PART 1: INTRODUCTION

The aims of the Fair Work Act 2009 (Cth) include achieving productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by good faith bargaining obligations. Importantly, employers need to be aware that they can no longer simply avoid enterprise agreement negotiations.

The ultimate aim of an enterprise agreement should be to increase efficiency and effectiveness of the business to the advantage of both the employer and the employee. From an employer’s perspective it is important to remain focused on the organisation’s objectives, but you must also keep two other crucial issues in mind:

► the objectives of employees and unions, so that appropriate responses can be made; and
► your obligations to your employees.

Balancing all three is a challenge, and there is also the potential for Fair Work Commission (FWC) intervention. That’s why early strategic advice is crucial for minimising costs and ensuring a speedy approval for your enterprise agreement, while increasing the benefits to you and your employees.

In these Guidelines, we set out the legal obligations that managers and IR practitioners need to know when negotiating an enterprise agreement, and some practical tips on negotiation strategy, notification requirements and good faith bargaining. It is important to note, however, that the contents of these Guidelines do not constitute legal advice and should not be relied upon as a substitute for formal legal advice.

We cover:

► types of enterprise agreements;
► mandatory, unlawful and permissible content of enterprise agreements;
► the bargaining process including good faith bargaining; and
► the approval process.

As an enterprise agreement can bind an employer for up to four years, it is important that your management understands the bargaining process. Significant preparation and planning is the key to achieving an enterprise agreement that you and your organisation can be proud of and that will stand the test of time.

PART 2: LEGAL FRAMEWORK

Enterprise agreement options under the Fair Work Act 2009

Under the Fair Work Act, employers can make one of the following types of enterprise agreements:

Single-enterprise agreements

Single-enterprise agreements are made between a single employer, or two or more employers that are engaged in a joint venture or are related bodies corporate. In limited circumstances, employers may apply to the Minister for a declaration that they may bargain as single-interest employers. To be eligible for a declaration, the employers need to have a close connection with one another. Examples include franchisees, schools in a common education system or public entities providing health services.

Multi-enterprise agreements

Multi-enterprise agreements are made between two or more employers and groups of their employees.

Greenfields agreements

A greenfields agreement can be made for either a single-enterprise agreement or a multi-enterprise. Greenfields agreements are made between an employer and a relevant union and must be made before the employer employs any of the persons who will be necessary for the normal conduct of the new enterprise and who will be covered by the enterprise agreement.

A relevant union is a union that is entitled to represent the industrial interests of one or more employees who will be covered by the agreement.

A greenfields agreement must relate to a “genuine new enterprise”. A genuine new enterprise includes a genuine new business, activity, project or undertaking. However, a greenfields agreement cannot be made where an existing business proposes to take over another business, as that business would not be considered a genuine new enterprise.
Individual agreements under the Fair Work Act

The Fair Work Act provides limited scope for employers to offer individual terms and conditions to an employee through individual flexibility agreements. For example, an employer and employee could agree to vary an employee’s ordinary span of hours. This could allow the employee to start work earlier and finish work earlier, so that the employee could do things such as pick their children up from school or coach a junior sporting team.

The individual flexibility term must genuinely be agreed to by the employer and the employee and must result in the employee being better off overall than if no individual flexibility agreement was reached. It is a requirement of the Fair Work Act that a term providing for individual flexibility agreements must be included in each modern award and every enterprise agreement.

Common law contracts

A common law contract is fundamental to every employment relationship. There is scope under the Fair Work Act for a common law contract to operate in some circumstances without the employee being regulated by an enterprise agreement or a modern award. If this is an area of interest you should seek further advice.

Coverage – who will be covered?

The enterprise agreement must clearly state who will be covered by the proposed enterprise agreement and who will be excluded, for example supervisors and managers.

It is a requirement that the employees to be covered by the enterprise agreement have been fairly chosen. This means the employees covered by the enterprise agreement must be geographically, operationally or organisationally distinct.

The Fair Work Act states that an enterprise agreement cannot be made with a single employee nor can the enterprise agreement allow employees to elect (unilaterally or otherwise) not to be covered by the enterprise agreement (an opt-out clause).

Content of enterprise agreement

The Fair Work Act is proscriptive when it comes to what can be included in an enterprise agreement.

An enterprise agreement must contain:

► a coverage clause, which identifies the parties to be covered by the enterprise agreement;
► a nominal expiry date, which is no later than four years after the day on which the FWC approves the enterprise agreement;
► a dispute resolution procedure, which allows the FWC to resolve any matters arising under the enterprise agreement and the National Employment Standards (NES). The term must require or allow the FWC, or another person who is independent from the parties, to settle a dispute. The term must also allow for the representation of employees during the dispute;
► an individual flexibility term, which would allow an employer and employee to make specific individual arrangements to meet the genuine needs of the employer and the particular employee; and
► a consultation term that requires the employer to consult with employees about major workplace changes or change to regular rosters or ordinary hours of work that is likely to have a significant effect on the employees and allows for the representation of the employees for the purposes of that consultation.

