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## Agreement Making Under the *Fair Work Act 2009*

*The Fair Work Act 2009 (the Act) implements a number of major reforms to our current federal workplace relations system, one of those areas of reform concerns enterprise agreements.*

The Act aims to promote fairness, flexibility and productivity at the workplace level through various initiatives, including:

- creating a single stream of agreement making with a streamlined approval process;
- providing for bargaining agents to represent parties in negotiations and less regulation regarding the content of agreements;
- ensuring that employees who are covered by an agreement are better off overall against the new safety net;
- imposing an obligation of good faith bargaining on the parties and empowering Fair Work Australia (FWA) with appropriate powers to facilitate and ensure compliance; and
- empowering FWA to bargain for the low paid.



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In this article, we examine the new single form of enterprise agreement in Part 2 - 4 of the Act and how the proposed arrangements differ from those pertaining to enterprise agreements under the existing *Workplace Relations Act 1996* (WR Act).

The Act was passed by the Senate on 20 March 2009 and will now become law, with several provisions, including those relating to enterprise agreements, coming into operation from 1 July 2009. While there are some concerns about how this will work in practice, the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* provides that:

- all statutory agreements in existence as at 1 July 2009 will continue to operate past their nominal expiry date until terminated under the current WR Act or replaced by a new enterprise agreement made under the Act;
- as of 1 January 2010, all employees covered by the federal system (including those covered by statutory agreements made prior to that date) will get the benefits of the 10 minimum National Employment Standards (NES) and minimum safety net wages;
- any new enterprise agreements concluded during the bridging period i.e. between 1 July 2009 and 1 January 2010 will be tested against the no disadvantage test using a reference instrument such as an unmodernised award.

### The existing arrangements

Currently, there are a raft of agreements which negotiating parties can conclude under the WR Act:

- Individual Transitional Employment Agreements (ITEAs) which were introduced by the Transition Act<sup>1</sup> to replace Australian Workplace Agreements (AWAs) from 28 March 2008 until 31 December 2009 – ITEAs can only be used by employers who have previously used AWAs;
- Union collective agreements;
- Employee collective agreements;
- Union greenfields agreements;
- Employee collective greenfields agreements; and
- Multi-employer agreements.

<sup>1</sup> *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Transition Act)

The WR Act regulates what can be included in enterprise agreements through the concept of prohibited content which, if contravened, can lead to penalties of up to \$33,000.

As a result of the Transition Act, all workplace agreements concluded during the transitional period (i.e. between 28 March 2008 and 31 December 2009) must pass the no-disadvantage test which compares the provisions of the agreement with the underlying award or in the case of ITEAs, with an existing collective agreement which would otherwise apply. This has resulted in the approval process becoming complex, convoluted, uncertain and protracted.

There are currently no provisions requiring the parties to negotiate with each other in good faith and as a result, parties are not actively encouraged to negotiate and reach agreement, this can result in frustrated parties resorting to industrial action.

There are no particular provisions dealing with assistance to low paid workers.

### The new system

The Act is unashamed in its support for collective bargaining at the enterprise level. The underlying assumption is that collective bargaining is a productive form of agreement making as employers and employees review ways of working, including flexible working agreements, and the Explanatory Memorandum<sup>2</sup> refers to research which has linked productivity gains to collective bargaining.

The Act draws no distinction between union and non-union/employee collective agreements and provides for a single stream of collective enterprise agreements where single enterprise, multi-enterprise or greenfields agreements can be made. There will be no capacity to make individual statutory agreements.

As our primary focus in this article is on single enterprise agreements, we will now examine these agreements more closely.

A single enterprise agreement is between an employer and the employees who are employed at the time the agreement is made and who will be covered by the agreement.

### Content

The Act provides that the enterprise agreement can be about:

- matters pertaining to the relationship between the employer and employees to be covered by the agreement;
- matters pertaining to the relationship between the employer/s and employee organisation/s to be covered by the agreement (e.g. union consultation clauses or leave to attend union training);
- deductions from wages for any purpose authorised by the employee to be covered by the agreement (eg payroll deductions salary for salary sacrifice or union dues);
- how the agreement will operate.

“Matters pertaining” does not include matters that fall within managerial prerogative or that are outside of the employer’s control or that are unrelated to employment arrangements – these matters are not subject to bargaining or industrial action.

