to ensure the loaded rate will adequately compensate employees under each roster scenario. The rounded percentage was then used to calculate the weekly loaded rate which was then verified in the models below.

To ensure that the loaded rate is clearly above the award rate plus penalties, a buffer is added to the amount. This buffer is:

- $10 for anyone working over 15 hours per week
- $5 for anyone working up to 15 hours per week.

Excerpt from clause 14 – Minimum wages of the *Security Award*

14. Minimum wages

14.1 An employer must pay full-time employees minimum weekly wages for ordinary hours (exclusive of penalties and allowances) as follows:

Employee classification	Minimum weekly rate $
Security Officer Level 1	808.00
Security Officer Level 2	831.20
Security Officer Level 3	845.30
Security Officer Level 4	859.40
Security Officer Level 5	887.20

Examples and modelling – Permanent employees

Example – Permanent employees

In respect of 'permanent' (that is, non-casual) full-time employees, the following tables set out a loaded rate which would pass the BOOT on the identified roster scenario, assuming that there is no other provision in the agreement superior or inferior to the award which is required to be taken into account:

Roster scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 1 – Full-time Employee working a 38 hour week. Roster made up as follows: • 1/7 of their ordinary hours worked on each day of the week • Mon-Fri work is split evenly between night shift and day shift. • 6 public holidays are worked each year for 7.6 hours.	34%	$28.49

Modelling – Scenario 1 – Permanent employee

A Level 1 permanent employee working a 38 hour week for each week of the year which comprises of the following:

- 1/7 of their ordinary hours worked on each day of the week:
  (38 hours ÷ 7 = 5.43 hours)
- Mon-Fri hours are evenly split between day shift work and night shift work:
  (5.43 hours x 5 (Mon-Fri) ÷ 2 (day shift or night shift) = 13.57 hours)
  (13.57 hours - 0.44 hours (half public holiday) = 13.13 hours)
- Given public holidays are likely to be worked in the security industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. The figure in a weekly model to proportion the public holidays to the weekly model would approximately be represented by:
  (6 days x 7.6 hours ÷ 52 weeks = 0.88 hours).

Award Ordinary Hourly Rate for a Security Officer Level 1 employee	**$21.26**			
	Hours	**Loading** (from clause 22.3 of *Security Award*)	**Calculation** (rate x hours x loading)	**Weekly total**
Mon- Fri Day	13.13	100%	$21.26 x 13.13 x 1.0	$279.14
Mon-Fri Night	13.13	121.7%	$21.26 x 13.13 x 1.217	$339.72
Mon-Fri Perm Night	0	130%	N/A	$0.00
Saturday	5.43	150%	$21.26 x 5.43 x 1.5	$173.16
Sunday	5.43	200%	$21.26 x 5.43 x 2.0	$230.88
Public Holiday	0.88	250%	$21.26 x 0.88 x 2.5	$46.77
Totals	**38.00**			**$1,069.67**

The loaded rate for each *Security Award* classification for a full-time employee on this roster pattern is below:

Classification	**Award minimum weekly rate**	**Award minimum hourly rate**	**Scenario 1 weekly rate**	**Percentage**	**Loaded rate increase**	**Loaded rate**
Calculations	From clause 14.1 of *Security Award*	(Award weekly rate ÷ 38)	Total from table above	(Scenario weekly rate + $10 - award weekly rate) ÷ award weekly rate*	(Award hourly rate x 0.34)	(Award hourly rate + 34%)
Level 1 (+ calculations)	$808.00	$21.26	$1,069.67	($1,069.67 + $10 - $808.00 = $271.67) $271.67 ÷$808.00 = 0.34 (34%)	$21.26 x 0.34 = $7.23	$21.26 + $7.23 = $28.49
Level 2	$831.20	$21.87	$1,100.37	34%	$7.44	$29.31
Level 3	$845.30	$22.24	$1,118.99	34%	$7.56	$29.80
Level 4	$859.40	$22.62	$1,138.10	34%	$7.69	$30.31
Level 5	$887.20	$23.35	$1,174.84	34%	$7.94	$31.29

* rounded up to nearest whole number

Loaded Rate for a Security Officer Level 1 employee	**$28.49**			
	Hours	**Loading**	**Calculation** (rate x hours x loading)	**Weekly total**
Ordinary Time	38	100%	$28.49 x 38 x 1.0	$1,082.62
Totals	**38.00**			**$1,082.62**

The above roster scenarios may also be adapted for part-time employees. If part-time employees work a proportion of the working hours specified for any of the above rosters consistent with the amount of hours they work each week, the loaded rate required to pass the BOOT will be the same. For example, in Scenario 1, if a part-time employee is engaged to work 1/7th of the contracted 30 hours per week each day Monday to Sunday, with the work split evenly between night shift and day shift, and 6 public holidays of 6 hours each are worked each year, the loaded rate necessary to pass the BOOT will remain at $28.49.

Examples and modelling – Part-time employees

Example – Part-time employees

Loaded rates for roster scenarios specific to part-time employees may be developed, such as the following:

Roster Scenario	**% Rate required to be above award base rate**	**Loaded rate required for Level 1 Classification**
Scenario 6 – Part-time Employee working a 30 hour week. Roster is as follows: • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on day shift. • 3 public holidays are worked each year for 7.6 hours.	23%	$26.15

Modelling – Scenario 6 – Part-time employee

A Level 1 part-time employee working a 30 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as:
  (2 days x 7.6 hours ÷ 4 weeks = 3.8 hours)
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as:
  (2 days x 7.6 hours ÷ 4 weeks = 3.8 hours).
- Other hours are worked by the employee on day shift:
  (30 hours - 3.8 hours (Saturday) - 3.8 hours (Sunday) - 0.44 hours (Public holidays) = 21.96 hours)
- Given public holidays are likely to be worked in the Security Industry this employee also works 3 public holidays a year for 7.6 hours on each public holiday. This is represented in the model as:
  (3 days x 7.6 hours ÷ 52 weeks = 0.44 hours)

Award Ordinary Hourly Rate for a Security Officer Level 1 employee	**$21.26**			
	Hours	**Loading** (from clause 22.3 of *Security Award*)	**Calculation** (rate x hours x loading)	**Weekly total**
Mon- Fri Day	21.96	100%	$21.26 x 21.96 x 1.0	$466.87
Mon-Fri Night	0	121.7%	N/A	$0.00
Mon-Fri Perm Night	0	130%	N/A	$0.00
Saturday	3.8	150%	$21.26 x 3.8 x 1.5	$121.18
Sunday	3.8	200%	$21.26 x 3.8 x 2.0	$161.58
Public Holiday	0.44	250%	$21.26 x 0.44 x 2.5	$23.39
Totals	**30.00**			**$733.02**

The loaded rate for each *Security Award* classification for a part-time employee on this roster pattern is below:

Classification	**Award minimum weekly rate for 30 hours**	**Award minimum hourly rate**	**Scenario 6 weekly rate**	**Percentage**	**Loaded rate increase**	**Loaded rate**
Calculations	(Hourly rate x 30)	(Award weekly rate from clause 14.1 of *Security Award* ÷ 38)	Total from table above	(Scenario weekly rate + $10 - award weekly rate) ÷ award weekly rate*	(Award hourly rate x 0.23)	(Award hourly rate + 23%)
Level 1 (+ calculations)	$637.80	$21.26	$773.02	($773.02 + $10 - $637.80 = $145.22) $145.22 ÷$637.80 = 0.23 (23%)	$21.26 x 0.23 = $4.89	$21.26 + $4.89 = $26.15
Level 2	$656.10	$21.87	$795.20	23%	$5.03	$26.90
Level 3	$667.20	$22.24	$808.64	23%	$5.12	$27.36
Level 4	$678.60	$22.62	$822.46	23%	$5.20	$27.82
Level 5	$700.50	$23.35	$849.02	23%	$5.37	$28.72

* rounded up to nearest whole number

Loaded Rate for a Security Officer Level 1 employee	**$26.15**			
	Hours	**Loading**	**Calculation** (rate x hours x loading)	**Weekly total**
Ordinary Time	30	100%	$26.15 x 30 x 1.0	$784.50
Totals	**30.00**			**$784.50**

Where an agreement seeks to provide for a single loaded rate at a given classification level, but also provides that employees may be directed to work hours which may fit into any of the above scenarios, then it will be necessary for the loaded rate to be at least as high as the highest rate from all of the scenarios above.

Alternatively, the agreement might provide for employees to be assigned specific roster patterns which contain express limitations on the number or proportion of hours to be worked at certain times (such as on evenings or weekends) which would attract the payment of penalty rates under the relevant award.

Thus if an agreement provided that a full-time or part-time employee, as the case may be, could be assigned to any one of the above roster scenarios at any given time, then the employee would only need to be paid the loaded rate for the scenario while on the roster in order for the agreement to pass the BOOT.

The position becomes more difficult with respect to casual employees. Casual employment may consist of engagement under hourly or daily fixed term contracts, and be used for the performance of short-term and/or intermittent work on an ‘on-call’ basis. In this case, the casual employee is not guaranteed work on any specified days or for any specified duration. In an enterprise agreement which provides or permits casual employment of this nature, it is difficult to envisage how it would be possible to provide for a loaded rate for casual employees that was capable of passing the BOOT. This is because it would always be possible for the casual employee, in a given pay period, to be engaged to work on a day or at a time which would attract the payment of penalty rates under the relevant award and not to be engaged on any other hours or at any other times. In that circumstance, if the agreement provided for a loaded rate which was less than the highest penalty rate provided for in the relevant award, the employee would necessarily be disadvantaged as compared to the award.

Examples and modelling – Casual employees – working 38 hours

Example – Casual employees

An enterprise which utilises casual employees to perform regular and ongoing work (so that casual employment is simply used as an alternative payment and entitlement system rather than to describe engagement on a truly casual basis), an enterprise agreement might provide casual employees with an entitlement to guaranteed hours and rosters.

In that circumstance it may be possible to construct a loaded rate for them, in the same way as for full-time and part-time employees above, which is capable of passing the BOOT based on particular prescribed rosters.

For example, the following loaded rates (which are inclusive of the 25% casual loading) for Level 1 casual employees covered by the *Security Award*, who work full-time hours would pass the BOOT if the agreement contained no offsetting disadvantageous provisions:

Roster Scenario	% Rate required to be above award base rate	Loaded rate required for Level 1 Classification
Scenario 10 – Casual Employee working a 38 hour week. Roster made up as follows: • 1/7 of their ordinary hours worked on each day of the week • Mon-Fri work is split evenly between night shift and day shift. • 6 public holidays are worked each year for 7.6 hours.	59%	$33.80

Modelling – Scenario 10 – Casual employees

A Level 1 casual employee working a 38 hour week for each week of the year which comprises of the following:

- 1/7 of their ordinary hours worked on each day of the week:
  (38 hours ÷ 7 = 5.43 hours)
- Mon-Fri hours are evenly split between day shift work and night shift work:
  (5.43 hours x 5 (Mon-Fri) ÷ 2 (day shift or night shift) = 13.57 hours)
  (13.57 hours - 0.44 hours (half public holiday) = 13.13 hours)
- Given public holidays are likely to be worked in the security industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. The figure in a weekly model to proportion the public holidays to the weekly model would approximately be represented by:
  (6 days x 7.6 hours ÷ 52 weeks = 0.88 hours).

Award Ordinary Hourly Rate for a Security Officer Level 1 employee	**$21.26**			
	Hours	**Loading** (from clause 22.3 of *Security Award*)	**Calculation** (rate x hours x loading)	**Weekly total**
Mon- Fri Day	13.13	125%	$21.26 x 13.13 x 1.25	$348.93
Mon-Fri Night	13.13	146.7%	$21.26 x 13.13 x 1.467	$409.50
Mon-Fri Perm Night	0	155%	N/A	$0.00
Saturday	5.43	175%	$21.26 x 5.43 x 1.75	$202.02
Sunday	5.43	225%	$21.26 x 5.43 x 2.25	$259.74
Public Holiday	0.88	275%	$21.26 x 0.88 x 2.75	$51.45
Totals	**38.00**			**$1,271.64**

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	**Award minimum weekly rate**	**Award minimum hourly rate**	**Scenario 10 weekly rate**	**Percentage**	**Loaded rate increase**	**Loaded rate**
Calculations	From clause 14.1 of *Security Award*	(Award weekly rate ÷ 38)	Total from table above	(Scenario weekly rate + $10 - award weekly rate) ÷ award weekly rate*	(Award hourly rate x 0.59)	(Award hourly rate + 59%)
Level 1 (+ calculations)	$808.00	$21.26	$1,271.64	($1,271.64 + $10 - $808.00 = $473.64) $473.64 ÷$808.00 = 0.59 (59%)	$21.26 x 0.59 = $12.54	$21.26 + $12.54 = $33.80
Level 2	$831.20	$21.87	$1,308.14	59%	$12.90	$34.77
Level 3	$845.30	$22.24	$1,330.27	59%	$13.12	$35.36
Level 4	$859.40	$22.62	$1,353.00	59%	$13.35	$35.97
Level 5	$887.20	$23.35	$1,396.66	59%	$13.78	$37.13

* rounded up to nearest whole number

Loaded Rate for a Security Officer Level 1 employee	**$33.80**			
	Hours	**Loading**	**Calculation** (rate x hours x loading)	**Weekly total**
Ordinary Time	38	100%	$33.80 x 38 x 1.0	$1,284.40
Totals	**38.00**			**$1,284.40**

Examples and modelling – Casual employees – working 15 hours

Example – Casual employees

The following loaded rates (inclusive of the casual loading) would also pass the BOOT for casual employees working 30 hours or 15 hours per week, again assuming there were no offsetting disadvantages in the agreement):

Roster Scenario	**% Rate required to be above award base rate**	**Loaded rate required for Level 1 Classification**
Scenario 18 – Casual Employee working a 15 hour week. Roster is as follows: • Employees work 7.6 hour shifts on 2 Saturdays and 2 Sundays in a 4 week period. • Other hours worked on permanent night shift. • 6 public holidays are worked each year for 7.6 hours.	87%	$39.76

Modelling – Scenario 18 – Casual employees

A Level 1 casual employee working a 15 hour week for each week of the year which comprises of the following:

- Employee works two 7.6 hour shifts on a Saturday in a 4 week period. This is represented in the weekly model as:
  (2 days x 7.6 hours ÷ 4 weeks = 3.8 hours)
- Employee works two 7.6 hour shifts on a Sunday in a 4 week period. This is represented in the weekly model as:
  (2 days x 7.6 hours ÷ 4 weeks = 3.8 hours)
- Other hours are worked by the employee on permanent night shift
  (15 hours - 3.8 hours (Saturday) - 3.8 hours (Sunday) - 0.44 hours (Public holidays) = 6.52 hours)
- Given public holidays are likely to be worked in the security industry this employee also works 6 public holidays a year for 7.6 hours on each public holiday. The figure in a weekly model to proportion the public holidays to the weekly model would approximately be represented by:
  (6 days x 7.6 hours ÷ 52 weeks = 0.88 hours).

Award Ordinary Hourly Rate for a Security Officer Level 1 employee	**$21.26**			
	Hours	**Loading** (from clause 22.3 of *Security Award*)	**Calculation** (rate x hours x loading)	**Weekly total**
Mon- Fri Day	0	125%	N/A	$0.00

Mon-Fri Night	0	146.7%	N/A	$0.00
Mon-Fri Perm Night	6.52	155%	$21.26 x 6.52 x 1.55	$214.85
Saturday	3.8	175%	$21.26 x 3.8 x 1.75	$141.38
Sunday	3.8	225%	$21.26 x 3.8 x 2.25	$181.77
Public Holiday	0.88	275%	$21.26 x 0.88 x 2.75	$51.45
Totals	**15.00**			**$589.45**

The loaded rate for each *Security Award* classification for a casual employee on this roster pattern is below:

Classification	**Award minimum weekly rate**	**Award minimum hourly rate**	**Scenario 18 weekly rate**	**Percentage**	**Loaded rate increase**	**Loaded rate**
Calculations	(Hourly rate x 15)	(Award weekly rate from clause 14.1 of *Security Award* ÷ 38)	Total from table above	(Scenario weekly rate + $5 - award weekly rate) ÷ award weekly rate*	(Award hourly rate x 0.87)	(Award hourly rate + 87%)
Level 1 (+ calculations)	$318.90	$21.26	$589.45	($589.45 + $5 - $318.90 = $275.55) $275.55 ÷ $318.90 = 0.87 (87%)	$21.26 x 0.87 = $18.50	$21.26 + $18.50 = $39.76
Level 2	$328.05	$21.87	$606.38	87%	$19.03	$40.90
Level 3	$333.60	$22.24	$616.63	87%	$19.35	$41.59
Level 4	$339.30	$22.62	$627.16	87%	$19.68	$42.30
Level 5	$350.25	$23.35	$647.41	87%	$20.31	$43.66

* rounded up to nearest whole number

Loaded Rate for a Security Officer Level 1 employee	**$39.76**			
	Hours	**Loading**	**Calculation** (rate x hours x loading)	**Weekly total**
Ordinary Time	15	100%	$39.76 x 15 x 1.0	$596.40
Totals	**15.00**			**$596.40**

Case example: **Passed the better off overall test – Loaded rates (with undertakings)**

Re Dominance Enterprises Pty. Ltd. T/A Dominance Guardian Services [2014] FWCA 4448 (Gregory C, 11 July 2014).

An application was made for approval of an enterprise agreement known as the *Dominance Guardian Services - Enterprise Agreement - 2014.* After reviewing the application, the Commission sought clarification of a range of issues. The agreement provided loaded hourly rates to employees depending upon whether an employee was rostered to work on weekdays, weekends or public holidays, and included an additional casual loading for casual employees.

Whilst the rates proposed for work rostered on weekdays appeared to satisfy the requirements of the BOOT, this was not necessarily evident for the rates provided for work rostered on weekends and on public holidays. The Commission also sought clarification of the intended span of ordinary hours, as well as the provisions concerning entitlement to overtime payments.

The Commission found that when pay rates were structured in the way proposed in the agreement, any assessment of those arrangements will depend in large part on when an employee is actually rostered to work. If the employee works the majority of his or her hours on weekdays then they will most likely be better off. However, if a significant proportion of the employee's hours are on weekends or public holidays, this is less likely to be the case because the loaded rate at those times was less than the award rate.

The applicant provided information about how the hourly rates had been calculated, together with an additional undertaking to the effect that any shortfall between earnings under the agreement and earnings that would have been earned under the modern award would be made up in the next pay cycle. The agreement was approved with undertakings.

Case example: **Passed the better off overall test – Loaded rates (with undertakings)**

Re Lucky Coffee Pty Ltd [2013] FWCA 294 (Gay C, 15 January 2013).

An application was made for approval of an enterprise agreement known as the *Lucky Coffee Pty Ltd Enterprise Agreement 2012.* The Commission had a number of concerns with the agreement, including in relation to part-time hours and days being agreed upon in writing, overtime penalties for part-time employees and wage rates being high enough to compensate for reduced penalties.

The Commission received undertakings addressing these concerns by raising the pay rate for a number of junior rates and paying part-time employees overtime rates for any worked outside those agreed to.

The Commission was satisfied that employees were better off overall under the agreement than under the modern award.

Case example: **Passed the better off overall test – Loaded rates (with undertakings)**

Re Leslie James Foster T/A Echuca Security Options [2011] FWAA 6081 (Lewin C, 8 September 2011).