If a flexibility, a consultation or a dispute resolution term is not included in an enterprise agreement, the model consultation, model flexibility or model dispute resolution term will be taken to be part of the enterprise agreement.

The three model terms are set out in the Schedules at the end of these Guidelines.

The FWC will not approve an enterprise agreement unless it contains the mandatory terms listed above.

An enterprise agreement may contain:

► any terms permitted by the NES;
► any terms that are ancillary or incidental to the NES, for example, terms that provide an employee may take twice as much annual leave at half the rate of pay;
► any terms that supplement the NES, for example, increase the amount of weeks of leave available;
► deductions from wages authorised by the employee, for example, terms relating to salary sacrifice or payments to a superannuation fund;
matters concerning the relationship of the employer and employees, such as the terms of payment of wages or terms of particular staffing levels; or

matters concerning the relationship of the employer and employee organisations, such as terms about union training leave and terms that provide for employees to have paid time off to attend union meetings or participate in union activities.

Examples of terms that would not be considered to pertain to the relationship between the employer and employees include terms that would contain a general prohibition on the employer employing casual employees or terms relating to corporate social responsibility.

An enterprise agreement must not contain:

- terms that require a party to breach the law;
- unlawful terms, which includes terms that discriminate against an employee covered by the enterprise agreement for reasons including the employee’s race, colour, sex, sexual preference, age, disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- a term which is objectionable. An objectionable term includes one which permits or requires a contravention of the Fair Work Act general protections provisions or requires the payment of a bargaining services fee;
- a term which is inconsistent with the unfair dismissal provisions of the Fair Work Act;
- a term that modifies the industrial action provisions in the Fair Work Act in an impermissible way. For example, terms that would allow industrial action to occur prior to the nominal expiry date of an enterprise agreement;
- terms relating to right of entry which are not in accordance with the provisions in the Fair Work Act;
- terms that breach the NES, which relate to maximum weekly hours, requests for flexible working arrangements, parental leave, annual leave, personal/carer’s leave, community service leave, long service leave, public holidays; redundancy pay, and the provision of a Fair Work Information Statement; or
- a term that requires superannuation contributions for a default fund employees to be made to a superannuation fund that:
  - offers a MySuper product;
  - is an exempt public sector scheme; or
  - is a fund of which a relevant employee is a defined benefit member.

There are narrow exceptions to the requirement that an enterprise agreement must not contain any unlawful terms. Examples include discrimination which relates to the inherent requirements of the position or a religious institution, and discrimination in relation to payment of wages for juniors, employees with a disability or to whom training arrangements apply. You should seek advice if you’re considering any of these circumstances.

Where an enterprise agreement contains unlawful terms, or terms that are not about permitted matters, the clauses will have no effect in the final enterprise agreement, even if the enterprise agreement is approved by the FWC. However, there is a risk that the FWC will not approve an enterprise agreement that contains unlawful clauses.

While it may be relatively straightforward to avoid unlawful terms in your enterprise agreement, specific legal principles exist as to whether certain terms may be included. This is important, as while such terms may appear in the enterprise agreement, their validity may not be known until they are tested by the FWC. Consequently, an employer might think it is acting in accordance with their enterprise agreement, only to later find that such clauses were invalid. This could result in significant fines and/or penalties.

You should seek advice on the proposed contents of your enterprise agreement.
PART 3: BARGAINING RIGHTS AND RESPONSIBILITIES

The Fair Work Act imposes particular requirements on employers and employees throughout the negotiation process. These include obligations to provide a Notice of Representational Rights, and to bargain in good faith once negotiations have commenced.

Notice of Representational Rights

Under the Fair Work Act, both an employer and an employee have the right to appoint a person of their choice to act as their bargaining representative in negotiations for an enterprise agreement.

An employer must “take all reasonable steps” to give employees a copy of the Notice in the prescribed form of their right to appoint a bargaining representative. These steps could include sending an email to each employee with the Notice attached or posting the Notice on a bulletin board that is known and accessible to the relevant employees. This must be done within 14 days after the employer agrees to bargain (or is required to bargain under a majority support determination). The requirement to give the Notice to employees does not apply to a greenfields agreement.

The Notice must contain the content prescribed by the regulations and be in the form prescribed by the regulations. The Notice must not contain any other content. However, this does not prevent an employer providing additional material to employees at the same time such as a nomination form or information about the bargaining process.

The Notice is included at Schedule 4.

Bargaining representatives

Bargaining representatives can be:
- an employer; or
- an employee that will be covered by the enterprise agreement; or
- a union; or
- a representative appointed by an employer; or
- a representative appointed by an employee.

Whoever they are, a bargaining representatives must be appointed in writing. An employee to be covered by the enterprise agreement may appoint, change or revoke their nomination for a bargaining representative at any time.

Bargaining representatives are entitled to bargain for enterprise agreements and depending on the type of enterprise agreement will usually be entitled to apply for (among other things) protected action ballot orders, bargaining orders, majority support determinations, scope orders and serious breach declarations. It is important to remember that an employer must not refuse to recognise or bargain with a bargaining representative.