Although there is case law on the “matters pertaining” formula as this wording was used in the pre-WorkChoices legislation, as there is no precision about what this term encompasses this could lead to confusion, uncertainty and disputes arising. Some commentators feel that the Fair Work Act has missed an opportunity to deal with this issue in a more meaningful way.

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<sup>2</sup> Explanatory Memorandum to the *Fair Work Bill 2008*

Any agreement which contains unlawful content, for example, provisions which are:

- discriminatory;
- objectionable;
- inconsistent with or try to override provisions in the new legislation such as clauses which allow industrial action during the life of the agreement or which contract out of unfair dismissal protections,

will not be approved by FWA.

Enterprise agreements will be required to include an individual flexibility arrangement and a consultation clause where major change is considered. Model clauses contained in the regulations will apply by default in the absence of such clauses being included in the agreement.

The model flexibility clause is likely to mirror the model flexibility clause to be contained in modern awards, the purpose of which is to allow employers and employees to enter individual flexibility arrangements varying the effect of the agreement in relation to the employee provided:

- it results in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to;
- the individual flexibility arrangement can be terminated by either the employee or the employer on 28 days written notice or by mutual agreement at any time;
- any individual flexibility arrangement is in writing and signed by the employee and employer and a copy given to the employee within 14 days.

Enterprise agreements must also include a dispute settlement clause enabling FWA or some other independent third party to settle disputes about any matters arising under the agreement and in relation to the NES. The clause must permit the employees to be represented in the dispute settlement procedure.

The base rate of pay payable to an employee under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate, whichever applies. As a result, where minimum award rates (or the national minimum wage order rate, as the case may be) increase during the life of an agreement to above the agreement rates, employers will have to pay the higher rate.

Agreements will have a nominal expiry date of no later than 4 years after the date of operation.

### **Interaction between the NES, modern awards and enterprise agreements**

An enterprise agreement must not exclude the NES or any of its provisions but may include terms which are ancillary or incidental to the operation of an entitlement under the NES (e.g. a term entitling an employee to twice as much annual leave at half the rate of pay required by section 90 of the NES) or supplementary to the NES (e.g. a term which increases the amount of paid annual leave beyond that required under section 87 of the NES).

A modern award will not apply to an employee who is covered by an enterprise agreement.

### **Bargaining process**

An employer that will be covered by a proposed single enterprise agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who is to be covered by the agreement and is employed at the time of notification.

The employer is also entitled to be represented by a bargaining representative.

Bargaining representatives include:

- the employer;
- an employee organisation (e.g. union) of which the employee who is to be covered by the agreement is a member. This organisation will be assumed to be that employee's bargaining representative provided the organisation is eligible to represent the industrial interests of the employee;
- a person who is appointed in writing by the employee or by the employer to be his/her bargaining representative for the agreement (this can, in the case of the employee, be the employee himself or herself or any other person).

The appointment of a bargaining representative can be revoked by the employer or employee, as the case may be, provided this is done in writing.

Where an employer does not agree to bargain, FWA can make a majority support determination or scope order, the making of which will require the employer to notify the employees of their right to be represented by a bargaining representative.

FWA will make a majority support determination on application of an employee bargaining representative provided FWA is satisfied that a majority of the employees who will be covered by the agreement want to bargain with their employer. In working out whether a majority of employees want to bargain, FWA may use any method it considers appropriate.

FWA will make a scope order on application of any bargaining representative who has concerns that bargaining is not proceeding efficiently or fairly because the agreement will not cover appropriate employees. Before making this application, the representative must notify the other bargaining representatives of their concerns and give a reasonable time for those parties to respond. If FWA makes a scope order, it will specify the employer and employees to be covered.

In both the case of a majority support determination and a scope order, FWA must be satisfied that the group of employees to be covered has been fairly chosen, taking into account whether the group is geographically, operationally or organisationally distinct.

### Approval of enterprise agreements

The employer must ensure that all employees who will be covered by the proposed enterprise agreement are given a copy of it for a period of 7 days immediately prior to voting and must notify the employees when the vote will occur and what voting method will be used.

The employer must also ensure that the agreement and its effect are explained to the employees, taking into account the particular circumstances and needs of the employees concerned.

