



Australian Government
Australian Public Service
Commission

Enterprise Bargaining Guide

Post bargaining

Contents

- Disclaimer 3**
 - Links to external websites 3
- H. Overview of the Guide 4**
- I. Post-bargaining 5**
 - I1 | Fair Work Commission approvals process 5
 - I2 | Communication and educating employees 8
 - I3 | Developing documents to support the new agreement 9
 - I4 | Knowledge transfer and succession planning..... 10
 - I5 | Identifying practical issues 11
 - I6 | Communicating with stakeholders 12
- J. Self-assessment 13**
 - J1 | Questions bargaining teams should ask themselves..... 13

Disclaimer

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The information and suggestions contained within this guide are not, in any way, legal advice. This guide is not a substitute for independent professional advice. Where required, practitioners should obtain appropriate professional advice relevant to their particular circumstances. Agencies should supply any legal advice sought to other agencies as required by legislation.

Links to external websites

Where external websites are referenced or linked to, they are provided for the reader's convenience and do not constitute endorsement of the materials on those sites.

H. Overview of the Guide

This guide covers some of the key areas and questions that Commonwealth agencies should consider during the enterprise bargaining process. *Post Bargaining* represents the third and final part of the guide. It deals with the issues agencies should consider after bargaining and a successful ballot.

Human resources and workplace relations practitioners from a number of Australian Public Service (APS) agencies have been consulted in the development of this guide.

What is enterprise bargaining?

Enterprise bargaining is the formal negotiation between an employer, employees and their representatives for an enterprise agreement. The aim of the process is to reach agreement on employees' terms and conditions of employment, usually including remuneration, and matters relevant to the manner in which work is to be performed. Enterprise agreements, being the result of enterprise bargaining, are collective industrial instruments and are made between an employer and their employees under the national workplace relations system.

Key points

- ✓ This guide provides only general guidance materials that are meant to be purely advisory in nature.
- ✓ This guide seeks to help workplace relations practitioners refresh their knowledge on bargaining.

I. Post-bargaining

This part deals with the key activities agencies undertake after an enterprise agreement has been successfully voted up by employees following a ballot.

I1 | Fair Work Commission approvals process

Before a proposed enterprise agreement commences it must be approved by the Fair Work Commission (FWC). The FWC ensures the proposed enterprise agreement was made in compliance with the various legislative requirements set out in the *Fair Work Act 2009* (Cth). The FWC also applies the Better Off Overall Test (BOOT) against the proposed enterprise agreement as per section 186(2)(d) of the *Fair Work Act 2009* (Cth).

The BOOT is a point-in-time assessment that requires that employees be better off under the enterprise agreement than under the relevant modern award. In the Commonwealth, the relevant award is likely to be the *Australian Public Service Enterprise Award 2015* or the *Australian Government Industry Award 2016*.

Agencies must apply to the FWC for approval of their 'made' enterprise agreement within 14 days of the agreement being made. Agencies should not wait until the 14th day to lodge their application and should be proactive in seeking guidance from the FWC should any questions arise during the application process.

Agencies must account for the FWC's approval process. This includes preparing the application and attached documentation prior to a ballot (as far as possible). These documents should be filled out with as much relevant information as possible, to give the agency the best possible chance of having the enterprise agreement approved by the Fair Work Commission.

Applications can be submitted via email, facsimile, in person, via post or through the FWC's website. Applications must include:

A completed application form, being "Form F16 – Application for approval of enterprise agreement".

A signed copy of the enterprise agreement that meets the requirements of regulation 2.06A of the *Fair Work Regulations 2009*.

Any required declarations, including, "Form F17 – Employers declaration in support of application for approval of enterprise agreement".*

* See also the optional Form F18, statutory declaration of an employee organisation. If a union is a bargaining representative, arrange for completion of this form in support of the application to assist expedite approval process.

Further Information

For more detailed information regarding the FWC's enterprise agreement approval process, the BOOT and any forms, consult the FWC's Enterprise Agreement Benchbook.

