ENTERPRISE AGREEMENTS

What is an Enterprise Agreement?

An enterprise agreement is an agreement which sets out terms and conditions of employment, including the rights and obligations of the employees and the employer covered by the agreement.

These agreements are made at the enterprise level and must be approved by the Fair Work Commission (**FWC**) prior to the enterprise agreement coming into force, lasting for a period of up to four years.

Who can make an enterprise agreement?

An enterprise agreement can be made under the *Fair Work Act 2009* (**FW Act**) by any corporation covered by the national workplace relations system. The Governments of all states excluding Western Australia have referred industrial relations powers to the Federal Government so that the FW Act applies to all private sector employers, regardless of whether the employer is a corporation.

Enterprise agreements can be made with award free and/or award covered employees under the FW Act.

What are the types of enterprise agreements?

Under the FW Act, there are different types of enterprise agreements which can be made depending on the circumstances of the workplace.

Single-enterprise agreement	This type of enterprise agreement can be made by a single employer, or two or more employers who are single interest employers.
Multi-enterprise agreement	This type of enterprise agreement can be made by two or more employers who are not single interest employers.
Greenfields agreement	This type of enterprise agreement can be made as a single or multi enterprise agreement and is applicable to genuine new enterprises that are yet to engage employees.

Secure Jobs Better Pay Act 2022

Changes under the *Secure Jobs Better Pay Act 2022* amend the FW Act to expand on multi-employer bargaining streams. From 6 June 2023, there will be three streams available, the:

- single interest employer stream - which refers to agreements between two or more employers pursuant to a single interest employer authorisation under the FW Act, however, significantly amending the pre-SJBP Act 2022 operation of single interest employer authorisations to remove limitations on multi-enterprise bargaining, including where employers do not wish to bargain.
- supported bargaining agreement stream which is replacing and somewhat expanding the current low-paid bargaining stream; and
- cooperative workplace agreements - which replaces the previous multi-enterprise bargaining provisions of the FW Act, which retains the requirement of employer consent to multi-enterprise bargaining, and to which limited changes have been made.

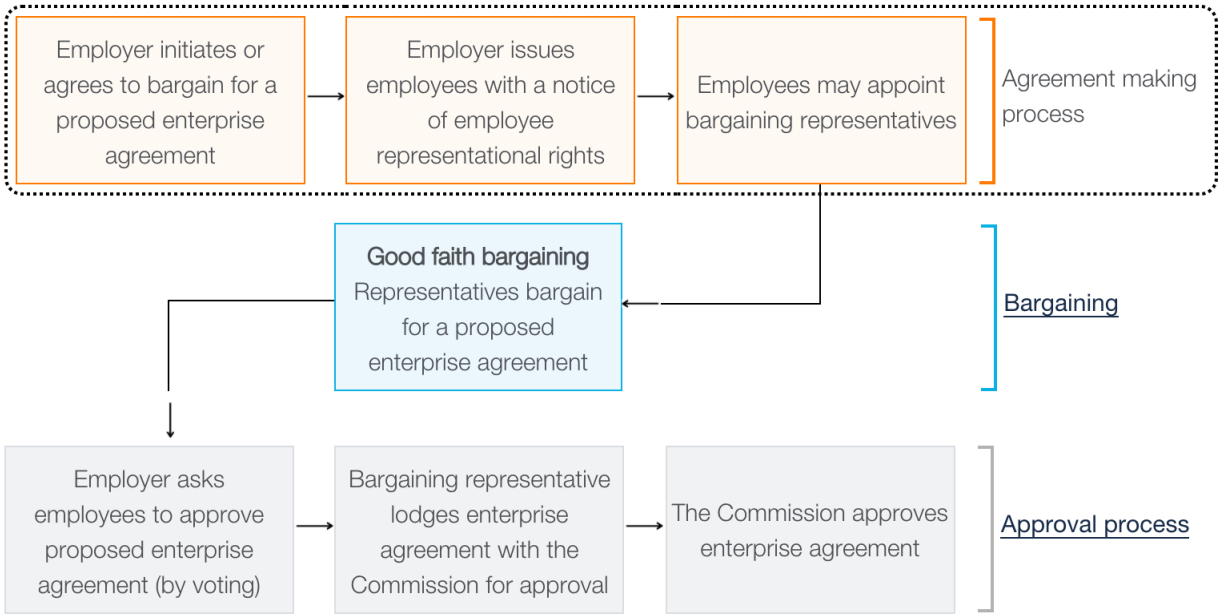
Please refer to following summary sheet for further information:

- "Fair Work Legislation Amendment Secure Jobs Better Pay Act Multi-Enterprise Bargaining - Single Interest Bargaining Stream;"
- "Fair Work Legislation Amendment Secure Jobs Better Pay Act Multi-Enterprise Bargaining - Supported Stream"; and
- "Fair Work Legislation Amendment Secure Jobs Better Pay Act Multi-Enterprise Bargaining - Cooperative Bargaining Stream."

THE AGREEMENT MAKING PROCESS

Under the FW Act, there are several key steps which must be completed during the bargaining, approval, and lodgement process.

Broadly, the steps to the agreement making and bargaining process are set out in the below diagram.



Bargaining Commences

Bargaining for both a single-enterprise agreement and a multi-enterprise agreement commences at the **notification time**.

The notification time for a single-enterprise agreement is the time when:

- An employer agrees to bargain or initiates bargaining for the agreement;
- An employer does not agree to bargain but is compelled to do so because of one of the following:
    - a majority support determination in relation to the agreement comes into operation.
    - a scope order in relation to the agreement comes into operation.

