A Guide to Enterprise Bargaining
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Chapter 1: Definitions

Act means the *Fair Work Act 2009*

FWC means the Fair Work Commission

NES means the National Employment Standards

Regulations means the *Fair Work Regulations 2009*
Chapter 2: What is an Enterprise Agreement

An Enterprise Agreement is an agreement made at an enterprise level between an employer/s and their employees about their terms and conditions of employment.

An Enterprise Agreement displaces the modern award/s that otherwise would cover employees at that enterprise and can include a range of matters which are not currently included in the modern award/s which, in conjunction with the National Employment Standards (NES), form the minimum terms and conditions of employment.

Importantly, the terms of an Enterprise Agreement cannot be less favourable to an employee than the NES and must result in an employee being better off overall when compared to the relevant modern award.

An Enterprise Agreement cannot include a pay rate that is less than the pay rates in the modern award.

Although an Enterprise Agreement may provide entitlements that are more generous than the NES, if the Enterprise Agreement includes a term that is less favourable than the NES, the term has no effect. In other words, an Enterprise Agreement may give an employee more than the minimum standards provided by the NES but cannot have a term that provides a lesser entitlement or condition.

Types of Agreements

Greenfields Agreements

A greenfields agreement is an Enterprise Agreement that is made in relation to a new enterprise of an employer or employers and before any employees are employed. A greenfields agreement can be either a single-enterprise or multi-enterprise agreement.

The parties to a greenfields agreement are the employer (or employers in a multi-enterprise greenfields agreement) and one or more relevant employee associations (usually a trade union).

Multi-employer Agreement

A multi-enterprise agreement is made between two or more employers (that are not all single interest employers) and employees who are employed and to be covered by the Enterprise Agreement at the time it is made.

Single-Enterprise Agreement
A single-enterprise agreement is an agreement made between a single employer (or two or more single interest employers) and employees who are employed and to be covered by the Enterprise Agreement at the time it is made.

Single interest employers are employers that are in a joint venture or common enterprise or are related corporations. They can also be employers authorised as single interest employers by the FWC, which may be either franchisees or other employers where the Minister for Employment has made a declaration.

Operation and Coverage

An Enterprise Agreement cannot be made with one employee. There must be at least two employees to be covered by an Enterprise Agreement.

An Enterprise Agreement can be made for a maximum period of four years and must clearly identify which employees are intended on being covered by the Enterprise Agreement.

Terms and Conditions in an Enterprise Agreement

Enterprise Agreements can include a range of matters such as:

- rates of pay;
- employment conditions e.g. hours of work, meal breaks, penalty rates, overtime;
- leave entitlements;
- deductions from wages for any purpose authorised by an employee;
- any matters pertaining to the relationship between the employer and the employees;
- matters pertaining to the relationship between the employer and employee organisations covered by the agreement, and how the Enterprise Agreement will operate.

Required Terms in an Enterprise Agreement

Enterprise Agreements must include the following terms:

- a dispute resolution term that allows disputes under the Enterprise Agreement and the NES to be brought before an independent person such as the FWC;
- a flexibility term that allows an employee and their employer to agree to an individual arrangement varying the effect of the Enterprise Agreement;
- a consultation term that requires employers to consult with employees if there are major changes to the business or a change to their regular roster or ordinary hours of work;

- a nominal expiry date which is the particular date when the Enterprise Agreement will expire; it must be within 4 years of when the FWC approves the Enterprise Agreement, and

- a coverage term that explains who the Enterprise Agreement covers - eg all employees of a particular employer.

**Prohibited Terms in an Enterprise Agreement**

An Enterprise Agreement cannot include certain terms including, also known as unlawful terms, including:

- discriminatory terms;

- terms that breach the general protections provisions in Part 3-1 of the Act;

- terms that require a bargaining services fee to be paid;

- terms inconsistent with the unfair dismissal provisions in the Act;

- terms that modify the law relating to industrial action in Part 3-3 of the Act, and

- terms relating to right of entry which are not in accordance with Part 3-4 of the Act.
Chapter 3: The Fair Work Act 2009

Bargaining Representatives

A bargaining representative is a person or organisation appointed to represent the interests of a party (employer/s or employees) to an Enterprise Agreement.