As part of their responsibilities, bargaining representatives must meet the good faith bargaining requirements.

If an employee does not appoint a bargaining representative, and the employee is a member of a union, the employee's union will automatically be the bargaining representative for that employee. As an employer is automatically a bargaining representative for a proposed enterprise agreement, the employer will be a bargaining representative unless they appoint someone else.

Majority Support Determination

Under the Fair Work Act, both employees and employers have a right to initiate bargaining for an enterprise agreement. However, if a majority of employees want to bargain for a single-enterprise agreement and the employer refuses they can request that the FWC make a Majority Support Determination.

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; and
- an employer who will be covered by the enterprise agreement has not agreed to bargain; and
- 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.

The FWC has absolute discretion in deciding the method of working out whether a majority of the employees want to bargain, which could include by a secret ballot, survey or a petition.
Once a majority support determination comes into force, an employer will have 14 days to provide employees with the Notice.

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.

While an employer will be required to bargain if the FWC issues a Majority Support Determination, there are different strategic considerations when you’re responding to bargaining as opposed to initiating it. You should consider carefully the potential advantages and disadvantages of initiating or responding to bargaining before deciding on your negotiating strategy.

**Good faith bargaining**

Under the Fair Work Act bargaining representatives are required to meet the good faith bargaining requirements when negotiating for a proposed enterprise agreement.

These requirements regulate the process and conduct of negotiations, but do not require parties to make concessions or reach an agreement.

The good faith bargaining requirements are:

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

The term “capricious or unfair conduct” may constitute:

► failing to recognise a bargaining representative;
► not allowing an employee who is a bargaining representative to attend meetings;

► engaging in detrimental conduct towards an employee because the employee is a bargaining representative; or
► preventing an employee from appointing their own representative.

Opinions have differed over the effect of the requirement that parties disclose relevant information. One view is that an employer will only be required to disclose information that is reasonably necessary to enable discussions to occur. Another view is that all relevant information will need to be disclosed which is likely to lead to disputes over whether particular documents are commercially sensitive, or not. While the good faith bargaining requirements do not require parties to reach an agreement which they do not accept, or make concessions during bargaining, the requirements could work to exert significant pressure on parties and the bargaining representatives involved in the process. This is especially so considering that the parties must provide reasons for their responses. The bargaining requirements do not apply to the process of varying or terminating an enterprise agreement.

Failure to comply with the good faith bargaining provisions can result in either:

► The FWC making orders about a party’s actions in the bargaining process; and if further breaches occur could lead to;
► The FWC arbitrating an outcome through making a workplace determination (see further discussion below).

You should seek legal advice about the effect that the good faith bargaining requirements will have on your negotiation strategy, particularly given the possible consequences of being found to have breached the requirement.

**Low-paid bargaining**

A special stream of bargaining is available only for low-paid employees, to assist and encourage them and their employers to make an enterprise agreement that meets their needs.

The Fair Work Act does not define “low-paid employees”; access to the low-paid multi-enterprise bargaining stream will be limited to those employers and employees covered by a low-paid authorisation obtained from the FWC, which is yet to grant one. Either a bargaining representative to the enterprise agreement or a relevant employee association is entitled to apply for a low-paid authorisation. An authorisation may be granted where a multi-enterprise agreement is being negotiated with low-paid employees.
In deciding whether to make a low-paid authorisation, the FWC must consider matters related to the historical and contemporary collective bargaining practices in the industry where the authorisation is being sought. The FWC must also consider the likely success of the parties agreeing to an enterprise agreement if the authorisation is granted. An employer could object to being covered by an authorisation, for example, if it has a history of successful collective bargaining outcomes.

If the authorisation is granted, the FWC may on its own initiative, take action to facilitate bargaining for the enterprise agreement. The type of assistance the FWC may provide is limited to that as if it were dealing with a dispute. This may include organising conferences or assisting parties with the negotiation process. It does not, however, allow the FWC to arbitrate an outcome.

The authorisation also means that unlike multi-enterprise agreement making generally, employers specified in a low-paid authorisation will be obliged to bargain in good faith and will be required to give employees a notice of their right to appoint a bargaining representative.

The FWC may also make low-paid workplace determinations, which are discussed in detail below.

Bargaining orders

If a bargaining representative does not meet the good faith bargaining requirements, another bargaining representative may apply to the FWC for a bargaining order. Contravention of a bargaining order is a serious matter, which is punishable by a maximum $51,000 fine per breach, and other court orders.

A bargaining representative may only apply for a bargaining order if the bargaining representative has concerns that:

► one or more of the bargaining representatives for the enterprise 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 enterprise agreement.

The bargaining representative must also give written notice setting out these concerns to the relevant bargaining representatives, give the relevant bargaining representatives reasonable time to respond to those concerns, and consider whether the relevant bargaining representatives have responded appropriately to those concerns.

The FWC will not make a bargaining order unless it is satisfied of these matters.

