

BARGAINING UNDER THE FAIR WORK ACT BEST PRACTICE GUIDE

Australia



The *Fair Work Act 2009* (Cth) (FW Act) provides for good faith bargaining, restrictions on the content of agreements, a single stream of collective enterprise agreements, an enhanced role for union officials as bargaining representatives and participants in dispute resolution and a streamlined process for approval. There is no provision for the making of individual statutory agreements.

ENTERPRISE AGREEMENTS

The FW Act provides for the making of an enterprise agreement that is simply a collective agreement that covers one (single-enterprise) or more employers (multi-enterprise) and the employees specified in the agreement, ie the scope of the agreement. There is no formal distinction between a union and a non-union agreement. Instead a union may elect to be covered by a non-greenfields enterprise agreement where it is a bargaining representative for that agreement.

Single-enterprise agreements

- Made between an employer and its employees.
- Can be made between two or more employers and their employees provided that the employers are “single interest employers”, meaning that they are related bodies corporate, engaged in a common enterprise or joint venture or are specified in a “single interest employer authorisation” such as for employers operating under franchise arrangements.

Multi-enterprise agreements

- Made between two or more employers and their employees.
- Effectively replaces the existing concept of a “multiple business agreement”.

- Fair Work Australia (FWA) can make low paid authorisations specifically for “low-paid employees” to enable employers and employees to bargain for a multi-enterprise agreement.

Greenfields agreements

Both single-enterprise agreements and multi-enterprise agreements can be made as a greenfields agreement if they relate to a genuine new enterprise and are made prior to the employment of any staff that will be necessary for the normal conduct of the new enterprise. The FW Act does not allow employer-only greenfields agreements. The only greenfields agreements that can be made are those where a union(s) is involved that is entitled to represent the majority of employees to be covered by the enterprise agreement.

HOW DOES BARGAINING BEGIN?

The FW Act removes the former concept of initiating a “bargaining period”. Instead the scheme introduces the concept of a “notification time” for an agreement. An employer must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the proposed agreement. The notification time for a proposed agreement is the time when:

- The employer agrees to bargain, or initiates bargaining for the agreement; or

- FWA makes a “majority support determination” (essentially if an employer does not choose to bargain with employees, FWA can make an order effectively requiring bargaining if it is satisfied that the majority of employees wish to collectively bargain); or
- FWA makes a “scope order” or a “low paid authorisation”.

BARGAINING REPRESENTATIVES

Once the obligation to give notice is triggered, employers are obliged to inform the employees to be covered by the agreement of their right to be represented by a bargaining representative within 14 days of any of the above occurring.

Bargaining representatives have a greater role under the FW Act bargaining framework than what was provided for under the *Workplace Relations Act 1996* (Cth) (WR Act).

Under the FW Act, bargaining representatives must meet new good faith bargaining requirements.

Both employers and employees can appoint a bargaining representative for a proposed enterprise agreement.

Importantly, section 176(3) of the FW Act provides that an employee organisation (union) cannot be a bargaining representative of an employee unless the union’s membership eligibility criteria specified in the Union Rules (constitution) entitles the union to represent the industrial interests of the employee in relation to work that will be performed under the agreement (including greenfields agreements).

Q&A - WHO CAN BE APPOINTED AS A BARGAINING REPRESENTATIVE?

For employees:

- The employee
- A union (as long as the union is entitled to represent the employee’s interests)
- Any other person appointed by the employee in writing.

If the employee is a union member, there is a presumption that the union will be the employee’s bargaining representative, unless the employee appoints another person in writing.

For employers:

- The employer
- Any other person appointed by the employer in writing.

The good faith bargaining obligations set out in this guide do not apply in the context of greenfields agreements.

MAJORITY SUPPORT DETERMINATION

An employee’s bargaining representative (typically a union) may apply to FWA for a majority support determination. This is likely to arise where an employer refuses to initiate bargaining themselves or agree to it commencing.

