Australian Government

Collective Bargaining Framework

Overview

The *Fair Work Act 2009* provides a framework for collective bargaining in good faith, particularly at the enterprise level. Under the *Fair Work Act 2009*, employers, employees and bargaining representatives (including employee organisations) can bargain for enterprise agreements.

Definitions

What is collective bargaining?

- Under the *Fair Work Act 2009*, "collective bargaining" is a term which describes the process where employers, employees and bargaining representatives (including employee organisations) bargain for an **enterprise agreement**.
- There are several different types of enterprise agreements. These are single-enterprise agreements, multi-enterprise agreements and greenfields agreements. Greenfields agreements (which are made before the employer has engaged any employees who will be covered by the agreement), can be either single-enterprise or multi-enterprise agreements.
- A single enterprise agreement can be made with a single employer or two or more employers where those employers are engaged in a joint venture or common enterprise, are related bodies corporate, or are specified in a single interest employer authorisation.
- The *Fair Work Act 2009* entitles employers and employees to appoint any person as their bargaining representative for a proposed enterprise agreement. An employer is always a bargaining representative for a proposed enterprise agreement that will cover it. Bargaining representatives are required to **bargain in good faith** when negotiating an enterprise agreement (other than a greenfields agreement).

NB: Under the previous workplace relations system there were multiple streams of agreement making, including Australian Workplace Agreements (AWAs), Individual Transitional Employment Agreements (ITEAs), union collective agreements, employee collective agreements, union greenfields agreements, employer greenfields agreements and multi-business agreements.

The new system has a single stream of enterprise agreements that are made between employers and employees. Under the *Fair Work Act 2009* there is no distinction between union and non-union agreements.

What is an enterprise agreement?

- For the purposes of the *Fair Work Act 2009*, an "enterprise" is a business, activity, project or undertaking.
- An **enterprise agreement** is a collective agreement made at the enterprise level between employer(s) and their employees.

- An enterprise agreement provides the terms and conditions of employment for those employees to whom it applies. It also sets out the rights and obligations of the employer(s) and any employee organisation(s) that it covers.

What are single-enterprise agreements?

- **Single-enterprise agreements** are made between a group of employees and:
  - an employer; or
  - two or more employers that are single interest employers.
- "Single interest employers" are employers that are related bodies corporate, or are engaged in a joint venture or common enterprise, or have been specified in a single interest employer authorisation.
- A "single interest employer authorisation" permits employers that have a close connection with one another to bargain together for a single-enterprise agreement.
- Franchisees and those employers approved by a Ministerial declaration may apply to Fair Work Australia to be included in a single interest employer authorisation.
- The Minister may make a declaration that employers may bargain together for a proposed enterprise agreement after considering certain criteria. Further information about single interest employer authorisations can be obtained from Fair Work Australia.

What are multi-enterprise agreements?

- **Multi-enterprise agreements** are 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 employers specified in a low-paid authorisation.
- A multi-enterprise agreement that is greenfields agreement cannot be made with two or more employers specified in a low-paid authorisation. This is because a greenfields agreement, by definition, cannot be made once the employers have employed persons that will be covered by the agreement.

What are greenfields agreements?

- **Greenfields agreements** can only be made in relation to a genuine new enterprise, before the employer has engaged any employees who will be covered by the enterprise agreement. These agreements are made between employer(s) and employee organisation(s) that are entitled to represent the majority of the employees who will be covered by the agreement.
- A genuine new enterprise does not include an existing enterprise that an employer(s) acquires, or proposes to acquire, which has been previously carried out by another employer.
- For example, a supermarket operator could not make a greenfields agreement if it acquired a chain of liquor stores in a transfer of business situation.
- The nature of the genuine new enterprise may nonetheless be the same or similar to the employer's existing enterprise, particularly in the case of a new project. For example, an existing employer in the construction industry could make a greenfields agreement in relation to a genuine new construction project. However, an existing employer, such as a major retailer, could not make a greenfields agreement in relation

to a new store that it is proposing to establish if that store is part of the employer's existing enterprise.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

- The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides that certain provisions of the *Workplace Relations Act 1996*, including the rules about agreement content, continue to apply to collective agreements and ITEAs made prior to the commencement of the new system.
- From 1 July 2009, collective agreements continue to operate as transitional instruments, even after their nominal expiry date. These transitional instruments will cease to operate when terminated or replaced by a new enterprise agreement.
- The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides that an employee covered by an individual statutory agreement that has not passed its nominal expiry date can agree with their employer to terminate that agreement on a conditional basis while negotiations are underway for an enterprise agreement under the new system. This allows the employee to fully participate in the bargaining process. Where an employee and employer have made a conditional termination, the individual statutory agreement will terminate when the new enterprise agreement comes into operation.
- Employees on individual statutory agreements that have passed their nominal expiry date are able to fully participate in the bargaining process. After an individual statutory agreement has passed its nominal expiry date, it can be terminated unilaterally by either the employee or employer.
- Once an individual statutory agreement has been terminated, an enterprise agreement that covers the employer and employees would then apply. If there is no applicable agreement then any applicable award (and the NES) will apply to that employee.
- Conditional termination of an individual agreement-based instrument is also available. Conditional terminations are intended to facilitate the orderly transition of employees covered by individual agreement-based instruments to an enterprise agreement by terminating the individual agreement as soon as the proposed new enterprise agreement comes into operation, though not before. An employee who is covered by a conditional termination can fully participate in bargaining for the proposed enterprise agreement, whether or not the individual agreement has passed its nominal expiry date.
- From 1 January 2010, the National Employment Standards will apply to transitional instruments on a no-detriment basis. In addition, employees will be entitled to the relevant safety net minimum wage if the base rate of pay in their agreement-based transitional instrument is less than the safety net.

Content Rules

The new workplace relations system enables employers and employees to bargain over a wide range of matters. The broad content provisions balance the legitimate interests of an employer and employees during the bargaining process. They are designed to make sure that the focus of an agreement is on the direct employment relationship between the parties and, where relevant, an employee organisation.

The concept of **prohibited content** is not part of the *Fair Work Act 2009*.

What matters can be included in an enterprise agreement?

Employers and employees can only make an enterprise agreement about **permitted matters**.

Permitted matters

Enterprise agreements must be about permitted matters.