As is identified in the Notice of Employee Representational Rights, the relevant trade union/s is the designated and default bargaining representative for employees unless they appoint themselves or another person as their bargaining representative.

Regulation 2.06 of the Regulations state a bargaining representative must be free from control by the employee’s employer or another bargaining representative and free from improper influence from the employee’s employer or other bargaining representative.

Section 176 of the Act sets out who can be a bargaining representative for a non Greenfield agreement.

(a) an employer that will be covered by the agreement is a bargaining representative for the agreement;

(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:

(i) the employee is a member of the organisation; and

(ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation--the organisation applied for the authorisation;

unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or

(c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;

(d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.
Bargaining Representatives – Greenfields Agreement

Section 177 of the Act sets out who can be a bargaining representative for a single employer Greenfield agreement. Specifically, a bargaining representative can be:

(a) an employer that will be covered by the agreement;

(b) an employee organisation:
   
   (i) that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and
   
   (ii) with which the employer agrees to bargain for the agreement;

(c) a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

Appointment of a Bargaining Representative

When a bargaining representative is to be appointed by an employee to be covered by the agreement, a copy of the instrument of appointment must be given to the employer.

When an employer appoints a bargaining representative, the instrument of appointment must be given to an employee to be covered by the agreement, or bargaining representative of an employee to be covered by the agreement if requested. The instrument of appointment comes into force on the day specified in the instrument of appointment.

Majority Support Determinations

A majority support determination can be sought by a bargaining representative of an employee to require an employer to commence bargaining for an Enterprise Agreement.

A majority support determination will only be successful when the FWC is satisfied that the majority of the employees who will be covered by the Enterprise Agreement want to bargain with the employer, or employers, that will be covered by the Enterprise Agreement.

Good Faith Bargaining Obligations

The Act has introduced an obligation to bargain in good faith. Once bargaining commences, each bargaining representative must bargain in good faith. The good faith bargaining requirements are to:
- recognise and bargain with the other bargaining representative involved;
- attend and participate in meetings at reasonable times;
- disclose relevant information in a timely manner (excluding confidential or commercially sensitive information);
- respond to proposals made by the other bargaining representative;
- genuinely consider the proposals of the other bargaining representatives and provides reasons for the responses;
- refrain from behaving in a way that undermines freedom of association or collection bargaining

Importantly, the food faith requirements do not require a bargaining representative to make concessions during bargaining or reach agreement on the terms that are to be included in the Enterprise Agreement.
Chapter 4: The Process

Bargaining Period

There are two ways that bargaining may begin:

- the employer and employees may agree to bargain; or

- where an employer refuses to bargain with its employees, an employee bargaining representative (ie. a trade union) may ask the FWC to determine if there is majority employee support for negotiating an Enterprise Agreement. If so, the employer will be required to bargain collectively with its employees in good faith.

Notice of Representational Rights

Once the employer agrees to be engage in bargaining, the ‘notification time’ has started. This means the employer must give notice to their employees of their right to be represented by a bargaining representative (s.173). See Notice of Employee Representational Rights (Attachment 2).

This Notice of Employee Representational Rights must be given to all employees covered by the proposed Enterprise Agreement no later than 14 days after the commencement of the notification time\(^1\). It is important to keep a record of when and how the notice was given, as it may be necessary to provide (or answer a question on the provision of the Notice to staff) that information to the FWC when lodging the Enterprise Agreement\(^2\).

An employee can appoint themselves as their bargaining representative or an organisation other than their Union, an employer can also appoint a bargaining representative (such as the LASA) or can represent itself.

The Notice of Employee Representational Rights can be given in the following methods (Reg 2.04):

- personally (by hand).