When making a bargaining order, the FWC must be satisfied that one of the following applies:

► the employer have agreed to bargain, or have initiated bargaining for the enterprise agreement;
► a Majority Support Determination for the enterprise agreement is in operation;
► a scope order for the enterprise agreement is in operation;
► all of the employers are specified in a low-paid authorisation that is in operation for the enterprise agreement.

The low threshold required for the FWC to make a bargaining order makes it all the more important that you adhere to your good faith bargaining obligations.

Content of bargaining orders

A bargaining order must specify all or any of the following:

► details of actions and requirements to be taken by bargaining representatives to meet the good faith bargaining requirements;
► requirements to be imposed upon bargaining representatives to ensure they do not behave in a manner that would constitute “capricious or unfair conduct that undermines freedom of association or collective bargaining”;
► actions to be taken by bargaining representatives that deal with capricious or unfair conduct; and
► such matters as the FWC considers appropriate to promote efficient and fair bargaining.

By way of an example, a first good faith bargaining order issued by the FWC required an employer to cease conducting a ballot with its employees as to whether the employees wanted a new enterprise agreement, and also to meet with the union four times over a two week period, with the length of meetings to be determined by the bargaining representatives.
A bargaining order may also contain:

► an order excluding a bargaining representative from bargaining;
► an order requiring some or all of the bargaining representatives for the proposed enterprise agreement to meet and appoint one of them to represent the others in bargaining if there are too many bargaining representatives;
► an order not to terminate, or to reinstate, an employee whose employment has been terminated for reasons relating to a failure by a bargaining representative to meet the good faith bargaining requirements.

To minimise the chances of a successful bargaining order being made against you, you should ensure that you do not breach any good faith bargaining requirements, have systems for record-keeping and responding to proposals, and develop a negotiation strategy before you begin bargaining.

Scope orders

Alternatively, if a bargaining representative has concerns that bargaining is not proceeding efficiently and fairly, and considers that the enterprise agreement will not cover appropriate employees, that bargaining representative may apply to the FWC for a scope order.

A scope order can only be made for a single-enterprise agreement.

Before applying for a scope order, a bargaining representative must give written notice setting out their concerns to the relevant bargaining representatives for the enterprise agreement, give the relevant bargaining representative a reasonable time to respond to these concerns and it must be considered that the relevant bargaining representatives have not responded appropriately.

The FWC may make a scope order if it is satisfied that:

► a bargaining representative has contravened a bargaining order for the enterprise agreement; and
► contravention/s of the bargaining order is serious and sustained and has significantly undermined bargaining for the enterprise agreement; and
► the other bargaining representatives for the enterprise agreement have exhausted all other reasonable alternatives to reach agreement on the terms to be included in the enterprise agreement; and
► agreement on the terms that should be included in the enterprise agreement will not be reached in the foreseeable future; and
► it is reasonable in all the circumstances to make the declaration.

The consequences of a serious breach declaration may be severe, include the potential for the FWC to unilaterally determine the content of an enterprise agreement.

Workplace Determinations

In rare circumstances, the FWC may determine terms and conditions of an enterprise agreement. This is known as a Workplace Determination.

The FWC may make three different types of Workplace Determinations:

► Bargaining-related Workplace Determinations;
► Low-paid Workplace Determinations; and
► Industrial Action-related Workplace Determinations.

Bargaining-related Workplace Determination

The FWC must make a Bargaining-related Workplace Determination only if a serious breach declaration has been made for a proposed enterprise agreement and if the bargaining representatives have not settled the matters at the end of the post-declaration negotiating period.

The negotiation period ends 21 days after a serious breach declaration is made. However, this may be extended by the FWC if all the bargaining representatives agree.
A Bargaining-related Workforce Determination must include:

► any terms that the bargaining representatives for the proposed enterprise agreement had agreed should be included in the proposed enterprise agreement;

► any terms dealing with the matters still at issue between the parties;

► a nominal expiry date, which must be no later than four years after the date on which the determination comes into operation;

► terms so that the determination passes the better off overall test;

► the NES;

► the model dispute resolution procedure, or a dispute resolution term agreed between the parties;

► the model flexibility term, or a flexibility term agreed between the parties; and

► the model consultation term, or a consultation term agreed between the parties.

The determination must also state each employer that would be have been covered by the enterprise agreement, the employees who would have been covered by the enterprise agreement and any union that was a bargaining representative for those employees.

Low-Paid Workplace Determination

If the FWC has issued a low-paid workplace determination, and bargaining representatives are unable to reach agreement about the terms that should be included in the enterprise agreement, a bargaining representative may apply to the FWC for a low-paid workplace determination.

There are two types of low-paid workplace determinations: a Consent Low-Paid Workplace Determination and a Special Low-Paid Workplace Determination.

A. Consent Low-Paid Workplace Determination

Bargaining Representatives may jointly apply to the FWC for a consent low-paid workplace determination. The FWC must make this determination if it is satisfied that the bargaining representatives have made all reasonable efforts to agree on the terms that should be included in the enterprise agreement, and that there is no reasonable prospect of agreement being reached. It is intended that arbitration would be used as a last resort.