On receipt of an agency's enterprise agreement approval application, the FWC has a number of steps it follows. An enterprise agreement will only be approved when the FWC is satisfied that (but not limited to):¹

- ✓ enterprise bargaining has been finalised;
- ✓ the FWC application forms have been completed and submitted on time;
- ✓ the agreement has been genuinely agreed to by the relevant employees;
- ✓ the agreement passes the better off overall test;
- ✓ the agreement does not contain terms which exclude or have the effect of excluding the National Employment Standards or a provision of the National Employment Standards;
- ✓ the agreement does not include any unlawful terms or designated outworker terms;
- ✓ the group of employees covered by the agreement was fairly chosen;
- ✓ the agreement specifies a date as its nominal expiry date (not more than 4 years after the date of Commission approval); and
- ✓ the agreement provides a dispute settlement procedure.

Note: if the agreement does not include a flexibility clause or a consultation clause, or includes clauses that are not consistent with the terms of the *Fair Work Act 2009* (Cth) then the applicable model clause is taken to be terms of the agreement on approval of the agreement.

Undertakings

In certain circumstances, the FWC may seek further information or amendments to the operation of the proposed enterprise agreement where it does not meet certain requirements of the *Fair Work Act 2009* (Cth). These amendments are called 'undertakings'.

If the Commission Member is concerned about an aspect of the agreement, they would seek the views of employee bargaining representatives about making undertakings. The FWC may require the employer to provide a written undertaking to address these concerns. The undertaking is read in conjunction with the proposed enterprise agreement and prevails over the terms within the agreement.

For example, if an enterprise agreement does not meet a National Employment Standard, the FWC may accept a written undertaking describing how the Standard will be met. Where the request for an undertaking is made and the FWC's rationale is not clear, an agency may seek further information from the FWC. Agencies should seek legal advice where they disagree with the proposed undertaking or believe it is broader than required to address the FWC's concerns.

¹ The Fair Work Commission, 'Approval Process' (updated 31 July 2017) <<https://www.fwc.gov.au/awards-and-agreements/agreements/approval-process>>.

Once the FWC approves the proposed enterprise agreement, the agency and other bargaining representatives will be notified. The agreement will be published on the FWC's website and the agreement will come into effect on the date specified by the published decision (seven days after its approval, or a later date specified in the proposed agreement).

Further Information

For more detailed information regarding the FWC's enterprise agreement approval process, the BOOT and any forms, consult the FWC's Enterprise Agreement Benchbook.

12 | Communication and educating employees

A newly voted up enterprise agreement is an opportunity for an agency to promote a good news story to its employees, and to thank everyone involved in bargaining. Agencies should communicate the confirmed outcome of the enterprise agreement ballot to their employees as soon as practicable. As a courtesy, agencies could also inform the bargaining representatives just prior to informing all employees.

The following diagram illustrates a range of groups agencies need to communicate with following a successful enterprise agreement ballot, including:



Fair Work Commission approval process

Once the enterprise agreement ballot is successfully voted up, the bargaining team's duties have not ended. An agency should communicate the FWC's approval process to their employees. It is vital to manage expectations that there is no specified time limit for the FWC to review and approve an enterprise agreement. Once the enterprise agreement has been lodged, an agency could periodically update their employees on the progress made.

Agencies should note that the approval process may be extended based on the complexity of the agreement, whether undertakings have been sought and the number of other agreements with the FWC for consideration at that time.

Implementation of the new agreement

An agency should inform their employees of the steps needed to implement the enterprise agreement. There may be a range of activities involved, including the agency's payroll functions actioning the remuneration proposal and any associated increases to allowances, uploading the approved enterprise agreement on the agency's intranet, amending human resource guides and factsheets to reflect any changes outlined in the enterprise agreement and issuing a new HR delegations instrument.

Other interested groups

The bargaining team should maintain communication with their agency's senior leadership and their Minister's Office. For some agencies, a successful enterprise agreement ballot also means the automatic cessation of a protected action ballot order, which ceases to be effective where an agreement is made with employees. The agency should communicate the ballot outcome and ballot participation statistics with the APSC as soon as practicable. The agency should also inform the APSC when the agreement has received the FWC's approval, so the APSC can update its records on the progress of bargaining across the Commonwealth public sector.

13 | Developing documents to support the new agreement

Agencies should develop new policy documents and/or update existing documents to reflect the changes proposed in the new enterprise agreement. These updates could include instructions to managers about administering entitlements and delegations for decision making.

Workplace policies codify the principles of the new enterprise agreement and set out any new practices involved in the implementation of the agreement. Policies may specify who is responsible for undertaking specific tasks and activities in line with the new agreement.