The employer can then request the employees to approve the agreement by voting for it (e.g. by ballot or an electronic method) – this request can only be made at least 21 days after the day on which the notice in regard to bargaining representatives has been given.

The single enterprise agreement is “made” when a majority of those employees who cast a valid vote approve the agreement.

An employee organisation that was a bargaining representative may give notice to FWA that it wants the enterprise agreement to cover it - this would give the organisation particular rights, e.g. with regard to enforcement of the agreement.

A bargaining representative must apply to FWA for approval of the agreement within 14 days of the agreement having been made or such further period as may be allowed by FWA.

When lodging a signed copy of the agreement for approval, the bargaining representatives will be required to make statutory declarations setting out details of the agreement.

Before approving the agreement, FWA must be satisfied that:

- the agreement has been “genuinely agreed” to by the employees covered by the agreement;
- the agreement does not contain terms that contravene the NES;
- the agreement passes the “Better Off Overall Test” (BOOT) – the exception being that FWA may still approve an enterprise agreement that does not pass the BOOT if it is satisfied that because of exceptional circumstances, the approval would not be contrary to the public interest (e.g. where the agreement is part of a reasonable strategy to deal with a short-term crisis in the particular business covered by the agreement) in which event the nominal expiry date of the agreement must be 2 years or less;
- if the agreement does not cover all the employees of the employer, that the group was fairly chosen;
- the agreement does not contain unlawful content;
- the agreement has a nominal expiry date not more than 4 years after the day on which FWA approves the agreement;
- the agreement has an appropriate dispute settlement clause;
- approving the agreement would not be inconsistent with or undermine good faith bargaining by one of more bargaining representatives in relation to which a scope order is in operation.

An enterprise agreement approved by FWA operates 7 days after the agreement is approved or from a later date if specified in the agreement.

### **The Better Off Overall Test (BOOT)**

The purpose of the BOOT is to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award which will be the relevant reference instrument.

The BOOT will be a point in time, on the papers assessment of the pay and entitlements in an agreement against modern awards.

Written undertakings from an employer covered by the agreement will not be accepted by FWA unless it is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement. Before accepting any such undertaking, FWA must seek the views of all bargaining representatives for the agreement.

FWA will approve an enterprise agreement if:

- it has been genuinely agreed to by the employees; and
- it passes the BOOT in respect of each employee – i.e. if at the time of the test (which is the time of the application to FWA), each award covered employee (and prospective award covered employees) would be better off overall if the agreement applied to the employee than if the applicable modern award applied to the employee. Although the enterprise agreement must pass the BOOT in relation to each employee and prospective employee, FWA may group employees into classes in order to apply the test. A “class of employees” is a group of employees who share common characteristics, e.g. employees who are in the same classification, grade or job level, with the same working patterns.

FWA must disregard any individual flexibility arrangement (agreed to by an employee and his/her employer in terms of a relevant modern award) for the purposes of determining whether the agreement passes the BOOT.

### **Good faith bargaining**

While the Act assumes that most parties negotiate in good faith, the Act imposes certain specific requirements on all parties to ensure that this requirement (which expects parties to act in an appropriate and productive manner) is adhered to at all times. The expectation is that this will enable parties to reach agreement in a more timely manner and reduce the likelihood of industrial action.

A bargaining representative is expected to meet the following good faith requirements when negotiating a proposed enterprise agreement:

- recognising and bargaining with the other bargaining representatives for the agreement;
- 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 from the other party in a timely manner;
- giving genuine consideration to the other party's proposals;
- providing reasons for those responses;
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Good faith bargaining does not require a bargaining agent to make any concessions or reach any agreement.

A bargaining representative may apply to FWA for a bargaining order if they have concerns that:

- Another bargaining representative is not bargaining in good faith; or
- The bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives.

In either case, the concerned party must notify the relevant bargaining representative in writing of their concerns. If their concerns are not responded to in a reasonable time, the concerned party may apply to FWA for a bargaining order. Non compliance with these notice requirements may be permitted if FWA is satisfied that it is appropriate for the application to be made in all the circumstances.

An application for a bargaining order can be made at any time save where an enterprise agreement already applies in which event:

- a bargaining order can only be applied for within 90 days of the nominal expiry date of the existing enterprise agreement; or
- after the employer has requested the employees to approve the agreement.

If FWA grants a bargaining order, the order must specify the actions which are to be taken by the bargaining representatives concerned.