B. Special Low-Paid Workplace Determination

A single bargaining representative may apply for a Special Low-Paid Workplace Determination. The FWC must make this Determination if it believes that:

► bargaining representatives are genuinely unable to reach agreement on the terms to be included in the enterprise agreement and there is no reasonable prospect of agreement being reached;

► the employees who will be covered by the determination are paid at or just above the safety net of terms and conditions provided by the modern awards together with the NES;

► the determination will promote future bargaining for enterprise agreements and productivity and efficiency in the enterprises concerned; and

► it is in the public interest to make the determination.

The high standard required for a Special Low-Paid Workplace Determination reflects the fact that the primary focus of the low-paid stream is to encourage and assist parties to make their own enterprise agreements. Special Low-Paid Workplace Determinations are only intended as a last resort where there is no reasonable prospect of agreement being reached.

Industrial Action-related Workplace Determination

An industrial action related workplace determination must be made if protected industrial action has been terminated and the bargaining representatives have not settled the matters outstanding for the enterprise agreement.

The protected industrial action must have been terminated either because:

► the action was causing, or threatening to cause, significant economic harm

► the action was endangering life or causing significant damage to the Australian economy (among other things), or

► the Minister made a declaration terminating the action.
PART 4: APPROVING AN ENTERPRISE AGREEMENT

After the bargaining representatives have agreed on the content of the enterprise agreement, an employer may then request that the employees approve a proposed enterprise agreement. Please note an employer may put an agreement to vote without the approval of bargaining representatives. Seek further advice if you think may be relevant to you.

Before the vote occurs, the employer must comply with certain requirements set out in the Fair Work Act. Broadly, these including the access period, the voting process, the application process and the approval of the enterprise agreement.

Access period

Seven clear days before asking employees to vote on the enterprise agreement, the employer must take all reasonable steps to ensure that all employees employed at the time and who will be covered by the enterprise agreement are given a copy of or have access to the following materials:

► the written text of the enterprise agreement, and
► any other material incorporated by reference in the enterprise agreement.

They must also be advised of the time and place at which the vote will occur and the voting method that will be used, and have the terms and the effect of the terms in the enterprise agreement explained to them. Employers should pay particular attention to how such terms are explained to culturally and linguistically diverse employees, young employees, or employees that did not have a bargaining representative for the enterprise agreement negotiations.

Voting

The employees who will be covered by the enterprise agreement must be given the opportunity to vote on it.

Who can vote?

All employees who are employed at the time of the vote and are to be covered by the terms and conditions of the enterprise agreement can be asked to vote upon it.

Timeframe for vote

An employer cannot request that a vote to approve an enterprise agreement be held until 21 clear days after the day on which the last Notice was given to employees.

The 7-day access period can run concurrently with the 21-day period.

Voting methods

The Fair Work Act does not state how voting is to occur, but the FWC has acknowledged that the following methods are acceptable:

► attendance voting eg. through a ballot or through a show of hands;
► postal voting;
► online voting eg. via email or a web-page;
► telephone voting eg. via telephoning a “yes” or a “no” number, via text message or via telephoning a phone number and using interactive voice response.

When an enterprise agreement is made

An enterprise agreement cannot be made unless a majority of the employees who cast a valid vote approve the enterprise agreement (50% + 1% of employees who voted. This approval step is not required for a greenfields agreement. This is because a greenfields agreement relates to a genuine new enterprise where the employer has not employed any persons. A greenfields agreement is made when it has been signed by the employer and each relevant union the enterprise agreement is to cover.

Application to FWC

A bargaining representative may apply to the FWC for approval of an enterprise agreement within 14 days of its being made.

The FWC intends to approve most enterprise agreements on the papers within seven days. However, there may be instances where approval takes longer. There also may be times where the FWC may hold a hearing, such as for example, as to whether the enterprise agreement passes the better off overall test for a group of employees covered by the enterprise agreement.
Before approving an enterprise agreement, the FWC must be satisfied that:

- the enterprise agreement has genuinely been agreed to by the employees and employers who will be covered by the enterprise agreement;
- the terms of the enterprise agreement do not contravene the NES;
- the enterprise agreement passes the better off overall test;
- all classes of employees to be covered by the enterprise agreement were fairly chosen;
- the enterprise agreement does not include any unlawful terms;
- the enterprise agreement specifies a date as its nominal expiry date and that date will be no later than 4 years after the day on which the FWC approves the enterprise agreement;
- the enterprise agreement includes a flexibility term, consultation term and a dispute resolution; and
- approving the enterprise agreement would not undermine good faith bargaining.

The FWC must approve an enterprise agreement if these requirements are met.

For a greenfields agreement, the FWC must be satisfied that the relevant unions that will be covered by the enterprise agreement are entitled to represent the industrial interest of a majority of the employees who will be covered by the enterprise agreement and it is in the public interest to approve the greenfields agreement.