- by pre-paid post to:

\(^1\) The Notice of Employee Representational Rights must be provided to staff in plain copy and not on facility letterhead.

\(^2\) When issuing the Notice of Employee Representational Rights, it is advisable to include a simple cover letter explaining the context of the notice to their employees and who to speak to if an employee has any questions about the Notice or bargaining.
the employee’s residential address; or

a postal address nominated by the employee.

the employer may send the notice to:

the employee’s email address at work; or

another email address nominated by the employee.

on the employer’s intranet, however, the employer must notify the employee of the intranet’s link.

by fax to:

the employee’s fax number at work; or

the employee’s fax number at home; or

another fax number nominated by the employee.

on a staff notice board that is known by and readily accessible to both current and new employees.

The content of the notice must include the following (s.174):

the employee may appoint a bargaining representative;

explain that if the employee is a member of a union and they do not appoint another person as their representative, the union will automatically be their bargaining representative;

explain that the an employee must give their employer a written confirmation detailing their bargaining representative, this written document will be known as the Instrument of Appointment (s.178(2)).

All written appointments made by employees, must be given to the employer (s.178 (2)).

An employer cannot request an employee to vote for an Enterprise Agreement until at least 21 days after the appropriate Notice of Employee Representational Rights has been issued (s.181 (2)).

Access Period

An access period, is a seven (7) day period (as a minimum), ending immediately before the start of the voting process.
During the access period, the employer must give a copy of the following material to employees:

- the written text of the Enterprise Agreement; and

- any other material incorporated by reference in the Enterprise Agreement (ie. other legislation).

The employer must ensure that employees have access to the above mentioned material throughout the access period. This may best be achieved by making copies available in a staff room or accessible on a staff intranet.

At the start of the access period, the employer must also notify relevant employees of the time and place at which the vote will occur and the voting method that will be used; ie: either by ballot or electronic method (s.180).

The employer must also explain to relevant employees the terms of the proposed Enterprise Agreement including the effect of those terms on their employment (s.180 (5) of the Act). This must be done in an appropriate manner, taking into account, those employees from culturally and linguistically diverse backgrounds, young employees and employees who are not represented during the negotiations.

It is a critical employer obligation that all employees that will be voting for the Enterprise Agreement have had a reasonable opportunity to have the proposed Enterprise Agreement explained to them. Each Member will need to schedule information sessions at reasonable times and accessible locations to give each employee a fair opportunity to attend if they wish to do so.

**Voting**

At least 21 days must have passed since the Notice of Employee Representational Rights was given to employees before the proposed Enterprise Agreement can be put to a vote (s.181(2)).

Once the Enterprise Agreement has been negotiated and is ready to be voted on, the employer must, at least 7 days before the vote:

- provide employees with a copy of the proposed agreement and any other material that is incorporated by reference into the Enterprise Agreement;

- notify employees of the time and place the vote will take place and the voting method that will be used (this should be done in writing);

- take all reasonable steps to ensure that the terms of the Enterprise Agreement and the effect of those terms have been explained to the employees covered by the
Enterprise Agreement in a manner that takes into account the particular circumstances of the employees.

It is important to keep records of the steps taken to comply with these requirements as this information will be included in information submitted to the FWC when applying for approval of the Enterprise Agreement.

A common and reliable method is using the services of the Australian Electoral Commission (AEC). The most inexpensive service they offer is a postal ballot. For more information about the AEC, go to their website www.aec.gov.au or telephone 13 23 26. Other voting options include SMS Voting, Telephone Voting, and internet voting.

Once the voting is complete, the Enterprise Agreement will only be made when the majority of those employees covered by the Agreement cast a valid vote, approving the Agreement (s.182 (1)). This means the majority of staff who voted, must vote yes to the introduction of an Enterprise Agreement, for an Enterprise Agreement to be made.

Please note voting is not compulsory and an employer must choose a voting process that is available to all employees and ensures employees remain anonymous throughout the voting process.