In some instances, FWA may order the exclusion of a particular bargaining representative from bargaining.

A bargaining order operates from the day on which it is made and ceases to operate if it is revoked, when the enterprise agreement is approved by FWA, when a workplace determination covering the employees who would have been covered by the agreement comes into operation, or when the bargaining representatives agree that bargaining has ceased.

A contravention of a bargaining order is a civil remedy provision resulting in a maximum possible penalty of 60 penalty units (\$6,600).

A bargaining representative can apply for a serious breach declaration if there have been serious and sustained breaches of bargaining orders by a bargaining representative and those breaches have significantly undermined bargaining for the agreement. In these circumstances, FWA will have the power to make a workplace determination provided it is satisfied that:

- the other bargaining representatives have exhausted all other reasonable alternatives to reach agreement;
- agreement will not be reached in the foreseeable future; and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives to the agreement.

A serious breach declaration must specify the proposed enterprise agreement to which it relates and any other matters required by the procedural rules of FWA. One of the possible consequences of a serious breach declaration is that FWA may make a bargaining related workplace determination in relation to the agreement if after the end of the post declaration negotiating period (which is 21 days after the declaration is made, unless extended), the bargaining representatives have not settled the matters that were at issue during bargaining for the agreement.

A bargaining representative may also apply to FWA to deal with a dispute about a proposed enterprise agreement if the bargaining representatives are unable to resolve the dispute. Additionally, FWA may arbitrate the dispute by agreement of the bargaining representatives.

Other options for the parties include abandoning the process by agreement and returning to the pre-negotiation workplace arrangements or taking protected industrial action.

### **Variation and termination of agreements**

Variations are to be approved by FWA – the enterprise agreement as proposed to be varied must pass the BOOT and must not contravene the NES. Additionally, a majority of the employees affected by the variation (i.e. those employees employed at the time and who are covered by the agreement as well as those employees employed at the time who will be covered by the agreement if the variation is approved by FWA) must genuinely agree to the variation.

Enterprise agreements can be terminated by agreement between an employer and the employees covered by the agreement. If the termination is at the initiative of the employer, the employer may request the employees covered by the agreement to vote on the termination – the employer will be required to give the employees a reasonable opportunity to decide whether they want to approve the proposed termination. If the majority of employees vote to approve the termination, the termination will be taken as having been agreed to. The termination will have no effect, however, unless it is approved by FWA on application which must be made within 14 days (or such further period as FWA allows) after the termination is agreed to.

FWA must approve the termination if:

- it is satisfied that employees were given a reasonable opportunity to decide on the matter;
- it is satisfied that the termination was agreed to by the employees;
- it is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination;
- it considers it appropriate to approve the termination taking into account the view of the employee organisation/s (if any) covered by the agreement.

If an enterprise agreement has passed its nominal expiry date, any party covered by the agreement (employer, employee or employee organisation) can apply to FWA for the termination of the agreement. FWA will terminate the agreement if:

- it is satisfied that it is not contrary to the public interest; and
- it considers it appropriate to terminate the agreement taking into account all the circumstances, including the views of all parties covered by the agreement and the circumstances of those parties and the likely effect the termination will have on them.

The termination will come into operation on the date specified in the FWA's decision to terminate the agreement.

### Contravening an enterprise agreement

A person can only be said to contravene a term of an enterprise agreement if the agreement applies to that person. If such a contravention occurs, it is a civil remedy provision resulting in a maximum possible penalty of 60 penalty units (\$6,600).

### Existing agreements – what happens after 1 July 2009

A variety of statutory agreements may be in existence on 1 July 2009, for example:

- pre-reform certified agreements and AWAs;
- post-reform collective workplace agreements, AWAs and ITEAs,

some of which may have reached their nominal expiry date and others not.

In all cases, all these statutory agreements will continue to apply after 1 July 2009 until terminated under the current WR Act or replaced by a new enterprise agreement made under the new legislation.

The Fair Work Act heralds the start of a new chapter in workplace relations in Australia – hopefully one in which employers and employees will be able to engage meaningfully in collective bargaining to their mutual benefit.

### References

*Fair Work Bill 2008* and Explanatory Memorandum

*Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* and Explanatory Memorandum

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#### **The Moores Legal Workplace Relations Team**

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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