An application was made for approval of an enterprise agreement known as the *Echuca Security Enterprise Agreement 2011.* The Commission was concerned the agreement incorporated loadings and penalties into the pay rates.

The applicant undertook to both raise the pay rates and to pay weekend penalty rates for permanent employees required to work on the weekend. The Commission was satisfied that by incorporating the undertakings, the agreement could be approved.

Case example: **Passed the better off overall test – Loaded rates (with undertakings)**

Re Calvary Health Care Tasmania Limited T/A Calvary Health Care Tasmania [2014] FWCA 7316 (Lee C, 16 October 2014).

An application was made for approval of an enterprise agreement known as the *Calvary Health Care Tasmania Hospital Staff Enterprise Agreement 2014*. It appeared the agreement incorporated shift loadings into the hourly rate.

The applicant increased the pay rates in the agreement to satisfy the Commission that employees would be better off overall under the agreement rather than the modern award. On this basis, the Commission approved the agreement.

Public interest test

See Fair Work Act s.189

The Fair Work Act allows for the approval of enterprise agreements that do not pass the better off overall test if, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest.

The Commission may only approve an agreement on this basis if failure to pass the better off overall test is the only reason the Commission is not required to approve the agreement.[248]

Exceptional circumstances

In *Nulty v Blue Star Group Pty Ltd*,[249] the Full Bench said:

> *In summary, the expression 'exceptional circumstances' has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare. Circumstances will not be exceptional if they are regularly, or routinely, or normally encountered. Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional. It is not correct to construe 'exceptional circumstances' as being only some unexpected occurrence, although frequently it will be. Nor is it correct to construe the plural 'circumstances' as if it were only a singular occurrence, even though it can be a one off situation. The ordinary and natural meaning of 'exceptional circumstances' includes a combination of factors which, when viewed together, may reasonably be seen as producing a situation which is out of the ordinary course, unusual, special or uncommon.*

An example of a case in which the Commission may be satisfied exceptional circumstances exist is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.[250]

The test to be applied is not whether the agreement is in the broader public interest but whether the agreement, because of exceptional circumstances, is not contrary to the public interest, which is a lower test.[251]

[248] Fair Work Act s.189(1)(b).
[249] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 (Lawler VP, Sams DP, Williams DP, 16 February 2011) at para. 13, [(2011) 203 IR 1].
[250] Fair Work Act s.189(3).
[251] *Re Top End Consulting Pty Ltd* [2010] FWA 6442 (Bartel DP, 24 August 2010) at para. 46.

Undermining or reducing entitlements

Public interest considerations could involve deciding whether a term of an agreement undermines or reduces entitlements in a modern award to the extent that members of the public whose employment is regulated by that award may have interests which are impacted by the approval of the agreement. It may also be the case that there is a public interest in maintaining a level playing field among employees in a particular industry or sector. This is particularly so given that the objects of the Fair Work Act to ensure 'a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders'.[252]

Case example: **Public interest test – Exceptional circumstances found**

Re Milingimbi & Outstations Progress Resource Association [2011] FWAA 1431 (Lawler VP, 4 March 2011).

An application was made for approval of an enterprise agreement known as the *Milingimbi & Outstations Progress Resource Association Enterprise Agreement 2010*.

The Commission was concerned that the agreement did not pass the BOOT because it did not provide penalty rates for work performed outside ordinary hours (particularly work performed on weekends).

However, the Commission was satisfied that, because of exceptional circumstances, it would not be contrary to the public interest to approve the agreement.

The workplace was an extremely remote part of Australia – some 500km from the closest town. The employer was a not-for-profit organisation that provided services to the local indigenous community and depended on Government grants to meet the costs of employing its four employees. The funding was already set for the existing year and was sufficient only to cover wage costs under the agreement. The employer had no realistic prospect of obtaining the additional funds that would be needed to meet the costs of an undertaking that would address the concerns with the BOOT.

In addition, one of the four employees to be covered by the agreement gave evidence that, due to a variety of cultural and other factors, weekends do not have the same significance as they do in other parts of Australia. The Commission was satisfied that the way in which weather interacts with the employer's activities, together with the need to accommodate cultural obligations, meant that employees were happy to be flexible about when ordinary hours were performed.

In these circumstances, the agreement was approved.

[252] *Re Agnew Legal Pty Ltd* [2012] FWA 10861 (Asbury C, 24 December 2012) at para. 12.

Case example: **Public interest test – Exceptional circumstances found**

Re Poolhaven Pty Ltd [2011] FWAA 4036 (Asbury C, 27 June 2011).

An application was made for approval of an enterprise agreement known as the *Poolhaven Enterprise Agreement 2011*. The relevant award for the purposes of the BOOT was the *Horticultural Award 2010*.

The Agreement provided for employees to work additional voluntary hours and to be paid for such hours at ordinary rates. The employer was informed that it appeared the agreement did not pass the BOOT, on the basis that if additional voluntary hours were worked under the award employees would be entitled to be paid for such hours at overtime rates.

The employer submitted material that indicated there were exceptional circumstances and that approval of the agreement was not contrary to the public interest. The employer's business had been impacted by:

- The non-occurrence of 'winter' in the Cairns region in 2010 which detrimentally impacted on the production of fruit for the 2009/2010 season
- The Queensland floods, and
- Cyclone Yasi.

The Commission found that although these exceptional circumstances were all one-off events, the combination of the three over a short period of time had a detrimental impact on the employer. Due to the combination of the three natural disasters, the farm had 'missed the market' and was not in a financial position to pay the penalty rates provided for in the award.

After considering the material provided by the employer, the Commission was satisfied that the agreement should be approved because there were exceptional circumstances and approval would not be contrary to the public interest. It was also relevant that the term of the agreement was only 12 months.

Case example: **Public interest test – Exceptional circumstances NOT found**

Re SOS Nursing & Homecare Service [2012] FWA 10543 (Deegan C, 14 December 2012).

An application for approval of the *SOS Home and Community Care Enterprise Agreement 2012* was not supported by the NSW Nurses and Midwives' Association nor the Queensland Nurses' Union on the grounds that the agreement did not pass the BOOT or comply with the NES.

The Commission determined that the agreement did not pass the BOOT. The employer submitted that it should be approved pursuant to s.189. Very little material was put by the employer in support of this claim. In essence, it was argued that, given the vital work carried out by the employees in remote and rural areas, it was in the public interest for the agreement to be approved.

The Commission found that whilst SOS employees performed a valuable service, the employer was set up to make a profit. The evidence contained nothing upon which to find exceptional circumstances that would justify the employees being subjected to an agreement which was less beneficial than the relevant awards.

The agreement was refused as it did not pass the BOOT and the Commission was not satisfied that exceptional circumstances existed which would render the approval of the agreement not contrary to the public interest.

Case example: **Public interest test – Exceptional circumstances NOT found**

Re Springfield Gourmet Pty Ltd [2010] FWA 8297 (Richards SDP, 23 November 2010).

An application was made for approval of the *Hell Pizza Queensland Enterprise Agreement 2009,* which included a provision allowing casual employees to nominate to perform duties in the morning, night and weekends at the ordinary casual hourly rate of pay. These were hours the casual employees were said to prefer to accommodate predominantly educational commitments. Payment at the ordinary hourly rate was substantially less favourable than the payment required under the relevant modern award.

The employer sought to have the agreement approved on the basis that exceptional circumstances applied- being that, if casuals were not able to choose to be paid at the ordinary hourly rate, they would be displaced by permanent employees to whom penalty rates would not apply.

The Commission was not satisfied that exceptional circumstances existed. Approving the agreement might also result in the employer receiving a labour cost advantage not received by others. The application was dismissed.

Case example: **Public interest test – Exceptional circumstances NOT found**

Re The Andrew Crawford Group Pty Ltd T/A Crawford Group Security and Investigations [2013] FWC 5858 (O'Callaghan SDP, 19 August 2013).

An application was made for approval of *The Andrew Crawford Group Pty Ltd Enterprise Agreement 2013*. The agreement applied to employees who worked as static guards, crowd controllers or 'cash in transit escorts'.

The Commission did not consider that the agreement met the BOOT. The applicant requested approval of the agreement under s.189 of the Fair Work Act on the basis that the only impediment to approval was the BOOT and that exceptional circumstances existed.

The applicant identified four security industry agreements which it asserted operated similarly to this agreement and had been approved by the Commission or its predecessor. The four security industry agreements enabled the companies concerned to charge lower rates to customers than the applicant could do under the relevant modern award. At least two customers had confirmed that the Sunday and public holiday rates were not competitive.

If the exceptional circumstance provision was applied so as to deliberately sanction the undermining of modern award entitlements to facilitate commercial competition, this would be inconsistent with the function and objective of the modern award and must therefore be contrary to the public interest.

The Commission concluded if the agreement was approved it may form the foundation for similar arguments, therefore substantially displacing the function of the modern award to set minimum employment conditions. The application was refused.

Undertakings

See Fair Work Act ss.190–191

Where the Commission has a concern that an enterprise agreement does not meet the requirements of ss.186 and 187 of the Fair Work Act (which include the better off overall test), the Commission may accept a written undertaking that meets this concern and approve the agreement.

Before accepting an undertaking, the Commission must:

- seek the views of each known bargaining representative for the agreement

- be satisfied the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement.

An undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking.[253]

A residual discretion remains to be exercised even if the undertaking that has been accepted meets the identified concern.[254]

If an undertaking is accepted, the terms of the undertaking are taken to be a term of the agreement.[255]

An undertaking that is expressed as varying a particular provision in an enterprise agreement should be taken to be a promise by the employer that the provision will not be applied and the term as set out in the undertaking will be.[256]

An undertaking can only be accepted where there is a concern under ss.186 and 187; not to address other deficiencies.[257]

'Section 190(3) does not permit undertakings that result in the wholesale reshaping of the agreement, such that it bears no resemblance to the pre-undertaking agreement that was approved by employees.'[258]

Important

The Commission cannot accept an undertaking to correct deficiencies of a flexibility term or a consultation term because they are not concerns about matters in ss.186 and 187 of the Fair Work Act.[259]

If the Commission has any concerns with these then the model clauses will be inserted.

Related information

- Schedule 2.2 – Model flexibility term
- Schedule 2.3 – Model consultation term

Process

The process for offering and accepting undertakings, assessing whether an accepted undertaking meets the requisite concern, and considering whether to approve an enterprise agreement may be summarised as follows:

1. There must be made an application for approval of an enterprise agreement.
2. The Commission must have a concern that the agreement does not meet one or more of the requirements set out in ss.186 and 187 of the Fair Work Act. It should go without saying that the relevant concern needs to be identified by the Commission and communicated to the applicant for the approval of the agreement, and where the applicant is a bargaining representative for the agreement which is not the employer, also communicated to the

[253] Fair Work Regulations reg 2.07.
[254] *Application by Metropolitan Fire and Emergency Services Board* [2019] FWC 106 (Gostencnik DP, 15 January 2019) at para. 26.
[255] Fair Work Act s.191(2).
[256] *Re Kore Construction Pty Ltd* [2014] FWC 1955 (Gostencnik DP, 24 March 2014) at para. 30.
[257] See for example *Mondelez Australia Pty Ltd* [2018] FWC 2140 (Hatcher VP, 13 April 2018).
[258] *Construction, Forestry, Mining and Energy Union v KAEFER Integrated Services Pty Ltd* [2017] FWCFB 5630 (Hatcher VP, Colman DP, Harper-Greenwell C, 20 November 2017) at para. 41.
[259] See for example *Re PPG Industries Australia Pty Limited* [2015] FWCA 5591 (Lee C, 3 September 2015) at para. 13.

employer or employers covered by the agreement. Only an employer or employers covered by an agreement can give an undertaking.

3. There must be a written undertaking from one or more of the employers covered by the agreement and that undertaking must meet the signing requirements.
4. The Commission must assess and be satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement.
5. Before accepting an undertaking the Commission must seek the views of known bargaining representatives for the agreement.
6. If the undertaking is accepted the Commission must be satisfied that the accepted undertaking meets its concern before it may approve the agreement.
7. There is a residual discretion to be exercised whether to approve the agreement with the undertaking that has been accepted and that meets the identified concern.[260]

[260] *BGC Contracting Pty Ltd T/A BGC* [2018] FWC 6936 (Gostencnik DP, 16 November 2018) at paras 15–22.

Case example: **Views of bargaining representatives NOT sought**

Australian Workers' Union v Roadworx Surfacing Pty Ltd [2011] FWAFB 1759 (Harrison SDP, Richards SDP, Williams C, 10 May 2011), [(2011) 207 IR 362].

All employees covered by an agreement had appointed themselves bargaining representatives. Prior to the vote for the agreement, a number of the employees revoked their own appointments, resulting in the AWU becoming a default bargaining representative. The enterprise agreement was ultimately made and an application for its approval was made to the Commission. There were concerns as to whether the agreement could be approved, but ultimately it was approved with undertakings.

The AWU appealed the decision to approve the agreement, arguing that, among other issues, bargaining representatives were not shown a copy of the undertakings or asked for their views. The Full Bench found that the legislation required that all bargaining representatives, including the AWU and the employees who had appointed themselves, should have been provided with a copy of the undertakings and their views should have been sought.

Accordingly, the decision to approve the agreement was quashed.

Financial detriment

An undertaking that reduces or removes an employee entitlement in an agreement and consequently be likely to cause financial detriment cannot be accepted by the Commission. This would change the nature of the agreement and may have affected the way the employees chose to vote on it.

An illustrative example is provided in the Explanatory Memorandum:[261]

The EN & EM Surveillance Pty Ltd Enterprise Agreement 2011 covers 800 employees working in a local security business. The Commission has a concern that the agreement may not pass the better off overall test for a group of 80 employees employed under the classification of Static Guard. The agreement would pass the better off overall test if the base rate of pay under the agreement was increased by 23 cents per hour. The Commission may accept an undertaking from the employer to pay the additional 23 cents an hour, without putting the agreement out for a further approval process, because it is not likely to cause financial detriment to any employee covered by the agreement, and would not result in substantial changes to the agreement.

The Commission also has a concern that the EN & EM Surveillance Pty Ltd Enterprise Agreement 2011 would not pass the better off overall test for employees employed under the classification of Security Patrol Officers if those employees were rostered to work on Sundays. In this situation, the Commission could not accept an undertaking from the employer that those employees would no longer be required to work on Sundays because such an undertaking is likely to cause financial detriment to those employees as they would lose the opportunity to work on Sundays for penalty rates. This would change the nature of the agreement and may have affected the way the employees chose to vote on it.

[261] Explanatory Memorandum to Fair Work Bill 2008 at para. 807.

Case example: **Undertakings – NO financial detriment**

Re Bupa Care Services Pty Ltd [2010] FWAFB 2762 (Acton SDP, Sams DP, Williams C, 15 April 2010), [(2010) 196 IR 1].

An appeal was made against decisions of the Commission to refuse the approval of ten agreements which contained preferred hours clauses. The clauses provided that where an employee requested to work additional hours, those additional hours would be paid at their ordinary hourly rate and would not attract overtime payments.

The appeals were dealt with concurrently due to the similarity in the clauses in the agreements that lead the Commission to refuse approval.

The Full Bench found that the Commission erred in not providing the employers with an opportunity to provide a written undertaking to meet the concerns about the preferred hours clauses.

The Full Bench was satisfied that, in relation to each of the ten agreements, the relevant detriment to employees as a result of the clause was financial and that the detriment could be removed by an undertaking.

The decisions not to approve the agreements were quashed, and each application referred back to the Commission for consideration.

Substantial change

The Commission cannot accept an undertaking unless the effect of accepting it is not likely to result in 'substantial changes' to the agreement. This suggests that minor changes to an agreement resulting from an undertaking are permissible.[262]

To view proposed undertakings as a variation to an agreement rather than an undertaking merely because of the expression used in the undertakings is 'to adopt an unnecessarily technical approach to the giving undertakings and is not one that is warranted'.[263]

In the decision *Re Hyatt Ground Engineering Pty Ltd* [264] the Commission said:

> *[30] The sense in which the word 'substantial' appears in s.190(3)(b) is in my view to describe changes to the agreement as result of undertakings offered where the changes are not 'trivial or minimal' or 'ephemeral or nominal'.*
>
> *[31] In this sense 'substantial' is not a quantitative term but a qualitative term. A number of trivial or minimal changes to the agreement may not constitute a substantial change to the agreement. However even a single change to a provision of the agreement where the change was not trivial or minimal would constitute a substantial change to the agreement.*

[262] Fair Work Act s.190(3)(b).
[263] *Re Kore Construction Pty Ltd* [2014] FWC 1955 (Gostencnik DP, 24 March 2014) at para. 30.
[264] *Hyatt Ground Engineering Pty Ltd* [2011] FWA 3527 (Ryan C, 3 June 2011).

Case examples

Case example: **Undertakings – NO substantial change**

Re Australian Industry Group [2010] FWAFB 4337 (Giudice J, Watson SDP, Blair C, 11 June 2010).

An application was made for approval of the *Newlands Coal Dunlop Foams (NSW) Collective Agreement 2009*. At first instance, the Commission approved the agreement.

The Australian Industry Group appealed the decision on the basis that the agreement contained an unlawful term, dealing with right of entry.

The Full Bench concluded that the term was an unlawful term, and that the agreement should not have been approved in that form. However, the Commission would accept an undertaking from the employer that the any exercise of a power under the unlawful term would be in accordance with the provisions of the Fair Work Act, subject to agreement to the undertaking by the bargaining representatives.

Case example: **Undertakings – Substantial change**

Australian Institute of Marine and Power Engineers v Inco Ships Pty Ltd [2011] FWAFB 1537 (Watson SDP, McCarthy DP, Deegan C, 10 March 2011), [(2011) 204 IR 66].

The AIMPE sought permission to appeal a decision at first instance approving the *Inco Ships Pty Ltd Officer Collective Agreement 2010 MV CSL Melbourne*. Under the terms of the agreement, employees were provided with increased salary in lieu of entitlements to long service leave and redundancy pay. In this case, the relevant long service leave entitlements were sourced in an award which allowed entitlements to be cashed out in advance.

The agreement provided for the incorporation into salary of an amount in respect of long service leave and extinguished any entitlement to long service leave and payment for long service leave upon termination. The agreement did not include terms that had the same (or substantially the same) effect as provisions of the NES in respect of long service leave.

The Full Bench concluded that the contraventions of the NES within the agreement could not be remedied by an undertaking because such an undertaking would result in substantial changes to the agreement. In addition, any undertaking would cause financial detriment to an employee covered by the agreement.

The Full Bench granted permission to appeal and upheld the appeal. The decision of the Commission approving the agreement was quashed.

Case example: **Undertakings – Substantial change**

Re Kore Construction Pty Ltd [2014] FWC 1955 (Gostencnik DP, 24 March 2014).

Kore Construction lodged an application for the approval of the *Kore Construction Enterprise Agreement 2013*. The Commission found that the agreement as lodged for approval did not pass the BOOT.

Kore Construction proposed a series of undertakings to address the concerns of the Commission. The CFMEU submitted that the proposed undertakings would result in a substantial change to the agreement and should not be accepted.

The Commission found that it was clear from the nature of the proposed undertakings that each sought to address any financial disadvantage under the agreement when compared to the modern award. However, when the undertakings were examined in their entirety, it was clear that they resulted in substantial changes to the agreement. The undertakings involved changes to the wage rates attached to classifications in the agreement, the inclusion of substantive new provisions into the agreement, and the inclusion of substantive allowances not previously provided for in the agreement.