The notification time for a multi-enterprise agreement is when:

- The employers agree to bargain or initiate bargaining for the agreement;
- An employer is compelled to bargain because a low-paid authorisation in relation to the agreement, that specifies the employer, comes into operation.

Employer agrees to bargain

What constitutes an agreement to bargain, or initiating bargaining, is not defined in the FW Act. In considering the definition of the term, the FWC has applied conventional contractual principles and determined that an employer may agree to bargain or initiate bargaining either:

- Expressly, through oral or written communication.
- By inference, through the employer's conduct (such as commencing to actually engage in bargaining).

Once an employer has agreed to bargain, it is not necessary for the employer to continue to maintain its agreement to bargain in order to be regarded as having agreed to bargain. Consequently, if an employer decides to cease negotiating for an enterprise agreement (for instance, because the proposed agreement no longer suits its interests), it does not alter the fact that the employer had at an earlier point in time agreed to bargain.

Conduct of an employer

The FWC has recognised that agreement to bargain may be inferred through the conduct of the parties. The level of interaction required to constitute an agreement by an employer to bargain will be a matter of fact and degree and will need to be determined on a case-by-case basis.

Matters the FWC has taken into consideration include:

- Whether the employee or representative of the employer is acting with authority to commence bargaining.
- The conduct and words used by the employer, and whether they indicate an intention to engage in bargaining.

Matters considering the commencement of bargaining through inference have included:

Transport Workers' Union of Australia v Hunter Operations Pty Ltd [2014] FWC 7469:

- a manager of the employer attended meetings with the union at regular intervals and responded to certain issues in the union's claim. The manager also made a number of counter-suggestions of his own.
- The FWC held that the manager should be regarded, by his words and other conduct in engaging with the union, as having agreed to bargain with the union. His conduct viewed as a whole was interpreted as engaging in negotiations for an enterprise agreement and therefore sufficient to trigger the notification time.
- The employer was held liable for the actions of the manager. It was held the manager was acting with the actual authority of his employer to enter into negotiations with the union, and in the alternative, the FWC considered he had apparent authority.

By contrast, in *Construction, Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* [2016] FWC 7780:

- the union advised the employer in a meeting that it wished to bargain for an enterprise agreement. During the meeting, the union and the employer's representative discussed the union's proposed agreement, however the employer was not provided with a take home copy of the union's proposed agreement.

- The employer indicated to the union its opinion that the proposed agreement did not meet the requirements of the 2014 Building Code, and that it would provide its position in due course. At a later date, the employer advised the union that it did not wish to bargain until the union provided it with a proposed enterprise agreement that was compliant with the 2014 Building Code.
- The FWC was not satisfied that the employer's conduct evinced an intention to bargain. Instead, the FWC felt that the employer had at all times maintained a position that it would agree to bargain if the enterprise agreement proposed by the union was compliant with the 2014 Building Code and available for consideration by the employer.
- The FWC found that all the employer had done was indicate that it would agree to bargain if the union proposed an agreement that was complaint, and the union had not proposed such an agreement. The FWC held that there was no notification time.

Employer does not agree to bargain

An order by the FWC can trigger the commencement (or recommencement) of the bargaining process.

For a single-enterprise agreement, this can occur through:

- A majority support determination
- A scope order, which may widen or reduce the scope of employees to be covered by an agreement.

Majority support determination

In many cases, the commencement will be uncontroversial. If, however, a majority of employees want to bargain for a single-enterprise agreement and the employer refuses, the employees can request that the FWC make a "Majority Support Determination" which, if granted, will effectively force the employer to commence bargaining with employees.

The FWC must make a majority support determination if it is satisfied that:

- a majority of employees who are employed by the employer at that time and who will be covered by the enterprise agreement want to bargain;
- an employer who will be covered by the enterprise agreement has not agreed to bargain;
- if the enterprise agreement will not cover all of the employer's employees, that the chosen group of employees was fairly chosen; and
- it is reasonable in all the circumstances to make the determination.

Once made, a majority support determination triggers the notification time.

If the FWC issues a Majority Support Determination, and an employer continues not to participate in bargaining, a bargaining representative for the employees may seek a bargaining order.

The Secure Jobs, Better Pay Act 2022

The *Secure Jobs, Better Pay Act 2022* provides an employee bargaining representative will no longer require a majority support determination to initiate bargaining, provided certain circumstances apply. Please refer to "Fair Work Legislation Amendment Secure Jobs Better Pay Act 2022 Summary Sheet – Initiating Bargaining and Termination of EAs" for further information.

Further, bargaining may also be initiated in the new multi-enterprise agreement stream, through the mechanism of either a:

- single interest employer authorisation
- supported bargaining authorisation.

Please refer to the below Summary Sheets for further information:

- "Fair Work Legislation Amendment Secure Jobs Better Pay Act 2022 Summary Sheet Multi-Enterprise Bargaining - Single Interest Bargaining Stream"; and
- "Fair Work Legislation Amendment Secure Jobs Better Pay Act 2022 Summary Sheet Multi-Enterprise Bargaining - Supported Stream".

Scope order

The scope or coverage of a proposed agreement is a matter than can itself be the subject of bargaining for a proposed enterprise agreement.

Bargaining can commence or be initiated even though the parties to the bargaining process are in disagreement about the scope of the proposed agreement.