Permitted matters are:

- ☑ 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 (or employee organisations) covered by the agreement;
- ☑ deductions from wages for any purpose authorised by an employee covered by the agreement; and
- ☑ how the agreement will operate.

The intention of the *Fair Work Act 2009* is that terms about trade union training leave are able to be included in agreements.

Whether an agreement is about permitted matters is important because employee claim action will only be protected industrial action if it is taken in support of such matters, or matters that are reasonably believed to be permitted matters.

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

What terms must be included in an enterprise agreement?

The following **mandatory terms** must be contained in all agreements:

Flexibility Term

- ☑ Agreements are required to include a **flexibility term**. The "flexibility term" must enable an employee and his or her employer to agree to an individual flexibility arrangement. This arrangement would allow the employee and the employer to vary the effect of the agreement in relation to the individual employee and the employer in order to meet the genuine needs of both parties.
- ☑ The flexibility term must set out the particular terms of the agreement which may be varied by an individual flexibility arrangement. The terms that are selected will be a matter for bargaining. These terms may include, for example:
    - arrangements for when work is performed
    - overtime rates
    - penalty rates
    - allowances
    - leave loading.
- ☑ The employer is required to ensure that an individual flexibility arrangement is only about **permitted matters** and doesn't include an **unlawful term**. Unlawful terms are explained further below.
- ☑ The flexibility term must require that the employee and the employer genuinely agree to any individual flexibility arrangement. The employer is also required to make sure

that the employee would be better off overall under the individual flexibility arrangement than if there was no individual flexibility arrangement.

☑ If an agreement does not contain a flexibility term or contains a flexibility term that does not comply with the requirements in section 203 of the *Fair Work Act 2009*, the **model flexibility term** will be taken to be a term of the agreement. The model flexibility term is prescribed in the *Fair Work Regulations 2009*.

☑ Where Fair Work Australia approves an agreement which incorporates the model flexibility term, this will be noted in the decision to approve the agreement.

Illustrative Example

Julie is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual flexibility arrangement to be made between the employer and its employees regarding ordinary hours to be worked.

Julie has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Julie will still work the equivalent of full-time hours.

Consultation Term

☑ Agreements must include a **consultation term**.

☑ A "consultation term" must require the employer(s) to consult the employees covered by the agreement about any major workplace changes that are likely to have a significant effect on those employees. The term must also allow for those employees to be represented during consultation. A person representing the employees could be an elected employee or a representative from an employee organisation.

☑ Where an agreement does not include such a consultation term, the **model consultation term**, prescribed by the *Fair Work Regulations 2009*, will be taken to be a term of the agreement. Where Fair Work Australia approves an agreement which incorporates the model consultation term, this will be noted in its decision to approve the agreement.

Dispute resolution term

☑ Fair Work Australia will not approve an agreement that does not contain a dispute resolution term.

☑ A dispute resolution term sets out a procedure for the settlement of disputes about matters arising under the agreement and in relation to the National Employment Standards. This will be known as a **dispute resolution** term. This 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 the representation of employees in the dispute settlement process.

☑ This requirement means, for example, that while the initial stages of a dispute resolution process may involve the direct participants in the dispute, such as the manager and the employee (and her or his representative), the agreement must allow Fair Work Australia or an independent person or body, such as a professional mediator, to be involved in the final stage of the process.

☑ Employers and employees (and their bargaining representatives) can refer to the **model term for dealing with disputes** 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.

What is an Unlawful Term?

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
- ☑ is an objectionable term
- ☑ would be inconsistent with the unfair dismissal provisions of the *Fair Work Act 2009*
- ☑ would be inconsistent with the industrial action provisions of the *Fair Work Act 2009*
- ☑ would be inconsistent with the right of entry provisions of the *Fair Work Act 2009* or
- ☑ 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.

Unlawful terms

Discriminatory terms:

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

A term of an agreement, however, would not be considered to discriminate against an employee if the reason for the discrimination is the inherent requirements of the particular position concerned or because the agreement provides particular wages for junior employees, employees with a disability or employees to whom training arrangements apply.

Objectionable terms:

An **objectionable term** is one that requires or permits either a contravention of the general protections under Part 3-1 of the *Fair Work Act 2009*, or the payment of a bargaining services fee.

*Terms that are inconsistent with the **unfair dismissal** provisions of the Fair Work Act 2009:*

A term of an agreement is an unlawful term if it gives an entitlement or remedy in relation to a termination of the employee's employment to an employee who has **not** completed the minimum employment period. This would be inconsistent with the unfair dismissal provisions of the Part 3-2 of the *Fair Work Act 2009*.

A term of an agreement is also an unlawful term if it excludes or modifies the application of the unfair dismissal provisions under the *Fair Work Act 2009*. An agreement may supplement the unfair dismissal provisions but it cannot exclude or modify the application of those provisions in a way that is detrimental to a person.

*Terms that are inconsistent with the **industrial action** provisions of the Fair Work Act 2009:*

A term of an agreement is unlawful if it is inconsistent with the industrial action provisions in the *Fair Work Act 2009*. For example, a term of an agreement would be unlawful if it purported to allow industrial action before the nominal expiry date of the agreement.

*Terms that are inconsistent with the **right of entry** provisions of the Fair Work Act 2009:*

A term of an agreement is unlawful if it is inconsistent with right of entry provisions in relation to the following:

- entry to premises to investigate a suspected breach or
- entry to premises to hold discussions with employees whose interests the employee organisation is eligible to represent.

It is intended that agreements can include terms allowing for employee organisation officials to enter the employer's premises for purposes other than those set out above, for example:

- to assist with representing an employee under a term dealing with the resolution of disputes or consultation over change or
- to attend an induction meeting of new employees or
- to meet with the employer when bargaining for a replacement to the current agreement.

*Certain terms relating to **State or Territory occupational health and safety** rights:*

A term of an agreement is unlawful if it provides for the exercise of a State or Territory occupational health and safety right (as defined in Section 494) other than in accordance with the right of entry provisions under the *Fair Work Act 2009*.