Additional approval requirements also apply to shift workers, pieceworkers, school-based apprentices, school-based trainees and outworkers. The FWC can refuse to approve an enterprise agreement where there are reasonable grounds to believe that the enterprise agreement has not been genuinely agreed to by the employees who will be covered by the enterprise agreement.

If not all of your employees will be covered by the enterprise agreement, you will need to make sure that the employees who are to be covered have been fairly chosen, for example, they are geographically, organisationally or operationally distinct. You should seek specific advice on these issues and how the law operates in the relevant circumstances before commencing bargaining for an enterprise agreement.

Approving an enterprise agreement with undertakings

The FWC may approve an enterprise agreement with undertakings even where all approval requirements have not been met. It may only accept an undertaking when it is satisfied that accepting the undertaking is not likely to cause financial detriment to any employee covered by the enterprise agreement, or result in a substantial change to the enterprise agreement.

Similarly, in exceptional circumstances, the FWC may approve an enterprise agreement that does not pass the better off overall test, as long as approval is not contrary to public interest. For example, this may occur where the enterprise agreement is part of a reasonable strategy to deal with a short-term crisis in the business of the employer.

Passing the Better Off Overall Test (BOOT)

An enterprise agreement must also pass the BOOT test. An enterprise agreement will pass the BOOT test where the FWC is satisfied that each class of employee will be better off overall under the enterprise agreement than if the relevant modern award applied to that class of employee.

The BOOT test is a global test. The FWC must make a judgement as to whether, taken as a whole, all the benefits provided under the enterprise agreement make up for any loss of award conditions and entitlements.

Approving an enterprise agreement that does not pass the BOOT

In exceptional circumstances the FWC may approve an enterprise agreement that does not meet the BOOT, provided that approval is not contrary to public interest, for example, where the enterprise agreement is part of a reasonable short-term strategy to revive an enterprise.

Base rate of pay

The Fair Work Act ensures that an employee’s base rate of pay under an enterprise agreement cannot be less than the base rate of pay under the relevant modern award or a national minimum wage order.

These provisions apply during the life of the enterprise agreement. This means that if the base rate of pay under the relevant modern award or minimum wage order is ever adjusted to a higher amount than the base rate of pay under an enterprise agreement, the enterprise agreement rate must be adjusted to at least the same rate of pay as under the modern award.
Variation of an enterprise agreement

The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty upon application of the employer and if a majority of employees agree to the variation. An employer covered by an enterprise agreement may ask its employees to vote for a proposed variation of an enterprise agreement.

If both the employer and a majority of employees agree to the variation, the employer and the employees may make a joint application to the FWC. This application needs to be made within 14 days of the employer and majority of employees agreeing to the variation being made.

The FWC can also vary an enterprise agreement to remove ambiguity or uncertainty on application by the employer, employee or employee association covered by the enterprise agreement.

When making a variation, the FWC must be satisfied of the same matters as when approving an enterprise agreement. If the FWC is satisfied of these matters it must approve the variation.

In the case of a greenfields agreement, a variation can only be made if one or more of the employees necessary for the normal conduct of the enterprise have been employed.

However, the FWC may decide not to approve a variation if it is satisfied that there are serious public interest grounds for not approving the variation, or if the proposed variation may result in the person committing an offence against the law.

In the same manner as when considering whether to approve an enterprise agreement, the FWC may approve a variation with undertakings where not all approval requirements have been met.

Termination of an enterprise agreement

Termination by employers and employees

Employers and employees may agree to terminate an enterprise agreement at any time while the enterprise agreement is in operation. Termination has no effect until approved by the FWC.

The FWC must approve a termination where it is satisfied that each employee covered by the enterprise agreement has had a reasonable time to decide whether they wanted to approve the proposed termination, and where the FWC is satisfied that the termination has been agreed to by the employer. It must also be satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination, and that it is appropriate to approve the termination, taking into account the views of the employee association covered by the enterprise agreement.

There are additional rules for multi-enterprise agreements and for greenfields agreements. In the case of multi-enterprise agreements, the termination must be approved by a majority of employees of all of the employers, while termination of a greenfields agreement can only occur if one or more persons necessary for the normal conduct of that enterprise have been employed.

Where an enterprise agreement is terminated and is not replaced by a new enterprise agreement, the relevant modern award will apply to the employees.

Unilateral termination

An employer, employee, or employee association may also apply to the FWC to terminate an enterprise agreement if the enterprise agreement has passed its nominal expiry date.
PART 5: PRACTICAL TIPS

The following checklist is intended as a guideline only and is provided as general information and assistance for employers when considering to, or being required to, enter into negotiations for a new enterprise agreement. It is not comprehensive and in each case advice must be taken for the particular circumstances.

