



FACT SHEET

Enterprise Agreements

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Under the *Fair Work Act 2009* (the 'Act'), formal registered workplace agreements are known as Enterprise Agreements ('EA's).

An EA is a legally binding industrial instrument which is negotiated by an employer with either its employees or with the relevant union/s, association/s, or other appointed bargaining agents/persons. An EA only comes into effect once approved by the Fair Work Commission (the 'FWC'). Where there is no EA in place, the relevant Modern Award remains the governing industrial instrument (unless another existing formally registered workplace agreement or EA applies).

TYPES OF AGREEMENTS

Under the Act, three types of EA may be made. These are as follows:

SINGLE-ENTERPRISE AGREEMENTS

Bargaining for a single-enterprise agreement occurs between an employer, or, 2 or more employers that are single interest employers, and employees who are employed at the time the Agreement is made, or with one or more relevant employee organisations. In this instance there is no requirement for the parties to seek authorisation or notify the FWC when they wish to bargain for an EA.

Section 172(5) of the Act defines a single interest employer as being where two or more employers are:

- (a) engaged in a joint venture or common enterprise; or
- (b) related bodies corporate; or
- (c) specified in a single interest employer authorisation that is in operation in relation to the proposed EA concerned.

Single interest employers will be able to bargain together for a single-enterprise agreement where they operate in a related way or share a common interest.

It should be noted that in accordance with the *Fair Work Amendment Act 2012*, employers are prohibited from making an EA with a single employee in accordance with s172(6) of the Act.

MULTI-ENTERPRISE AGREEMENTS

A multi-enterprise agreement is created where two or more employers, who are not single-interest employers, make an EA with the employees who are employed at the time the Agreement is made or with one or more relevant employee organisations.

GREENFIELDS AGREEMENTS

A Greenfields Agreement may be made by a prospective employer for a new enterprise or business which has not yet engaged any employees. A Greenfields Agreement must be made with one or more relevant employee organisations if the EA relates to a genuine new enterprise that the employer/s are establishing and the employer/s have not employed any of the persons who would be covered by the Agreement.

For a Greenfields Agreement to be approved, section 187(5) requires that the FWC is satisfied that the relevant employee organisation/s that will be covered are entitled to represent the industrial interests of the majority of the employees (who will be covered by the Greenfields Agreement) and that it is in the public's interest to approve the Greenfields Agreement.

WHAT DO ENTERPRISE AGREEMENTS DO?

EAs can override a Modern Award or pre-existing formally registered workplace agreement or EA.

AGREEMENT REQUIREMENTS

An EA may be made where it concerns one or more of the following permitted matters:

- Matters pertaining to the relationship between an employer that will be covered by the EA and that employer's employees who will be covered by the EA;
- Matters pertaining to the relationship between the employer or employers, and the employee organisations, that will be covered by the EA;
- Deductions from wages for any purpose authorised by an employee who will be covered by the EA; and/or
- How the EA will operate.

All EAs are required to include:

- The nominal expiry date of the EA (which can be no more than 4 years after the date on which the FWC approves the EA);
- A dispute settlement process;
- A flexibility term; and
- A clause within the EA which ensures that employees are consulted about major workplace changes.

Where an EA does not include a flexibility or consultation clause, the default model terms prescribed by the *Fair Work Regulations 2009* (the 'Regulations') will apply.

It should also be noted that it is unlawful for an EA to include a term which prescribes a method that the employee can use to opt out of an EA if the Agreement covers the employee and employer, and applies to the workplace.

HOW IS BARGAINING INITIATED?

There are four ways enterprise bargaining may be initiated:

1. Employer Agrees

Bargaining may begin when an employer initiates bargaining or when the employer agrees to bargain upon the request of employees.

Where an employer initiates bargaining, they are required to provide a notice to employees advising them of the bargaining period being initiated, and advising employees they can appoint a bargaining agent to bargain on their behalf. See '*Representation*' below.

2. Scope Order

A bargaining representative for a proposed single-enterprise agreement may apply to the FWC for a scope order. An application for a scope order may only be made where the bargaining representative has concerns that bargaining for the EA is not proceeding efficiently or fairly and has concerns that the EA will not cover appropriate employees.

A bargaining representative can only apply for a scope order once they have taken all reasonable steps to give written notice to the other bargaining representatives involved in the EA. This notice must set out all concerns in relation to the EA and must provide for a reasonable time for the bargaining representative to respond to the concerns raised. A scope order must not be made unless the relevant bargaining representative has failed to respond appropriately to the notice and concerns raised.

3. Majority Support Determination

A bargaining representative may apply to the FWC for a Majority Support Determination. Applying for a Majority Support Determination signifies that a majority of employees who will be covered by the EA want to bargain with the employer.

The FWC will only grant a Majority Support Determination where they are satisfied that:

- The majority of employees want to bargain;
- The employer/s that will be covered by the EA have not yet agreed to bargain, or initiated bargaining;
- The group of employees who will be covered by the EA was fairly chosen; and
- It is reasonable in all the circumstances to make the Determination.

The determination will come into operation on the date on which the FWC approves it.

4. Low-Paid Bargaining Authorisation

The primary objective of a low-paid bargaining authorisation is to assist and encourage low-paid employees and their employers (who have not collectively bargained before) to make an EA that meets their needs. The low-paid authorisation will facilitate multi-employer bargaining for the “low paid” who have not had access to the benefits of, or who face substantial difficulty, undertaking collective bargaining at an enterprise level.