Key Points

- The previous workplace relations system had over 30 matters that were listed as 'prohibited content,' including matters that did not pertain to the employment relationship. Prohibited content in an agreement was void and unenforceable.
- The scope of matters an enterprise agreement can cover has been expanded by the *Fair Work Act 2009.*
- Enterprise agreements can be made about 'permitted matters'. Permitted matters include:
  - matters pertaining to the relationship between employer(s) and employees
  - matters pertaining to the relationship between employer(s) and employee organisation(s)
  - deductions from wages for any purpose authorised by an employee, or
  - how the agreement will operate
- Enterprise agreements must contain:
  - only terms about permitted matters
  - a flexibility term
  - a consultation term
  - a dispute settlement term
  - a nominal expiry date
- Enterprise agreements must not contain unlawful terms, which include discriminatory terms and objectionable terms.

Bargaining Representatives

Who is a bargaining representative?

Employers are bargaining representatives for a proposed enterprise agreement but they may also appoint in writing another person as their representative.

Employees are entitled to appoint in writing a person of their choice (including themselves) as their **bargaining representative** for a proposed enterprise agreement. Where an employee is a member of an employee organisation, that organisation will be taken to be the employee's bargaining representative unless the employee has appointed someone else or revoked in writing the organisation's status as their representative.

Employers are required to take all reasonable steps to notify each employee of their right to be represented during bargaining. This must occur no later than 14 days after either the employer initiates or agrees to bargain for a proposed enterprise agreement or a majority support determination, scope order or low-paid authorisation comes into operation for the proposed enterprise agreement.

** Further information on bargaining representatives can be found in the Rights and Responsibilities for Employers and Employees section of this module.*

Good Faith Bargaining

What is good faith bargaining?

The good faith bargaining provisions of the *Fair Work Act 2009* require bargaining representatives to meet certain requirements when bargaining for a proposed enterprise agreement (other than a greenfields agreement).

These requirements are:

- ☑ attending, and participating in, meetings at reasonable times;
- ☑ disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- ☑ responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- ☑ giving genuine consideration to the proposals 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.

Refraining from capricious or unfair conduct covers a broad range of conduct. Examples of conduct that may be capricious or unfair include, but are not limited to:

- an employee organisation deliberately excluding an employee who is a bargaining representative from discussions relating to the terms of the proposed agreement and not notifying them of meetings;
- an employer dismissing or engaging in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining; and

- an employer preventing an employee from appointing his or her own representative.

The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement or to enter into an agreement if they do not agree to its terms.

What if these requirements are not met?

A bargaining representative may apply to Fair Work Australia for a **bargaining order** to ensure that the good faith bargaining requirements are being met and that bargaining is proceeding efficiently and fairly. Bargaining orders are only available in relation to a proposed single-enterprise agreement or a multi-enterprise agreement for which a low-paid authorisation is in operation.

Key Points

- The new industrial relations system introduces good faith bargaining requirements which must be met by all bargaining representatives.
- Fair Work Australia will have the power to regulate the procedural aspects of good faith bargaining.

What role can Fair Work Australia take in facilitating good faith bargaining?

Fair Work Australia has a role in facilitating bargaining in occasions where bargaining breaks down. For example if bargaining representatives are not meeting good faith bargaining requirements, Fair Work Australia can make a bargaining order on the application of another representative.

The bargaining order will specify actions required for bargaining representatives to meet good faith bargaining requirements. If non-compliance with a bargaining order is serious and sustained, a bargaining representative may apply for a serious breach declaration. The consequence of such a declaration is that if the representatives do not settle all the matters at issue within 21 days from the date of the declaration, Fair Work Australia must make a workplace determination.

If an employer does not agree to bargain with its employees, a bargaining representative can also apply to Fair Work Australia for a majority support determination. If Fair Work Australia determines the majority of employees support bargaining for an enterprise agreement, the employer must meet the good faith bargaining requirements and an employee bargaining representative may seek a bargaining order to ensure the employer bargains in good faith.

A bargaining representative may apply to Fair Work Australia for a scope order to determine which group of employees are to be covered by the agreement, as well as seek Fair Work Australia's assistance in dealing with bargaining disputes.

When can Fair Work Australia make bargaining orders?

In the event that one or more bargaining representatives are not meeting the good faith bargaining requirements, Fair Work Australia will be able to make a **bargaining order** on application by one of the parties.

If a bargaining representative has concerns that another bargaining representative is not complying with the good faith bargaining requirements, they must give the relevant bargaining representatives a **written notice** setting out those concerns and give them a reasonable chance to respond. If the concerns are not addressed, the bargaining representative may apply to Fair Work Australia for a bargaining order to address those

concerns. If Fair Work Australia is satisfied that it is appropriate in the circumstances, it may waive the requirement to issue the notice of concerns.

Applications for bargaining orders can only be made by a bargaining representative and are not available in relation to a proposed multi-enterprise agreement (except where Fair Work Australia has issued a low-paid authorisation).

What is the process for making bargaining orders?

☑ Bargaining for an agreement may occur at any time, but good faith bargaining orders are only available **90 days before the nominal expiry date of an agreement**. This restriction does not apply when the employer asks the employees to approve an agreement.

☑ Before making a bargaining order, Fair Work Australia must be satisfied that **bargaining has commenced** because the employer or employers have agreed to bargain, or a majority support determination, scope order or low-paid authorisation is in operation in relation to the agreement.

☑ In addition, Fair Work Australia must be satisfied both that the applicant for the order has **notified the other representatives of their concerns** (unless Fair Work Australia considers it appropriate to waive this requirement) and either that the **good faith bargaining requirements have not been met** or that the bargaining process is not proceeding efficiently and fairly where there are multiple bargaining representatives.

Fair Work Australia will have discretion as to the content of bargaining orders to address the concerns raised. Different kinds of bargaining orders can be granted at the discretion of Fair Work Australia in order to rectify each individual situation.

The bargaining order will specify the actions required to ensure that the bargaining representatives meet the good faith bargaining requirements, or specify appropriate measures that promote the efficient or fair conduct of bargaining in the event that there are multiple employment representatives (e.g. excluding particular bargaining representatives who may be hindering the process).

Fair Work Australia will not be able to make an order requiring:

- particular content to be included or not included in a proposed agreement;
- an employer to request that employees approve a proposed agreement; or
- an employee to approve, or not approve, a proposed agreement.

'Application for a Bargaining Order' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

How long does a bargaining order apply?