The proposed undertakings were not accepted and the Commission declined to approve the agreement.

Case example: **Undertakings – Substantial change**

Construction, Forestry, Maritime, Mining and Energy Union v Lightning Brick Pavers t/a Lightning Brick Pavers [2018] FWCFB 3825 (Hatcher VP, Catanzariti VP, Gostencnik DP, Lee C, Harper-Greenwell C, 28 June 2018).

At first instance the Commission approved the *Lightning Brick Pavers Enterprise Agreement 2017-2021* with undertakings. The CFMMEU contended that the Commission erred in approving the Agreement because the approval was based on the acceptance of undertakings which resulted in substantial changes to the Agreement contrary to s.190(3) of the Fair Work Act.

The Full Bench found that the undertakings, which ran to almost five pages of text, were extensive in scope and altered a range of conditions in the Agreement in an extensive way. Whilst some of the undertakings were relatively minor and were entirely beneficial to employees, others were are much more significant.

First, the remuneration structure was reshaped entirely. The Agreement contains a loaded rate structure, that was changed to a different structure which involved *significantly lower* ordinary rates of remuneration, a restoration of some of the Award allowances and a higher rate of overtime. Second, the scale of redundancy payments was changed in a way which reduced them for employees with from one to about 2½ years' service. This constituted a straight out reduction in the redundancy entitlement.

The Full Bench held that the acceptance of the undertakings was critical to the Commission's determination to approve the Agreement. The Full Bench found that in the circumstances the Commission erred in approving the Agreement, as the undertakings could not have been accepted because they were incapable of satisfying the condition in s.190(3)(b). Permission to appeal was granted and, because of the extent to which the undertakings altered the terms of the Agreement, the appeal was upheld and the decision quashed.

Powers of the Commission

See Fair Work Act s.590

The Fair Work Act sets out various requirements as to how the Commission may proceed in considering whether to approve an enterprise agreement.

The Commission may, except as provided by the Fair Work Act, inform itself in relation to any matter before it in such manner as it considers appropriate, such as by holding a hearing.[265]

Most enterprise agreement approval applications are dealt with without holding a hearing.

'On the papers'

The Commission may inform itself by inviting oral or written submissions or by requiring a person to provide copies of documents or records, or to provide any other information to the Commission.

If the material provided can satisfy the requirements of the Commission, a decision in a matter can be made without a formal hearing or conference.

This is referred to as a matter being determined **'on the papers'**.

[265] Fair Work Act s.590(2)(i).

Holding a hearing

See Fair Work Act s.593

If the Commission holds a hearing in relation to a matter, the hearing must generally be held in public. If the Commission is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason, the Commission may:

- order that all or part of the hearing is to be held in private
- make orders about who may be present at the hearing
- prohibit or restrict the publication of the names and addresses of persons appearing at the hearing, or
- prohibit or restrict the publication of evidence, or its disclosure to some or all of the persons present at the hearing.

If the agreement is approved...

Decision

If the Commission approves an enterprise agreement, a copy of the Commission decision and the approved enterprise agreement must be published.[266]

An approval decision must include:

- if the model flexibility term or model consultation term is taken to be a term of the agreement – that these terms are so included
- if a union has given notice that it wants to be covered by the enterprise agreement – that the agreement covers the union, and
- if the agreement was approved after accepting an undertaking – that the undertaking is taken to be a term of the agreement.[267]

Operative date – 7 days later

An enterprise agreement approved by the Commission comes into operation seven days after the agreement is approved, or if a later day is specified in the agreement – that later day.[268]

Although an enterprise agreement cannot commence before the seven day period has passed, the benefits of the agreement may be expressed to be payable from an earlier date. For example, payment of wage increases may be backdated to a date earlier than the commencement of the agreement. There is no requirement for an employer or employees to agree to such terms.

While benefits provided by the agreement terms may be backdated, a term of an enterprise agreement cannot remove an entitlement with retrospective effect.

Interaction between one or more enterprise agreements

Only one enterprise agreement can apply to an employee at a particular time as it relates to their particular employment.

[266] Fair Work Act s.601; see also *The Australian Workers' Union v Oji Foodservice Packaging Solutions (Aus) Pty Ltd* [2018] FWCFB 7501 (Ross J, Saunders DP, Lee C, 20 December 2018).
[267] Fair Work Act s.201.
[268] Fair Work Act s.54.

If an enterprise agreement (the earlier agreement) applies to an employee in relation to particular employment, and another enterprise agreement (the later agreement) that covers the employee in relation to the same employment comes into operation, then:

- if the earlier agreement has not passed its nominal expiry date – the later agreement cannot apply to the employee in relation to that employment until the earlier agreement passes its nominal expiry date, or
- if the earlier agreement has passed its nominal expiry date – the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and
- once the agreement ceases to apply, it can never so apply again.[269]

Single-enterprise agreement replaces multi-enterprise agreement

If a multi-enterprise agreement applies to an employee in relation to particular employment, and a single-enterprise agreement that covers the employee in relation to the same employment comes into operation, the multi-enterprise agreement ceases to apply to that employee when the single-enterprise agreement comes into operation.

If the approval of the agreement is refused...

Failure to comply with the agreement making requirements under the Fair Work Act could lead to a refusal to approve an enterprise agreement. The Commission may refuse to approve an agreement for a number of reasons including that:

- pre-approval requirements were not met
- employees were not fairly chosen
- the agreement does not pass the better off overall test, or
- undertakings that were offered would result in financial detriment or substantial change.

Approval of an enterprise agreement may also be refused if compliance with the terms of the agreement may result in a person committing an offence against a Commonwealth law or a person being liable to pay a pecuniary penalty in relation to the contravention of a Commonwealth law.[270] If approval is refused on this basis, the Commission may refer the agreement to any person or body considered appropriate.[271]

Decision

If the Commission refuses to approve an enterprise agreement, a copy of the Commission decision is published.[272]

Where to from here?

If approval of an agreement is refused on the basis that proposed undertakings would result in substantial changes to the agreement, this does not mean that that an enterprise agreement with such changes cannot be approved.[273]

The employer could consolidate the original agreement and the undertakings into a proposed new agreement and immediately recommence the process under the Fair Work Act for making a new agreement.[274]

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[269] Fair Work Act s.58.
[270] Fair Work Act s.192(1).
[271] Fair Work Act s.192(3).
[272] Fair Work Act s.601.
[273] *Re Hyatt Ground Engineering Pty Ltd* [2011] FWA 3527 (Ryan C, 3 June 2011) at para. 35.
[274] Ibid.

Part 10 – Associated applications

This part deals with applications that can be made as a part of the agreement making process. If bargaining has stalled, or there are issues regarding the scope or content of a proposed enterprise agreement the Fair Work Commission (the Commission) has the power to assist parties in resolving these issues.

Objects of the Fair Work Act

Part 2-4 of the *Fair Work Act 2009* (the Fair Work Act) describes the Commission's role in enterprise bargaining as facilitating good faith bargaining and the making of enterprise agreements, including through:

- making bargaining orders
- dealing with disputes where the bargaining representatives request assistance, and
- ensuring that applications to the Commission for approval of enterprise agreements are dealt with without delay.[275]

There are a number of ways in which the Commission can become involved:

- in processes that occur before the commencement of bargaining for an enterprise agreement, or
- during the bargaining process.

This Part sets out the various ways in which the Commission may be involved in enterprise bargaining. This Part also explains the process of Court enforcement of Commission decisions and describes the process for appealing a decision of the Commission.

Related information

- Majority support determinations
- Single interest employer authorisations
-
- Low-paid authorisations
- Scope orders
-
- Bargaining orders
- Serious breach declarations
- Bargaining disputes
- Workplace determinations
- Role of the Court
- Appeals
- Varying enterprise agreements
- Terminating enterprise agreements
- Termination of individual agreements

[275] Fair Work Act s.171.

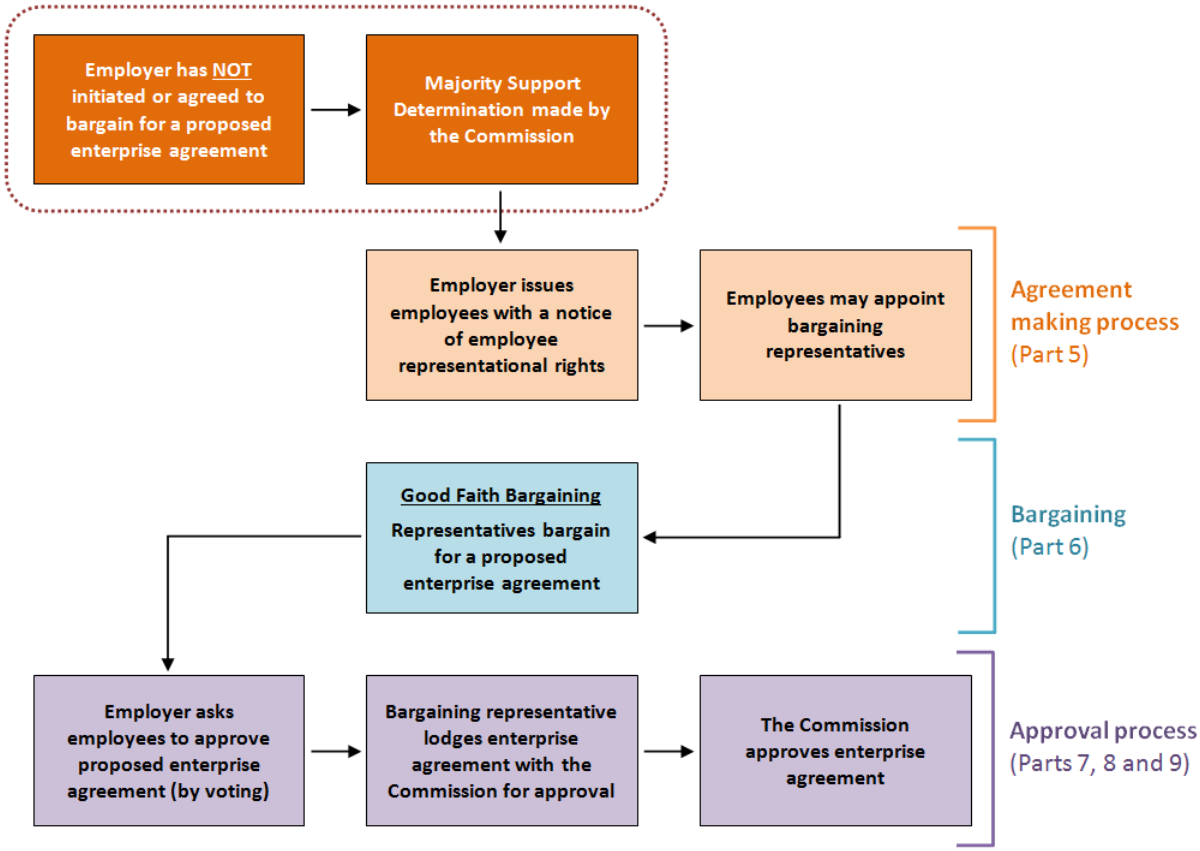
Majority support determinations

See Fair Work Act ss.236–237

Where a majority of employees want to bargain with their employer to make an enterprise agreement and the employer has not yet agreed to bargain or initiated bargaining, a bargaining representative of the employees may apply to the Commission for a majority support determination.

If the Commission makes a majority support determination, the employer is required to bargain. If the employer refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to meet the good faith bargaining requirements.[276]

Stage in bargaining process



Making an application

An application for a majority support determination can only be made in relation to a proposed single-enterprise agreement.[277]

An application for a majority support determination must be made by a bargaining representative of an employee who will be covered by the proposed agreement.

The application must specify the employer (or employers) and the employees who will be covered by the proposed agreement.

[276] Explanatory Memorandum to Fair Work Bill 2008 at para. 651.
[277] Fair Work Act s.236.

Role of the Commission

The Commission must make a majority support determination if an application has been made and it is satisfied that:

- a majority of the employees who are employed by the employer (or employers) at that time and who will be covered by the agreement want to bargain
- the employer (or employers) have not yet agreed to bargain, or initiated bargaining
- the group of employees who will be covered by the agreement was fairly chosen, and
- it is reasonable in all the circumstances to make the determination.

The Commission may work out whether a majority of employees want to bargain using any method the Commission considers appropriate. Methods might include a secret ballot, survey, written statements or a petition.[278]

If the agreement will not cover all of the employees of the employer(s) covered by the agreement, in deciding whether the group of employees who will be covered was fairly chosen the Commission must take into account whether the group is geographically, operationally or organisationally distinct.

A majority support determination comes into operation on the day on which it is made.

Related information

- Meaning of 'fairly chosen'
- Good faith bargaining requirements

- Bargaining orders
- Bargaining representatives

[278] Explanatory Memorandum to Fair Work Bill 2008 at para. 979; see for example *Transport Workers' Union of Australia v MWAV Pty Ltd T/A Man With A Van* [2018] FWC 6525 (Gregory C, 23 October 2018).

Case example: **Majority support determination made**

Australasian Meat Industry Employees Union v Somerville Retail Services [2012] FWA 7484 (Roe C, 30 August 2012).

The AMIEU made an application for a majority support determination in relation to employees who were employed to work in, or in connection with, the meat processing establishment of Somerville Retail Services Pty Ltd and who would be covered by the Meat Industry Award 2010.

At the initial hearing, the Commission accepted that Somerville had not initiated bargaining or agreed to bargain. The Commission was satisfied that the group of employees proposed by the AMIEU was fairly chosen.

The Commission advised the parties that the method the Commission considered appropriate to establish whether a majority of employees wanted to bargain was to compare the petitions provided by the AMIEU with the list of employees provided by Somerville. Two petitions were provided by the AMIEU.

The Commission did not take into account names on the petition that could not be matched with the employer's list. Regardless, the comparison established that at least 127 of the 245 employees on Somerville's list had signed the petition.

The Commission was therefore satisfied that a majority of employees did wish to bargain, and issued a majority support determination.

Case example: **Majority support determination made**

Textile, Clothing and Footwear Union of Australia v Jeanswest Corporation Pty Ltd [2014] FWC 1024 (Kovacic DP, 11 February 2014).

The TCFUA made an application for a majority support determination in respect of employees who were members or were eligible to be members of the union and who were employed by Jeanswest at its Moorabbin Airport Distribution Centre.

Jeanswest opposed the application submitting the union was not able to cover employees at the distribution centre. However, the union's rules indicated they were intended to have wide application.

The Commission found that the employees employed at the distribution centre were eligible to be members of the union.

A majority of employees signed a petition indicating their wish to bargain, the employer had not agreed to bargain or initiated bargaining and the group of employees had been fairly chosen.

The Commission determined that it was reasonable in all the circumstances to make the determination.

Case example: **Majority support determination made**

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Iveco Trucks Australia Ltd [2013] FWC 5106 (Gooley DP, 29 July 2013).

The AMWU made an application for a majority support determination in respect of administrative, supervisory, technical and professional engineering employees of Iveco Trucks Australia Ltd. In support of its application, the AMWU submitted a petition signed by 62 employees.

Iveco submitted a staff list of 139 employees, excluding senior executive staff, who were within the scope of the AMWU's application. As a result the AMWU could not establish that a majority of employees supported bargaining.

The AMWU submitted that members who had not signed the petition should be presumed to want to bargain and that certain managerial staff should be excluded from the staff list.

The Commission found that there were 98 non-management employees on the staff list and 52 of these employees had signed the petition. Therefore there was a majority of non-managerial employees who wished to bargain. The Commission was satisfied that other legislative requirements had been met and issued a majority support determination.

Case example: **Majority support determination made**

National Union of Workers v ePharmacy Pty Ltd [2015] FWC 3819 (Gostencnik DP, 12 June 2015).

The NUW made an application for a majority support determination in respect of work performed in a warehouse or distribution centre environment by employees of ePharmacy. Employees that will be covered by the proposed agreement perform duties which include picking and packing items and filling of shelves.

ePharmacy objected on the basis that the work performed by employees who would be covered by the proposed enterprise agreement was primarily retail in nature. ePharmacy submitted that the duties to be performed were in the context of employees facilitating retail sales and were incidental to the fundamental duties of retail sales. As the NUW was not entitled to represent the industrial interests of retail workers it was not entitled to represent the relevant employees.

The Commission found that the employees were storeworkers performing traditional storeworker duties, such as the handling, picking and packing of goods in a distribution centre designed to cater for the dispatch of online sales orders. The employees were not engaged in retail sales. The Commission held that the NUW was entitled to represent the industrial interests of a member who was an employee that would be covered by the proposed enterprise agreement. The majority support determination was issued.

Case example: **Majority support determination NOT made**

The Australian Workers' Union v F. Laucke Pty Ltd T/A Laucke Mills [2013] FWC 4632 (Hampton C, 12 July 2013).

The AWU made an application for a majority support determination in relation to employees of Laucke Mills covered by the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *Manufacturing and Associated Industries and Occupations Award 2010*. The application was supported by two employee petitions.

The Commission considered that on face value, a slim majority of employees supported the petitions. The Commission sought further submissions regarding the petitions. It emerged that there was a question about whether they demonstrated the necessary majority.

With the agreement of the parties, the Commission ordered a ballot of employees to be conducted by the Australian Electoral Commission. The declared results were that there were 39 employees within the employee group, 25 had voted, 19 had supported the question, five had voted against it and one vote was declared informal. Whilst a majority of those who voted were in support of proposition, the 19 votes did not represent a majority of the employee group.

The AWU argued that the ballot was indicative of strong support for bargaining and that in the circumstances the Commission should accept the one informal vote (which would provide a majority) or order a further ballot. The employer contended in response that there was no basis for the Commission to interfere with the declared result.

The Commission accepted that it had discretion to order a further ballot but concluded that a further ballot should not be ordered where two ballot processes (one of which was agreed) had not produced the requisite majority.

Accordingly, the Commission was not satisfied that a majority of the employee group wanted to bargain, and declined to make a majority support determination.

Case example: **Majority support determination NOT made**

Australian Municipal, Administrative, Clerical and Services Union v The Salvation Army (Peninsula Youth and Family Services) [2013] FWC 6287 (Johns C, 6 September 2013).

The ASU made an application for a majority support determination in relation to employees of The Salvation Army (Peninsula Youth and Family Services), except Directors and Residential Youth Services employees.

The application was made on 27 August 2013. The next day, the Salvation Army stated that it did not object to bargaining. Following clarification from the Commission, the Salvation Army confirmed that it agreed to bargain for an enterprise agreement covering employees, other than Residential Youth Services employees.

On this basis, the Commission could not be satisfied that the employer had not agreed to bargain. The application was dismissed.

Authorisations to commence bargaining

There are certain circumstances in which it is not possible or desirable for enterprise bargaining to occur in the normal way. The Fair Work Act provides a number of mechanisms by which the normal process of enterprise bargaining can be altered.