Where the employer does not agree with the proposed scope of an agreement at the notification time, it must proceed to bargain on the basis of the broader scope noting that it is entitled to continue to bargain over the scope during the negotiation or apply for a scope order.

Circumstances can also arise where an employer agrees to bargain for an agreement with a particular scope, and during the bargain the employer agrees to a broader scope. The subsequent agreement to bargain for a broader scope triggers a new notification time.

A bargaining representative for a single-enterprise agreement may apply to the FWC for a scope order if both of the following conditions are met:

- the bargaining representative has concerns that bargaining is not proceeding efficiently or fairly;
- the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

A bargaining representative may only apply for the scope order if the representative:

- has taken all reasonable steps to give a written notice setting out the concerns regarding the scope of the proposed agreement to the relevant bargaining representatives for the agreement;
- has given the relevant bargaining representatives a reasonable time within which to respond

to those concerns, and

- considers that the relevant bargaining representatives have not responded appropriately to those concerns.

The FWC may make a scope order if it is satisfied in relation to each of the following matters:

- that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements;
- that making the order will promote the fair and efficient conduct of bargaining;
- that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen, and
- it is reasonable in all the circumstances to make the order.

A scope order will affect the coverage of the agreement, specifically, the classes or groups of employees to be covered.

The date that a scope order comes into operation becomes the notification time for issuing a notice of employee representational rights.

Employer issues notice of representation rights (NERR)

Once bargaining commences, either because an employer or agrees, or who is compelled to as a result of an order of the FWC, 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 agreement.
- is employed at the notification time of the agreement.

Notice is given using the Notice of Employee Representational Rights (also known as **NERR** for short).

The NERR:

- Gives notice to employees that their employer is bargaining in relation to an enterprise agreement named in the NERR and identifies the employees the enterprise agreement is proposed to cover.
- Specifies that employees may appoint a bargaining representative.
- Explains that if the employee is a member of an employee organisation and the employee does not appoint another person as a bargaining representative, then the employee organisation (of which they are a member) will be the bargaining representative of the employee.
- Explains the effect of *section 178(2)(a)* of the FW Act, which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer.

The deadline to issue the NER is "as soon as practicable and **no more than 14 days** after the bargaining process starts. The FWC has adopted a strict interpretation to this requirement. If the NERR is issued after the 14-day period it may be invalid.

There are important rules about the content and form of the NERR. The NERR must:

- Contain the content prescribed by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).

- Not contain any other content
- Be in the form prescribed by the FW Regulations - prescribed by *Regulation 2.05*.

Giving the NERR

There are a variety of methods by which an employer can give the NERR to employees. The FW Regulations outline a number of possible methods of distribution.

Regulation 2.04 of the FW Regulations states that the notice may be given in the following ways:

- Personally, to the employee.
- By pre-paid post to the employee's residential address or nominated address
- By emailing a copy to the employee's work address or another nominated email address
- By emailing an electronic link that takes the employee directly to the notice on the employer's intranet.
- By fax to the employee's work fax, an employee's home fax or another nominated fax number.
- By displaying the NERR in a conspicuous location at the workplace that is known by and readily accessible to the employee.

However, the list is not exhaustive, and an employer is not prevented from using another manner of giving the NERR to the employee.

Taking all reasonable steps to give notice

An employer must take all reasonable steps to give the NERR to employees covered by the agreement.

Taking all reasonable steps has been interpreted as requiring the employer to use a method of giving the NERR, or a combination of methods, which is both:

- Appropriate in the context of the workplace.
- Appropriate in the context of the particular circumstances of the employees to whom the NERR is to be given.

For example

- For employees on a remote site with limited email access, it may be appropriate to physically hand the employees a copy of the NERR in combination with also placing it in a conspicuous place.
- Where employees spend a large amount of time away from work, it may be appropriate to email them the NERR in combination with making copies of the NERR available at the site where they are working.

Case law has confirmed that the requirement to give notice is not absolute. What is a reasonable step will depend upon the circumstances of the employer and employee.

The FWC has observed that there may be circumstances where an employer has taken all reasonable steps to issue the NERR, but those steps were unsuccessful. This will still be sufficient for the employer to meet its requirements. However, if no steps have been taken within the 14-day period, then the requirement will clearly not have been met.

Appointment of Bargaining representatives

Once the NERR has been given, employers and employees may appoint any person as their bargaining representative for a proposed enterprise agreement.

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

The following people can be bargaining representatives for a proposed enterprise agreement (that is not a greenfields agreement):

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

An employee may appoint himself or herself as his or her bargaining representative for the proposed agreement.

If an employee does not nominate a bargaining representative, but that employee is a member of a union, the union will become their default bargaining representative However, the union will not be the employee's bargaining representative if:

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

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

- for an appointment made by an employee who will be covered by the agreement – be given to the employer; or
- for an appointment made by an employer – be given, on request, to a bargaining representative of an employee who will be covered by the agreement.

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

The appointment of a bargaining representative for a proposed enterprise agreement, and the default representation by a union of a member, may be revoked by written instrument. There is no limitation within the Fair Work Act on when a person may appoint or change or revoke the appointment of a bargaining representative.

CONTENT OF AN ENTERPRISE AGREEMENT

There are strict legislative obligations set out in the FW Act which must be complied with for an enterprise agreement to be approved.

Permitted matters

The FW Act sets out matters which are permitted to be included in an enterprise agreement.