The steps below outline some of the key stages in developing and introducing new policy documents.

Step 1: Plan and consult

- Involve relevant staff in the development and implementation of any new workplace policies.
- Determine responsibility for promoting awareness and ownership of policies.
- Ensure all consultation obligations are included in the plan.

Step 2: Undertake research

- Research the characteristics of effective policy documents and what is best practice.
- Determine what the policy documents should contain and how they should be presented.

Step 3: Draft the policy documents

- Determine the format for the new policy documents.
- Clearly define who the policy documents apply to.
- Write policy documents in plain English, which can be easily understood by users.
- Determine the processes to review and revise policy documents on a regular basis.

Step 4: Implement the new policy documents

- Prepare the workplace for new policy documents, for example on the intranet or physically in offices.
- Make new policy documents easily available and accessible to all employees.
- Assist managers in disseminating information regarding the new policy documents.

Step 5: Monitor and Evaluate

- Set a timetable to review policies to ensure they remain current and factual.
- Seek feedback from employees on the readability and usefulness of new policy documents.

14 | Knowledge transfer and succession planning

Following an enterprise bargaining round, the most underrated but important activities are those that assist agencies to retain knowledge of the bargaining process. The long gaps between enterprise bargaining rounds of at least three years can lead to the loss of bargaining knowledge and skills.

Organisational (corporate) knowledge

This is partially addressed in Section E8 'Records management' which deals with maintaining accurate records during bargaining to illustrate that an agency was meeting its good faith bargaining obligations. Accurate and comprehensive, bargaining records form part of an agency's organisational knowledge. The bargaining team should take steps to ensure the organisational knowledge contained in official records is collected and stored. Selected human resource practitioners within the agency should know where these records are stored and have access to them.

Future bargaining teams can refer to records to see why a particular decision was made or action taken. More than offering a rationale, these records are resources to help agencies during future bargaining rounds. Communications materials or tools developed in one bargaining rounds can also be retooled, tailored and amended for use in a future bargaining round, where appropriate.

Succession planning

Bargaining succession planning is about ensuring that human resource and workplace relations practitioners are developed and retained between bargaining rounds. The skills developed in bargaining and lessons learned can be effectively employed in the next bargaining round.

At the ground level this involves training and developing practitioners between bargaining rounds, ensuring they have a sound understanding of the Australian industrial relations system and the enterprise bargaining process. It may also involve mentoring and coaching of new practitioners by more developed practitioners. Some bargaining representatives may have been involved in or observed bargaining across multiple rounds. They often have robust and intimate knowledge of the organisation's history and decisions taken in previous bargaining rounds. Agencies should prepare for this by utilising the services of practitioners and representatives who were involved in previous bargaining rounds, or at least have a working knowledge of what occurred.

It is important for agencies to keep in touch with what is happening within the Australian industrial relations system and the Commonwealth context.

15 | Identifying practical issues

Agencies should look at their enterprise agreement critically between bargaining rounds. If issues are not recorded in a timely fashion, it is likely many will be forgotten or overlooked by the time the bargaining team performs its pre-bargaining consultation and evaluation.

Critical evaluation will ensure practical deficiencies are recorded and can be addressed when preparing for the following bargaining round. This might include clauses that unduly restrict agency operations or have unintended consequences. Changes to legislation, particularly in relation to the National Employment Standards, will have to be recorded and implemented. Agencies should consider monitoring the FWC's annual wage review and any amendments to the applicable modern award. Agencies have to ensure their pay scales are equivalent to or higher than the award rate.

There are a number of ways to monitor practical issues so agencies should select the most suitable options, which may include:

A positional mailbox for human resource, workplace relations practitioners and all employees

- Circulating a specified email address to corporate functions designed to receive concerns and notes about the application of terms contained within the enterprise agreement.
- A staff member, or human resources team, could keep a record of these interactions and pass them on to the relevant persons once a new bargaining team is assembled.

Keeping track of issues raised over a draft enterprise agreement

- Circulating a link to a copy of the enterprise agreement to corporate functions.
- The enterprise agreement may then be edited between bargaining rounds by those corporate functions. Those functions can comment on clauses that require attention and the reasons why an edit is required.
- Once a bargaining team is assembled, access to the document can be provided to them for consideration.

Members of the incoming bargaining team can review the comments provided by the agency's corporate functions, and determine which issues can be rectified through the drafting and/or bargaining process.