Single interest employer authorisations

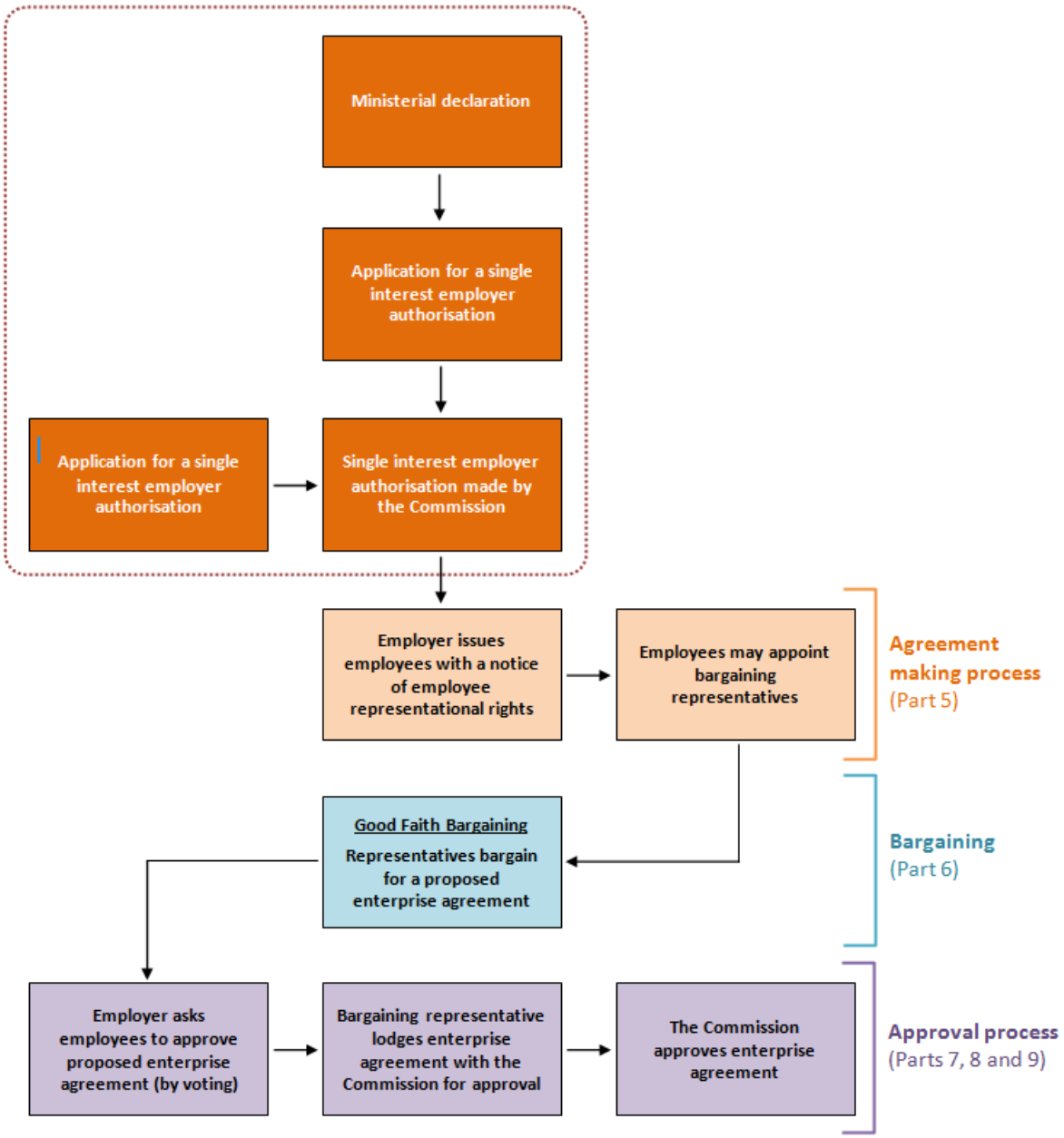
See Fair Work Act ss.248–252

Two or more employers that are not single interest employers but that have a close connection to one another may be permitted to bargain for a single-enterprise agreement. These employers must obtain a single interest employer authorisation by application to the Commission.[279]

Related information

- Single interest employers

Stage in bargaining process



[279] Fair Work Act ss.247 and 249.

The types of employers who can apply for a single interest employer authorisation are franchisees, and, where approved by a Ministerial declaration, employers such as schools in a common education system and public entities providing health services.[280]

Applying for a single interest employer authorisation

An application for a single interest employer authorisation must specify:

- the employers and employees that will be covered by the agreement, and
- the person (if any) nominated by the employers to make applications under the Fair Work Act if the authorisation is made.

If an application has been made, the Commission must make a single interest employer authorisation if it is satisfied that:

- the employers that will be covered by the agreement have agreed to bargain together
- no person coerced, or threatened to coerce, any of the employers to agree to bargain together, and
- either:
    - the employers are franchisees of the same franchisor or related bodies corporate of the same franchisor (or any combination of these), or
    - the employers are specified in a Ministerial declaration.[281]

Where the Commission has made a single interest employer authorisation, it comes into operation on the day on which it is made. A single interest employer authorisation ceases to operate on the earlier of the following:

- the day on which the enterprise agreement to which the authorisation relates is made, or
- 12 months after the day on which the authorisation is made (or if the period is extended, at the end of that period).

Related information
- Ministerial declaration

Varying a single interest employer authorisation

A single interest employer authorisation may be varied to add and remove employer names.[282]

On application by an employer, the Commission must vary the authorisation to remove the employer's name if it is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

On application by an employer, the Commission must vary a single interest employer authorisation to add the employer's name if it is satisfied that:

- each employer specified in the authorisation has agreed to the variation
- no person coerced, or threatened to coerce, the employer to make the application, and
- the requirements in relation to employers being franchisees or specified in a Ministerial declaration are met.[283]

[280] Explanatory Memorandum to Fair Work Bill 2008 at para. 1032.
[281] Fair Work Act s.249.
[282] Fair Work Act s.251.
[283] Fair Work Act s.251.

Extending a single interest employer authorisation

A bargaining representative for a proposed enterprise agreement may apply to the Commission to extend the 12 month period for which the single interest employer authorisation is in operation. The Commission may extend the authorisation if satisfied that there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period, and it is appropriate to extend the period.[284]

Ministerial declaration

 See Fair Work Act s.247

Two or more employers that will be covered by a proposed enterprise agreement may apply to the Minister for a declaration that they may bargain together. The Minister may only make a declaration upon application by the relevant employers and the declaration must be in writing.

Applying for a Ministerial declaration

The application must specify the employers that will be covered by the agreement. The specified employers are the relevant employers in the application.

Categories of employers that may be considered for a Ministerial declaration include:

- public hospitals that are technically distinct employers, but have a high degree of coordination and common employment arrangements
- schools which share common employment arrangements and a common funding source and arrangements, and
- school councils or parents and friends associations that are technically separate employers but who may employ additional staff to work within a single public school system.[285]

The Minister **must** take into account the following matters when deciding whether or not to make a declaration:

- the history of bargaining of each of the relevant employers
- the interests that the relevant employers have in common and the extent to which those interests are relevant to whether they should be permitted to bargain together
- whether the relevant employers are governed by a common regulatory regime
- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees
- the extent to which the relevant employers operate collaboratively rather than competitively
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth or a State or Territory, and
- any other matter the Minister considers relevant.

In addition to obtaining a Ministerial declaration, the employers must apply to the Commission for a single interest employer authorisation.

Upon application, the Commission **must** make a single interest employer authorisation if:

- the Minister has issued a declaration, and[286]

[284] Fair Work Act s.252.
[285] Explanatory Memorandum to Fair Work Bill 2008 at para. 1041.
[286] Fair Work Act s.249(3).

- the Commission is satisfied that the employers that will be covered by the agreement have agreed to bargain together and that no person coerced, or threatened to coerce, any of the employers to agree to bargain together.[287]

Case example: **Single interest employers – Franchisees engaged in a common enterprise**

Buxridge Pty Ltd [2012] FWA 5132 (Gay C, 15 June 2012).

Buxridge Pty Ltd made an application for a single interest employer authorisation in respect of itself and six franchisees that conducted business in the bakery industry. The Commission was satisfied that the employers that were the subject of the application carried on similar business activities under the same franchise and were franchisees of the same franchisor.

The Commission made the single interest employer authorisation.

Case example: **Single interest employers – Ministerial declaration**

Re Victorian Hospitals' Industrial Association [2011] FWA 8376 (Jones C, 6 December 2011), [(2011) 216 IR 11].

The Victorian Hospital Industrial Association (VHIA) applied to the Commission for a single employer authorisation. The employers that were seeking to bargain together included several metropolitan and regional hospitals or health services centres. VHIA made its application as the nominated representative of these employers. The VHIA had applied to the Minister for Tertiary Education, Skills, Jobs and Workplace Relations for a declaration that they may bargain together for an enterprise agreement. The Minister had granted this declaration.

Upon confirming that all other requirements under the Fair Work Act were satisfied, the Commission granted the single interest employer authorisation.

Case example: **Agreement a single-enterprise agreement – Franchisees engaged in a common enterprise**

Shop, Distributive and Allied Employees Association v McDonald's Restaurants PR915681 (AIRC, Lawson C, 22 March 2002).

In considering whether the employers, who operated franchise McDonald's restaurants, named in the application constituted a 'common enterprise' the Commission was referred to an authority of the High Court relied upon in similar applications [*Australian Softwood Forests*].

The Commission found that the nine employers named in the application carried on businesses which were identical in character, are operated in an identical manner and which provide identical products which are priced identically. In all respects the operations of the businesses were carried out in a manner which is seamless to the consumer. In each case the businesses were mutually interdependent with McDonald's Australia Ltd.

[287] Fair Work Act s.249(1).

Case example: **Agreement NOT a single-enterprise agreement – Franchisees not engaged in a common enterprise**

Re Bakers Delight Holdings Ltd PR923670 (AIRC, Ives DP, 15 October 2002), [(2002) 119 IR 20].

Application for a proposed agreement by nine companies (the Franchisees) which own and operate Bakers Delight bakeries in the Australian Capital Territory. The Franchisees were not related bodies corporate within the meaning of the *Corporations Act 2001* (Cth), either with each other or with Bakers Delight and each Franchisee had entered into a franchise arrangement with Bakers Delight, each with substantially similar contractual obligations. Even where significant controls were placed upon employers, either by a franchise agreement or by statute, the Commission had been cautious in treating multiple employers as a common enterprise.

The Commission was not satisfied that the nine Franchisees were engaged in a common enterprise. Notwithstanding the substantial degree of uniformity of their operations, each Franchisee was not closely connected with the operations of each other Franchisee 'on the footing that one part is to be carried out by [Franchisee] A and the other by [Franchisee] B.'

Although each Franchisee had a contractual relationship with Bakers Delight, there does not appear to be a declared collective intent between the Franchisees. While operations were close to identical between Franchisees, there was no evidence that the Franchisees share operations or resources. Subject to the restraints imposed by the franchise agreements between Bakers Delight and each Franchisee, the Franchisees operated independently of one another.

Low-paid authorisations

See Fair Work Act ss.242–245

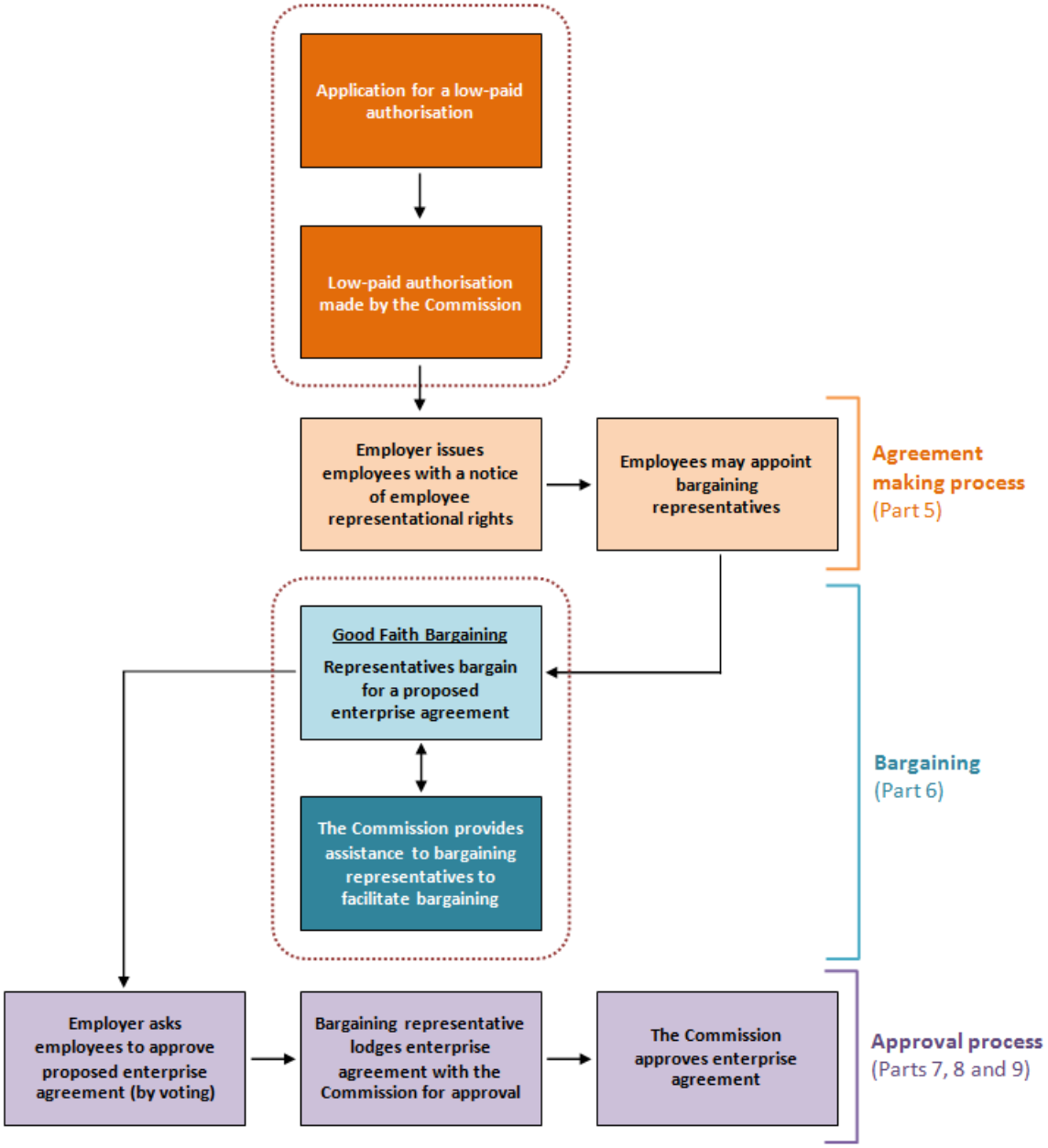
A bargaining representative or a union entitled to represent the industrial interests of an employee in relation to work to be performed under a proposed multi-enterprise agreement may apply for a low-paid authorisation.[288]

If granted, a low-paid authorisation makes additional rules applicable to certain employers in relation to a multi-enterprise agreement. Employers specified in a low-paid authorisation will be obliged to bargain in good faith and will be required to give employees a notice of employee representational rights (which is not generally the case for multi-enterprise agreement making).[289] An application for a bargaining order cannot be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.[290] The Commission also has additional powers to facilitate bargaining for the agreement (including on its own initiative).

A low-paid authorisation is only available in relation to a proposed multi-enterprise agreement, and cannot be made in relation to a proposed greenfields agreement.[291]

[288] Fair Work Act s.242(1).
[289] Explanatory Memorandum to Fair Work Bill 2008 at para. 1004.
[290] Fair Work Act s.229(2).
[291] Fair Work Act s.242(3).

Stage in bargaining process



Applying for a low-paid authorisation

An application for a low-paid authorisation must specify the employers and employees that will be covered by the agreement.

If an application has been made, the Commission must make a low-paid authorisation if satisfied that it is in the public interest to make the authorisation.[292]

In considering whether it is in the public interest to make a low-paid authorisation, the Commission must take into account the following matters related to historical and current collective bargaining:

- whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level

[292] Fair Work Act s.243(1).

- the history of bargaining in the industry in which the employees who will be covered by the agreement work
- the relative bargaining strength of the employers and employees who will be covered by the agreement
- the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to the relevant industry and community standards, and
- the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.[293]

The Commission must also take into account the following matters related to the likely success of collective bargaining:

- whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprise to which the agreement relates
- the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process
- the views of the employers and employees who will be covered by the agreement
- the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement
- the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that would:
    - cover that employer, and
    - not cover the other employers specified in the application.[294]

Where the Commission has made a low-paid authorisation, it comes into operation on the day on which it is made.[295] The authorisation must specify:

- the employers that will be covered by the agreement (which may be some or all of the employers specified in the application), and
- the employees that will be covered by the agreement (which may be some or all of the employees specified in the application).[296]

Varying a low-paid authorisation

A low-paid authorisation may be varied to add and remove employer names.[297]

The Commission must vary the low-paid authorisation to remove an employer's name if it is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.[298]

The Commission must vary a low-paid authorisation to add an employer's name if it is satisfied that it is in the public interest to do. In determining whether is in the public interest to add an employer's name to a low-paid authorisation, the Commission must take the same matters into account as those taken into account when deciding whether or not to make a low paid authorisation.[299]

[293] Fair Work Act s.243(2).
[294] Fair Work Act s.243(3).
[295] Fair Work Act s.243(5).
[296] Fair Work Act s.243(4).
[297] Fair Work Act s.244.
[298] Fair Work Act s.244(2).
[299] Fair Work Act s.244(4).

Commission assistance for the low-paid

If a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement, the Commission may, on its own initiative, provide the bargaining representatives for the agreement with assistance that the Commission:

- considers appropriate to facilitate bargaining for the agreement, and
- could provide if it were dealing with a dispute (except for arbitration).[300]

Case example: **Low-paid authorisation made**

United Voice v The Australian Workers' Union of Employees, Queensland [2011] FWAFB 2633 (Giudice J, Watson VP, Gay C, 5 May 2011).

United Voice and the AWUQ jointly applied for a low-paid authorisation in relation to employees engaged in the residential aged care sector in certain parts of Australia and enrolled nurses in the aged care sector in Western Australia. The President of the Commission directed that the matter be dealt with by a Full Bench.

The Full Bench accepted that, in general terms, employees in the aged care sector are low-paid. Given that a number of employers listed in the application were covered by enterprise agreements, the Full Bench could not be satisfied that all of the employees had not had access to collective bargaining. However, they considered that the existence of enterprise agreements was a matter to be considered when determining the scope of an authorisation to be made.

Overall, leaving out of consideration employers and employees to whom an enterprise agreement applied, the Full Bench was satisfied that the employees to whom the authorisation would apply were low-paid, that they either had not had access to enterprise bargaining or faced substantial difficulty in bargaining at the enterprise level and that making an authorisation would assist them to bargain. Accordingly, an authorisation was made.

Case example: **Low-paid authorisation NOT made**

Re United Voice [2014] FWC 6441 (Gostencnik DP, 29 September 2014).

United Voice made an application for a low-paid authorisation in relation to a multi-enterprise agreement covering five security industry employers in the Australian Capital Territory. The employers opposed the making of the authorisation.

The Commission was satisfied that some of the employees to be covered by the proposed enterprise agreement were low-paid employees. However, the Commission was not satisfied that the employees faced significant obstacles to bargaining, given that three of the five employers already had enterprise agreements. In addition, the Commission was not satisfied that United Voice would readily consider proposals from particular employers that would result in a single interest enterprise agreement. Accordingly, the application was dismissed.

[300] Fair Work Act s.246.