This is essentially a poll of employees as to whether they wish to bargain, and if a majority wish to bargain then the employer is required to bargain in good faith. A majority support determination is a determination by FWA that a majority of the employees who will be covered by the proposed enterprise agreement want to bargain with the employer. These determinations apply only in relation to single-enterprise agreements and not to multi-enterprise agreements.

QUESTIONS FOR MAKING MAJORITY SUPPORT DETERMINATIONS

- Does a majority of the employees who will be covered by the proposed agreement want to bargain?
- As the employer, have you not yet agreed to bargain or not yet initiated bargaining for the agreement?
- If it is proposed that the agreement will not cover all of the employees and the group that the agreement will cover (eg clerical staff) is not geographically, operationally or organisationally distinct, was the group of employees fairly chosen?
- Is it reasonable in all the circumstances for FWA to make a majority support determination?

If the answer to each of the four questions above is yes, then FWA may be satisfied that a majority support determination should be made.

What is the effect of a majority support determination?

The effect of such an order is that it triggers the employer’s obligation to notify employees of their representation rights and commence bargaining in good faith. Once a determination is made it opens the way for bargaining orders to be sought from FWA.

PROTECTED (LAWFUL) INDUSTRIAL ACTION ORDERS

A recent decision of the Federal Court has held that in certain circumstances employees may take protected (lawful) industrial action in support for a proposed single enterprise or multi-enterprise agreement before formal bargaining has been initiated under the FW Act (ie the employer has agreed to bargain or a majority support determination or scope order has been issued).

In seeking to take protected (lawful) industrial action, the employees (or their representatives) must apply to FWA to seek a Protected Action Ballot Order (PABO). FWA must determine that the employees (or their representatives) have been genuinely trying to reach an agreement with the employer. If FWA is satisfied this is the case, then the majority of employees must vote by secret ballot in favour to take the proposed industrial action as set out in the PABO.

Therefore employees potentially have two avenues to seek to engage an employer to bargain for a new agreement: by seeking a majority support determination (initiating formal bargaining) or by taking protected (lawful) industrial action in order to apply pressure on the employer to agree to bargain.

The ability for employees to take protected (lawful) industrial action prior to commencing formal bargaining has been subject to significant criticism and cases before FWA.

SCOPE ORDERS

A bargaining representative may seek a “scope order” from FWA that resolves concerns about the proposed coverage of a single-enterprise agreement, in terms of the employees it does or does not cover.

A bargaining representative (of an employee or employer) may apply to FWA for a scope order if the representative has concerns that the bargaining for the proposed enterprise agreement is not proceeding efficiently or fairly because the agreement will not cover the appropriate employees.

As with majority support determinations, scope orders apply only in relation to single-enterprise agreements (provided a single-interest authorisation is not in operation) and not to multi-enterprise agreements.

Enterprise agreements can still be made in relation to geographically, operationally or organisationally distinct groups of employees. FWA can only make a scope order in the following circumstances:

- The bargaining representative making the application has met (or is meeting) the good faith bargaining requirements.
- Making the scope order will promote fair and efficient bargaining.
- If the agreement will not cover all the employees and the group of employees that will be covered is not geographically, operationally or organisationally distinct, the group of employees was fairly chosen.

- It is reasonable in all the circumstances to make the scope order.

The general protections prohibit an employer from taking adverse action against an employee because the employee has a workplace right, or because of an employee’s decision on whether or not they will exercise a workplace right. Adverse action to prevent the exercise of a workplace right is also prohibited.

CASE STUDY – SCOPE ORDERS

Fox Enterprises has two divisions: general staff and operational staff. Fox Enterprises, the bargaining representative for the operational staff and the bargaining representative for the general staff, Felicity and Fred, commence negotiations for a new enterprise agreement. However, the different interests of the general staff and the operational staff mean that Felicity and Fred cannot agree on their negotiating strategy.

After two months of unsuccessful bargaining, Fox Enterprises applies for a scope order because it believes that bargaining is not proceeding efficiently. Fox Enterprises considers that it is more appropriate for it to bargain separately with the employees of each division.