Enterprise agreements may deal with the following 'permitted matters':

1. **Matters pertaining to the relationship between the employer and the employees who will be covered by the agreement**. This might include:
    - wages and allowances, hours of work and shift patterns;
    - leave and leave arrangements;
    - staffing levels (particularly if aimed at ensuring health and safety of employees); and
    - the employment of casual employees and casual conversion provisions.
    - As of 7 December 2022, special measures to achieve equality can be permitted matters (for example, a term which requires an employer to offer a set number of positions to people with a mental or physical disability). However, if the special measure would be unlawful under an anti-discrimination law, it may still be unlawful.
2. **Matters pertaining to the relationship between the employer and the union/s that will be covered by the agreement**. For example, terms:
    - about union training leave and leave for training conducted by a union (such as work health and safety training)
    - that provide for employees to have paid time off to attend union meetings or participate in union activities, and
    - that provide for union involvement in dispute settlement procedures.
3. **terms about deductions from wages authorised by an employee who will be covered by the agreement**; Deduction terms will not have effect if:
    - they benefit the employer, and they are unreasonable in the circumstances, or
    - if the employee is under 18 years – without a parent, or guardian's agreement.
4. **How the agreement will operate**. For example, terms:
    - setting out how and when the negotiations for a replacement enterprise agreement will be conducted or
    - specifying who the enterprise agreement will cover.

If the FWC approves an enterprise agreement which contains matters that are not 'permitted' but not 'unlawful', such matters will be of no effect and will not be enforceable.

Unlawful terms

When deciding whether an agreement which has been lodged should be approved, the FWC must be satisfied that the agreement does not contain any unlawful terms.

An 'unlawful term' which is defined as:

- a discriminatory term – as defined in the FW Act;
- an objectionable term (one that requires or permits a contravention of the "general protections" provisions or the payment of a bargaining services fee);
- an objectionable emergency management term (terms that limit employees from volunteering in emergency services activities);
- a term that would allow an employee or employer to opt-out of coverage of the agreement;
- a term that provides an unfair dismissal remedy before the qualifying period is served;
- a term that excludes or modifies the unfair dismissal provisions to the detriment of an employee;
- a term that is inconsistent with the industrial action provisions of the FW Act;
- a term that provides for right of entry entitlements other than in accordance with the FW Act;
- a term that requires superannuation contributions for default fund employees to be made to a superannuation fund, unless that fund:
    - offers a MySuper product;
    - is an exempt public sector scheme; or
    - is a fund which a relevant employee is a defined benefit member.

**Note - under the SJBP Act 2022, 'special measures to achieve equality', for example, a term that has the purpose of achieving substantive equality for employees who are female and have a physical or mental disability, are matters that are not discriminatory and therefore not unlawful terms in an enterprise agreement – to the extent the action is not unlawful under an anti-discrimination law. A term of an enterprise agreement ceases to be a special measure to achieve equality after substantive equality for the employees has been achieved.*

Mandatory terms

There are certain matters that **must** be included in an enterprise agreement and, if not, in some cases there will be a model term which will be deemed to apply.

A nominal expiry date	An enterprise agreement must specify a date as its nominal expiry date which will not be more than 4 years after the day on which the FWC approves the agreement.
A coverage term	The coverage term in the enterprise agreement should identify the employer(s), employees and work covered by the agreement.
A dispute settlement procedure	This is a term that provides a procedure for settling disputes about matters arising under the enterprise agreement and in relation to the National Employment Standards (**NES**). Where an enterprise agreement is lodged without a dispute settlement procedure, the agreement will not be approved.
A flexibility term	An enterprise agreement must include a term that allows an employer and employee to make an individual flexibility agreement (IFA) which varies the effect of terms of the enterprise agreement in order to meet the genuine needs of the employer and the individual employee. If an enterprise agreement does not contain a flexibility term, the model flexibility term in the FW regulations is taken to be a term of the agreement.
A consultation term	An enterprise agreement requires a consultation term which requires the employer to consult with employees about: • requires the employer to consult employees about major workplace changes that are likely to have a significant effect on the employees; or • a change to an employee's regular roster or ordinary hours of work; and • allows for representation of those employees for the purposes of that consultation. If an enterprise agreement does not include a valid consultation term, the model consultation term in the FW regulations is taken to be a term of the agreement.

Additional requirements

Employers who engage shiftworkers, pieceworkers, school-based apprentices and school-based trainees, and outworkers should consider the additional requirements set out in the FW Act. The table below sets out these specific content requirements.

Definition of a shiftworker for the purposes of the NES	This provision will need to be included in an enterprise agreement if an employee is covered by an enterprise agreement; and a modern award that is in operation and covers the employee defines or describes the employee as a shiftworker for the purposes of the NES. For example, a proposed enterprise agreement might cover maintenance employees in the business who would be covered by the *Manufacturing and Associated Industries and Occupations Award 2020*. This award describes a shiftworker for the purposes of the NES and as a result of this, the enterprise agreement will need to contain a definition. *Note: The Horticulture Award 2020 does not describe a shift worker for the purposes of the NES.*
Pieceworker provisions	Where an enterprise agreement includes a term that defines or describes the employee as a pieceworker and the modern award that is in operation and covers the employee does not include such a term, the Fair Work Commission (FWC) must be satisfied that the effect of including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the NES. Where an enterprise agreement does not include a term that defines the employee as a pieceworker; and a modern award that is in operation and covers the employee includes such a term, the FWC must be satisfied that the effect of not including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the NES.
School-based apprentice and school-based trainee	If an enterprise agreement contains a loading to be paid to the school based apprentice, or school based trainee in lieu of annual leave, personal/carer's leave and paid absences for public holidays, and the modern award that is in operation and covers the employee provides for the employee to be paid loadings in lieu of leave or absence of that kind, the FWC must be satisfied that the amount or rate of the agreement loadings is not detrimental to the employee when compared to the amount or rate of award loadings.
Outworker terms	Enterprise agreements cannot include any designated outworker terms. The definition of designated outworker terms is set out in clause 12 of the FW Act.

