



AGREEMENT MAKING

The *Fair Work Act 2009* (Cth) (FW Act) substantially changes the process and nature of agreement making and emphasises collective agreement making. The scope of matters that an agreement can cover has been expanded by the FW Act. This fact sheet outlines the agreement making process, types of agreements and content of agreements. Builders should also refer to Master Builders' Fact Sheet 6, which provides information on dispute resolution and Master Builders' Fact Sheet 7 on the National Employment Standards.

Types of agreements

The emphasis of the FW Act is on collective agreement making through enterprise agreements. There is no longer a distinction between union and non-union agreements. The FW Act provides for the following types of agreements:

- Single enterprise agreements - a collective agreement made between a group of employees and:
 - an employer; or
 - two or more employers that are 'single interest' employers. Single interest employers are franchises that carry on similar business activities under the same franchise or employers who have a common interest. It is unlikely that builders would be considered as 'single interest employers' - it is most likely to apply to employers who receive a common source of funding, do not compete with each other and which conduct their workplace relations activities through a central body (for example a public hospital). Multi-employer agreements are likely to be more applicable to building projects involving more than one employer and joint ventures that are not separately incorporated.
- Multi-enterprise agreements – a collective agreement made between two or more employers and groups of their employees. Employers must voluntarily agree to bargain together for a multi-enterprise agreement, with the exception of the low-paid bargaining stream.
- Greenfields agreements – an agreement which the employer makes for future employees of a new enterprise. Greenfields agreements are made between employer(s) and employee organisation(s) that are entitled to represent the majority of the employees to be covered by the agreement. Greenfields agreements are suitable for new construction projects.

Content of agreements

The concept of prohibited content under the *Workplace Relations Act 1996* does not apply from 1 July 2009. Rather, employers and employees can only make an agreement about permitted matters.

Permitted matters

Permitted matters are terms which relate to:

- Matters pertaining to the relationship between the employer (or employers) and employees covered by the agreement;
- Matters pertaining to the relationship between the employer (or employers) and employee organisation(s) covered by the agreement;
- Deductions from wages for any purpose authorised by an employee covered by the agreement; and
- How the agreement will operate.

Agreements that contain terms that are not about permitted matters will still be valid but only to the extent of the provisions relating to the permitted matters. The non-permitted matters will have no effect.



Mandatory terms

Enterprise agreements must contain the following:

- A **flexibility term** which enables an employee and employer to agree to an individual flexibility arrangement which meets the needs of both parties. The flexibility term must set out the terms of the enterprise agreement that can be varied by an individual flexibility arrangement (for example, arrangements for when work is performed, overtime rates, penalty rates, allowances, leave loading). The flexibility term must require the employer and employee to genuinely agree to any individual flexibility arrangement.
- A **consultation term** which must require the employer(s) to consult with employees covered by the agreement about any major workplace changes that are likely to have a significant effect on those employees. The term must allow employees to be represented during consultation – this could be by an elected employee or a representative from a union.
- A **dispute resolution term** which outlines the procedure for settling disputes about matters arising under the agreement and in relation to the National Employment Standards. The term must provide for Fair Work Australia or another person who is independent of the parties to deal with a dispute and must provide for representation of employees in the dispute settlement process.

The *Fair Work Regulations* prescribe a model flexibility term, a model consultation term and a model dispute resolution term. Where an agreement does not contain a mandatory flexibility or consultation term, the model term will be taken to be a term of the agreement. Employers and employees (and their bargaining representatives) can refer to the model dispute resolution term for guidance, and may agree to include the model term, or part of it, in a proposed agreement. However, the model term will not be taken to be a term of an agreement if the parties fail to include one (instead the agreement will be rejected by Fair Work Australia).

