



How do you make an enterprise agreement?

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Date: Monday July 5, 2021

Enterprise agreements entered the Australian industrial relations landscape in the mid 1990's. They are now a popular tool for many employees, employers and unions, to set in place a legally binding set of employment standards, entitlements and protections. In this article, we look at the primary steps required to create an enterprise agreement.

The 6 primary steps when making an enterprise agreement

The following steps must be followed when making an enterprise agreement:

1. A 'notice of employee representational rights' must be provided by the employer to all current employees that will be covered by the agreement. The notice informs the employees of their right to be represented by a bargaining representative (eg, a union) and must be provided within 14 days of the 'notification time' (the decision to make the agreement or compulsion to negotiate an agreement).
2. Bargaining (negotiation about the employment terms and conditions to be included in the agreement) between the parties will commence between the employer and employees and/or their representatives.
3. After bargaining is completed and terms are finalised as much as they can be between the bargaining representatives, the proposed agreement must be submitted to the employees for approval. The proposed agreement cannot be submitted until 21 days has passed after the last 'notice of employee representation rights' has been issued. The approval from employees can be given by way of a ballot or some other voting method. Prior to voting, and at least seven days before voting begins, an employer must take all reasonable steps to ensure that each employee has a copy of the agreement or at least ready access to the agreement.

4. Approval for the proposed agreement must be given. For single enterprise agreements, the agreement must be approved by a majority of employees casting a valid vote. For multi-enterprise agreements, there must be a separate vote at each enterprise. A multi-enterprise agreement is only valid if there is a majority approval in at least one enterprise.
5. The enterprise agreement must be lodged at the Fair Work Commission ('**FWC**') for approval. This must be done by the employer or another bargaining representative within 14 days after the enterprise agreement has been made.
6. The FWC must approve the enterprise agreement. The enterprise agreement can commence operation seven days after it has been approved.

The above steps do not apply to a 'greenfields agreement'. A 'greenfields agreement' is an agreement made between a new employer (new entity) and a union (or unions) that would have coverage for the employees who will ultimately work for that enterprise. This agreement can be made by each employer and union signing it or by an employer submitting the proposed agreement at the end of a notified negotiation period.

What terms must be included in an enterprise agreement?

There are four main mandatory inclusions for an enterprise agreement.

1. Duration and expiry

An enterprise agreement must specify a 'nominal expiry date'. Under the FWA, enterprise agreements generally have a maximum term of four years.

2. Dispute settlement

An enterprise agreement must contain a 'dispute settlement procedure' that authorises the FWC or some other independent person to settle disputes about the agreement.

3. Flexibility

An enterprise agreement must have a 'flexibility term' to allow for 'individual flexibility arrangements' to be made.

4. Consultation

An enterprise agreement must have a consultation term. The effect of this is that employers must consult with their employees (and/or any relevant union) in relation to major workplace changes that are likely to have a significant effect on them.

What must the Fair Work Commission consider when approving an enterprise agreement?

The primary requirements that the FWC must be satisfied of prior to approving an enterprise agreement include:

- For a single enterprise agreement - that the agreement has been genuinely agreed to by the employees covered by the agreement;
- For a multi-enterprise agreement - that the agreement has been genuinely agreed to by each employer covered by the agreement and no person coerced or threatened to coerce any of the employers to make the agreement;
- The terms of the agreement do not contravene [the NES](#);
- The agreement passes the ['better off overall test'](#);
- The employees to the agreement were fairly chosen;
- The agreement does not include any unlawful terms;
- The agreement does not include any designated outworker terms;
- The agreement specifies a nominated expiry date which is no more than four years after the FWC approved the agreement;
- The agreement includes a term that provides for the settlement of disputes;
- That approving the agreement would not be inconsistent with or undermine good faith bargaining.

What happens if the parties cannot reach an agreement?

Where parties to a proposed enterprise agreement cannot reach an agreement, the FWC can assist by:

- allowing protected industrial action to be taken (such as a strike by employees or a lockout of the business by employers);
- prohibiting forms of coercion or misrepresentation;
- imposing a general duty to bargain in good faith by making bargaining orders and other related orders;
- offering assistance in brokering a settlement to bargaining disputes or to impose an outcome through compulsory arbitration.

How can an employment lawyer help?

We recommend that if you have any questions or concerns regarding existing enterprise agreements or new agreements you should [seek legal advice as soon as possible](#).

Our employment law team is able to assist you in obtaining comprehensive legal advice and protection.

Contacting Gilshenan &Luton

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