Enterprise agreements and the National Employment Standards (NES)

The NES are minimum employment standards that apply to all national system employees, regardless of what industrial instrument applies, including an enterprise agreement.

Before approving an agreement, the Commission must be satisfied that the terms of the agreement do not exclude the NES or any provision of the NES.

Whilst an enterprise agreement cannot exclude the NES or any provision of the NES, it is not necessary for an enterprise agreement to expressly include each NES entitlement. However, an enterprise agreement can include terms which are ancillary or incidental to employee entitlements under the NES, or supplement the NES as long as they are not detrimental to the employee. An enterprise agreement can provide more favourable entitlements than those provided in the NES.

Examples of 'ancillary or incidental' terms include, taking twice as much annual leave at half pay, or when payment for paid annual leave is to be made. 'Supplementary' terms include increasing the amount of annual leave entitlement or paying annual or personal carer's leave at a higher rate than prescribed by the FW Act.

The increasing proportion of enterprise agreements requiring undertakings to address deficiencies impacts on the time the FWC take to finalise applications for approval of agreements. Many of these undertakings are requested when an agreement provides entitlements that are inconsistent with, or less beneficial than NES.

In order to reduce delay in approval in connection with NES-related undertaking, it may assist if a NES precedent term is included in an enterprise agreement when it is made providing that where there is any inconsistency, more generous entitlements under the NES will prevail over provisions in an agreement.

Example – Precedent term

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

Enterprise agreement wage rates

The base rates of pay in an enterprise agreement are subject to the following rules as set out in the FW Act.

Modern award covers the employee	The base rate of pay payable to the employee under the agreement must not be less than the base rate of pay that would be payable to the employee under the modern award if the modern award applied to the employee. If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.
No modern award covers the employee	The base rate of pay payable to the employee under the enterprise agreement must not be less than the national minimum wage order. If the agreement rate is less than the national minimum wage order, the agreement has effect in relation to the employee as if the agreement rate were equal to the national minimum wage order rate.

For Example

The rate of pay for an employee engaged as a vegetable picker under the terms of an enterprise agreement is $748.40 per week. Under the *Horticulture Award 2020* the comparable skill level for a vegetable picker is a level 1 employee– the minimum weekly wage is $753.80.

Therefore, the employee must be paid the $753.80 minimum weekly wage from the modern award, even though the enterprise agreement says the employee should be paid only $748.40.

Coverage of Agreements

The group of employees to be covered by a proposed agreement will typically be chosen at or shortly after the commencement of bargaining. If there is disagreement between bargaining representatives on the scope of the agreement, then the scope itself will become a matter for bargaining – and may also be subject to a scope order – please refer above.

The coverage of an enterprise agreement will depend on the group of employees who the employer and the employee bargaining representatives have chosen to cover.

An enterprise agreement covers an employee or employer if the agreement is expressed to cover the employee or the employer.

A coverage terms commonly specifies:

- the employer;
- which employees the agreement will cover;
- work that the employees will perform; and
- locations where the employees will do the work.

Example coverage clause

2 Scope

2.1 This agreement will cover:

(a) Oh-Mazing Oranges Pty Ltd (**Company**) in respect of its employees at the Mildura grove who are covered by this agreement, and

(2) Employees of the Company at the Mildura grove who are covered by the classifications set out in clause X of the agreement, undertaking harvesting, planting, picking or sorting and packing activities (**Employees**).

Growers might decide that the enterprise agreement will apply to a particular type of work, or all employees at a particular site. The most important factor is that the group of employees proposed to be covered by the agreement are *'fairly chosen'.*

This is because before approving an agreement, the FWC must be satisfied that the group of employees the agreement covers was fairly chosen.

'Fairly Chosen'

Whilst the FWC's decision as to whether or not the group of employees covered by the agreement was fairly chosen involves a degree of subjectivity or value judgement, in circumstances where an agreement does not cover all of the employees of the employer(s) covered by the agreement, the FWC must consider whether the group of employees covered by the agreement is geographically, operationally, or organisationally distinct.

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

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

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

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

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

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

An illustrative example is provided in the Explanatory Memorandum of the FW Act:

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

Better Off Overall Test (BOOT)

The Better Off Overall Test (**BOOT**) requires that FWC is satisfied, as at the time of approval, that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

The better off overall test is applied as at the test time – this is the time when the application for approval of the agreement was made (the date the application was lodged with the FWC).

The BOOT is a global test, not a line-by-line analysis, and does not require the FWC to enquire into each employees' individual circumstances. This means that award conditions can be traded off or excluded as long as compensation is provided in other provisions.

As a result, it is important for growers to not only make sure that that, overall, their enterprise agreement meets the award but that any additional or more generous benefits are appropriately codified.

If your agreement does not pass the BOOT

If the FWC believes the terms of your agreement may cause it to fail the BOOT, they may:

- ask you for further information to help them assess your agreement;
- ask for a formal submission in writing to respond to a query;
- invite you to provide an undertaking to address the issue - the terms of the undertaking are taken to be a term of the agreement; or
- dismiss your application.