Case example: **Low-paid authorisation NOT made – Not in the public interest**

Australian Nursing Federation v IPN Medical Centres Pty Limited and Ors [2013] FWC 511 (Watson VP, 17 June 2013).

The ANF lodged an application for a low-paid authorisation in relation to nurses employed in general practice clinics and medical centres performing nursing work. The ANF sought an authorisation which would permit it to bargain for a multi-enterprise agreement covering all of the employers named in a list of respondents. For several years the ANF had attempted to negotiate an improved package of terms and conditions based on the benefits provided to nurses in the public hospital sector. Its attempts had been met with strong opposition by general practice employers.

The Commission concluded on the evidence presented by the parties in this matter that a low-paid authorisation may provide some assistance to some low paid employees, however, most practice nurses do not fall within established definitions of 'low-paid' employees, the assistance to low paid employees is likely to be marginal. The ANF had faced difficulty bargaining on behalf of its members. It had not however accessed all rights available under the Fair Work Act to advance the interests of its members by way of enterprise-based negotiations.

In all of the circumstances the case for the authorisation was not strong and several important factors indicate that multi-employer bargaining was undesirable or less appropriate than genuine enterprise-based bargaining. For these reasons the Commission was not satisfied that it was in the public interest to make the authorisation. The application was therefore dismissed.

Scope orders

See Fair Work Act ss.238–239

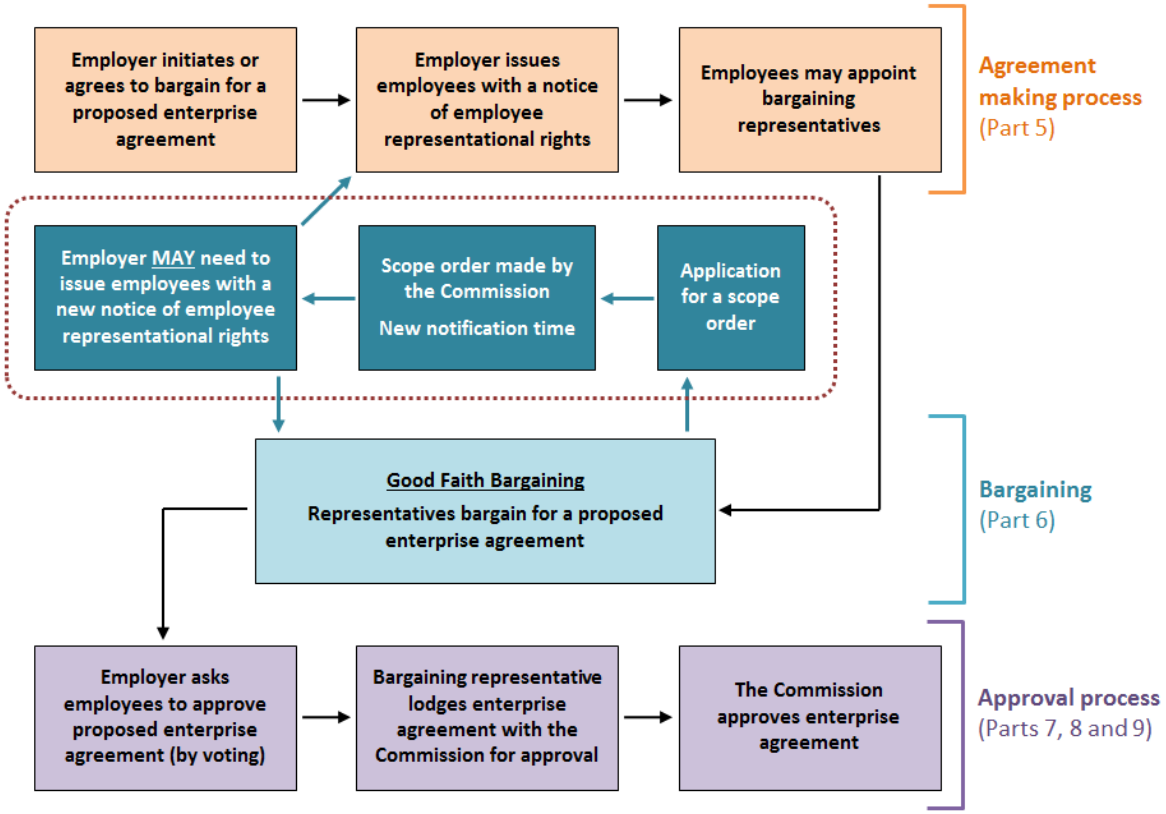
If a bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement):

- has concerns that bargaining for the agreement is not proceeding efficiently or fairly, and
- the reason for these concerns is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover;

the bargaining representative may apply to the Commission for a scope order.

If the Commission grants the scope order, the order will specify the employer (or employers), and the employees who will be covered by the proposed agreement.

Stage in bargaining process



Who can apply?

A bargaining representative for a proposed single-enterprise agreement may apply to the Commission for a scope order.

Steps prior to application

A bargaining representative may only apply for the scope order if the representative:

- has taken all reasonable steps to give a written notice setting out the concerns regarding the scope of the proposed agreement to the relevant bargaining representatives for the agreement
- has given the relevant bargaining representatives a reasonable time within which to respond to those concerns, and
- considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Exclusion – Single interest employer authorisation

A bargaining representative must not apply for a scope order if a single interest employer authorisation is in operation in relation to the proposed enterprise agreement.

Powers of the Commission

The Commission may make a scope order if it is satisfied in relation to each of the following matters:

- that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements
- that making the order will promote the fair and efficient conduct of bargaining

- that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen, and
- it is reasonable in all the circumstances to make the order.

If the proposed agreement will not cover all of the employees of the employer (or employers), the Commission must, when deciding whether the group of employees who will be covered by the agreement was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Content and effect of a scope order

A scope order must specify the employer (or employers) and the employees who will be covered by the agreement.

A scope order may relate to more than one proposed single-enterprise agreement.

If the Commission makes a scope order, it may also:

- amend any existing bargaining orders, and
- make or vary other orders (such as protected action ballot orders), determinations or other instruments, or take such other action as the Commission considers appropriate.

Operation of a scope order

A scope order in relation to a proposed single-enterprise agreement comes into operation on the day on which it is made.

A scope order ceases to operate at the earliest of the following:

- if the order is revoked – the time specified in the instrument of revocation
- when the agreement is approved by the Commission
- when a workplace determination that covers the employees that would have been covered by the agreement comes into operation, or
- when the bargaining representatives for the agreement agree that bargaining has ceased.

New notification time

The date that a scope order comes into operation becomes the notification time for issuing a notice of employee representational rights.

However, an employer is not required to give a new notice of employee representational rights to an employee if:

- the employer previously issued the employee with a notice when the employer agreed to bargain, and
- the notice was issued within a reasonable period before the scope order came into operation.[301]

Related information

- Good faith bargaining requirements
- Meaning of ‘fairly chosen’
- Single interest employer authorisations

[301] Fair Work Act s.173(4).

Case example: **Scope order made**

United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board; Metropolitan Fire & Emergency Services Board v United Firefighters' Union of Australia, Mr W. Crossley, Mr P. Swain and Mr P. Holmes [2010] FWAFB 3009
(Giudice J, Lawler VP, Gay C, 14 April 2010).

The Commission was required to deal with two applications for scope orders. The first, made by the UFUA, sought a scope order requiring the proposed enterprise agreement to include the classifications of Commander and Assistant Chief Fire Officer. The second, made by the employer, sought a scope order requiring the proposed enterprise agreement to not cover those two classifications.

As the relevant terms of the Fair Work Act had not previously been considered by a Full Bench, the applications were heard by a Full Bench.

The Full Bench did not accept the UFUA's submissions that, as a matter of statutory construction, preference ought to be given to agreements that cover as much of an enterprise as possible.

In deciding to make the scope order requested by the employer, the Full Bench noted that the Fair Work Act requires the Commission to consider the views of employees. While it does not assign priority to the views of employees, in applying the relevant provisions it is necessary to have regard to the overall context. The Full Bench considered that a proper consideration of the matters specified in the Fair Work Act may make it appropriate to make a scope order contrary to the views of the potentially affected employees.

The Full Bench determined that the two classifications constituted a distinct organisational group and commented that their negotiating interests as management employees would on occasion be very difficult to reconcile with those of operational employees generally. They considered that significant weight should be attached to the fact that the relevant classifications were senior management positions, with interests distinct from the positions below them.

The Full Bench concluded that a scope order in the form requested by the employer would promote the fair and efficient conduct of bargaining and include a group of fairly chosen employees. Accordingly a scope order in that form was made.

Case example: **Scope order made**

The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd [2014] FWCFB 1476
(Catanzariti VP, Lawler VP, Lewin C, 3 April 2014).

The Commission was required to deal with two applications for scope orders. The first application, made by the employer, sought to retain two separate enterprise agreements for operators and technicians. The second, made by the AWU, sought one agreement to cover both operators and technicians.

The technicians worked in a laboratory building within the refinery site some 200m distant from where the operators worked.

At first instance, the Commission granted the scope order sought by the employer and refused the application of the AWU on the basis that the two groups of employees were both organisationally and geographically distinct. The AWU appealed the decision.

In considering whether the employees for the relevant proposed enterprise agreements had been fairly chosen, the Full Bench concluded that depending on the circumstances of the particular case, there may be more than one way of fairly choosing the group of employees to be covered by a proposed enterprise agreement.

The Full Bench agreed with the Commission's characterisation of the two groups as organisationally distinct. However, the Full Bench determined that the Commission erred in finding that the groups were geographically distinct. The Full Bench determined that geographical distinctness is concerned with the geographical separateness of the employer's various worksites or work locations, not a separation of a few hundred metres within the same work site.

On the evidence, the Full Bench found the group to be covered by the AWU's proposed single agreement was fairly chosen. The decision and orders of the Commission were quashed.

On a re-hearing of the original applications, the Full Bench granted the application of the AWU for a scope order in favour of an enterprise agreement covering both operators and technicians and dismissed the application of the employer.

Case example: **Scope order NOT made – Efficiency and Fairness – Parallel negotiation process**

National Union of Workers v Linfox Australia Pty Ltd [2013] FWC 9851 (Roe C, 16 December 2013).

The NUW made an application for a scope order in relation to a proposed agreement to replace the *Linfox Road Transport and Distribution Centres National Agreement 2011.* That agreement covered approximately 3,000 employees at 146 sites. A large proportion of employees were members of the Transport Workers Union (TWU).

The NUW sought a separate agreement for the warehouse portion of Linfox's Truganina site. Bargaining for such an agreement would involve both the AWU and the TWU. Linfox opposed the scope order, seeking to retain a single national enterprise agreement.

Nevertheless, Linfox engaged in separate bargaining processes with the TWU and the AWU and prior to the scope order application, in principle agreement for a proposed enterprise agreement was reached with the TWU.

At the hearing of the scope order application, the NUW contended that bargaining was not proceeding efficiently or fairly because:

- a significant minority of the total number of employees to be covered by the proposed national agreement were effectively being denied a 'real voice' in the negotiations
- the site-specific concerns were effectively being ignored
- warehouse employees represented by the NUW were not aware of what was being discussed in negotiations between Linfox and the TWU, and
- two negotiations were being held concurrently in circumstances where information about each negotiation was not freely available to all parties.

The Commission was satisfied that there had been some unfairness in the negotiation process, and that the group of employees proposed by the NUW was fairly chosen. However, given the circumstances of bargaining with the NUW and the TWU, the Commission could not be satisfied that granting the scope order would make the conduct of bargaining fairer or more efficient. Accordingly, the Commission declined to make a scope order.

Case example: **Scope order NOT made – Specific classification – Network Controllers**

Australian Rail, Tram and Bus Industry Union v Australian Rail Track Corporation (ARTC) [2012] FWA 6329 (Cambridge C, 27 July 2012).

The ARTBIU made an application for a scope order which would remove a particular classification of employees of ARTC called Network Controllers from coverage of a proposed enterprise agreement. The proposed enterprise agreement has been the subject of bargaining aimed at establishing a replacement for an expired instrument, the *Australian Rail Track Corporation (NSW) Enterprise Agreement 2009*. The ARTC advised the union that it rejected any separate agreement or agreements for any of the classifications that had been identified in the log of claims.

Many of the concerns raised on behalf of Network Controllers involved issues regarding roster arrangements for continuous shift work. Network Controllers worked on a continuous rotating shift roster basis as did most other employees who worked in operational control and coordination functions of the ARTC. However the substantial majority of employees covered by the 2009 NSW Agreement worked in areas other than operational control and coordination. Therefore the majority of employees to be covered by the proposed agreement did not work on a continuous rotating shift roster basis.

The specific classification of Network Controller was one of a number of classifications which, to varying degrees, worked in an integrated fashion with one another within what was frequently described as the Operations Team.

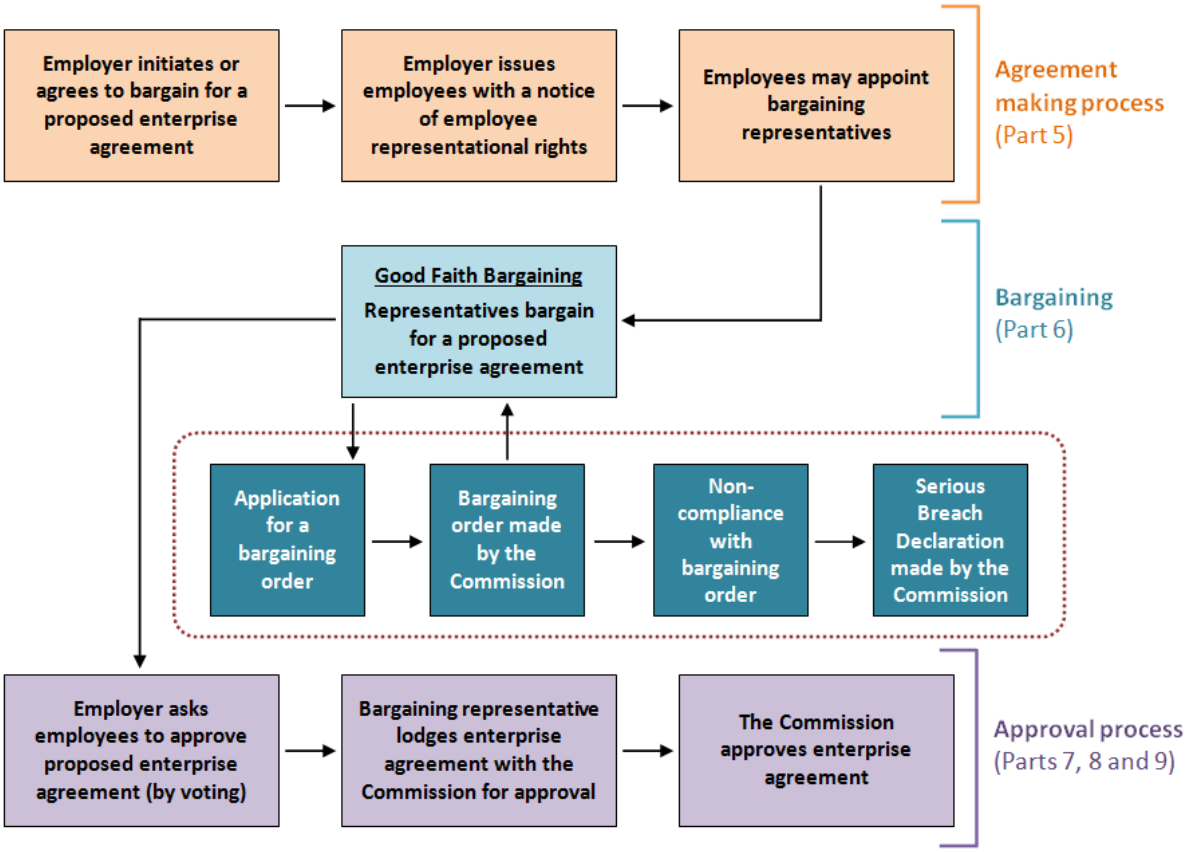
The Commission was unable to establish that the group specified in the scope order, namely Network Controllers, was a group that was fairly chosen. In particular the evidence did not establish that this group was geographically or operationally or organisationally distinct. In addition, the Commission was unable to conclude that the scope order sought would promote both fair and efficient bargaining. Although there was considerable sympathy in respect to the underlying issues of legitimate concern to Network Control staff these issues cannot be remedied by way of the scope application made in this matter.

Bargaining orders

See Fair Work Act ss.229–232; Fair Work Regulations reg 2.11

A bargaining representative for a proposed enterprise agreement may apply to the Commission for a bargaining order in relation to the proposed agreement. Bargaining orders are designed to promote fair and efficient bargaining.

Stage in bargaining process



Prerequisites for a bargaining order

An application for a bargaining order cannot be made unless the bargaining representative:

- has concerns that:
  - one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements, or
  - the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
- has given a written notice setting out those concerns to the relevant bargaining representatives and has given them a reasonable time to respond, and
- considers that the relevant bargaining representatives have not responded appropriately to those concerns.

However, the Commission can consider an application for a bargaining order even if the notice or opportunity to respond requirements above have not been met, if the Commission is satisfied that it is appropriate in all the circumstances to do so.[302]

Process

An application for a bargaining order must be made by a bargaining representative.

Exclusion – Multi-enterprise agreements

An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing – Not more than 90 days before nominal expiry date of an existing agreement

An application may only be made at whichever of the following times applies:

- if one or more enterprise agreements apply to employees who will be covered by the proposed enterprise agreement:
    - not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be), or
    - after an employer that will be covered by the proposed enterprise agreement has requested that employees approve the agreement, but before the agreement is approved;
- otherwise – at any time.

Powers of the Commission

The Commission may make a bargaining order in relation to a proposed enterprise agreement if:

- an application for a bargaining order has been made
- the requirements of section 230 of the Fair Work Act have been met (see below), and
- the Commission is satisfied that it is reasonable in all the circumstances to make the order.

Requirements

Before making a bargaining order, the Commission must (in all cases) be satisfied that **one** of the following applies:

- the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement
- a majority support determination in relation to the agreement is in operation
- a scope order in relation to the agreement is in operation, or
- all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

In addition to the above, before making a bargaining order the Commission must be satisfied:

- that:
    - one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements, or
    - the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

[302] Fair Work Act s.229(4)–(5).

- the bargaining representative who applied for the bargaining order has given the relevant bargaining representatives a written notice setting the representative's concerns and provided a reasonable time for a response.

The Commission should be *'slow to interfere in the legitimate tactics undertaken by parties during the bargaining process unless an applicant for a bargaining order has demonstrated that there are sound reasons for so doing. There needs to be satisfaction that the good faith bargaining requirements are not being met.'* An order under s.230 is discretionary and may only be made if the Commission is satisfied that it is reasonable in all the circumstances to make the order.[303]

What a bargaining order must specify

A bargaining order in relation to a proposed enterprise agreement must specify all or any of the following:

- the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements
- requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining
- the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct,
- such matters, actions or requirements as the Commission considers appropriate (taking into account whether the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

Types of bargaining order

The types of bargaining orders that the Commission may make in relation to a proposed enterprise agreement include the following:

- an order excluding a bargaining representative for the agreement from bargaining
- an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint a single bargaining representative to represent them in bargaining
- an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirements,
- an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirements.