FWA is satisfied that Fox Enterprises is meeting its good faith bargaining requirements and that making the order will promote fair and efficient bargaining. The two groups of employees are operationally distinct and therefore it is reasonable in the circumstances to make the order.

Fox Enterprises therefore obtains an order that it makes one enterprise agreement with the general staff and another enterprise agreement with the operational staff.

MULTI-ENTERPRISE BARGAINING IN “LOW-PAID” SECTORS

FWA may issue a “low-paid authorisation” for a proposed multi-enterprise agreement.

Granting the authorisation must be in the public interest, by reference to numerous factors set out in section 243 of the FW Act. The FW Act offers no definition of “low-paid” employees, but the Explanatory Memorandum indicates that the industries or sectors that might qualify include employees in the community services sector and the cleaning and childcare industries.

Why do I need to know this?

The significance of a low-paid authorisation is that it opens the way for a bargaining representative to seek bargaining orders from FWA. It also opens up the possibility of FWA providing certain forms of assistance in relation to the bargaining process.

GOOD FAITH BARGAINING

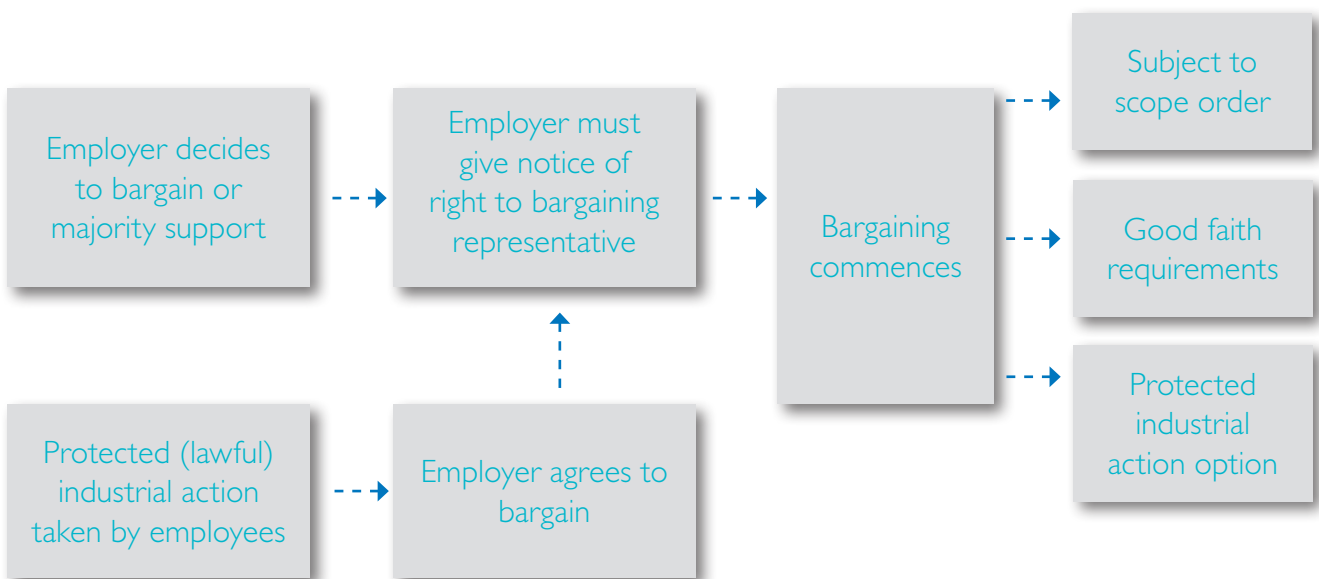
All bargaining representatives for an enterprise agreement must meet the “good faith bargaining requirements” set out in the FW Act. If a party does not meet the requirements, FWA can make a bargaining order to redress the breach.

What are the good faith bargaining requirements?