Undertakings

If the FWC has a concern that the agreement does not meet the requirements of the FW Act, the FWC may approve the agreement if it is satisfied that an undertaking meets that concern (*section 190(1) and (2)*). Undertakings are commonly given by employers to assist with a concern that an agreement does not meet the BOOT.

The FWC may only accept a written undertaking from an employer covered by the agreement if it is satisfied that the undertaking is not likely to:

- Cause financial detriment to any employee covered by the agreement.
- Result in substantial changes to the agreement.

The FWC must also seek the views of other bargaining representatives before accepting an undertaking.

If an undertaking is accepted, the terms of the undertaking are taken to be a term of the agreement and operates to modify or exclude the operation of a particular provision as a result of the FWC finding that the agreement does not pass the BOOT.

The *Secure Jobs, Better Pay Act 2022*

Amendments contained in the *Secure Jobs, Better Pay Act 2022* are broadly intended to simplify the approval process in respect of application of the better off overall test.

The *Secure Jobs, Better Pay Act 2022* Act also introduces a new BOOT reconsideration process.

For further information on the key changes to the BOOT please refer to “Fair Work Legislation Amendment Secure Jobs, Better Pay Act 2022 Summary Sheet – Enterprise Agreement Making and BOOT.”

BARGAINING

Good faith bargaining

One of the objects of the FW Act is to provide a framework that enables collective bargaining in good faith, particularly at the enterprise level.

Those involved in the bargaining process, including bargaining representatives, are required to bargain in good faith.

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

> ***228 Bargaining representatives must meet the good faith bargaining requirements***
>
> *(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:*
>
> *(a) attending, and participating in, meetings at reasonable times;*
>
> *(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;*
>
> *(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;*
>
> *(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals*
>
> *(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;*
>
> *(f) recognising and bargaining with the other bargaining representatives for the agreement. Note: See also section 255A (limitations relating to greenfields agreements)*
>
> *(2) The good faith bargaining requirements do not require:*
>
> *(a) a bargaining representative to make concessions during bargaining for the agreement; or*
>
> *(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.*

The good faith bargaining requirements are designed to facilitate agreement making and assist bargaining representatives to bargain effectively and aim to ensure that all bargaining representatives act in an appropriate and productive manner. The requirements also seek to facilitate improved communication between bargaining representatives, which is expected to reduce the likelihood of industrial action.

In general, the legislative scheme might be described as one which seeks to promote agreement making but which does not compel parties to make concessions or to reach agreement.

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

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

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

Capricious or unfair conduct

The requirement in section 228(1)(e) ('refraining from capricious or unfair conduct ...') is intended to cover a broad range of conduct.

For example, conduct may be capricious or unfair if an employer:

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

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

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

It is anticipated that most bargaining representatives will bargain voluntarily and cooperatively without the need for assistance or intervention from the FWC.

In the occasional cases where this is not occurring, the FW Act provides mechanisms for the FWC to facilitate bargaining and, where necessary, make orders to ensure the integrity of the bargaining process.

Failing to comply with the good faith bargaining requirements is not unlawful on its own. However, failure to observe the requirements can lead to:

- Another bargaining representative seeking a bargaining order from the FWC;
- A bargaining representative seeking to have a bargaining dispute dealt with by the FWC;
- If a serious breach declaration is breached, the FWC compulsorily arbitrating the bargaining dispute and making a bargaining related workplace determination.

Bargaining order

Where a bargaining representative is concerned that the good faith bargaining requirements are not being met, a simple reminder to the person of their obligations of good faith bargaining might be enough to bring them back to the table. Where this simple measure fails, an application can be made to the FWC for a bargaining order to be issued requiring bargaining representatives to bargain in good faith.

A bargaining order must be made by a bargaining representative and can only be made if one or more of the bargaining representatives, or are not meeting, the good faith bargaining requirements; or bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement.

Before making a bargaining application, a bargaining representative must give a formal writing notice to the other bargaining representatives setting out their concerns about the breaches of the good faith bargaining requirements and how the bargaining process is not proceeding efficiently as a result. The bargaining representatives receiving the notice must be given an appropriate time to respond to the concerns before applying for the bargaining order.

Before making a bargaining order, the FWC must be satisfied that that:

- the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
- one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements, or
- the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
- the bargaining representative who applied for the bargaining order has given the relevant bargaining representatives a written notice setting the representative's concerns and provided a reasonable time for a response.

If the FWC grants an order, the order may specify:

- action to be taken by and the requirements imposed upon the bargaining representatives, in order to meet good faith bargaining requirements;
- requirements imposed upon the bargaining representatives not to take action that would be capricious or unfair; or
- such matters, actions or requirements as FWC consider appropriate to promote efficient or fair conduct of bargaining the agreement.

A person to whom a bargaining order applies must not contravene a term of the order. This is a civil remedy provision.

Serious Breach Declarations

A bargaining representative for a proposed enterprise agreement may apply to the Commission for a serious breach declaration in relation to the agreement. Generally, a serious breach declaration is available where there are serious and sustained contraventions of a bargaining order that significantly undermine the bargaining process.

An application for a serious breach declaration must be accompanied by a copy of each of the bargaining orders in relation to the agreement which the applicant alleges have been contravened.

