



Australian Government

# Fair Work Act 2009

## Bargaining

# Unions and Agreements

Three types of Agreements:

- Single Enterprise Agreement
- Multi-Enterprise Agreement
- Greenfields Agreement

# Commencing Bargaining Process

## Initiating Bargaining

- Ask the employer to bargain up to 90 days before the NED of the existing agreement
- An employer who wishes to bargain must notify all employees of the right to be represented at least 14 days before the negotiation commences

# Bargaining Representatives

- A Union is the default bargaining representative for its members
- Non Union members may nominate themselves, the Union or another bargaining agent.
- Employers must recognise and bargain with employees' bargaining representatives.

# Parties to the agreement?

- No longer 'parties' but coverage
- Must apply to FWA to be 'covered' by agreement
- 'Coverage' can apply even if a union has not negotiated agreement

# Agreement-making: What can parties bargain about?

Parties will be free to bargain over more matters than they could under WorkChoices.

## Agreements CAN include terms that relate to:

- Union training leave
- Union participation in employee inductions
- Paid time off to participate in union activities
- Union participation in consultation meetings or dispute settlement procedures
- Requiring the employer to commence renegotiations of the agreement on a certain date
- Ensuring that contractors are engaged on the same terms and conditions as regular employees

There will still be some matters that aren't allowed in agreements. An agreement that contains a non permitted term will be valid but the non-permitted term will not be enforceable and can be severed from the agreement by a court

# Terms that *must* be in agreements

**A flexibility clause**

**A consultation clause**

**A dispute settlement procedure**

**A nominal expiry date (4 years or less)**

## Bargaining reps (continued)

Employers **must** recognise and bargain with the union as the employees' nominated bargaining representative.

Employers and unions must bargain in good faith. This means that parties should:

- Attend and participate in meetings at reasonable times;
- Disclose relevant information in a timely manner;
- Respond to proposals made by other parties;
- Give genuine consideration to the proposals;
- Refrain from capricious or unfair conduct

If the parties don't bargain in good faith then Fair Work Australia can issue a number of bargaining orders.....

## Bargaining orders

- If an employer or union does not bargain in good faith after Fair Work Australia has issued a 'bargaining order' then FWA can issue a subsequent order called a serious breach declaration
- A serious breach declaration can lead to a workplace determination
- If an employer does not agree to bargain then a union can apply for a majority support determination
- Fair Work Australia can also issue a scope orders

# BOOT – “Better Off Overall Test”

FWA will only approve an agreement if it passes the “**better off overall’ (BOOT) test**”

- An employee must be better off under the agreement than under the relevant modern award.



## Low Paid Bargaining stream

This is a new stream of bargaining which is aimed at helping low paid workers negotiate a collective agreement (often for the first time).

Groups of employers can bargain together with the union for an agreement to apply to many work places (multi-enterprise bargaining)

FWA may intervene to facilitate low-paid bargaining, make a workplace determination if required and enforce the 'good faith' requirements

# Low Paid Authorisation

FWA will issue a low paid authorisation if it is satisfied it is in the public interest tested against a range of criteria including:

- assist low paid who have not had access to bargaining or face difficulty bargaining
- history of bargaining in industry
- relative bargaining strength
- current terms and conditions compared to industry / community standards

# Varying or terminating an agreement

- Varying an agreement is by same process as making agreement;
- Termination (prior to N.E.D.) by ballot, union view taken into account;
- Termination (after N.E.D.) Application by a party tested against public interest and appropriate considering the views of the parties

# Protected Industrial Action

Where parties:

- are genuinely trying to reach an agreement
- are not engaged in pattern bargaining
- have obtained authorisation through protected action ballot
- have given the employer 3 days notice

And *only* during bargaining and after expiry of an agreement

# The Ballot

- Bargaining representative applies for ballot
- Application determined within 2 days
- Ballot is run by AEC
- 50% of those eligible to vote must vote and 50% of those voting must vote in favour

# Voting for agreement

- Not before 21 days after “notification of representational rights”
- At least 7 days after employer invites employees to vote and sends them the agreement
- Can be a vote by ballot (secret or not) – but the vote **MUST** demonstrate employees “genuine agreement”

# Approval of agreement

- FWA will approve an agreement if:
  - it has been genuinely agreed to by employees;
  - does not contravene the NES;
  - passes the better off overall test (BOOT);
  - contains the mandatory terms;
  - do not contain unlawful terms

# Bargaining Process – Fast and simple!

The following is a quick guide to the bargaining process if all parties agree.....

- Employer agrees to bargain or initiates bargaining;
- Employer sends notification to employees of representational rights ('notification period');
- Employer and union agree to terms;
- Employer sends agreement and incorporated material to employees (or makes it available), and informs when the vote will be held (at least 7 days later);
- Agreement voted up (at least 21 days after notification period);
- Union notifies FWA it wishes to be covered by agreement;
- Employer/union applies for FWA approval of agreement (within 14 days of vote)