There may be issues that do not relate to drafting or bargaining but point to broader capability issues within the agency's corporate functions or a lack of proper communication with staff. Where such concerns are identified, the bargaining team may wish to report this on to the relevant area or function to address.

16 | Communicating with stakeholders

In addition to giving corporate functions a means of providing feedback on the enterprise agreement over its substantive lifetime, agencies should explore active communication with senior management and staff, even though they are not actively engaged in bargaining.

Communicating with staff

Communication with staff does not end when an enterprise agreement is voted up or comes into effect. Effective post-agreement communication assists in increasing engagement, morale and productivity. This communication may also increase an agency's chances of success when it proposes a new agreement.

Agencies may wish to communicate the following to staff:



Communicating with senior management

Communication with senior management is crucial as senior management provide strategic direction.

Expectations about the agency's next workplace arrangement and draft timeframes should be decided early. This will allow the new bargaining team time to conduct their pre-bargaining investigations prior to the nominal expiry date of the existing arrangement. Agencies may also wish to ensure senior management are kept abreast of workplace arrangement.

Agencies also need to ensure senior management is kept up-to-date with important issues arising from the application of the agreement, and significant changes in the agency's broader operational environment. Such changes may include machinery of government changes, elections or funding changes.

J. Self-assessment

Upon completing bargaining, bargaining teams could take the time to reflect and self-assess their performance. This could help inform the agency's approach in the next bargaining round. Identifying strengths and weakness is an effective approach to ensuring the next bargaining round starts with a more informed approach.

J1 | Questions bargaining teams should ask themselves

Agencies should also conduct a post-mortem analysis of the bargaining process where possible. This could include asking questions about:

1. Preparation prior to bargaining

- How did the bargaining team evaluate the agency's context prior to bargaining?
- To what extent were the bargaining positions developed with sufficient evidence?
- What did the bargaining team consider the employer's position to be? Was this reflected in the employer bargaining position?

2. The bargaining team

- What subject matter expertise was particularly effective during bargaining?
- Did the bargaining team experience high turnover during the bargaining round?

3. Consulting and communicating with stakeholders

- How effectively did the bargaining team consult with agency stakeholders, including senior management and corporate functions, to set expectations for bargaining?
- How effectively did the bargaining team consult with employees?
- What were the most effective communication methods to inform staff and promote the employer's positions?
- How regularly did the bargaining team communicate with staff during bargaining?

4. The bargaining process

- How did the bargaining participants act in good faith during the course of bargaining?
- What issues/topics/positions did the bargaining representatives reach agreement over?
- How effective were the bargaining protocols established *[if any protocols were established]*?
- How realistic were the expected timeframe for bargaining?
- How effective were the bargaining team's record keeping and documentation?

5. Ballot of employees

- Did the bargaining team engage with line managers to promote the enterprise agreement to staff during bargaining?
- Did the agency succeed in having the enterprise agreement voted up in its first employee ballot?
- How effective was the service of the ballot provider?

6. Other factors in enterprise bargaining

- How effectively did the bargaining team respond to legal action taken during bargaining? *[if any legal action was taken by bargaining representatives]*
- How did the agency manage industrial action during the course of bargaining? *[if any industrial action was taken by employees]*
- How did the agency handle any FWC conferences for mediation and conciliation? *[if the agency participated in any FWC conferences]*
- What did the bargaining team have to deal with that was unexpected and unforeseen? How effectively did the bargaining team respond? What lesson can be learned from this experience?

7. FWC approval process

- How prepared was the agency for the FWC enterprise agreement application forms?
- What undertakings had to be made with the FWC? *[if any undertakings were made]*

8. The new enterprise agreement

- What drafting issues did the bargaining team identify within the new enterprise agreement?
- What practical issues have been identified from the application of the new enterprise agreement?

9. The next bargaining round

- How should the agency deal with or avoid issues identified in the next bargaining round?
- How should the agency continue to seek feedback from line managers, employees, human resource and workplace relations practitioners on the new enterprise agreement?

Bargaining teams should utilise these questions and self-reflections when drafting a handover document with lessons learnt for future bargaining teams. Agencies should recognise that engaging with their staff is part of a continual industrial relations process. The new enterprise agreement, employee consultation and ongoing activities will inform future bargains.