To further assist low-paid employees and their employer, the FWC will assist them in identifying improvements to productivity and service delivery through bargaining for an EA that covers 2 or more employers, while taking into account specific needs of individual enterprises.

A bargaining representative for an EA or an employee organisation which is entitled to represent the interests of the employees that will be covered by the EA may apply to the FWC for a low-paid authorisation. The application must specify:

- (a) The employers that will be covered by the EA; and
- (b) The employees who will be covered by the EA.

Once the FWC has made an authorisation to low-paid bargaining it is important to note that:

- The authorisation will list the employers and employees who will be covered by the EA;
- The authorisation will take effect on the day it is issued;
- A variation can be sought to remove an employer from the authorisation; and
- A variation can be made to include a new employer in the authorisation.

REPRESENTATION

Except in relation to a Greenfields Agreement, it is a requirement under s173 of the Act that an employer who will be covered by a proposed EA must take reasonable steps to notify employees of their right to be represented by a bargaining representative as soon as practicable, and no later than 14 days from the time bargaining commences (refer to previous section ‘*How is Bargaining Initiated?*’). Employers are required to give the relevant employees a notice of their representational rights and this notice is prescribed in the Regulations. In accordance with s174(1) of the Act, the notice of representational rights given to the employee must only contain the content and be given in the form as specified by the Regulations.

A bargaining representative for a proposed EA, that is not a Greenfields Agreement, may be:

- An employer that will be covered by the EA;
- An employee organisation where the employee is a member of the organisation;
- Any representative of an employee where the employee appoints, in writing, that person as his or her bargaining representative for the EA;
- Any representative of an employer where the employer appoints, in writing, that person as his or her bargaining representative for the EA.

Importantly, the right to representation has meant that, unless the employee has appointed another person as their bargaining representative for the EA, or has revoked the status of the employee organisation as their bargaining representative for the EA, the employee organisation (ie. Union) will be the default bargaining representative of the employee where they are, or are eligible to be, a member of that employee organisation. Employee organisations or representatives of an employee organisation (i.e. Union) cannot act as a bargaining representative for the employee unless that union has coverage to represent that particular employee/industry.

GOOD FAITH BARGAINING

A bargaining representative for a proposed EA must meet good faith bargaining requirements.

Good faith bargaining requirements include:

- Attending, and participating in meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- Recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the EA or to reach agreement on the terms that are to be included in the EA.

Bargaining Order

In the instance where a bargaining representative has concerns that one or more of the bargaining representatives for the Agreement have not, or are not meeting the good faith bargaining requirements, an application for a bargaining order may be made to FWC. Contravention of a term in a good faith bargaining order made by FWC will result in civil remedies.

APPROVAL PROCESS

Pre-Approval Process

Employers have a duty to take reasonable steps to provide employees who will be covered by the EA with the written text or access to copies of the proposed EA and any other material made reference to within the EA.

Employers must ensure access to this material during the 7 day access period, with the access period ending the day immediately before voting commences. An employer has an obligation to take reasonable steps to explain the terms and effect of the EA to affected employees. Upon consulting employees, employers must act in an appropriate manner whereby they take into account employees particular circumstances, for example non-English speaking employees and those without a bargaining representative.

Employees Approval or Disapproval of the Agreement

The employer must take all reasonable steps to notify the relevant employees by the start of the access period for the EA of the time and place at which the vote will occur and the voting method that will be used. Such a request to vote for the EA must not be made earlier than 21 days after the date on which the employer notified employees of their rights to be represented and no less than 7 clear days after employees have been notified of the vote.

The EA will be approved where the majority of employees agree to it.

For the vote:

- (a) A returning officer should be chosen to conduct the vote; and
- (b) The returning officer should read the Ballot Rules and the Returning Officer instructions and issue a ballot to each employee on the ballot day; and
- (c) A majority plus one vote (ie 50% + 1) of eligible employees that vote on the EA must approve it; and
- (d) After the vote, the returning officer must count the votes and record the results on a Certificate of Returning Officer form. The returning officer's signature should be witnessed by another person (not the employer representative).

FWC Approval of an Agreement

The employer must lodge the application for approval with the FWC within 14 days of the EA being approved by vote. The application must be accompanied by a signed copy of the EA and any declarations that are required under the procedural rules.

An EA will only be approved where the FWC is satisfied that it has been:

- genuinely agreed to by the employees covered by the EA;
- genuinely agreed to by each employer covered by the EA;
- the terms of the EA do not contravene the National Employment Standards (the 'NES'); and
- the EA passes the 'Better Off Overall Test' (*see below*).

Where an EA does not cover all the employees of the employer, the FWC must be satisfied that the group of employees covered by the EA were fairly chosen.

Further, the FWC must be satisfied that the EA has been genuinely made and that all requirements have been met, for example the pre-approval steps, notice to employee of right to representation etc.

Prior to the EA being approved, the FWC must be satisfied that by approving the EA, good faith bargaining will not be undermined where there is a scope order in operation.

Better Off Overall Test (BOOT)

An EA must pass the better of overall test ('BOOT').

An EA will pass the BOOT where the FWC is satisfied that each award covered employee and each prospective award covered employee would be better off overall if the EA applied than if the relevant modern award applied.

A Greenfields Agreement must also pass the BOOT. Each prospective award covered employee must be better off overall if the Agreement applied than if the relevant modern award applied.

Section 193(7) of the Act provides that, for the purposes of determining whether an EA passed the BOOT, if a class of employees to which a particular employee belongs would be better off if the EA applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employees would be better off overall if the EA applied to the employees.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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