A bargaining order comes into operation on the day on which it is made and ceases operation when an enterprise agreement is approved by Fair Work Australia, or a workplace determination is made, or when the bargaining representatives agree to cease bargaining or when the order is revoked, whichever is the earliest. Contravening a term of the order may lead to civil remedies.

Key Points

- Fair Work Australia can assist with facilitating bargaining on occasions where bargaining breaks down.
- If bargaining representatives are not meeting good faith bargaining requirements, Fair Work Australia can make a bargaining order on the application of another bargaining

representative.

- The bargaining order will specify actions required for bargaining representatives to meet good faith bargaining requirements.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

- Bargaining and protected industrial action conducted under the *Workplace Relations Act 1996* does not carry over to the new system.
- Therefore, parties involved in bargaining for a new collective agreement under the *Workplace Relations Act 1996* will need to have:
  - concluded their bargaining prior to the commencement of the new system or
  - start the bargaining and industrial action processes under the *Fair Work Act 2009* in relation to an enterprise agreement.

However, Fair Work Australia is able to take the conduct engaged in by the bargaining representatives during bargaining that took place under the *Workplace Relations Act 1996* into account when making a range of decisions (e.g. in deciding whether to make a bargaining order).

There is also an exception which allows for the limited preservation of *Workplace Relations Act 1996* protected action ballot authorisations after the commencement date of the new system, provided strict criteria is met.

What happens if an employer refuses to bargain with its employees?

If an employer has not agreed to bargain with its employees, a bargaining representative of an employee may apply to Fair Work Australia for a **majority support determination**.

Majority support determinations are only available in relation to proposed single enterprise agreements.

When deciding whether to make a majority support determination FWA must be satisfied that:

☑ a majority of employees who will be covered by the proposed agreement want to bargain;

☑ the employer has not yet agreed to bargaining or initiated bargaining for the proposed agreement;

☑ if the group of employees who will be covered by the agreement is fairly chosen; and

☑ it is reasonable in all the circumstances to make the determination.

Fair Work Australia may use whatever method it considers appropriate to work out whether a majority of employees want to bargain.

If Fair Work Australia makes a majority support determination the employer is required to bargain in good faith with the bargaining representatives for the employees.

If the employer continues to refuse to bargain, the employee bargaining representatives may seek a **bargaining order** to require the employer to bargain.

'Application for a Majority Support Determination' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Key Points

- A bargaining representative can apply to Fair Work Australia for a determination as to whether the majority of employees who will be covered by a proposed single enterprise agreement want to bargain with an employer.
- If Fair Work Australia determines the majority of employees support bargaining for an enterprise agreement, the employer is required to bargain in good faith.

What if an agreement does not cover the appropriate employees?

If bargaining proceeds inefficiently or unfairly because the agreement will not cover the appropriate employees, or will cover employees that it's not appropriate for the agreement to cover, a bargaining representative can seek a **scope order**.

☑ A bargaining representative may only apply for a scope order if they have given written notice of their concerns to the other relevant bargaining representatives, and those representatives have not responded appropriately to the concerns within a reasonable time.

☑ Fair Work Australia may only grant a scope order where:

- the applicant bargaining representative has met good faith bargaining requirements;
- the order will promote the fair and efficient conduct of bargaining;
- the group of employees to be covered by the agreement that is the subject of the scope order was fairly chosen; and
- it is reasonable in all the circumstances to make the order.

A scope order must specify the employer(s) and employees that will be covered by the proposed enterprise agreement. For example, a scope order may specify a group of employees to be included in, or excluded from, a particular agreement. In addition, Fair Work Australia may amend other existing orders (e.g. an existing bargaining order) to reflect a scope order.

☑ Before approving an enterprise agreement in relation to which there is a scope order in operation, Fair Work Australia must be satisfied that approval of the agreement would not be inconsistent with or undermine good faith bargaining.

'Application for a Scope Order' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Illustrative Example

David's Debt Services (DDS) is refusing to bargain collectively with its employees, who are in two divisions – the Loans Division, and the Debt Recovery Division. Justine, as bargaining representative for the Debt Recovery employees, obtains a majority support determination that a majority of the employees at DDS want to bargain with the employer for the proposed enterprise agreement.

DDS, Justine and the bargaining representative for the Loans Division employees, Cath, commence negotiations. However, the different interests of the employees in the two Divisions mean that Justine and Cath cannot agree on their negotiating strategy.

Two months later after the determination is made DDS applies for a scope order because it believes bargaining is not proceeding efficiently on the basis it is more appropriate for it to bargain separately with the employees of each Division.

Fair Work Australia is satisfied that:

- DDS is meeting the good faith bargaining requirements
- making the order will promote the fair and efficient conduct of bargaining
- the two groups of employees are operationally distinct and
- it is reasonable in the circumstances to make the order.

Fair Work Australia makes the scope order specifying DDS and the Debt Recovery Division employees in one proposed enterprise agreement, and DDS and the Loans Division employees in another proposed enterprise agreement. At the same time, Fair Work Australia varies the majority support determinations so that it applies to what are now the two proposed agreements.

Key Points

- The *Fair Work Act 2009* establishes scope orders which encourage fair and efficient conduct in bargaining and ensure that the group of employees covered by the agreement has been fairly chosen.

What other assistance can Fair Work Australia provide in dealing with a bargaining dispute?

Fair Work Australia may deal with a bargaining dispute on the request of a bargaining representative for the proposed agreement.

For a single-enterprise agreement or a multi-enterprise agreement where a low-paid authorisation is in operation, one bargaining representative can apply without the agreement of the other bargaining representatives. If, however, the agreement is a multi-enterprise agreement for which a low-paid authorisation is not in operation, an application for assistance may only be made with the agreement of all the bargaining representatives.

Fair Work Australia may deal with the dispute by mediation, conciliation, making a recommendation or expressing an opinion. It may only arbitrate the dispute if the bargaining representatives have agreed to it doing so.

What happens if a party breaches the bargaining order?

Contravening a bargaining order may lead to pecuniary penalties and other court orders.

Where a bargaining representative believes another party has seriously breached the bargaining order they may apply for a **serious breach declaration** and Fair Work Australia may, in certain circumstances, make a **bargaining related workplace determination**.