Unlawful terms

If an enterprise agreement contains **unlawful terms** then Fair Work Australia must refuse to approve the enterprise agreement. A term of an enterprise agreement will be an unlawful term if it:

- Is a **discriminatory term** that discriminates against an employee because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. A term would not be considered to discriminate if the reason for the discrimination is the inherent requirements of the particular position or because the agreement provides particular wages for junior employees, employees with a disability or employees to whom training arrangements apply.
- Is an **objectionable term** which contravenes the general protections of the FW Act or the payment of a bargaining services fee.
- Would be inconsistent with the unfair dismissal provisions of the FW Act (see Master Builders Fact Sheet 9).
- Would be inconsistent with the industrial action provisions of the FW Act (see Master Builders Fact Sheet 6). For example, a term would be unlawful if it were to allow industrial action before the nominal expiry date of the agreement.
- Would be inconsistent with the right of entry provisions of the FW Act (see Master Builders Fact Sheet 5). For example, a term would be unlawful if it were to allow right of entry to investigate a suspected breach or to hold discussions not established by the FW Act. However, an agreement can include terms allowing for union officials to enter the employer's premises for other purposes, such as to represent an employee under a term dealing with resolution of disputes or to meet with the employer when bargaining for a replacement to the current agreement.
- Would result in an exercise of State or Territory occupational health and safety rights in a way that is inconsistent with the right of entry provisions.



Agreement making processes

Bargaining representatives

An employee who will be covered by a proposed enterprise agreement (other than a greenfields agreement) may appoint a bargaining representative to represent the employee in the bargaining for the agreement and in a matter before Fair Work Australia that relates to bargaining for the agreement. The employee's bargaining representative must be independent – that is free from control and improper influence by the employer or another bargaining representative.

If the employee is a member of a union that is entitled to represent the interests of the employee and the employee does not appoint another bargaining representative, the union automatically becomes the representative for that employee.

An employer may also elect to be represented by a bargaining representative.

An employer must take all reasonable steps to notify each employee who will be covered by the enterprise agreement of their right to appoint a bargaining representative. The notice must explain that the union entitled to represent the employee will become the bargaining representative for the employee if the employee does not appoint another person.

Good faith bargaining

Bargaining representatives must comply with various 'good faith bargaining' requirements when negotiating an enterprise agreement (other than a greenfields agreement). These requirements do not apply to the process of varying or terminating an enterprise agreement.

The good faith bargaining requirements imposed on all bargaining representatives include:

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Responding to proposals made by other bargaining representatives in a timely manner;
- 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;
- Recognising and bargaining with the other bargaining representatives for the agreement; and
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Bargaining commences when the employer agrees to bargain or initiates bargaining for the agreement (including by offering an agreement to the employees). Bargaining can also be initiated where Fair Work Australia:

- Determines that a majority of employees support bargaining for an enterprise agreement (known as a majority support determination). This would apply where an employer has not agreed to bargain with its employees. Fair Work Australia must receive an application from a bargaining representative of an employee. Fair Work Australia has discretion to use whatever method it considers appropriate to work out whether a majority of employees want to bargain. This may be a ballot, a petition or a show of hands. Where the order is made, it essentially forces an employer to the bargaining table.
- Makes a scope order which specifies the employer(s) and employees that will be covered by the proposed enterprise agreement. A bargaining representative may apply to Fair Work Australia for a scope order where the bargaining is proceeding inefficiently or unfairly because the agreement will not cover the appropriate employees or covers employees that it's not appropriate for the agreement to cover.
- Makes a low-paid authorisation which provides employers and employees access to the low-paid multi-enterprise bargaining stream.



Australian Government



Employers should do their utmost to ensure that they do not breach the good faith bargaining requirements in the FW Act, to avoid potential financial penalties and to avoid an arbitrated outcome being imposed on them.

There is no requirement for formal notification of the commencement of bargaining, or any time period during which bargaining must take place. However, an employer must notify employees of their right to appoint a bargaining agent within 14 days of one of the above events occurring.

An employer, employee or union covered by the agreement must apply to Fair Work Australia for approval within 14 days after the agreement is made. The application must be accompanied by a signed copy of the agreement and any declarations that are required by the procedural rules to accompany the application.

An enterprise agreement does not have any legal effect until it is approved by Fair Work Australia.