Bargaining order for reinstatement of employee

If the Commission is making a bargaining order to reinstate an employee, the Commission may make any of the following orders:

- an order to reappoint the employee to the position in which he or she was employed immediately before the termination of his or her employment
- an order to appoint the employee to another position for which the terms and conditions of employment are no less favourable than those under which he or she was employed immediately before the termination of his or her employment

[303] *Liquor, Hospitality and Miscellaneous Union v Foster's Australia Ltd* [2009] FWA 750 (Kaufman SDP, 28 October 2009) at para. 20.

- any order that the Commission thinks appropriate to maintain continuity of the employee's employment, or
- an order that the employer who terminated the employment of the employee pay the employee an amount for remuneration lost, or likely to have been lost, because of the termination of employment.[304]

Operation of a bargaining order

A bargaining order in relation to a proposed enterprise agreement comes into operation on the day on which it is made and ceases to be in operation at the earliest of the following:

- if the order is revoked – the time specified in the instrument of revocation
- when the agreement is approved by the Commission
- when a workplace determination that covers the employees that would have been covered by the agreement comes into operation, or
- when the bargaining representatives for the agreement agree that bargaining has ceased.

Contravening a bargaining order

 See Fair Work Act s.233

A person to whom a bargaining order applies must not contravene a term of the order. This is a civil remedy provision.

A bargaining order is legally binding. However, the Commission does not itself have the power to enforce its orders.

A **civil remedy provision** is a provision of the Fair Work Act that is enforced by civil rather than criminal orders.

If a civil remedy provision is breached, an application can be made to a court for orders imposing a pecuniary penalty on the person who has breached the provision and for other orders such as an injunction or an order to pay compensation.

Related information

- Serious breach declarations
- Enforcement of Commission orders

[304] Fair Work Regulations reg 2.11.

Case example: **Bargaining order made**

Health Services Union v Victorian Hospitals' Industrial Association [2012] FWAFB 2901 (Watson SDP, Smith DP, Bissett C, 4 April 2012), [(2012) 221 IR 1].

The HSU and VHIA were engaged in bargaining for a multi-employer agreement. The HSU made an application for an interim order restraining the VHIA from requesting a vote of employees until related bargaining proceedings had been heard and determined. At first instance, the Commission was not satisfied that VHIA had not met the good faith bargaining requirements, and was not persuaded that there was a serious question to be tried about the scope of the agreement in respect of mental health employees. In addition, the Commission was not satisfied that the balance of convenience favoured making interim orders. The HSU appealed the decision.

The Full Bench found that there was a serious issue to be tried as to the operation of the Heads of Agreement and the scope of the agreement. The failure of VHIA to respond to requests for information about the scope of the proposed agreement in respect of mental health employees raised a serious question as to whether VHIA was engaging in good faith bargaining.

The Full Bench found that the Commission had erred in exercising its discretion not to make interim orders. Permission to appeal was granted and the appeal upheld.

Case example: **Bargaining order made**

'Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia (Collieries' Staff Division [2012] FWAFB 1891 (Boulton J, Harrison SDP, Deegan C, 22 March 2012).

Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia [2012] FWAFB 1891 (22 March 2012) [(2012) 217 IR 131].

Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia and Another [2012] FCA 764 (19 July 2012), [(2012) 206 FCR 576].

Endeavour Coal commenced bargaining with employees and APESMA following the Commission's decision to issue a majority support determination.

At least 12 bargaining meetings were held between Endeavour Coal and APESMA over a 12 month period. APESMA produced various draft agreements for discussion. An impasse was reached in the negotiations. APESMA submitted that the impasse arose because the real position of Endeavour Coal was that it was never going to agree to an enterprise agreement covering the staff employees and that it therefore did not matter what concessions or changes to proposals APESMA made in the negotiations.

At first instance, the Commission was satisfied that Endeavour Coal was not meeting the good faith bargaining requirements. The unwillingness of Endeavour Coal to enter into enterprise agreement negotiations with APESMA had continued in modified form after the making of the majority support determination.

The Commission concluded that Endeavour Coal was bargaining with APESMA with no real intention to negotiate an enterprise agreement and contrary to the good faith bargaining requirements, and made five bargaining orders.

Endeavour Coal appealed the decision, and the Full Bench concluded that it was open to the Commission to find that, in the circumstances, Endeavour Coal had failed to meet the good faith bargaining requirements by:

- not giving genuine consideration to the proposals of APESMA for the agreement, and
- not recognising and bargaining with APESMA.

However, the Full Bench considered that the Commission had erred by not giving appropriate consideration to whether it was satisfied that it was reasonable in all the circumstances to make the order. Ultimately, the Full Bench adopted all but one of the Commission's orders, and provided guidance on how the remaining orders were to be construed.

Endeavour Coal sought judicial review of the Full Bench's decision on the basis that the Full Bench misconstrued s.228(1) of the Fair Work Act and that this misconstruction affected the orders made by the Full Bench.

The Federal Court concluded that the Full Bench had correctly construed s.228 of the Fair Work Act. However, the Court did conclude that three of the orders made by the Full Bench should be set aside on the basis that they required Endeavour Coal to make concessions during bargaining. These orders related to requiring Endeavour Coal to take various actions (including providing APESMA with a list of the subject matter it would be prepared to include in an enterprise agreement), as well as representation in future bargaining meetings and the holding of meetings.

Case example: **Bargaining order made – Attending, and participating in, meetings at reasonable times**

Esso Australia Pty Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU); The Australian Workers' Union (AWU); Australian Municipal, Administrative, Clerical and Services Union (ASU) [2014] FWC 6132 (Hamilton DP, 5 September 2014).

Esso made an application for a bargaining order against the AMWU, CEPU, AWU and ASU. There were four agreements in place which the parties sought to replace, however only one of the four agreements had all four unions as bargaining representatives. Previously, agreements and other issues had been raised and discussed in meetings of the Esso All Sites Committee (EASC) comprising Esso management and representatives of each of the four unions.

The proposed order sought that the relevant bargaining representatives for each of the agreements attend bargaining meetings with Esso at four separate site meetings and that no person other than the bargaining representatives for that replacement agreement attend except with the prior approval of Esso. The unions objected to the application and advised Esso that they would negotiate with Esso 'only the EASC level'.

Esso did not want to renegotiate these agreements through the EASC because it viewed this to be 'cumbersome' and 'inefficient' for the purposes of negotiation. Also, it had not been able to include specific productivity items in the previous agreements due to rejection by the unions, including those not eligible to act as bargaining representatives for those agreements.

The Commission found that the refusal by the unions to attend separate site meetings for negotiations on each of the replacement agreements was a failure to meet the good faith bargaining requirement to attend and participate in meetings at reasonable times (s.228(1)(a)). The Commission issued a bargaining order requiring attendance at separate site meetings.

Case example: **Bargaining order NOT made – Eligibility rule specifies coverage for pilots on airline services operated in whole or part and under any name by Qantas**

Australian and International Pilots Association v Network Aviation Pty Limited [2013] FWCFB 5216 (Hatcher VP, Boulton J, Cargill C, 14 August 2013).

AIPA applied for a bargaining order against Network, a wholly-owned subsidiary of Qantas Airways Ltd, in relation to bargaining for an enterprise agreement to cover Network pilots.

At first instance, the Commission determined that it could not make bargaining orders on the basis that pilots employed by Network were not eligible to be members of AIPA.

AIPA appealed the decision and, given the importance of the interpretation of the eligibility rules of unions, permission to appeal was granted. However, the Full Bench found that the Commission's decision was correct and that AIPA could not represent the industrial interests of Network pilots. Accordingly, AIPA could not seek bargaining orders with respect to the enterprise agreement.

Case example: **Bargaining order NOT made – Further meetings planned**

Total Marine Services Pty Ltd v Maritime Union of Australia [2009] FWA 290, (Thatcher C, 16 September 2009), [(2009) 188 IR 4].

During negotiations with the MUA for a proposed enterprise agreement, Total Marine Services applied to the Commission for bargaining orders requiring the MUA to provide Total Marine Services with a tracked changes version of the amendments the MUA proposed to the existing enterprise agreement. In the alternative, Total Marine Services sought an order requiring the MUA to provide an annotated version of the MUA's log of claims, as well as a written response to the claims proposed by Total Marine Services.

The hearing of the application was held one day before the parties were scheduled to meet, and three further meetings had already been arranged.

The Commission declined to make the orders sought on the basis that the orders would require the MUA to provide significant written material that may not be required after the parties had met and each had clarified its various claims, options and preferences.

Serious breach declarations

See Fair Work Act ss.234–235

A bargaining representative for a proposed enterprise agreement may apply to the Commission for a serious breach declaration in relation to the agreement.

Generally, a serious breach declaration is available where there are serious and sustained contraventions of a bargaining order that significantly undermine the bargaining process.

Process

Making an application

An application for a serious breach declaration must be accompanied by a copy of each of the bargaining orders in relation to the agreement which the applicant alleges have been contravened.[305]

When the Commission may make a serious breach declaration

The Commission may make a serious breach declaration in relation to a proposed enterprise agreement if an application for the declaration has been made and the Commission is satisfied that:

- one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement
- the contravention or contraventions:
  - are serious and sustained, and
  - have significantly undermined bargaining for the agreement
- the other bargaining representatives for the agreement have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement
- agreement on the terms that should be included in the agreement will not be reached in the foreseeable future, and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

[305] Fair Work Commission Rules 2013 r.30.

Reasonable alternatives exhausted

In deciding whether or not all other reasonable alternatives to reach agreement have been exhausted, the Commission may take into account any matter the Commission considers relevant, including:

- whether the Commission has provided assistance by dealing with a bargaining dispute in relation to the agreement
- whether a bargaining representative has applied to a court for an order under the civil remedy provisions in relation to the contravention or contraventions of one or more bargaining orders, and
- any findings or orders made by the court in relation to such an application.

What declaration must specify

If made, a serious breach declaration must specify the proposed enterprise agreement to which the declaration relates.

Operation of declaration

A serious breach declaration comes into operation on the day on which it is made and ceases to operate when each employer specified in the declaration is covered by either an enterprise agreement or a workplace determination.

Consequences of a serious breach declaration

The consequence of a serious breach declaration being made in relation to an agreement is that the Commission may, in certain circumstances, make a bargaining related workplace determination in relation to the agreement.

Related information

- Workplace determinations
- Enforcement of Commission orders

Disputes

The Fair Work Act provides for several ways for bargaining representatives to deal with disputes or issues which arise during the bargaining process for a proposed enterprise agreement.

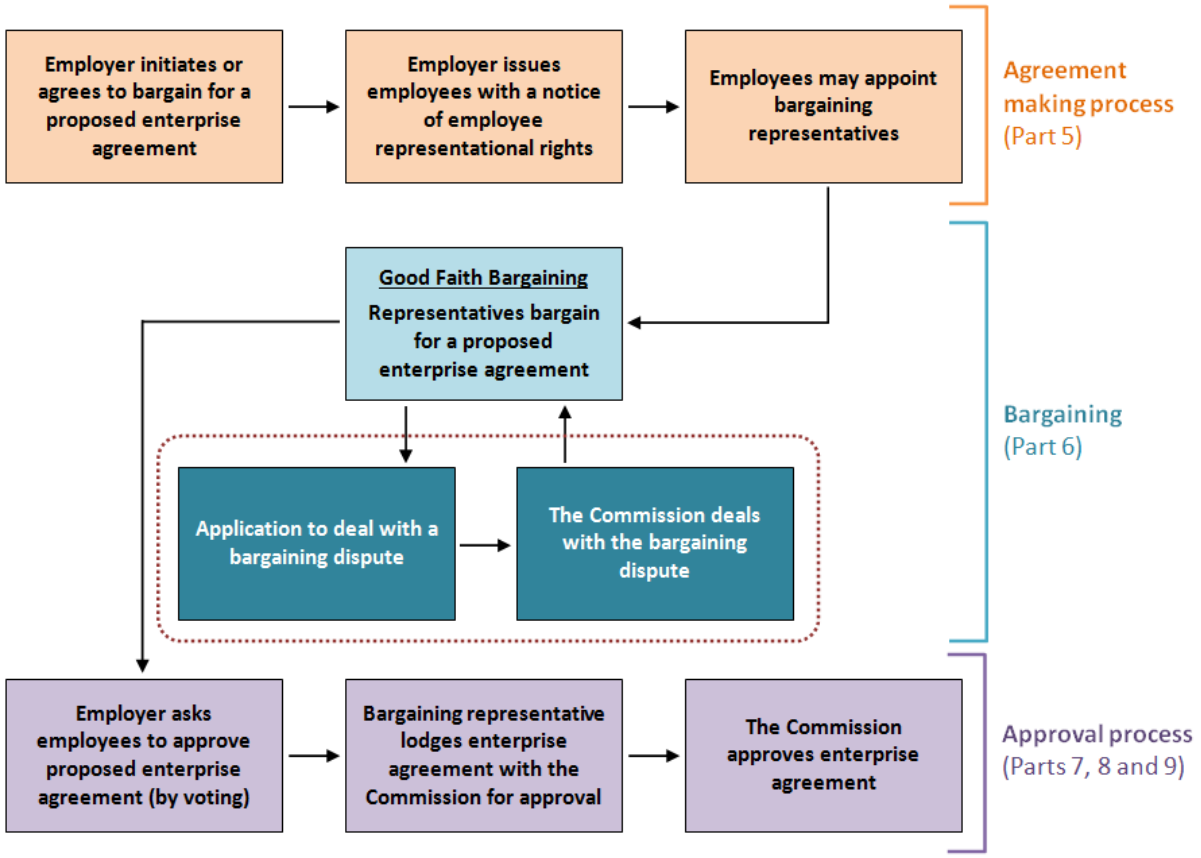
Bargaining disputes

See Fair Work Act s.240

Whilst negotiating a new enterprise agreement, a bargaining representative can make an application for the Commission to deal with a dispute between bargaining representatives about the agreement.

Applying for the Commission to deal with a bargaining dispute can be a way to advance negotiations if the bargaining representatives have reached an impasse or deadlock in their negotiations (although it is not necessary to have reached an impasse or deadlock before seeking the Commission's assistance).

Stage in bargaining process



Process of application

If the proposed enterprise agreement is:

- a single-enterprise agreement, or
- a multi-enterprise agreement in relation to which a low-paid authorisation is in operation;

the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

Otherwise, a bargaining representative can only make an application if all of the bargaining representatives for the agreement agree.

Exception – Greenfields agreements

If the proposed single-enterprise agreement is a greenfields agreement, and there has been a notified negotiation period for the agreement which has ended, then a bargaining representative cannot make an application for a bargaining dispute.[306]

Powers of the Commission when dealing with the dispute

The Commission may deal with a bargaining dispute (other than by arbitration) as it considers appropriate, including by:

- mediating or conciliating the dispute, or
- making a recommendation or expressing an opinion.[307]

The Commission may only arbitrate the dispute if all of the bargaining representatives for the proposed agreement have agreed that it may do so.[308]

If the Commission **arbitrates** a dispute, the Commission can make a decision and orders that the bargaining representatives will be bound by.

Workplace determinations

The expectation is that in the overwhelming majority of cases bargaining will result in an enterprise agreement being submitted to the Commission for approval. However, if the bargaining representatives for a proposed enterprise agreement cannot agree, in special cases (after specific requirements are met) the Fair Work Act allows for a Full Bench of the Commission to determine terms and conditions of employment.[309] If the Commission makes such a determination, it is called a workplace determination.

The Fair Work Act provides for three types of workplace determinations:

- low-paid workplace determinations
- industrial action related workplace determination, and
- bargaining related workplace determinations.

Low-paid workplace determination

 See Fair Work Act ss.260–265

A low paid workplace determination is only available if:

- there is a low-paid authorisation in operation in relation to a proposed multi-enterprise agreement, and
- one or more of the bargaining representatives are unable to reach agreement on the terms that should be included in the agreement.

There are two categories of low-paid workplace determination:

[306] Fair Work Act s.255A.
[307] Fair Work Act s.595(2).
[308] Fair Work Act s.240(4).
[309] Explanatory Memorandum to Fair Work Bill 2008 at para. 1076.

- a **consent** low-paid workplace determination – where the bargaining representatives for both the employer(s) and employees jointly apply for a determination, and
- a **special** low-paid workplace determination – where a single bargaining representative may apply.[310]

When the Commission must make a CONSENT low-paid workplace determination

A Full Bench of the Commission must make a consent low-paid workplace determination if an application for a consent low-paid workplace determination has been made and the Commission is satisfied that:

- the bargaining representatives who made the application have made all reasonable efforts to agree on the terms that should be included in the agreement, and
- there is no reasonable prospect of agreement being reached.

When the Commission must make a SPECIAL low-paid workplace determination

A Full Bench of the Commission must make a special low-paid workplace determination if an application has been made and the Commission is satisfied that:

- the bargaining representatives are genuinely unable to reach agreement on the terms that should be included in the agreement
- there is no reasonable prospect of agreement being reached
- at the time of the application, the terms and conditions of the employees to be covered by the determination were substantially equivalent to the minimum safety net provided by modern awards together with the NES
- making the determination will promote bargaining in the future for an enterprise agreement and productivity and efficiency in the enterprise or enterprises concerned
- it is in the public interest to make the determination
- no employer that will be covered by the determination is specified in an application for an existing consent low-paid workplace determination, and
- no employer that will be covered by the determination is, or has previously been, covered by an enterprise agreement or another workplace determination in relation to the work performed by the employees who will be covered by the determination.

Industrial action related workplace determination

 See Fair Work Act ss.266–268

In certain circumstances, employees engaged in bargaining for an enterprise instrument can engage in protected industrial action to further their claims with respect to a proposed enterprise agreement. The Commission may suspend or terminate protected industrial action in certain situations.

When the Commission must make an industrial action related workplace determination

If protected industrial action is terminated by the Commission, a post-industrial action negotiating period commences. If at the end of that negotiating period the bargaining representatives have not settled all of the matters that were at issue during bargaining, a Full Bench of the Commission must make an industrial action related workplace determination.[311]

[310] Fair Work Act s.260.
[311] Fair Work Act s.266(1).

The **post-industrial action negotiating period** starts on the day on which the termination of industrial action instrument is made and ends 21 days after that day (or 42 days if extended by the Commission).

The key requirement for the making of an industrial action related workplace determination is that the protected industrial action has been terminated because:

- the action was causing, or threatening to cause, significant economic harm to the parties
- the action has threatened, is threatening, or would threaten to endanger the life, the personal safety or health, or the welfare of the population or of part of it
- the action has threatened, is threatening, or would threaten to cause significant damage to the Australian economy or an important part of it, or
- the Minister made a declaration terminating the action.[312]

The Commission must make the workplace determination as quickly as possible after the end of the post-industrial action negotiating period.

Case example: **Industrial action related workplace determination granted**

Transport Workers' Union of Australia v Qantas Airways Ltd [2012] FWAFB 6612 (Watson VP, Harrison SDP, Harrison C, 8 August 2012), [(2012) 225 IR 13].

A Full Bench of the Commission terminated industrial action in relation to a proposed enterprise agreement being negotiated between Qantas Airways Ltd, QCatering Ltd and the TWU to cover Qantas ground handling operations. As the bargaining representatives did not settle all of the matters at issue between them during the 21 day period following the termination of the industrial action, the Commission was required to make a workplace determination as quickly as possible thereafter.

