



Fact Sheet 9

Enterprise agreements – their content and approval

Collective bargaining at the enterprise level is at the heart of the new workplace relations system and new laws governing enterprise agreements took effect on 1 July 2009.

Enterprise Agreements can provide an opportunity to develop flexible work arrangements that benefit the employer and the employees; provide certainty about wage increases to employees and salary costs for employers; develop career structures; provide certainty in the employment conditions that are available to employees and reduce disputation.

They also enable the development of employment conditions suitable to the individual enterprise.

Types of Enterprise Agreements

The new workplace relations system will enable enterprise agreements to be made between a single employer, or single interest employers, and their employees (a single-enterprise agreement) or between more than one employer and their employees (a multi-enterprise agreement). Once approved, all enterprise agreements will operate according to a common set of rules; however there will be different rules for the bargaining, approval, variation and termination of multi-enterprise agreements. There will no longer be a distinction between union and non-union agreements.

A greenfields agreement can still be made for a genuine new enterprise where the employer or employers have not yet engaged any employees who will be covered by the agreement.

There will be no capacity to make an individual statutory agreement (like an Australian Workplace Agreement) under the new workplace relations system.

Single-enterprise agreements

In most cases an enterprise agreement will be made between an employer and some or all of their employees. This is the most common form of enterprise bargaining and there is no requirement to seek authorisation or notify Fair Work Australia when an employer and their employees wish to bargain for an enterprise agreement.

Single-interest employers

Single-interest employers are employers who operate in a related way or share such a common interest that they may bargain together for a single-enterprise agreement.

If two or more employers are engaged in a joint venture or common enterprise or the employers are related bodies corporate, they will be able to bargain for a single-enterprise agreement and will not need authorisation to do so.

Employers that are not franchisees but who wish to be authorised as single-interest employers must first apply to the Minister for a declaration that would allow them to bargain together for an enterprise agreement.

Multi-enterprise agreements

Multiple employers, who are not single-interest employers, may voluntarily choose to bargain together for a multi-enterprise agreement. There will be no public interest test for voluntary multi-enterprise bargaining and the employers do not need to seek authorisation from Fair Work Australia to bargain together.

Bargaining orders and protected industrial action are not available to parties when bargaining for a multi-enterprise agreement because bargaining will be voluntary. This will also prevent industrial action in support of pattern bargaining. When approving a multi-enterprise agreement, Fair Work Australia must be satisfied that all employers genuinely agreed to make the agreement and were not coerced.

Low-paid bargaining stream

There is a special bargaining stream for low-paid employees who have not had access to the benefits of collective bargaining. Fair Work Australia can facilitate bargaining for a multi-enterprise agreement to cover these employees.

Further details of the low-paid bargaining stream are set out in the fact sheet *“Assisting low-paid employees and those without access to collective bargaining”*.

Content of agreements

The new workplace relations system enables employers and employees to bargain over a wide range of matters. These provisions focus on the direct employment relationship between the employer and employees and, where relevant, the union. The concept of prohibited content no longer exists in the new workplace relations system.

Agreements are able to contain permitted matters, which include matters pertaining to the relationship between:

- a) the employer and the employees, and
- b) the employer and any union to be covered by the agreement.

Deductions from wages for any purpose authorised by an employee such as salary sacrifice or deduction of union dues may also be included, as will terms dealing with the operation of the agreement.

Terms that are not about permitted matters will have no effect and cannot be the subject of protected industrial action. If terms in agreements do not meet these criteria, they will be void and unenforceable.

Courts in the past have found certain kinds of claims do not pertain to the employment relationship, such as clauses requiring an employer to make a donation to a third party,

requiring an employer to only use certain suppliers or that outright prohibit the engagement of contractors.

To be approved, agreements are also required to contain terms that provide for:

- a nominal expiry date, and
- a procedure that requires Fair Work Australia or another independent person to settle disputes about any matters arising under the agreement and in relation to the National Employment Standards. The term must also allow for the representation of employees in the dispute settlement procedure.

Agreements must also contain terms about:

- individual flexibility arrangements that can be made between the employer and individual employees, and
- consultation on major workplace change.

Parties are able to negotiate such terms to meet their particular circumstances. Where an agreement is silent on these two matters, the model terms set out in regulations will be deemed to be incorporated.

Terms about certain matters will be classed as unlawful content and cannot be included in agreements. These include terms that:

- are discriminatory
- breach the general protections
- require the payment of a bargaining services fee to a union
- provide remedies for unfair dismissal to persons who have not served the applicable minimum employment period (i.e. six or 12 months), or exclude or modify unfair dismissal protections to the detriment of a person
- provide for right of entry to an employer's premises in a way that is inconsistent with certain right of entry laws, or
- purport to authorise industrial action during the life of the agreement.

Fair Work Australia will not approve agreements that contain unlawful content.

Approval of agreements

All agreements need to be approved by Fair Work Australia before they commence operation.

When applying for approval of an agreement by Fair Work Australia, a bargaining representative must submit a signed copy of the agreement and any declarations required by Fair Work Australia.

Before approving agreements Fair Work Australia must be satisfied that:

- the employees genuinely agree to the agreement and approval would not be inconsistent with the good faith bargaining requirements;
- the group of employees covered by the agreement was fairly chosen and requirements relating to specific categories of employees, such as outworkers, have been met;

- each award-covered employee and prospective award-covered employee will be better off overall by entering into the agreement;
- the terms of the agreement do not contravene the National Employment Standards;
- the agreement does not contain unlawful content and the required terms (i.e. nominal expiry date and a term about settling disputes) are included; and
- if the agreement is a multi-enterprise agreement, all employers have genuinely agreed to make the agreement, and no person coerced, or threatened to coerce, any of the employers to make the agreement.

An agreement will come into operation seven days after Fair Work Australia approves it, or a later date if one is specified in the agreement.

The Better Off Overall Test

Fair Work Australia will apply the Better Off Overall Test to ensure that each award-covered employee and each prospective award-covered employee, who will be covered by the agreement, will be better off overall in comparison to the relevant modern award.

Fair Work Australia may examine classes of employees in applying the Better Off Overall Test. Fair Work Australia will assume, in the absence of evidence to the contrary, that an employee will be better off overall if their class of employees will be better off overall in comparison to the relevant modern award.

The Test will be applied as a point in time test. Minimum wage provisions in awards or the national minimum wage order will override less generous minimum wage provisions in an enterprise agreement, to ensure that agreements are not made with the intention of bypassing the safety net. This will mean that where minimum award rates increase during the life of an agreement to above the agreement rates, employers will have to pay the higher rate.