Approval requirements

Fair Work Australia must be satisfied that all of the following requirements have been met before approving an enterprise agreement:

- The agreement was genuinely agreed to by the employees covered by the agreement. Fair Work Australia must be satisfied that employees were provided with a copy of the agreement at least 7 days before the start of the voting process, that the employer took all reasonable steps to explain the agreement to employees and that a majority of the employees that cast a valid vote approve the agreement.
- The terms of the agreement do not contravene the National Employment Standards (see Master Builders Fact Sheet 7).
- The agreement passes the Better Off Overall Test (from 1 January 2010), or if the agreement was lodged between 1 July 2009 and 31 December 2009, the agreement passes the no disadvantage test.
- The group of employees covered by the agreement was fairly chosen.
- The agreement does not contain unlawful terms.
- The agreement contains a nominal expiry date which is not more than four years from the day on which Fair Work Australia approves the agreement.
- The agreement contains the mandatory terms.
- Approving the agreement would not undermine good faith bargaining if a scope order is in operation.
- The agreement meets the approval requirements dealing with shift workers, pieceworkers, outworkers, or school-based apprentices and school-based trainees.

If the agreement is a multi-employer agreement, Fair Work Australia must be satisfied that each employer genuinely agreed to the agreement and that no person coerced, or threatened to coerce, any of the employers to make the agreement. If a multi-enterprise agreement was not approved by the employees of all the employers who asked their employees to vote on the agreement, that the agreement has been varied to cover only the employers (and their employees) whose employees approved the agreement.

The Better Off Overall Test

Between 1 July 2009 and 31 December 2009 enterprise agreements will be assessed under the current no-disadvantage test.

From 1 January 2010, all new enterprise agreements must pass the Better Off Overall Test (BOOT). An enterprise agreement will pass the BOOT if Fair Work Australia is satisfied that each employee eligible to be covered by the relevant modern award would be better off overall if they were employed under the agreement than under the relevant modern award.

Fair Work Australia can examine classes of employees in applying the BOOT. Unless there is evidence to the contrary, an employee in the class of employees will be considered to be better off under the agreement if their class of employees would be better off overall.



Australian Government



The BOOT is a point in time test therefore it is possible over time for the base rate of pay under an agreement to be less than the base rate under the relevant modern award or the national minimum wage. If this occurs the employee is entitled to be paid under the agreement at a rate of pay equal to the award rate, or the rate of the national minimum wage.

National Employment Standards

The terms of an enterprise agreement must not contravene the National Employment Standards (NES). However, an agreement may contain terms that are ancillary or supplementary to the NES. Master Builders Fact Sheet 7 details the NES and provides further information about the interaction between agreements and the NES.

Varying agreements

The process for varying an enterprise agreement is similar to the process for making an agreement.

To vary an agreement, the majority of affected employees who cast a valid vote must approve the variation. An affected employee is an employee who is either covered by the agreement or who will be covered by the agreement if the proposed variation is approved by Fair Work Australia.

A variation to a greenfields agreement can only be made if one or more of the employees who are covered by the agreement have been employed.

A variation to an agreement has no effect unless it is approved by Fair Work Australia. An employer, employee or union covered by the agreement must apply to Fair Work Australia for approval of the variation with 14 days after the variation is made. The application must be accompanied by a signed copy of the variation and a copy of the agreement consolidated to include the variation.

A variation is subject to the same approval requirements as a new agreement and must pass the BOOT and not contravene the NES. Provided that these requirements are met Fair Work Australia cannot refuse to approve a variation unless there are grounds for serious public interest concerns.

Fair Work Australia may deal with a dispute about a proposed variation to an agreement that is already in place if the matter is not able to be resolved by the employer and employees. However, Fair Work Australia cannot arbitrate such a dispute.

Terminating agreements

Employers and employees who are covered by an enterprise agreement may agree to terminate the agreement at any time while the agreement is in operation. A majority of employees must vote in favour of the termination and the termination must be approved by Fair Work Australia.

If an agreement has passed its nominal expiry date, any one of the parties covered by the agreement (an employer, employee or employee organisation) may apply to Fair Work Australia for the agreement to be terminated. Fair Work Australia must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so and if it is appropriate to do so, taking into account the views of the employees, each employer, and each employee organisation covered by the agreement, and their circumstances, and the likely effect the termination will have on each of them.

Date of termination

Agreements are terminated on the date specified in the Fair Work Australia decision.



FOR FURTHER INFORMATION

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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.