The FWC may make a serious breach declaration in relation to a proposed enterprise agreement if an application for the declaration has been made and the Commission is satisfied that:

- one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement;
- the contravention or contraventions:
    - are serious and sustained, and
    - have significantly undermined bargaining for the agreement;
- the other bargaining representatives for the agreement have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement;
- agreement on the terms that should be included in the agreement will not be reached in the foreseeable future, and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

Reasonable alternatives exhausted

In deciding whether all other reasonable alternatives to reach agreement have been exhausted, the FWC may take into account any matter it considers relevant, including:

- whether it has provided assistance by dealing with a bargaining dispute in relation to the agreement
- whether a bargaining representative has applied to a court for an order under the civil remedy provisions in relation to the contravention or contraventions of one or more bargaining orders, and
- any findings or orders made by the court in relation to such an application.

The consequence of a serious breach declaration being made in relation to an agreement is that the FWC may, in certain circumstances, make a bargaining related workplace determination in relation to the agreement.

Bargaining Disputes

The Fair Work Act provides for several ways for bargaining representatives to deal with disputes or issues which arise during the bargaining process for a proposed enterprise agreement.

Whilst negotiating a new enterprise agreement, a bargaining representative can make an application for the FWC to deal with a dispute between bargaining representatives about the agreement.

Applying for the FWC to deal with a bargaining dispute can be a way to advance negotiations if the bargaining representatives have reached an impasse or deadlock in their negotiations (although it is not necessary before seeking the FWC's assistance).

Application to the FWC

If the proposed enterprise agreement is a single-enterprise agreement the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

Otherwise, a bargaining representative can only make an application if all of the bargaining representatives for the agreement agree.

The FWC may deal with a bargaining dispute (other than by arbitration) as it considers appropriate, including by:

- mediating or conciliating the dispute, or
- making a recommendation or expressing an opinion.

The FWC may only arbitrate the dispute if all of the bargaining representatives for the proposed agreement have agreed that it may do so.

The *Secure Jobs, Better Pay Act 2022*

The FW Act currently restrict the FWC's ability to arbitrate in respect of bargaining disputes to circumstances where there has been a serious and sustained breach of good faith bargaining, in respect of which a serious breach declaration has been made.

Under the *Secure Jobs, Better Pay Act 2022*, the FWC has been given power to make intractable bargaining declarations and arbitrate disputes in certain circumstances.

Please refer to "Fair Work Legislation Amendment Secure Jobs, Better Pay Act 2022 Summary Sheet – Industrial Action and Bargaining Disputes" for further information.

APPROVAL PROCESS - VOTING FOR THE ENTERPRISE AGREEMENT AND MAKING AN APPLICATION TO FWC FOR APPROVAL

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

Before an employer requests that employees approve and a proposed enterprise agreement by voting for the agreement, the employer must comply with certain requirements set out in the FW Act.

Pre-approval requirements

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

For example, if a grower plans to request that employees vote on the proposed agreement on Wednesday 22 March 2023, the access period will run from after midnight Tuesday, 14 March 2023 to midnight Tuesday, 21 March 2023.

During the 'access period', an employer must ensure that all employees at the time of the vote and who will be covered by the enterprise agreement are given a copy, or have access to the following:

- The written text of the agreement
- Any other material incorporated by reference in the agreement.

An employer must also take all reasonable steps to notify employees at the *start* of the access period, the time and place at which the vote will occur and the voting method that will be used.

An employer is also required to take all reasonable that the terms of the agreement, and the effect of those terms, are explained to the employees and that the explanation is provided in an appropriate manner having regard to the circumstances and needs of employees, for example taking into account needs of young employees or employees from culturally diverse backgrounds and employees who do not have a bargaining representative.

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

Voting

A grower may then request the employees employed at the time who will be covered for the agreement to approve the agreement by voting for it.

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

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

This request to vote must not be made until at least 21 days after the day on which the employees were given the NERR and employees must have been given at least 7 days' notice of the vote – as above.

Methods of voting

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

Some common voting methods are:

- attendance voting - by completing a ballot form and placing it in a ballot box, or by a show of hands at a meeting;
- postal voting – by completing a ballot form which has been posted to a nominated address and is returned by return post. Postal voting is often used for employees who are absent from work on leave at the time when an attendance vote occurs;
- online voting – by completing an electronic ballot form which may be sent to them via email, or be hosted on the employer's intranet or on an internet page;
- telephone voting – by either phoning a telephone number and voting by using the IVR (interactive voice response) or by calling a 'yes' phone number or a 'no' phone number.

You must keep a record of the voting process. When you apply for approval of the agreement, you will need to provide to the FWC:

- the date voting started;
- the date voting finished;
- the number of employees covered by the agreement;
- the number of employees who voted following the correct process; and
- the number of employees who voted to approve the agreement.

An enterprise agreement is "made" if a majority of the employees who cast a valid vote approve the enterprise agreement.

What happens if the parties cannot agree?

If a proposed enterprise agreement has been voted on and a majority of employees do not approve the agreement, the bargaining process can continue until such time as a majority of employees vote to approve the agreement.

The Fair Work Act does not limit the number of times that a proposed enterprise agreement can be put to the vote. Each time the proposed enterprise agreement is put to a vote, the relevant requirements regarding the voting process (including the requirement for an access period) must be met.

The Fair Work Act provides a way for parties to seek assistance from the FWC by making an application to deal with a bargaining dispute.