The Full Bench considered that, in deciding the unresolved terms of the workplace determination, the current enterprise agreement was an appropriate starting point, because it represented the package of terms the parties had previously agreed to apply. The Commission considered that it was relevant to have regard to practices of other employers in the airline industry and the terms and conditions of their employees.

The Full Bench also confirmed that the approach adopted in the matter of *CFMEU v Curragh Queensland Mining Ltd* (which dealt with workplace determinations as they existed in the predecessor legislation) could equally be applied under the Fair Work Act. The Full Bench also confirmed that dealing with each of the issues in dispute between the parties could also include dealing with the issue by choosing not to insert a particular term or dealing with an issue in a manner other than that suggested by a party.

Overall, the Full Bench was satisfied that the workplace determination passed the better off overall test, and did not contain any clauses other than mandatory terms, core terms or terms that dealt with the matters still at issue at the end of the post-industrial action negotiation period.

[312] Fair Work Act s.266(2); see also Explanatory Memorandum to Fair Work Bill 2008 at para. 1096.

Case example: **Industrial action related workplace determination granted**

Parks Victoria v Australian Workers' Union [2013] FWCFB 950 (Ross J, Hamilton DP, Hampton C, 11 February 2013), [(2013) 234 IR 242].

On 31 May 2011, the *Parks Victoria Agreement 2008* reached its nominal expiry date. The agreement covered Parks Victoria, four unions (the CPSU, ASU, AWU and APESMA) and just over 1,000 non-executive employees of Parks Victoria.

On 11 July 2012, the Commission made an unopposed order terminating industrial action that had taken the form of bans on engaging in emergency response work. During the post-industrial action negotiating period, Parks Victoria and the unions did not settle all of the matters that were at issue during bargaining for the proposed agreement.

A substantial part of the proposed workplace determination was agreed between the parties. However, significant matters such as wages and allowances increases were not agreed and required determination by the Full Bench.

Upon making the determination, the Full Bench was satisfied that it passed the BOOT, included all of the agreed terms, core terms and mandatory terms, and dealt with all of the issues in dispute at the end of the post-industrial action negotiation period.

Bargaining related workplace determination

See Fair Work Act ss.269–271

When the Commission must make a bargaining related workplace determination

If a serious breach declaration has been made in relation to a proposed enterprise agreement, a 21 day post-declaration negotiating period commences. If at the end of that negotiating period the bargaining representatives have not settled all of the matters that were at issue, a Full Bench of the Commission must make a bargaining related workplace determination.[313]

The **post-declaration negotiating period** starts on the day on which the serious breach declaration is made and ends 21 days after that day (or 42 days if extended by the Commission).

A **serious breach declaration** is available where there are serious and sustained contraventions of a bargaining order that significantly undermine the bargaining process.[314]

The Commission must make the bargaining related workplace determination as quickly as possible after the end of the post-declaration negotiating period.

Limitations relating to greenfields agreements

See Fair Work Act s.271(A)

If a proposed single-enterprise agreement is a greenfields agreement, and there has been a notified negotiation period for the agreement which has ended, section 269 of the Fair Work Act (which deals

[313] Fair Work Act s.269(1).
[314] Explanatory Memorandum to Fair Work Bill 2008 at para. 650.

with bargaining related workplace determinations) does not apply in relation to the agreement at any time after the end of the notified negotiation period.

Related information
- Serious breach declarations

Terms that must be included in a workplace determination

See Fair Work Act ss.272–275

Workplace determinations are treated in a similar way to enterprise agreements. Accordingly, if a workplace determination (of any kind) is made, it must:

- include a nominal expiry date
- only include terms that would be about permitted matters if the determination were an enterprise agreement
- not include terms that would be unlawful terms if the determination were an enterprise agreement
- not include any designated outworker terms
- include terms such that the determination would, if it were an enterprise agreement, pass the better off overall test
- not include any terms that would, if the determination were an enterprise agreement, mean that the Commission could not approve the agreement
- include a term about settling disputes arising in relation to the NES or about any matter arising under the determination
- include the model flexibility term (unless the Commission is satisfied that an agreed term would be sufficient), and
- include the model consultation term (unless the Commission is satisfied that an agreed term would be sufficient).

In addition, workplace determinations must include applicable coverage and agreed terms and terms dealing with matters at issue between the parties.

Factors to be taken into account when deciding terms of a workplace determination

When deciding the content of a workplace determination, the Commission must take the following factors into account:

- the merits of the case
- for a low-paid workplace determination—the interests of the employees and employers who will be covered by the determination, including ensuring that employers can remain competitive
- for other workplace determinations—the interests of the employees and employers who will be covered by the determination
- the public interest
- how productivity might be improved in the enterprise or enterprises concerned
- the extent to which the conduct of bargaining representatives was reasonable during bargaining

- the extent to which the bargaining representatives have complied with the good faith bargaining requirements, and
- incentives to continue to bargain at a later time.

Interaction between a workplace determination and enterprise agreement

A workplace determination that applies to an employee in relation to particular employment will cease to apply (and will never again apply to the employee in relation to that employment) if an enterprise agreement that covers the employee comes into operation in relation to the same employment. This is the case even if the nominal expiry date of the workplace determination has not yet passed.

Role of the Court

Enforcement of Commission orders

If a person does not comply with a bargaining order, an employee who the proposed agreement will cover, a bargaining representative or an inspector may seek enforcement of the Commission's order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.[315]

Failure to comply with a bargaining order may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

Related information

- Bargaining orders

Types of order made by the Court

 See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision (such as section 233, which prohibits a person contravening a bargaining order).

Orders the Federal Court or Federal Circuit Court may make include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention, or
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest).

[315] Fair Work Act s.539, table item 6.

Pecuniary penalty orders

The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in section 539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.

A **penalty unit** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening s.233 of the Fair Work Act (which prohibits a person contravening a bargaining order) is 60 penalty units.

From 1 July 2023 a penalty unit was $313.[316]

- for an individual – 60 penalty units = $18,780
- for a body corporate – 5 x 60 penalty units = $93,900

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

Costs orders

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

Appeals

See Fair Work Act s.604

The following information is limited to providing general guidance for **appeals against a decision to approve or refuse an enterprise agreement**.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal proceedings practice note.

Note: The examples used in this section do not only refer to enterprise agreements, they also include decisions related to other types of matters heard by the Commission. These examples have been used because they help explain the principles behind the appeal process.

[316] *Crimes Act 1914* (Cth) s.4AA and Crimes (Amount of Penalty Unit) Instrument 2023.

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.[317]

A **person who is aggrieved** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as in some circumstances, a union or an employer association.[318]

In determining whether a person is a 'person aggrieved' for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.[319]

Intervention

There is no provision of the Fair Work Act expressly dealing with intervention however the Commission has used the broad procedural power in s.589(1) to empower it to permit intervention in an appropriate case.[320]

Time limit for appeal – 21 days

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.[321] If an appeal is lodged late, an application can be made for an extension to the time limit.[322]

Related information

- What is a day?
-

Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

Permission to appeal

The Fair Work Act provides that the Commission must grant permission to appeal if it is satisfied that it is in the public interest to do so.[323]

[317] Fair Work Act s.604(1).
[318] See for example *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).
[319] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).
[320] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 23 December 2010) at para. 9.
[321] Fair Work Commission Rules 2013 r 56(2)(a)–(b).
[322] Fair Work Commission Rules 2013 r 56(2)(c).
[323] Fair Work Act s.604(2).

Public interest

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[324]

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of decisions so that guidance from an appellate court is required
- where the original decision manifests an injustice or the result is counter intuitive, or
- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[325]

The public interest test is not satisfied simply by the identification of error or a preference for a different result.[326]

Grounds for appeal

Error of law

An error of law of law may be a jurisdictional error, which means an error concerning the tribunal's power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.[327]

Error of fact

An error of fact can exist where the Commission makes a decision that is 'contrary to the overwhelming weight of the evidence...'.[328]

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.[329] If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.[330]

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.[331] The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.[332]

Link to form

- Form F7 – Notice of appeal

[324] *Coal and Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (Marshall, Cowdroy, Buchanan JJ, 19 April 2011) at para. 44, [(2011) 192 FCR 78].
[325] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].
[326] Ibid., at paras 26–27. See for example *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 58, [(2012) 223 IR 177].
[327] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].
[328] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.
[329] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].
[330] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499].
[331] Ibid.
[332] Ibid.

All forms are available on the Forms page of the Commission's website.

Case example: **Permission to appeal granted – Interpretation and misapplication of provisions of the Fair Work Act**

McDonald's Australia Pty Ltd [2010] FWAFB 4602 (Watson VP, Kaufman SDP, Raffaelli C, 21 July 2010).

This decision involved an appeal against the decision of the Commission not to approve an enterprise agreement. The Full Bench determined that the Commission had misstated relevant tests in the Fair Work Act and misapplied relevant provisions central to the decision not to approve the agreement. On this basis, permission to appeal was granted and the original decision quashed.

Case example: **Permission to appeal granted – Public interest**

Re G.J.E. Pty Ltd [2013] FWCFB 1705 (Acton SDP, Smith DP, Ryan C, 3 April 2013).

This decision involved an appeal against a decision of the Commission not to approve an enterprise agreement. The employer had sought approval for the enterprise agreement on the basis that the employees were award free. The Commission disagreed, determining that the employees were covered by the *General Retail Award 2010*. On that basis, the agreement could not be approved because it did not pass the BOOT.

The Full Bench considered that the appeal raised general issues regarding the coverage of modern awards and on that basis was satisfied that it was in the public interest to grant permission to appeal. However, the Full Bench was not satisfied that the Commission's decision was affected by error, and confirmed the original decision.

Case example: **Permission to appeal granted – Misapplication of provisions of Fair Work Act**

Aperio Group (Australia) Pty Ltd (t/as Aperio Finewrap) v Sulemanovski [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

Decision at first instance [2010] FWA 9958 and order PR505584. (Ryan C, 30 December 2010).

The Full Bench determined that, in deciding the application at first instance, there had been a failure to properly consider whether there was a valid reason for termination in accordance with s.387(a). This misapplication of the statutory test was significant and productive of a plainly unjust result. The preservation of public confidence in the administration of justice was a matter of public interest and could be undermined by decisions that were manifestly unjust. The appeal was allowed, the order quashed, and the matter re-heard.

Case example: **Permission to appeal granted – Interpretation of provisions of the Fair Work Act**

Ulan Coal Mines Limited v Honeysett [2010] FWAFB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010), [(2010) 199 IR 363].

Decision at first instance [2010] FWA 4817 (Raffaelli C, 12 July 2010).

These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies. The Full Bench found that, because these appeals concerned the interpretation of an important section of the Fair Work Act which had not been considered by a Full Bench before, it was in the public interest to grant permission to appeal. However, the Full Bench concluded that the Commission's decision was open on the evidence and other material before it and did not involve any error in interpretation of the section.

Case example: **Permission to appeal refused – No error in findings of fact or exercise of discretion**

Cotton On Group Services Pty Ltd v National Union of Workers [2014] FWCFB 8899 (Watson VP, Gostencnik DP, Bissett C, 23 December 2014).

Cotton On applied for permission to appeal a decision of the Commission to make a majority support determination regarding Cotton On employees.

The Full Bench was required to consider whether the Commission had erred in finding that the group of employees covered by the majority support determination was 'fairly chosen'. The Full Bench was satisfied that Cotton On had not established any error of fact or in exercise of discretion. Accordingly, permission to appeal was refused.

Case example: **Permission to appeal refused – Significant error of fact established but not in the public interest to grant permission to appeal**

Qantas Airways Limited v Carter [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012), [(2012) 223 IR 177].

Decision at first instance [2011] FWA 8025 and order PR517011 (Spencer C, 25 November 2011).

These were appeals from a decision that there was no valid reason for the employee's dismissal, that the dismissal was unfair and that the employee be reinstated. The Full Bench found that the Commission was in error in failing to find that the employer had a valid reason to dismiss the employee. However, permission to appeal was not granted, because the matter turned on its particular facts, and raised no wider issue of principle or of general importance, and no issue of jurisdiction or law.

Staying decisions

See Fair Work Act s.606

The Commission may order that the operation of the whole or part of the decision pending the determination of the appeal be stayed by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

Varying enterprise agreements

Enterprise agreements can be varied in 4 ways:

- **by agreement** between the employers and employees and with the approval of the Commission
- on application to the Commission to remove **ambiguity** or **uncertainty**
- on application to the Commission to resolve an uncertainty or difficulty concerning the agreement and the definition of **casual employee** or the **casual conversion provisions** in the Fair Work Act or to make the agreement operate effectively with that definition or those provisions, or
- on referral to the Commission by the Australian Human Rights Commission to remove **discrimination**.

- Related informationEmployers and employees may agree to vary an enterprise agreement
- Variation of an enterprise agreement where there is ambiguity or uncertainty
- Variation of an enterprise agreement - casual employee definition and casual conversion provisions

Variation of an enterprise agreement – casual employee definition and casual conversion provisions

See Fair Work Act, clause 45 in Part 10 of Schedule 1

On 27 March 2021, the Fair Work Act was amended by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021.* The amendments included inserting a definition of 'casual employee' in the Fair Work Act and amending the NES to provide rights for employees to be offered or request conversion from casual to full-time or part-time employment.

Upon application by an employer, employee or employee organisation covered by the agreement, the Commission may vary an enterprise agreement that was made **before 27 March 2021** to:

- resolve an uncertainty or difficulty concerning the agreement and the definition of 'casual employee' in s.15A of the Fair Work Act (including the circumstances in which employees are to be employed as casual employees under the agreement)
- resolve an uncertainty or difficulty concerning the agreement and the casual conversion provisions in Division 4A of Part 2-2 of the Fair Work Act 2009
- to make the agreement operate more effectively with s.15A or Division 4A of Part 2-2 of the Fair Work Act.

If the Commission varies the enterprise agreement, the variation can operate retrospectively.

Link to form

- Form F23C – Application for the Commission to vary an enterprise agreement to resolve an uncertainty or difficulty about the definition of casual employee or casual conversion rights

All forms are available on the Forms page of the Commission's website.

- Variation of an enterprise agreement where there is discrimination

Employers and employees may agree to vary an enterprise agreement

See Fair Work Act s.207

If an agreement covers a **single employer**:

- the employer
- the employees employed at the time who are covered by the agreement, and
- the employees employed at the time who will be covered by the agreement if the variation is approved;

may jointly make a variation of the enterprise agreement.

If an agreement covers **two or more employers**:

- ALL of those employers
- the employees employed at the time who are covered by the agreement, and
- the employees employed at the time who will be covered by the agreement if the variation is approved;

may jointly agree to make a variation of an enterprise agreement.

A variation of an enterprise agreement has no effect unless it is approved by the Commission.

The employees involved are referred to as the **affected employees** for the variation.

Limitation – Greenfields agreement

A greenfields agreement can only be varied by agreement if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned, and are covered by the agreement, have been employed.

Employers may request employees to approve a proposed variation of an enterprise agreement

See Fair Work Act s.208

An employer covered by an enterprise agreement may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it.

A 'no extra claims' provision in an enterprise agreement cannot operate to deprive the employer of the capacity to request employee approval of a variation to that enterprise agreement.[333]

The employer may request that the employees vote by ballot, by an 'electronic method' or by some other method.

Related information

- Access period
- Better off overall test (BOOT)
- Voting methods

When a variation of an enterprise agreement is made

See Fair Work Act s.209

Single-enterprise agreement

If the affected employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed variation, the variation is **made** when a majority of the affected employees who cast a valid vote approve the variation.

Multi-enterprise agreement

If the affected employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed variation, the variation is **made** when a majority of the affected employees of each individual employer who cast a valid vote have approved the variation.

Application for the approval of a variation of an enterprise agreement

See Fair Work Act s.210

Application for approval

If a variation of an enterprise agreement has been made, a person covered by the agreement must apply to the Commission for approval of the variation. An application for approval of variation of an enterprise agreement must be made with a Form F23.

Material to accompany the application

An application for approval of variation of an enterprise agreement made to the Commission must include the following documentation:

- a signed copy of the variation

[333] *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84 (18 July 2014).

- a copy of the agreement as proposed to be varied
- a completed and signed declaration from each employer [Form F23A], and
- a completed and signed declaration from each union (if covered) [Form F23B].[334]

The declaration must be completed truthfully. It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document, in support of an application for approval of a variation to an enterprise agreement, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

Links to forms

- Form F23 – Application for approval of variation of an enterprise agreement
- Form F23A – Employer's declaration in support of variation of an enterprise agreement
- Form F23B – Declaration of employee organisation in relation to variation of an enterprise agreement

All forms are available on the Forms page of the Commission's website.

When the application must be made

The application must be made:

- **within 14 days** after the variation is made, or
- if in all the circumstances the Commission considers it fair to extend that period—within such further period as the Commission allows.

Signature requirements

 See Fair Work Act s.210(4) & reg 2.09A

A **signed copy** of a variation must be signed by the **employer** and **at least one representative of the employees** covered by the agreement as varied.

Generally the signature of a representative of employees does not bind the representative to the agreement as varied; unless the representative is an employee who will be bound by the agreement as varied.

While it is necessary to have at least one representative of the employees sign the variation, it is not necessary for every bargaining representative to sign the variation.

Important

The signed copy must include the **full name and address** of each person who signs the variation; and an **explanation of the person's authority** to sign the variation.

[334] Fair Work Commission Rules 2013 r.25.

Requirements of regulation 2.09A

For the purposes of reg 2.09A(2)(b)(i)—which requires 'the full name and address of each person who signs the variation' a person can use his or her **work address**, and does not have to provide home address details.[335]

When the Commission must approve a variation of an enterprise agreement

Note: Due to the complexities involved with the cross-referencing within section 211 of the Fair Work Act, the section is presented as a direct quote.

211 When the FWC must approve a variation of an enterprise agreement

Approval of variation by the FWC

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

(a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and

(b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

Note: The FWC may approve a variation under this section with undertakings (see section 212).

Modification of approval requirements

(2) For the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), the FWC must:

(a) take into account subsections (3) and (4) and any regulations made for the purposes of subsection (6); and

(b) comply with subsection (5); and

(c) disregard sections 190 and 191 (which deal with the approval of enterprise agreements with undertakings).

(3) The following provisions:

(a) section 180 (which deals with pre-approval steps);

(b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);

(c) section 188 (which deals with genuine agreement);

have effect as if:

[335] *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 (Ross J, Hatcher VP, Asbury DP, Gostencnik DP, Simpson C, 2 April 2014) at paras 87–102.

(d) references in sections 180 and 188 to the proposed enterprise agreement, or the enterprise agreement, were references to the proposed variation, or the variation, of the enterprise agreement (as the case may be); and

(e) references in those provisions to the employees employed at the time who will be covered by the proposed enterprise agreement, or the employees covered by the enterprise agreement, were references to the affected employees for the variation; and

(f) references in section 180 to subsection 181(1) were references to subsection 208(1); and

(g) the words "if the agreement is not a greenfields agreement—" in paragraph 186(2)(a) were omitted; and

(h) paragraph 186(2)(b) were omitted; and

(ha) references in paragraphs 186(2)(c) and (d) to the agreement were references to the enterprise agreement as proposed to be varied; and

(hb) subparagraph 188(a)(ii) were omitted; and

(j) the words "182(1) or (2)" in paragraph 188(b) were omitted and the words "209(1) or (2)" were substituted.