Enterprise agreement options

- Is your enterprise agreement a single-enterprise agreement? [ ]
- Is your agreement a multi-enterprise agreement? [ ]
- Can you make a greenfields agreement? [ ]

Enterprise agreement content

- Does the enterprise agreement contain a nominal expiry date? [ ]
- Does the enterprise agreement contain a dispute settling procedure? [ ]
- Does the enterprise agreement contain a consultation term? [ ]
- Does the enterprise agreement contain a flexibility term? [ ]
- Is your enterprise agreement free from unlawful content? [ ]
- Do the terms of your enterprise agreement comply with the National Employment Standards? [ ]
- Do all the matters in your enterprise agreement pertain either to the relationship between the employer and the employees, or pertain to the relationship with the employer or the union? [ ]

If all boxes are ticked, PROCEED

If not, RECONSIDER TERMS

Bargaining rights and responsibilities

- Are you prepared to engage in bargaining if a majority support determination is in place? [ ]
- Have you taken all reasonable steps to notify employees of their right to appoint a bargaining representative within 14 days of either agreeing to bargain or a majority support determination coming into effect? [ ]
- Have you included all relevant information in the notice of representational rights? [ ]
- Have you included any additional information in the notice of representational rights? [ ]
- Will you appoint a bargaining representative? [ ]
- Are you aware that the FWC can issue a Low-Paid Authorisation, which gives the FWC greater power to facilitate bargaining for the enterprise agreement? [ ]

If all boxes are ticked, PROCEED

If not, RECONSIDER YOUR RESPONSIBILITIES
**Good faith bargaining – your responsibilities**

- Have you attended meetings for the purposes of negotiation?

- Have you scheduled meetings at reasonable times?

- Have you explained why you want certain provisions included in the enterprise agreement?

- Are you aware that you do not need to disclose information which is confidential or commercially sensitive?

- Are you aware of what documents could be considered commercially sensitive?

- Have you promptly responded to letters, emails and other requests made by the other side’s bargaining representative?

- Have you given reasons for your responses to the other side’s proposals?

- Have you genuinely considered the other side’s proposals?

- Have you refrained from engaging in any unfair conduct?

- Have you allowed an employee who is a bargaining representative to attend meetings?

- Have you kept minutes of meetings?

- Have you got a record-keeping system where you collect all documents relevant to bargaining and has this undergone a legal audit?

If all boxes are ticked, **PROCEED**

If not, **RECONSIDER YOUR RESPONSIBILITIES**

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**Good faith bargaining – the FWC’s involvement**

- Do you know that the FWC can issue bargaining orders if a bargaining representative is not meeting the good faith bargaining requirements?

- Do you know that the FWC can issue bargaining orders if the bargaining process is not proceeding efficiently or fairly because there are too many bargaining representatives?

- Are you aware that contravention of a bargaining order can be punished by a maximum $51,000 fine?

- Do you know that a bargaining representative can apply to the FWC where they have concerns that the agreement will not cover appropriate employees?

- Are you aware that the FWC can issue a serious breach declaration if a bargaining representative has contravened a bargaining order?

- Do you know that in some cases the FWC can arbitrate your enterprise agreement?

If all boxes are ticked, **PROCEED**

If not, **RECONSIDER YOUR RESPONSIBILITIES**
Approving an enterprise agreement

Have 21 days passed since the last employee was provided with a notice of representational rights?

Were all employees given a copy of and access to the enterprise agreement and any supporting documents at least seven days before the vote?

Were the terms of the enterprise agreement sufficiently explained to culturally and linguistically diverse employees, young employees, or employees who did not have a bargaining representative for the negotiations?

Have the employees been asked to vote on a proposed enterprise agreement?

Have the employees been notified as to when voting will occur?

Have the employees been notified as to how the vote will occur?

Did a majority of employees vote to approve the enterprise agreement?

Has an application been made to the FWC to approve the enterprise agreement within 14 days of a majority of employees voting in favour of the enterprise agreement?

If all boxes are ticked, PROCEED TO THE FWC

PART 6: TRAINING

Clayton Utz has developed a series of comprehensive training courses for managers on minimising the risks associated with termination of employment. These courses include training in the key area of managing performance and conduct and provide managers with tailored one-on-one coaching.

Please go to www.claytonutz.com/training for more information and to find the training course that’s right for you.
PART 7: KEY CONTACTS

Saul Harben
National Practice Group Leader
Partner, Perth
T +61 8 9426 8219
F +61 8 9481 3095
sharben@claytonutz.com

Abraham Ash
Partner, Sydney
T +61 2 9353 4858
F +61 2 8220 6700
aash@claytonutz.com

Hedy Cray
Partner, Brisbane
T +61 7 3292 7003
F +61 7 3221 9669
hcray@claytonutz.com

Stuart Pill
Partner, Melbourne
T +61 3 9286 6148
F +61 3 9629 8488
spill@claytonutz.com

Dan Trindade
Partner, Melbourne
T +61 3 9286 6144
F +61 3 9629 8488
dtrindade@claytonutz.com

Jennifer Wyborn
Partner, Canberra
T +61 2 6279 4069
F +61 2 6279 4099
jwyborn@claytonutz.com

Anna Casellas
Partner, Perth
T +61 8 9426 8413
F +61 8 9481 3095
acasellas@claytonutz.com

Shae McCartney
Partner, Brisbane
T +61 7 3292 7306
F +61 7 3221 9669
smccartney@claytonutz.com

Dr Graham Smith
Partner, Melbourne
T +61 3 9286 6138
F +61 3 9629 8488
gsmith@claytonutz.com

Robbie Walker
Partner, Sydney
T +61 2 9353 4208
F +61 2 8220 6700
rwalker@claytonutz.com

SCHEDULE 1: MODEL FLEXIBILITY TERM

The Fair Work Regulations 2009 include a model flexibility term.