Serious breach declarations are intended as a last resort where bargaining representatives have significantly undermined the bargaining process and good faith bargaining orders have failed to bring about a resolution.

Fair Work Australia may make a serious breach declaration if it is satisfied that:

☑ a bargaining representative has contravened one or more bargaining orders;

- ☑ the contravention has been serious and sustained and significantly undermined bargaining;
- ☑ the other bargaining representatives have exhausted all reasonable alternatives to reach agreement;
- ☑ no agreement will be reached in the foreseeable future; and
- ☑ it is reasonable in the circumstances to make the declaration, taking into account the views of all bargaining representatives for the agreement.

Once Fair Work Australia has made a serious breach declaration, the bargaining representatives have a further 21 days to make an agreement (though this can be extended by Fair Work Australia if all of the bargaining representatives jointly agree for the extension).

If at the end of this 21 day post-declaration negotiating period the bargaining representatives have not settled all of the matters that were at issue during the bargaining for the agreement, Fair Work Australia must make a **workplace determination**.

'Application for a Serious Breach Declaration' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Key Points

- If a bargaining representative believes another party has breached a bargaining order and the breach is serious and sustained and significantly undermines bargaining, they can apply for a serious breach declaration.
- If an agreement is not made within 21 days of the declaration, Fair Work Australia must make a workplace determination.

Agreement approval process

When is an agreement made?

A proposed single enterprise agreement that is not a greenfields agreement is made when the agreement is approved by a majority of the employees who will be covered by the agreement and who cast a valid vote for the agreement.

A proposed single-enterprise agreement that will cover two or more employers that are single interest employers, the agreement is made when it is approved by a majority of the employees (taken as a group) who will be covered by the agreement and who cast a valid vote for the agreement.

A proposed multi-enterprise agreement that is not a greenfields agreement is made on an enterprise by enterprise basis. A multi-enterprise agreement is made immediately after the voting process where the employees of each of the employers that will be covered by the proposed agreement have voted for the agreement and it has been approved by a majority of the employees of at least one of those employers who cast a valid vote for the agreement.

A greenfields agreement (whether a single-enterprise or multi-enterprise agreement) is made when it is signed by each employer and each employee organisation that will be covered by the agreement.

When does an agreement commence operation?

An enterprise agreement does not commence operation until it is approved by Fair Work Australia.

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

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

What must accompany an application for approval of an enterprise agreement by Fair Work Australia?

When lodging an application, the applicant must ensure that it is accompanied by:

☑ declarations completed by each employer and each employee organisation which was a bargaining representative for the agreement. These declarations may be found at www.fwa.gov.au

☑ an original of the written agreement signed by the bargaining representatives to the agreement;

☑ three copies of the agreement; and

☑ sufficient additional copies to enable a copy to be provided to each bargaining representative in the event of approval by Fair Work Australia.

'Application for Approval of Enterprise Agreement' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

When will Fair Work Australia approve an agreement?

Once an application for approval has been made, Fair Work Australia must approve an agreement if it is satisfied that all **approval requirements** have been met.

The **approval requirements** are:

☑ the agreement was **genuinely agreed** to by the employees covered by the agreement;

☑ in the case of a multi-enterprise agreement, 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;

☑ the terms of the agreement do not contravene the **National Employment Standards** (from 1 January 2010);

☑ the agreement passes the **better off overall test** (from 1 January 2010);

☑ the group (or **scope**) of employees covered by the agreement was fairly chosen;

☑ the agreement does not contain **unlawful terms;**

☑ the agreement contains a **nominal expiry date** of not more than four years from the day on which Fair Work Australia approves the agreement;

☑ the agreement contains a **dispute settlement term**, as described above;

☑ approving the agreement would not undermine good faith bargaining if a **scope order** is in operation in relation to 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; and

☑ the agreement meets the **approval requirements** dealing with shiftworkers, pieceworkers, outworkers, or school-based apprentices and school-based trainees (these requirements ensure that the agreement is not detrimental to those employees).

If an enterprise agreement does not contain a flexibility term or a consultation term then Fair Work Australia may still approve the agreement, however, Fair Work Australia will note that the model flexibility term or the model consultation term will be taken to be a term of the agreement.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

- Between 1 July and 31 December 2009 enterprise agreements will be assessed under the no-disadvantage test.
- From 1 January 2010, Fair Work Australia will assess enterprise agreements against the better off overall test to ensure that employees are better off under the agreement than under the relevant modern award.
- All employees will have the benefit of the National Employment Standards and minimum wages from 1 January 2010, including those covered by transitional agreements.
- The National Employment Standards will prevail over a transitional instrument to the extent that the instrument is detrimental to the employee in any respect when compared to the National Employment Standards.
- Fair Work Australia will have scope to make orders to 'phase in' minimum wages in modern awards on application by an employer covered by a transitional agreement based instrument, where it is satisfied that such measures are necessary to ensure the ongoing viability of a business.

What does it mean for employees to have genuinely agreed to an agreement?

For Fair Work Australia to be satisfied that the requirement for **genuine agreement** has been met, it must be satisfied that:

☑ each of the employers that will be covered by the agreement has complied with the pre-approval steps, which are as follows:

- employees must be given a copy of the proposed agreement and any related material incorporated within it;
- the employer must take all reasonable steps to notify employees of the time and place of the vote and the voting method
- the employer must take all reasonable steps to ensure that the terms of the agreement and their effect is properly explained to employees

☑ a majority of those employees who cast a valid vote have approved the agreement and

☑ Fair Work Australia is satisfied that there are no other reasonable grounds to believe the agreement was not genuinely agreed to.

What are the National Employment Standards?

The National Employment Standards will come into effect on 1 January 2010. There are 10 National Employment Standards which provide minimum standards for national system employees. They are:

- maximum weekly hours
- requests for flexible working arrangements
- 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
- Fair Work Information Statement.

The terms of the enterprise agreement must not contravene the National Employment Standards. However an agreement may contain terms that are ancillary or supplementary to the National Employment Standards.

** For further information on the National Employment Standards refer to the Overview Module.*

What is the better off overall test?

Enterprise agreements must pass the better off overall test (BOOT) in order to be approved by Fair Work Australia.

An agreement passes the better off overall test if Fair Work Australia is satisfied that each award covered employee, and each prospective award covered employee, would be better off overall if they were employed under the agreement rather than under the relevant modern award.