(4) Section 193 (which deals with passing the better off overall test) has effect as if:

(a) the words "that is not a greenfields agreement" in subsection (1) were omitted; and

(b) subsection (3) were omitted; and

(c) the words "the agreement" in subsection (6) were omitted and the words "the variation of the enterprise agreement" were substituted; and

(d) the reference in subsection (6) to subsection 182(4) or section 185 were a reference to section 210.

(5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, the FWC must disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term in the agreement.

Regulations may prescribe additional modifications

(6) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), specified provisions of this Part have effect with such modifications as are prescribed by the regulations.

Related information

- Better off overall test (BOOT)
- Undertakings

The Commission may approve a variation of an enterprise agreement with undertakings

See Fair Work Act s.212

Approval of agreement with undertakings

If an application for the approval of a variation of an enterprise agreement has been made and the Commission has a concern that the variation does not meet the requirements for approval of a variation set out in the Fair Work Act.

The Commission may approve the variation if satisfied that an undertaking accepted by the Commission meets the concern.

Undertakings

The Commission may only accept a written undertaking from one or more employers covered by the agreement if satisfied that the effect of accepting the undertaking is not likely to:

- cause financial detriment to any affected employee for the variation, or
- result in substantial changes to the variation.

Related information

- Financial detriment
- Substantial change

Signature requirements

See Fair Work Act s.212(4) & reg 2.10

An undertaking relating to the variation of an enterprise agreement must be signed by each employer who gives the undertaking.

Effect of undertakings

See Fair Work Act s.213

Single employer

If the Commission approves a variation of an enterprise agreement after accepting an undertaking in relation to the variation and the agreement covers a single employer, the undertaking is taken to be a term of the agreement as the agreement applies to the employer.

Two or more employers

If the Commission approves a variation of an enterprise agreement after accepting an undertaking in relation to the variation and the agreement covers two or more employers, the undertaking is taken to be a term of the agreement as the agreement applies to each employer that gave the undertaking.

When the Commission may refuse to approve a variation of an enterprise agreement

See Fair Work Act s.214

Approval of a variation of an enterprise agreement may be refused if compliance with the terms of the agreement as proposed to be varied may result in a person committing an offence against a Commonwealth law or a person being liable to pay a pecuniary penalty in relation to the contravention of a Commonwealth law. If approval is refused on this basis, the Commission may refer the agreement to any person or body considered appropriate.

Approval decision to note undertakings

See Fair Work Act s.215

If the Commission approves a variation of an enterprise agreement after accepting an undertaking in relation to the variation, the Commission must note in its decision to approve the variation that the undertaking is taken to be a term of the agreement.

When variation comes into operation

See Fair Work Act s.216

If a variation of an enterprise agreement is approved, the variation operates from the day specified in the decision to approve the variation.

Variation of an enterprise agreement where there is ambiguity or uncertainty

Variation of an enterprise agreement to remove an ambiguity or uncertainty

See Fair Work Act s.217

The Commission may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:

- one or more of the employers covered by the agreement
- an employee covered by the agreement, or
- a union covered by the agreement.

Link to form

- Form F1 – Application (no specific form provided)

Note: In response to question 1.1 on Form F1: 'Please set out the provision(s) of the *Fair Work Act 2009* (or any other relevant legislation) under which you are making this application.' **Please clearly indicate that it is an application under section 217.**

All forms are available on the Forms page of the Commission's website.

If the Commission varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

The Commission may deal with certain disputes about variations

See Fair Work Act s.217A

An employer or union covered by the enterprise agreement, or an affected employee for the variation, may apply for the Commission to deal with a dispute about the proposed variation if the employer and the affected employees are unable to resolve the dispute.

The Commission must not arbitrate the dispute.

Important

The provision that the Commission must not arbitrate a dispute in s.217A(3) of the Fair Work Act only applies to a dispute about a proposed variation to remove an ambiguity or uncertainty in an enterprise agreement.

The Commission can still arbitrate a dispute under the terms of an enterprise agreement, made in accordance with the dispute settling procedure under s.739 of the Fair Work Act, if the dispute settling procedure provides such power.

Link to form

- Form F1 – Application (no specific form provided)

Note: In response to question 1.1 on Form F1: *'Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.'* **Please clearly indicate that it is an application under section 217A.**

All forms are available on the Forms page of the Commission's website.

Variation of an enterprise agreement – casual employee definition and casual conversion provisions

See Fair Work Act, clause 45 in Part 10 of Schedule 1

On 27 March 2021, the Fair Work Act was amended by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*. The amendments included inserting a definition of 'casual employee' in the Fair Work Act and amending the NES to provide rights for employees to be offered or request conversion from casual to full-time or part-time employment.

Upon application by an employer, employee or employee organisation covered by the agreement, the Commission may vary an enterprise agreement that was made **before 27 March 2021** to:

- resolve an uncertainty or difficulty concerning the agreement and the definition of 'casual employee' in s.15A of the Fair Work Act (including the circumstances in which employees are to be employed as casual employees under the agreement)

- resolve an uncertainty or difficulty concerning the agreement and the casual conversion provisions in Division 4A of Part 2-2 of the Fair Work Act 2009
- to make the agreement operate more effectively with s.15A or Division 4A of Part 2-2 of the Fair Work Act.

If the Commission varies the enterprise agreement, the variation can operate retrospectively.

Link to form

- Form F23C – Application for the Commission to vary an enterprise agreement to resolve an uncertainty or difficulty about the definition of casual employee or casual conversion rights

All forms are available on the Forms page of the Commission's website.

Variation of an enterprise agreement where there is discrimination

Variation of an enterprise agreement on referral by Australian Human Rights Commission

See Fair Work Act s.218

Review of an enterprise agreement

The Commission must review an enterprise agreement if the agreement is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (Cth) (which deals with discriminatory industrial instruments).

Submissions

The Age Discrimination Commissioner is entitled to make submissions to the Commission for consideration in the review if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004* (Cth).

The Disability Discrimination Commissioner is entitled to make submissions to the Commission for consideration in the review if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992* (Cth).

The Sex Discrimination Commissioner is entitled to make submissions to the Commission for consideration in the review if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984* (Cth).

Variation of an enterprise agreement

If the Commission considers that the agreement reviewed requires a person to do an act that would be unlawful under:

- the Age Discrimination Act
- the Disability Discrimination Act, or
- the Sex Discrimination Act;

(but for the fact that the act would be done in direct compliance with the agreement), the Commission must vary the agreement so that it no longer requires the person to do an act that would be so unlawful.

If the agreement is varied, the variation operates from the day specified in the decision to vary the agreement.

Terminating enterprise agreements

An enterprise agreement can be terminated in two ways:

- **by agreement** between the employers and employees and with the approval of the Commission, or
- on application to the Commission **after its nominal expiry date**.

Related information

- Employers and employees may agree to terminate an enterprise agreement
- Application for termination of an enterprise agreement after its nominal expiry date

Employers and employees may agree to terminate an enterprise agreement

 See Fair Work Act s.219

If an agreement covers a **single employer**—the employer and the employees covered by the enterprise agreement may jointly agree to terminate the agreement.

If an agreement covers **two or more employers**—ALL of the employers and the employees covered by the enterprise agreement may jointly agree to terminate the agreement.

A termination of an enterprise agreement has no effect unless it is approved by the Commission.

Limitation – Greenfields agreement

A greenfields agreement can only be terminated by agreement if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned, and are covered by the agreement, have been employed.

Employers may request employees to approve a proposed termination of an enterprise agreement

 See Fair Work Act s.220

An employer covered by an enterprise agreement may request the employees covered by the agreement to approve a proposed termination of the agreement by voting for it.

Before making the request, the employer must:

- take all reasonable steps to notify the employees of the following:
  - the time and place at which the vote will occur
  - the voting method that will be used, and
- give the employees a reasonable opportunity to decide whether they want to approve the proposed termination.

The employer may request that the employees vote by ballot, by an 'electronic method' or by some other method.

Related information

- Voting methods

When the termination of an enterprise agreement is agreed to

See Fair Work Act s.221

Single-enterprise agreement

If the employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed termination of the agreement, the termination is **agreed to** when a majority of the employees who cast a valid vote approve the termination.

Multi-enterprise agreement

If the employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed termination of the agreement, the termination is **agreed to** when a majority of the employees of each individual employer who cast a valid vote have approved the termination.

Application for the approval of a termination of an enterprise agreement

See Fair Work Act s.222

Application for approval

If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the Commission for approval of the termination. An application for termination of an enterprise agreement by agreement must be made with a Form F24.

Material to accompany the application

The application must be accompanied by a completed and signed declaration from the applicant in support of the termination by agreement.[336] [Form F24A]

The declaration must be completed truthfully. It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document, in support of an application for approval of termination of an enterprise agreement, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

Links to forms

- Form F24 – Application for termination of an enterprise agreement by agreement
- Form F24A – Declaration in support of termination of an enterprise agreement

All forms are available on the Forms page of the Commission's website.

[336] Fair Work Commission Rules 2013 r.26(1).

When the application must be made

The application must be made:

- **within 14 days** after the termination is agreed to, or
- if in all the circumstances the Commission considers it fair to extend that period—within such further period as the Commission allows.

When the Commission must approve a termination of an enterprise agreement

 See Fair Work Act s.223

If an application is made for approval of an agreed termination of an enterprise agreement, the Commission must approve the termination if:

- satisfied that each employer covered by the agreement complied with the requirement to give employees a reasonable opportunity to decide whether they want to approve the proposed termination,
- satisfied that the termination was agreed to by employees (as above)
- satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination, and
- the Commission considers that it is appropriate to approve the termination taking into account the views of the union or unions (if any) covered by the agreement.

When termination comes into operation

 See Fair Work Act s.224

If a termination of an enterprise agreement is approved by the Commission, the termination operates from the day specified in the decision to approve the termination.

Application for termination of an enterprise agreement after its nominal expiry date

 See Fair Work Act s.225

If an enterprise agreement has passed its nominal expiry date, any of the following may apply for the termination of the agreement:

- one or more of the employers covered by the agreement
- an employee covered by the agreement, or
- a union covered by the agreement.

Application for approval

An application for termination of an enterprise agreement after the nominal expiry date must be made with a Form F24B.

Material to accompany the application

The application must be accompanied by a completed and signed declaration from the applicant.[337] [Form F24C]

The declaration must be completed truthfully. It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document, in support of an application for approval of termination of an enterprise agreement, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

Links to forms

- Form F24B – Application for termination of an enterprise agreement after the nominal expiry date
- Form F24C – Declaration in relation to termination of an enterprise agreement after the nominal expiry date

All forms are available on the Forms page of the Commission's website.

When the Commission must terminate an enterprise agreement

See Fair Work Act s.226

If an application is made for termination of an enterprise agreement after its nominal expiry date, the Commission must terminate the agreement if:

- satisfied that it is not contrary to the public interest to do so, and
- the Commission considers that it is appropriate to terminate the agreement taking into account all the circumstances including:
  - the views of the employees, each employer, and each union (if any), covered by the agreement, and
  - the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

When termination comes into operation

See Fair Work Act s.227

If an enterprise agreement is terminated by the Commission, the termination operates from the day specified in the decision to terminate the agreement.

[337] Fair Work Commission Rules 2013 r.26(2).

Case example: **When the Commission must terminate an enterprise agreement – Termination of enterprise agreements**

Re Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540 (Watson VP, Gostencnik DP, Spencer C, 22 April 2015).

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd [2015] FCAFC 126 (3 September 2015).

Aurizon applied to the Commission to terminate 14 enterprise agreements that had passed their nominal expiry dates. By the time the matter reached hearing, two of the agreements had been replaced by new agreements and the application was only pressed in relation to the remaining 12.

The construction and application of s.226 was considered. Firstly, in relation to s.226(a) the Full Bench held that a consideration of the public interest would involve something distinct from the interests of the persons and bodies covered by the agreement. The Full Bench applied the decision in *Kellog Brown*.

In this case the parties had been engaged in bargaining for several months without reaching an agreement. The union parties submitted that terminating the agreements would undermine the bargaining process and deliver an advantage to Aurizon in the negotiations. The Full Bench held that there was nothing inherently inconsistent with the termination of an enterprise agreement that had passed its nominal expiry date and the continuation of collective bargaining in good faith.

In considering the requirements of s.226(b) the Full Bench acknowledged that the application had been made in the context of a bargaining stalemate. The agreements subject to the application had a particular history due to directions issued to Aurizon from its previous owner, the Queensland Government. The particular clauses included an employment guarantee which had also expired and other clauses relating to work practices which affected Aurizon's ability to effectively manage the business. One result of the termination of the agreements would be that 69 employees who did not have a productive role within the organisation would have their employment terminated.

The union parties submitted that the employees covered by the agreements opposed the termination of those agreements because it would result in a reduction in the terms and conditions of their employment. The Full Bench was not persuaded by this submission holding that the Fair Work Act did not guarantee the terms and conditions contained in a nominally expired agreement. Ultimately, the Full Bench held that it could not be expected that an enterprise agreement that had passed its nominal expiry date would continue to apply unaltered in perpetuity.

The Full Bench was satisfied that it was appropriate to terminate each of the 12 enterprise agreements.

The union parties then made an application for judicial review to the Federal Court. A Full Court of the Federal Court found no error in the decision of the Commission and dismissed the application.

Termination of individual agreements

Certain employees may be covered by an individual agreement made under previous legislative schemes, such as an Australian Workplace Agreement (AWA) or an Individual Transitional Employment Agreement (ITEA).

All individual agreements made under the *Workplace Relations Act 1996* (Cth) (and preserved individual State agreements) have passed their nominal expiry date.

An individual agreement (an 'individual agreement-based transitional instrument') can be terminated in three ways:

- **by agreement** between the employee and employer and with the approval of the Commission
- on application to the Commission **after the nominal expiry date**, or
- **conditional** upon the approval of an enterprise agreement.

Related information

- Termination by agreement
- Termination after nominal expiry date
- Conditional termination

Termination by agreement

See Transitional Act Sch 3, item 17

The employee and employer covered by an individual agreement-based transitional instrument may make a written agreement (a **termination agreement**) to terminate the agreement.

It is recommended that a termination agreement include:

- the name of the employer
- the name of the employee
- the date of the termination agreement
- if the individual agreement-based transitional instrument is an AWA or ITEA, the AWA or ITEA identification number
- the employee's date of birth, and
- a statement that both parties agree to the termination and acknowledge it will take effect when the Commission approves the termination.

In addition:

- a termination agreement must be signed by the employee and the employer
- if the employee is under 18, it must also be signed by a parent or guardian of the employee, and
- the signatures must be witnessed.

A termination has **no effect** unless it is approved by the Commission.

Making an application

If a termination agreement has been made, the employer or employee may apply to the Commission for approval of the termination agreement using Form F29.

The applicant needs to indicate at Question 1 on Form F29 that the application is being made under **item 17, Schedule 3** to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

The application must be accompanied by a copy of the termination agreement.[338]

It must be made:

- within 14 days after the termination agreement was made, or
- if in all the circumstances the Commission considers it fair to extend that period – within such further period as the Commission allows.

[338] Fair Work Commission Rules 2013 r.27(1).

Link to form

- Form F29 – Application for approval of termination of individual agreement-based transitional instrument

All forms are available on the Forms page of the Commission's website.

Role of the Commission

If an application for the Commission to approve the termination agreement is made, the Commission must approve the termination of the individual agreement-based transitional instrument if satisfied that:

- the requirements for making the termination agreement have been complied with, and
- there are no other reasonable grounds for believing that the employee has not agreed to the termination.

The termination operates from the day specified in the Commission decision to approve the termination.

The parties will be notified by the Commission of the approval of the termination.

Termination after nominal expiry date

See Transitional Act Sch 3, item 19

All individual agreements made under the *Workplace Relations Act 1996* (Cth) (and preserved individual State agreements) have passed their nominal expiry date.

Either the employer or the employee party to an individual agreement-based transitional instrument may apply to the Commission for the termination of the instrument.

Once the employer or the employee decides that they wish to terminate the instrument, the employer or employee may draw up a **notice of intention to terminate the instrument**. The notice of intention to terminate should be in the form of a written declaration:

- identifying the transitional instrument, and
- that states that the employer or employee wants to terminate the instrument.

It is recommended that a **notice of intention to terminate the instrument** include:

- the name of the employer
- the name of the employee
- the date of the notice, and
- if the individual agreement-based transitional instrument is an AWA or ITEA, the AWA or ITEA identification number.

The employer or employee cannot make an application to the Commission unless, at least **14 days** before the day on which the application is made, the employer or employee gives the other a notice complying with the following requirements:

- the notice must identify the transitional instrument
- the notice must state that the employer or employee intends to apply to the Commission for approval of the termination of the instrument, and

- the notice must state that, if the Commission approves the termination, the transitional instrument will terminate on the **90th day** after the day on which the Commission makes the approval decision.

Making an application

A person covered by the individual agreement-based transitional instrument may apply to the Commission for approval of the termination using Form F29.

The applicant needs to indicate at Question 1 on Form F29 that the application is being made under **item 19, Schedule 3** to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

The application must be accompanied by a **declaration** made by a person authorised to do so indicating the facts establishing a basis for the Commission to be satisfied that the requirements for making the **notice of intention to terminate the instrument** and giving notice to the other party have been complied with, and a copy of the written **notice of intention to terminate the instrument**.[339]

The declaration must be completed truthfully. It is an offence to knowingly give information that is false or misleading or which omits any matter or thing without which the information is misleading, or to knowingly produce a false or misleading document, in support of an application for approval of termination of a transitional instrument, the punishment for which is imprisonment for up to 12 months – see s.137.1 and s.137.2 of the *Criminal Code.*

Link to form

- Form F29 – Application for approval of termination of individual agreement-based transitional instrument

All forms are available on the Forms page of the Commission's website.

Role of the Commission

The Commission must approve the termination if satisfied that:

- the individual agreement-based transitional instrument applies to the employer and the employee, and
- the requirements for making the **notice of intention to terminate the instrument** and giving notice to the other party have been complied with.

If the Commission approves the termination, the individual agreement-based transitional instrument terminates on the 90th day after the day on which the Commission makes the approval decision.

The parties will be notified by the Commission of the approval of the termination.

Conditional termination

 See Transitional Act Sch 3, item 18

A **conditional termination** is an instrument that has the effect of terminating an individual agreement-based transitional instrument if an enterprise agreement covering the employee and the employer is subsequently made and comes into operation. If no enterprise agreement subsequently comes into operation, the transitional instrument will continue to operate.

A conditional termination must be in writing and signed by **either** the employee or the employer.

[339] Fair Work Commission Rules 2013 r.27(2).

It is recommended that a conditional termination include:

- the name of the employer
- the name of the employee
- the date the conditional termination was signed
- if the individual agreement-based transitional instrument is an AWA or ITEA, the AWA or ITEA identification number
- the employee's date of birth, and
- a statement that the transitional instrument terminates when the proposed enterprise agreement comes into operation.

In addition:

- the signature must be witnessed, and
- if the conditional termination is signed by the employee, and the employee is under 18, it must also be signed by a parent or guardian of the employee.

The employer must give the employee a copy of the conditional termination if the conditional termination is signed by the employer.

When conditional termination comes into operation

The conditional termination must accompany any application to the Commission for approval of the enterprise agreement under section 185 of the Fair Work Act.

If the requirements for making a conditional termination have been complied with, the transitional instrument terminates when the enterprise agreement comes into operation.

The parties will be notified by the Commission of the approval of the enterprise agreement.