Making an Application to the FWC

Once an enterprise agreement has been made, an application must be made to the FWC for approval. An application for the Commission to approve an enterprise agreement must be made to the Commission within 14 days after the agreement is made.

The agreement is made when a majority of those employees who cast a valid vote approve the agreement.

An application for the approval of a single or multi-enterprise agreement made to the FWC must include the following documentation:

- a signed and dated copy of the agreement - A copy of an enterprise agreement is a signed copy only if it has been signed by the employer, and at least one representative of the employees, covered by the agreement;
- a completed and signed application form [Form F16]; and
- a completed and signed declaration by employer in support of the agreement [Form F17 (and its attachments)]
    - This must include a copy of the NERR provided to employees.
    - Copies of any materials provided to employees to notify them of the time and place at which the vote was to occur and the voting method to be used;
    - Copies of any materials used to explain to employees the terms of the agreement and the effect of those terms. A statement by an employer is not enough to satisfy this requirement. To help show that the employer has met this requirement they should provide, for example:
        - evidence of how the terms of the agreement, and the effect of those terms, were explained to the relevant employees;
        - copies of any comparison between the agreement and the relevant modern award,
        - evidence of how the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees.

Only a bargaining representative can apply for the approval of a single or multi-enterprise agreement. This means that the application can be lodged by:

- an employer covered by the agreement;
- a bargaining representative for the employer;
- a bargaining representative for an employee; or
- an employee organisation (such as a union).

Each employer that will be covered by an enterprise agreement must notify employees who will be covered by the agreement, through the usual means that are adopted by the employer for communicating with employees, that an application has been made to the Commission for approval of the enterprise agreement.

APPROVAL PROCESS –
FAIR WORK COMMISSION APPROVAL

If an application for the approval of enterprise agreement is made and the enterprise agreement meets the requirements of the Fair Work Act, the Commission must approve the agreement.

The FWC must be satisfied the agreement:

- has been genuinely agreed to by the employees covered by the agreement;
- cover employees who the employer chose in a fair way;
- passes the Better Off Overall Test;
- specifies a nominal expiry;
- includes a dispute settlement term;
- does not include any unlawful terms;
- does not include any designated outworker terms; and
- meets the requirements with respect to particular kinds of employees (shiftworkers, pieceworkers, school-based apprentices and school-based trainees and outworkers).

An enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that:

- the employer, or each of the employers, covered by the agreement:
    - took all reasonable steps to ensure that during the access period for the agreement, the employees were given a copy of the written text of the agreement, and any other material incorporated by reference in the agreement or that the employees had access through the access period to those materials;
    - took all reasonable steps to notify the employees, by the start of the access period for the agreement, of the time and place at which the vote will occur and the voting method;
    - took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the employees and the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees, and
    - did not request the employees to approve the enterprise agreement until 21 clear days after the last notice of employee representational rights was given;
- the agreement was made when a majority of the employees of at least one employer who cast a valid vote approved the agreement; and
- there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

The FW Act sets out various requirements as to how the FWC may proceed in considering whether to approve an enterprise agreement. The FWC may, except as provided by the FW Act, inform itself in relation to any matter before it in such manner as it considers appropriate, such as by holding a hearing.

The FWC may inform itself by inviting oral or written submissions or by requiring a person to provide copies of documents or records, or to provide any other information to the FWC.

If the FWC holds a hearing in relation to a matter, the hearing must generally be held in public. If the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason, the FWC may:

- order that all or part of the hearing is to be held in private;
- make orders about who may be present at the hearing;
- prohibit or restrict the publication of the names and addresses of persons appearing at the hearing, or
- prohibit or restrict the publication of evidence, or its disclosure to some or all of the persons present at the hearing.

Most enterprise agreement approval applications are dealt with without holding a hearing 'on the papers.'

If the agreement is approved

If the FWC approves an enterprise agreement, a copy of the Commission decision and the approved enterprise agreement must be published and must include:

- if the model flexibility term or model consultation term is taken to be a term of the agreement – that these terms are so included;
- if a union has given notice that it wants to be covered by the enterprise agreement – that the agreement covers the union, and
- if the agreement was approved after accepting an undertaking – that the undertaking is taken to be a term of the agreement.

An enterprise agreement approved by the FWC comes into operation seven days after the agreement is approved, or if a later day is specified in the agreement – that later day.

If the approval of the agreement is refused

Failure to comply with the agreement making requirements under the FW Act could lead to a refusal to approve an enterprise agreement.

The FWC may refuse to approve an agreement for a number of reasons including that:

- pre-approval requirements were not met;
- employees were not fairly chosen;
- the agreement does not pass the better off overall test, or
- undertakings that were offered would result in financial detriment or substantial change.

If the FWC refuses to approve an enterprise agreement, a copy of the decision is published.

If approval of an agreement is refused on the basis that proposed undertakings would result in substantial changes to the agreement, this does not mean that that an enterprise agreement with such changes cannot be approved.

The grower could consolidate the original agreement and the undertakings into a proposed new agreement and immediately recommence the process under the FW Act for making a new agreement.

The *Secure Jobs, Better Pay Act 2022*

Broadly, under the *Secure Jobs, Better Pay Act 2022*, the strict pre-approval requirements for an enterprise agreement under the FW Act are being repealed replaced with a broad discretion given to the FWC to determine that an agreement has been genuinely agreed by employees.

Please refer to "Fair Work Legislation Amendment Secure Jobs, Better Pay Act 2022 Summary Sheet – Enterprise Agreement Making and BOOT" for further information.

The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.