Fair Work Australia will be able to 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 award covered employee will be better off overall if their class of employees will be better off overall in comparison to the relevant modern award.

The better off overall test is a point in time test, which requires each award covered employee and prospective award covered employee to be better off overall at the test time. The test time is the time that a bargaining representative makes the application to Fair Work Australia for approval of the agreement.

Though the approval of an agreement is subject to the better off overall test, Fair Work Australia may approve an agreement that does not pass the better off overall test if, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest.

Because the better off overall test is a point in time test, over a period of time it is possible for an employee's base rate of pay under an agreement to be less than the base rate under the relevant modern award or the national minimum wage order. If this occurs then the employee is entitled to be paid under the agreement at a rate of pay equal to the award or national minimum wage order rate.

Note: the BOOT will come into effect from 1 January 2010. Between 1 July 2009 and 31 December 2009, agreements will be assessed under the current 'no disadvantage test'

Whether employees covered were fairly chosen

As part of the approval process, Fair Work Australia must assess whether the group of employees covered by the agreement was fairly chosen. In deciding whether the group was fairly chosen, Fair Work Australia must take into account whether the group is geographically, operationally, or organisationally distinct.

Illustrative Example

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 from another organisational unit that has a total of thirty employees. Fair Work Australia is required to decide whether the group of employees covered by the agreement was fairly chosen.

In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees covered by the agreement appear to have been chosen in a discriminatory manner.

Will agreements have a nominal expiry date?

In order for Fair Work Australia to approve an agreement, the agreement must specify a nominal expiry date of not more than 4 years after the day on which it is approved by Fair Work Australia.

Those agreements that do not pass the better off overall test but are approved under Section 189 (in exceptional circumstances) must have a nominal expiry date of no more than 2 years from the date that Fair Work Australia approves the agreement.

What happens when there is a scope order in place in relation to the agreement?

When a scope order is in operation in relation to an enterprise agreement and the agreement, for example, does not cover all of the employees specified in the scope order, Fair Work Australia must be satisfied that approving the agreement would not be inconsistent with, or undermine, good faith bargaining.

What are the approval requirements for particular types of employees?

Shiftworkers

- Fair Work Australia must be satisfied employees defined or described in the relevant modern award as shift workers are also defined or described as shift workers under the agreement for the purposes of the National Employment Standards. The National Employment Standards provide shift workers with an entitlement of 5 weeks annual leave.

Pieceworkers

- If an employee is defined or described as a pieceworker under an agreement but not under a modern award that covers them, Fair Work Australia must be satisfied that the term in the agreement is not detrimental to the employee regarding their entitlements under the National Employment Standards.
- If an employee described as a pieceworker under a modern award is not described as a pieceworker under an agreement, Fair Work Australia must be satisfied that the

absence of the term is not detrimental to the employee regarding their entitlements under the National Employment Standards.

School-based apprentices

- If a modern award provides loadings for employees who are school-based apprentices or trainees, Fair Work Australia must be satisfied that where an agreement provides for loadings the amount or rate of the agreement loadings is not detrimental to the employee when compared to the amount or rate of loadings provided for in a modern award that covers the employee.

Outworkers

- 'Designated outworker terms' in a modern award continue to apply irrespective of anything in an agreement. Designated outworker terms are terms that apply to outworkers in the textile, clothing and footwear industry which contains certain specified protection for outworkers – including terms which deal with registration and record keeping obligations, and terms and conditions for non-employee outworkers (a full list of what constitutes a 'designated outworker term' is in section 12 of the *Fair Work Act 2009*).
- Where an employee is an outworker and is covered by a modern award that is in operation and includes outworker terms, Fair Work Australia must be satisfied that the agreement also includes outworker terms which are not detrimental to the employee when compared to the outworker terms of the modern award.

What happens if an agreement does not meet the approval requirements?

If Fair Work Australia has a concern that the agreement does not meet the approval requirements, it may accept an undertaking from an employer (or employers) to address that concern. Fair Work Australia may then approve the agreement. The undertaking, once accepted, is taken to be a term of the agreement.

In the case of an agreement that covers two or more employers, the undertaking will only apply to those employers who gave it. The agreement will not be approved in respect of employers who do not give an undertaking.

Fair Work Australia may only accept a written undertaking from an employer where it is 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 change to the agreement. In addition, Fair Work Australia must seek the views of each person who Fair Work Australia knows is a bargaining representative for the agreement before accepting an undertaking.

Key Points

- Under the previous workplace relations system, all workplace agreements were lodged with the Workplace Authority and tested against the no-disadvantage test (which was introduced by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* in March 2008).
- The new system requires all enterprise agreements to be lodged with Fair Work Australia for approval. An enterprise agreement will only commence operation after it has been approved by Fair Work Australia.

Variation and Termination of enterprise agreements

What is the process for varying an enterprise agreement?

The process for varying an enterprise agreement is similar to the process for making an agreement. This means that the employer(s) and their employees must jointly make a variation. The variation is made when it is approved by a majority of the employees who vote for the variation. Once a variation has been made, a person covered by the agreement must apply to Fair Work Australia to have it approved.

Affected employees

The employees affected by a variation are the employees employed at the time that a proposed variation is made who are either covered by the agreement or will be covered by the agreement if the proposed variation is approved by Fair Work Australia.

These employees are referred to as affected employees. In many instances, these two groups of employees will be the same. However, where the scope of the agreement changes as a result of the variation, all of the employees affected by the change are able to vote on whether to make the variation.

An employer covered by an agreement may request the affected employees to approve the proposed variation by voting for it. This voting process is the same as for the approval of a new agreement.

Single enterprise agreement

Variation to a single-enterprise agreement is made when the proposed variation is approved by a majority of the affected employees who cast a valid vote for the proposed variation.

Multi- enterprise agreement

A variation to a multi-enterprise agreement is made when the proposed variation is approved by a majority of the affected employees of each individual employer who cast a valid vote for the proposed variation.

The variation must be approved by the affected employees of each of the employers. A variation of a multi-enterprise agreement is not made on an enterprise by enterprise basis (in contrast to the making of a multi-enterprise agreement).

Greenfields agreement

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.