**Lodging the Enterprise Agreement**

Once an Enterprise Agreement is made, a bargaining representative for the Enterprise Agreement must apply to the FWC for approval of the Enterprise Agreement.

The application must be lodged with the FWC within 14 days of the successful vote.

The application must be accompanied by:

- a signed copy of the Enterprise Agreement;
- any declarations that are required by the FWC Rules or Regulations to accompany the application;
- Form F16 – Application for Approval of Enterprise Agreement;
- Form F17\(^3\) – Employers declaration in support of an application for approval of an Enterprise Agreement;

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\(^3\) F17 is a statutory declaration and can only be witnessed by an authorised delegate under the *Statutory Declarations Act 1959* including a legal or medical practitioner, a Justice of the Peace, a notary public, a police officer, a minister of religion, a pharmacist or a full time teacher. For a complete list of signatories please go to the Australian Government Attorney General’s Department [website](#).
Form F18 – Statutory declaration of employee organisation in relation to an application for approval of an Enterprise Agreement.

The application can be lodged using any of the five lodgement methods:
- email (10 megabyte restriction);
- e-filing;
- post;
- fax, or
- in person.

Approval Process – The Better off Overall Test

Once the application for approval of an Enterprise Agreement has been lodged, the Triage team of the FWC will undertake a comparison of the Enterprise Agreement against the relevant Modern Award/s. The purpose of this assessment is to ascertain whether employees will be better off overall under the Enterprise Agreement as compared with the minimum terms detailed in Awards. This assessment is called the Better Off Overall Test (BOOT).

Following the completion of this assessment, the Triage team will provide their assessment findings to the allocated Member of the FWC to consider when determining whether the Enterprise Agreement should be approved.

To approve an Enterprise Agreement, the FWC must be satisfied:
- the Enterprise Agreement has been made with the genuine agreement of those involved;
- the Enterprise Agreement passes the BOOT;
- the Enterprise Agreement does not include any unlawful terms;
- the group of employees covered by the Enterprise Agreement was fairly chosen;
- the Enterprise Agreement specified a date as its nominal expiry date (not more than 4 years after the date of approval by the FWC), and
- the Enterprise Agreement has the mandatory terms (dispute settlement procedure, flexibility clause and a consultation clause),
In doing so, the FWC has the power to do any of the following:

- approve the Enterprise Agreement;
- refuse the Enterprise Agreement;
- seek further information from either party, for example, the commissioner may seek an undertaking from the employer; and/or
- in the most exceptional circumstances, refer the matter to a hearing.

The FWC’s power is discretionary, which means there are no set timeframes for approval.

Once the FWC approves the Enterprise Agreement, the Enterprise Agreement will take effect seven (7) days after the approval is given unless the Enterprise Agreement states a later commencement date. The intention behind the 7 day period is to provide an employer with an opportunity to transition onto the Enterprise Agreement.

This means that once you are notified that the Enterprise Agreement has been approved, you will have a minimum of 7 days in which to implement the Enterprise Agreement and commence your employees on the new employment terms and conditions.

**Undertakings**

Where the FWC is uncertain whether the Enterprise Agreement satisfies the BOOT it may require written clarification or attendance at a hearing to discuss the Enterprise Agreement and relevant Award/s.

The FWC may approve an Enterprise Agreement that does not satisfy the BOOT if the FWC is satisfied that written undertakings made by the employer will result in employees, covered by the Enterprise Agreement, are in fact better off under the Enterprise Agreement.
Chapter 5: Terminating or Varying an Enterprise Agreement

An Enterprise Agreement can be terminated by the agreement of both parties or by one party to an Enterprise Agreement after the nominal expiry date.

Both types of termination processes are detailed below.

Terminating an Enterprise Agreement by Employers and Employees

An Enterprise Agreement can be terminated by employers and employees.

An employer can request the employees covered by an Enterprise Agreement to approve a proposed termination of the agreement by voting for it. Before making the request, the employer just notify the employees of the time and place the vote will occur, the voting method that will be used and give the employees a reasonable opportunity to decide whether they want to approve the proposed termination.