A bargaining representative must:

- Attend, and participate in, meetings at reasonable times
- Disclose relevant (but non-confidential) information
- Respond to proposals from other representatives in a timely manner
- “Recognise” and bargain with other representatives
- Give genuine consideration to the proposals of the other bargaining representatives and give reasons for responses to those proposals
- Refrain from “capricious or unfair conduct that undermines freedom of association or collective bargaining”.

A SNAPSHOT OF THE BARGAINING STEPS



LESSONS LEARNED

Since the commencement of good faith bargaining on 1 July 2009, a number of cases have emerged providing guidance on how to ensure bargaining representatives uphold their obligations during bargaining.

- **Preparation for bargaining is critical.** Care needs to be taken in how you frame your proposals and how you respond to proposals. The good faith bargaining requirements are interrelated so that your genuine consideration and response to a proposal could make certain information relevant. A common example concerns information on an employer's financial position (ie how viable it might be), which will typically be relevant if an employer asserts it has an inability to pay a wage demand as opposed to an unwillingness to pay. How you frame responses is important.
- **While there is freedom to contract, you must still approach negotiations with an open mind.** Where you are obliged to bargain in good faith, an employer is expected to approach negotiations with an open mind and participate actively in deliberations. This is to be balanced by the fact that you are not required to make concessions or even reach agreement.
- **Some common examples of bad faith bargaining** include delaying tactics, deliberately misleading the other party (eg not disclosing intentions to restructure if asked may be misleading), refusing to agree on trivial matters, surface bargaining (ie merely listening with the pretence of bargaining), "boulwarism" (the take it or leave it approach), receding horizon bargaining (ie withdrawing matters already agreed on) and offering unreasonable terms.
- **Hard bargaining is still an option.** What employers need to be aware of is the need to take greater care in their preparation for negotiations so that they don't make mistakes that can lead to a breach of good faith bargaining and derail a negotiation strategy. The key is being able to explain a position and the reasons for standing firm should be genuinely held.

Q&A - WHAT ARE MY RIGHTS IN GOOD FAITH BARGAINING?

Can an employer refuse to recognise the employee's bargaining representative?

No, unless there is evidence that the bargaining representative has not been properly appointed.

Would it amount to a failure to bargain in good faith if an employer organises a meeting directly with the employees and not their respective bargaining agent?

This is likely to be a contentious area. From overseas experience, such conduct has been found to be a breach of good faith bargaining requirements.

Do employers have to hand over any documents that a bargaining representative demands?

No. An employer is only required to hand over information that is relevant. And it is information that must be disclosed, not necessarily any particular document. Employers should give active consideration to whether information is in fact relevant to the bargaining before disclosing it.

What happens if an employer does not bargain in good faith?

This may lead to a bargaining representative seeking a "bargaining order" from FWA that can redress the causes as to why the bargaining process is not proceeding efficiently or fairly.

Can an employer require a union bargaining representative to give reasons for rejecting a proposal?

Yes. Bargaining requirements fall on both sides. Employers should plan for bargaining and ensure that the bargaining requirements are met by both sides.

Can employees take industrial action during bargaining?

Yes, provided the requirements under the FW Act are met, namely that the employees have sought to genuinely reach agreement, a secret ballot order is obtained, the ballot approved and notice is given of the intended industrial action.

What if we are having difficulties with the employees' bargaining representative(s)?

FWA may make a bargaining order if there are too many bargaining representatives, resulting in the process not proceeding efficiently or fairly. Alternatively, FWA may require the bargaining representatives for the proposed agreement to meet and appoint one of them to represent the others in bargaining. In addition, FWA may exclude a bargaining representative who is hindering or disrupting bargaining from participating in the process.

Does an employer have to make concessions?

No.

Does an employer have to reach agreement on terms to be included in the agreement?

No.

RESOLUTION OF BARGAINING DISPUTES

A bargaining representative for a proposed single-enterprise agreement (or a multi-enterprise agreement for which there is a low-paid authorisation) may unilaterally refer a dispute about the agreement to FWA.

Does FWA have the power to arbitrate the dispute without the employer's consent?