Fair Work Australia approval process:

- ☑ An employer, employee or employee organisation covered by the agreement must apply to Fair Work Australia for approval of the variation within 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 and any declarations that are required by Fair Work Australia's procedural rules to accompany the application.
- ☑ A variation is subject to the same approval requirements as new agreements and must pass the better off overall test and not contravene the National Employment Standards.
- ☑ A variation to an agreement has no effect unless approved by Fair Work Australia.
- ☑ If Fair Work Australia is satisfied that the approval requirements have been met, it must approve the variation unless there are serious public interest grounds for not approving it.

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

'Application for Approval of Variation of Enterprise Agreement' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675.

What is the process for terminating an enterprise agreement?

Employers and employees who are covered by an enterprise agreement may agree to terminate an enterprise agreement at any time while the agreement is in operation.

The process for the approval of a termination of an enterprise agreement consists of:

☑ employees voting in favour of the termination; and

☑ subsequent approval of the termination by Fair Work Australia.

A termination of an agreement has no effect unless it is approved by Fair Work Australia.

If an agreement has passed its nominal expiry date, an employer, employee or employee organisation covered by the agreement may apply to Fair Work Australia for the termination of the agreement.

If a party makes an application for the termination on an agreement, 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 considers it is appropriate to do so, taking into account the views of the employees, each employer, and each employee organisation covered by the agreement, as well as their circumstances, and the likely effect the termination will have on each of them.

'Application for Termination of Enterprise Agreement' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Key Points

- Employers and employees may agree to vary or terminate enterprise agreements at any time. Variation or termination by agreement must be approved by a majority of employees who are covered by the enterprise agreement.
- An enterprise agreement can also be terminated after its nominal expiry date on application by one of the parties covered by the agreement, if Fair Work Australia is satisfied that it would not be contrary to the public interest to terminate the agreement.
- Variation and termination are subject to approval by Fair Work Australia.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Agreements that were made or approved under previous workplace relations laws are transitional instruments. Schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides for the variation and termination of transitional instruments from 1 July 2009.

Schedule 8 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* enables the Workplace Authority to process workplace agreements, variations and terminations made under the *Workplace Relations Act*.

From 1 July 2009, variations and terminations must be approved by Fair Work Australia before coming into operation.

Low Paid Bargaining Stream

The low paid bargaining stream seeks to assist and encourage low-paid employees and their employers, who have not historically engaged in collective bargaining, to develop an enterprise agreement.

Who are the low-paid?

The *Fair Work Act 2009* does not seek to define the 'low-paid'. It will be Fair Work Australia's role to determine, with regard to relevant circumstances, whether to make a **low-paid authorisation**.

What is a low paid authorisation?

A low-paid authorisation, obtained from Fair Work Australia, provides employers and employees access to the low-paid multi-enterprise bargaining stream.

In order to obtain such an authorisation an application to Fair Work Australia must be made by either a bargaining representative for the agreement or an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.

What does Fair Work Australia consider before making a low paid authorisation?

When considering whether to grant a low-paid authorisation Fair Work Australia must take into consideration:

- ☑ both historical and current matters relating to collective bargaining including the history of bargaining in the industry;
- ☑ the relative bargaining strength of the employers and employees; and
- ☑ the current terms and conditions of employment, in comparison to the relevant industry and community standards.

Before granting a low-paid authorisation, Fair Work Australia must be satisfied that the employees in question:

- ☑ are low-paid employees; and
- ☑ have not had access to a collective bargaining agreement in the past or face substantial difficulty bargaining at the enterprise level.

Fair Work Australia must also consider the degree of commonality of the enterprises to which the proposed agreements relate, i.e. do they have a commonality of interest, provide similar services, etc.

In deciding whether or not to make a low-paid authorisation, Fair Work Australia must take into account the following:

- ☑ whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises 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; and
- ☑ the extent to which the applicant for the authorisation is prepared to consider bargaining with individual employers.

In addition, once a low-paid authorisation is made it may be varied to add or remove various employers if their circumstances change (for example if an employer makes a single-enterprise agreement with its employees).

What assistance can Fair Work Australia provide during 'low-paid' bargaining?

Fair Work Australia may provide, on its own initiative, such assistance to the bargaining representatives as it considers appropriate in order to facilitate bargaining for an agreement.

Fair Work Australia has broad powers to mediate or conciliate and make recommendations.

Fair Work Australia can also call compulsory conferences to bring the representatives together, as well as directing a third party who exercises control over wages and conditions of the employees to attend and participate in, if this is necessary to advance the negotiations.

What happens when the parties are unable to reach agreement?

In the event that a low-paid authorisation is in operation and the bargaining representatives for a proposed agreement are unable to reach agreement a bargaining representative may apply to Fair Work Australia for a **low-paid workplace determination**.

The *Fair Work Act 2009* provides for two types of workplace determinations to be made in the low-paid stream:

1. a consent low-paid workplace determination: this can be made on application by the bargaining representatives of one or more of the employer(s) that would be covered by the agreement and the bargaining representatives of the employees of those employers; or
2. a special low-paid determination: this can be made on application by a single bargaining representative.

Fair Work Australia must make a consent workplace determination if an application has been made and it is satisfied that the bargaining representatives have made all reasonable efforts to reach agreement and there is no reasonable prospect of agreement being reached.

What requirements must Fair Work Australia consider before making a special low-paid workplace determination?

Access to this type of determination is more restricted than access to a consent low-paid workplace determination. Fair Work Australia must be satisfied that:

- ☑ the bargaining representatives are genuinely unable to reach agreement and there is no reasonable prospect of agreement being reached;
- ☑ no employer that will be covered by the determination is or was previously covered by an enterprise agreement or another workplace determination in relation to the employees who will be covered by this determination;
- ☑ the terms and conditions of employees to be covered by the agreement are substantially equivalent to or just above the minimum safety net ;
- ☑ the making of the special low-paid workplace determination will promote productivity and efficiency in the enterprises concerned, as well as promoting bargaining in the future by the employers and employees who will be covered by the determination; and
- ☑ it is in the public interest to make the special low-paid determination.

In deciding the terms of a low-paid workplace determination, Fair Work Australia must take into account, among other things, the views of the employers and employees who would be covered by this determination, including ensuring that the employers will be able to remain competitive.