The model flexibility term (below) will automatically be taken to be a term of your enterprise agreement if no other flexibility term is included.

1. An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:
   (i) arrangements about when work is performed;
   (ii) overtime rates;
   (iii) penalty rates;
   (iv) allowances;
   (v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

2. The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the Fair Work Act 2009; and

(b) are not unlawful terms under section 194 of the Fair Work Act 2009; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.
The employer must ensure that the individual flexibility arrangement:
► is in writing; and
► includes the name of the employer and employee; and
► is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
► includes details of:
  » the terms of the enterprise agreement that will be varied by the arrangement; and
  » how the arrangement will vary the effect of the terms; and
  » how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
  » states the day on which the arrangement commences.

The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

The employer or employee may terminate the individual flexibility arrangement:
► by giving no more than 28 days written notice to the other party to the arrangement; or
► if the employer and employee agree in writing—at any time.

SCHEDULE 2: MODEL CONSULTATION TERM

The Fair Work Regulations 2009 include a model consultation term.

The model consultation term below will automatically be taken to be a term of your enterprise agreement if no other consultation term is included.

1) This term applies if the employer:
   (a) has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees; or
   (b) proposes to introduce a change to the regular roster or ordinary hours of work of employees.

   **Major change**

2) For a major change referred to in paragraph (1)(a):
   (c) the employer must notify the relevant employees of the decision to introduce the major change; and
   (d) subclauses (3) to (9) apply.

3) The relevant employees may appoint a representative for the purposes of the procedures in this term.

4) If:
   (a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and
   (b) the employee or employees advise the employer of the identity of the representative;
   the employer must recognise the representative.

5) As soon as practicable after making its decision, the employer must:
   (a) discuss with the relevant employees:
       » the introduction of the change; and
the effect the change is likely to have on the employees; and
measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and
(b) for the purposes of the discussion—provide, in writing, to the relevant employees:
» all relevant information about the change including the nature of the change proposed; and
» information about the expected effects of the change on the employees; and
» any other matters likely to affect the employees.
6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.
7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.
8) If a term in this agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the requirements set out in paragraph (2)(a) and subclauses (3) and (5) are taken not to apply.
9) In this term, a major change is likely to have a significant effect on employees if it results in:
(a) the termination of the employment of employees; or
(b) major change to the composition, operation or size of the employer’s workforce or to the skills required of employees; or
(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
(d) the alteration of hours of work; or
(e) the need to retrain employees; or
(f) the need to relocate employees to another workplace; or
(g) the restructuring of jobs.

Change to regular roster or ordinary hours of work
10) For a change referred to in paragraph (1)(b):
(a) the employer must notify the relevant employees of the proposed change; and
(b) subclauses (11) to (15) apply.
11) The relevant employees may appoint a representative for the purposes of the procedures in this term.
12) If:
(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and
(b) the employee or employees advise the employer of the identity of the representative;
the employer must recognise the representative.
13) As soon as practicable after proposing to introduce the change, the employer must:
(a) discuss with the relevant employees the introduction of the change; and
(b) for the purposes of the discussion—provide to the relevant employees:
(i) all relevant information about the change, including the nature of the change; and
(ii) information about what the employer reasonably believes will be the effects of the change on the employees; and
(iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and
(c) invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).
14) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

15) The employer must give prompt and genuine consideration to matters raised about the change by the relevant employees.

16) In this term:

(a) relevant employees means the employees who may be affected by a change referred to in subclause (1).

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SCHEDULE 3: MODEL DISPUTE RESOLUTION TERM

The Fair Work Regulations 2009 include a model dispute resolution term.

The model consultation term (below) will automatically be taken to be a term of your enterprise agreement if no other dispute resolution term is included.

1) If a dispute relates to:

(a) a matter arising under the agreement; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Commission.

5) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

» arbitrate the dispute; and

» make a determination that is binding on the parties.

Note: If Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.
6) While the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
   » the work is not safe; or
   » applicable occupational health and safety legislation would not permit the work to be performed; or
   » the work is not appropriate for the employee to perform; or
   » there are other reasonable grounds for the employee to refuse to comply with the direction.

7) The parties to the dispute agree to be bound by a decision made by Fair Work Commission in accordance with this term.

SCHEDULE 4: NOTICE OF REPRESENTATIONAL RIGHTS

The Fair Work Regulations 2009 include the notice of representational rights.

[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—include:] 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—include:] 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—include:]

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 either your employer, bargaining representative, go to www.fairwork.gov.au, or contact the Fair Work Commission Infoline on 13 13 94.