A termination is agreed when a majority of employees who cast a valid vote approve the termination of the Enterprise Agreement. After a valid vote outcome is received the employer must apply to the FWC to terminate the Enterprise Agreement within 14 days of the vote outcome.

Termination of an Enterprise Agreement has no effect unless approved by the FWC.

Terminating an Enterprise Agreement after the Nominal Expiry Date

Under s 225 of the Act an employer, employee or employee organisation (ie trade union) covered by the Enterprise Agreement may apply to the FWC terminate the Enterprise Agreement if it has passed its nominal expiry date.

The FWC must terminate the Enterprise Agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

   (i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

   (ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.
Chapter 6: LASA Consultancy Services

Enterprise Bargaining

LASA can assist members throughout the bargaining process. Our Enterprise Bargaining Consultancy Services includes:

- providing consulting services, such as reviewing clauses, wage tables, research, to members who bargain independent of LASA;

- acting as the bargaining representative for a member and assisting with the development and bargaining of an enterprise agreement including negotiating with employee representative/s, drafting clause wording for an Enterprise Agreement, developing wage and allowance tables, and assisting members comply with their obligations under the Act.

For information about the LASA Bargaining Services please contact a member of the Employment Relations team on:

Ph: 02 9212 6922
Email: employmentrelations@nswact.lasa.asn.au.

Lodgment

LASA can lodge enterprise agreement approval forms on behalf of a member and represent them in proceedings for approval of an Enterprise Agreement at the FWC.

This service is only available where LASA has been involved in the development of the Enterprise Agreement.

Education Sessions

LASA can develop education for a member to present to staff to satisfy the requirements under s 180(5) & (6) of Act.

LASA can develop and present education to staff to satisfy the requirements under s 180(5) & (6) of Act.

It will be the employer’s obligation to arrange translators for any employees from a non English speaking background or provide options for education for staff that are under the age of 21 or have difficulty reading. LASA is unable to provide this service for you.
Chapter 7: Relevant Links

FWC Enterprise Bargaining Benchbook

Aged Care Award 2010

Nurses Award 2010

Health Professionals and Support Services Award 2010

Social, Community Home Care and Disability Services Industry Award 2010

Fair Work Act 2009

Fair Work Regulations 2009

Enterprise Bargaining Forms

Notice of Employee Representational Rights (NERR)

NERR Guide
**Chapter 8: Industry Enterprise Agreements**

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<td>Bluecross Community and Residential Services Group</td>
<td>Enterprise Agreement 2014</td>
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<td>Enterprise Agreement 2016</td>
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<td>Benetas Community Services</td>
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<td>Estia Investments Pty Ltd T/A Estia Health</td>
<td>Enterprise Agreement 2015</td>
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<td>UnitingCare Health &amp; QNU Nurses</td>
<td>Enterprise Agreement 2015 – 2018</td>
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<td>McKenzie Aged Care Group</td>
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<td>Moran Australia (Residential Aged Care) Victoria</td>
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<td>The Forrest Centre Home Care</td>
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<td>Southern Cross Care (WA) Inc. HomeCare and Respite Services</td>
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<tr>
<td>Mayo Home Nursing Service and Hunter Nursing Nurses and Support Services</td>
<td>Enterprise Agreement 2016</td>
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Attachment 1 - Notice of Employee Representational Rights

Note to Members: Do not use this version of the document. Use the version on FWC’s website.

Schedule 2.1—Notice of employee representational rights
(regulation 205)

Fair Work Act 2009, subsection 174(1A)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement [(name of the proposed enterprise agreement)] which is proposed to cover employees that [proposed coverage].

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies—includel]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union’s status as your representative.

[If a low-paid authorisation applies to the agreement—includel]

Fair Work Commission has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union’s status as your representative, or you are a member of another union that also applied for the authorisation.

[If the employee is covered by an individual agreement-based transitional instrument—includel]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.