A low-paid workplace determination will be made to cover the employers, employees and employee organisations that were specified in the application.

What is the difference between the low-paid bargaining stream and other multi-enterprise agreements?

Good faith bargaining orders are available in bargaining for a proposed multi-enterprise agreement for which a low-paid authorisation is in operation. This is different from multi-enterprise agreements more generally, where good faith bargaining orders are not available. However, protected industrial action is not available in support of bargaining for any multi-enterprise agreement, including in the low-paid bargaining stream.

If the proposed enterprise agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation and an employee has not appointed another person as their representative, then the employee organisation that applied for the authorisation is the bargaining representative for the employee. This applies even if the employee is a member of another employee organisation, unless that organisation was one of the applicants for the authorisation.

Key Points

- The *Fair Work Act 2009* establishes the low-paid bargaining stream which assists low paid employees to collectively bargain.
- A bargaining representative needs to obtain a low-paid authorisation from Fair Work Australia before entering into the low-paid bargaining stream.
- Fair Work Australia will assist bargaining representatives to facilitate bargaining for an agreement in the low-paid stream.

Rights and responsibilities in bargaining under the *Fair Work Act 2009*

Employers

As a quick reference guide, employers are required to take the following steps when bargaining:

1. Provide Notice of Employee Representational Rights

☑ At the commencement of bargaining employers are required to take all reasonable steps to give notice to each employee who will be covered by the agreement of their right to be represented by a bargaining representative – known as the notice of employee representational rights.

Further Information

The requirement to notify employees of their right to be represented arises when:

- the employer agrees to bargain or initiates bargaining for the agreement (including by offering an agreement to the employees); or
- a majority support determination comes into operation; or
- a scope order (defined above) in relation to the agreement comes into operation; or
- a low-paid authorisation that specifies the employer comes into operation.

The employer must issue the notice of employee representational rights as soon as practicable, and not later than 14 days after the notification time.

Section 174 of the *Fair Work Act 2009* specifies the content that must be included in the notice of employee representational rights. The Fair Work Regulations prescribe the form of the notice in Schedule 2.1.

2. Provide Access to a Proposed Enterprise Agreement

☑ Employers are required to take all reasonable steps to ensure that during the access period (the 7 day period ending immediately before the start of the voting process for the agreement) employees that will be covered by the agreement are given a copy of, or access to, the proposed agreement and any other material incorporated by reference in the agreement. This may include new employees that commence employment during that period.

Further Information

Employers are required to take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the relevant employees and that this explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

Where the proposed agreement is a single-enterprise agreement with two or more single interest employers, or a multi-enterprise agreement, each employer must comply with the access requirements in respect of its employees before requesting the employees to approve the agreement.

These pre-approval requirements are part of assessing whether employees have genuinely agreed to an enterprise agreement.

3. Approval of Enterprise Agreement

☑ An employer may request employees to approve a proposed enterprise agreement by voting for it.

☑ The request by an employer for employees to vote must not be made until at least 21 days after the last notice of employee representational rights has been issued.

☑ An agreement is made when a majority of the employees who cast a valid vote approve the agreement.

Further Information

Among other methods of voting, the employer may request that the employees vote by ballot (secret or not) or by an electronic method. The vote may also be conducted by a show of hands or by another method that demonstrates the employees' genuine agreement.

3. Approval of a Greenfields Agreement

A greenfields agreement (whether a single-enterprise or multi-enterprise agreement) is made when it is signed by each employer and each employee organisation which represents the prospective employees who will be covered by the agreement.

When approving a greenfields agreement, Fair Work Australia must be satisfied that the employee organisation or employee organisations who will be covered by it would (taken together) represent the majority of employees to be covered by the agreement, and that it is in the public interest that the agreement be approved.

4. Application for approval by Fair Work Australia

☑ Once an agreement has been made, a bargaining representative, such as the employer or employee organisation, must make an application for the agreement to be approved by Fair Work Australia.

☑ The application must be lodged with Fair Work Australia within 14 days after the agreement was made with a signed copy of the agreement and any declarations that are required by Fair Work Australia's procedural rules.

'Application for Approval of Enterprise Agreement' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Key Points

- All bargaining representatives for a proposed enterprise agreement must meet the good faith bargaining requirements.
- The key responsibilities of employers, when bargaining, are to ensure that:
  - employees are given notice of their representational rights
  - employees have access to a copy of the proposed agreement
  - the majority of employees have approved the agreement
  - an application for approval of the agreement has been made to Fair Work Australia.
- Employees must genuinely agree to the proposed enterprise agreement.

Further Information

Who can be a bargaining representative for an enterprise agreement (that is not a greenfields agreement)?

Employers

An employer is always taken to be a bargaining representative. Employers may also appoint, in writing, another bargaining representative such as an organisation of employers or a consultant. If a proposed enterprise agreement will cover two or more employers (for example, two employers who are engaged in a common enterprise), each employer is a bargaining representative and similarly each employer can appoint another person or organisation as its bargaining representative.

Employees

- An employee may appoint any person (including himself or herself), in writing, as his or her bargaining representative. If the employee is a member of an employee organisation, then the employee organisation is taken to be the bargaining representative for the employee, unless the employee appoints a different bargaining representative or revokes the right of the organisation to be his or her representative.
- An employee organisation cannot be a bargaining representative for an employee unless the employee organisation is entitled to represent the industrial interests of the employee in relation to the work that will be performed under the proposed enterprise agreement.

- If a member of an employee organisation appoints a different bargaining representative or revokes the organisation's status as the employee's representative, the employee must notify the employer, but need not advise the employee organisation.
- The Fair Work Regulations require that a bargaining representative of an employee must be free from control or improper influence from the employer or another bargaining representative.
- There is no restriction on when a person may appoint a bargaining representative, and the appointment of a bargaining representative comes into force on the day specified in the instrument of appointment. The instrument of appointment can be revoked in writing.
- The bargaining representative provisions under the *Fair Work Act 2009* do not apply to greenfields agreements.

For further information

Fair Work Act 2009, Explanatory Memorandum to the Fair Work Bill, and the Transitional and Consequential Bill:
http://www.workplace.gov.au/workplace/Publications/Legislation/FairWorkBill.htm

'Fact Sheets' on the new industrial relations system:
http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Pages/FactSheets.aspx