No. FWA cannot arbitrate the dispute, unless all bargaining representatives agree. However, it may use its general powers under section 595 of the FW Act to conduct compulsory conciliation or mediation, or to make recommendations to the parties.

THE CONTENT TO BE INCLUDED IN AN ENTERPRISE AGREEMENT

The FW Act has an expanded range of matters that can be included in an enterprise agreement. It allows employers and employees to reach agreement about permitted matters as follows:

- Matters pertaining to the employment relationship between the employer and employees.
- Matters pertaining to the relationship between the employer and a union that represents the employees and is to be covered by the agreement.
- Deductions from wages for any purpose authorised by an employee.
- How the agreement will operate.

Therefore, by definition, matters that do not pertain to the employment relationship will not be permitted. The concept of 'matters pertaining' brings back into focus the reasoning of the High Court in *Electrolux Homes Products Pty Ltd v AWU* (2004) 221 CLR 309 and the subsequent decisions of the former Australian Industrial Relations Commission. However, the new permitted category of matters pertaining to the relationship between an employer and a union covered by an agreement expands the allowable matters.

The FW Act also allows deductions from wages for salary sacrificing arrangements or deductions for union dues or childcare. And by permitting clauses on how an agreement will operate, it will again be permissible for provision to be made for when negotiations will recommence for a replacement agreement.

Q&A - HOW DOES FWA RESOLVE A BARGAINING DISPUTE?

There are four situations in which FWA may resolve a bargaining dispute by making a binding workplace determination under the FW Act:

- Either FWA or the Minister determines that protected industrial action is threatening public health and safety, or the economy.
- The taking of protected (lawful) industrial action has resulted in significant economic harm to an employer and a group of employees (or just the employees, if there has been a lockout) and FWA has terminated that action and there is no reasonable prospect of reaching agreement over any matters still at issue.
- FWA has made a serious breach declaration following serious and sustained breaches of bargaining orders by one or more bargaining representatives, who have significantly undermined bargaining for the agreement.
- A low-paid authorisation is in operation, but the parties concerned are genuinely unable to reach agreement over the proposed multi-enterprise agreement – so long as no employer to be covered by the determination has previously been covered by an enterprise agreement or workplace determination.

APPROVAL OF AGREEMENTS

The FWA has responsibility for approval of enterprise agreements. Before approving an agreement, the FWA must be satisfied that, among other things, all parties genuinely agreed to the enterprise agreement, the agreement does not contain unlawful content and that the agreement makes employees better off overall.

Better Off Overall Test (BOOT)

An enterprise agreement passes the BOOT if the FWA is satisfied at the time of the test that the agreement makes each employee better off overall when compared to the terms and conditions of the relevant modern award. FWA can consider employees as a class where they share characteristics (eg a classification).

An agreement comes into operation seven days after approval by the FWA.

Bargaining checklist

- Review your bargaining practices and consider whether they may need to change to ensure your organisation complies with the good faith bargaining requirements.
- Consider whether your organisation devotes sufficient resources and preparation to meet the new good faith bargaining obligations.
- Consider what resources and planning you need to undertake to ensure your organisation is both prepared for bargaining under the FW Act and best placed to achieve its desired bargaining outcomes.
- Consider whether your organisation needs further training to prepare for its next bargaining round.
- Ensure your organisation understands the bargaining tools – rights to information, rights to responses to demands and protection from unfair conduct – and how these tools may be used by unions and by your organisation.

HOW CAN DLA PIPER ASSIST?

We have a number of expert lawyers who can help you prepare for bargaining. We also draw on our international expertise from the United States where good faith bargaining has been operating for over 60 years.

We have extensive experience in preparing bargaining strategies, managing responses to unlawful industrial action and ensuring compliance with secret ballots, protected industrial action requirements and approval of agreements.

We also provide strategic bargaining workshops to our clients and have updated this training so it covers good faith bargaining. We are in the unique position of being able to share the lessons on good faith bargaining with our international colleagues.

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