



8. Approval and content of enterprise agreements

Work Choices prohibited certain content in enterprise agreements including payroll deductions for union membership and leave for occupational health and safety training where it is conducted by a union.

The new workplace relations system enables employers and employees to bargain over a wide range of matters. These provisions balance the legitimate interests of an employer and employees during the bargaining process. They ensure the focus of an agreement is on the direct employment relationship between the employer and employees and, where relevant, the union.

The concept of prohibited content no longer exists in the new workplace relations system.

Approval of agreements

All agreements need to be approved by Fair Work Australia before they commence operation.

When applying for approval of an agreement by Fair Work Australia, a bargaining representative must submit a signed copy of the agreement and any declarations required by Fair Work Australia.

Before approving agreements Fair Work Australia must be satisfied that:

- the employees genuinely agree to the agreement and approval would not be inconsistent with the good faith bargaining requirements
- the group of employees covered by the agreement was fairly chosen and requirements relating to specific categories of employees, such as outworkers, have been met
- each award-covered employee and prospective award-covered employee will be better off overall by entering into the agreement
- the terms of the agreement do not contravene the National Employment Standards
- the agreement does not contain unlawful content and the required terms (i.e. nominal expiry date and a term about settling disputes) are included, and
- if the agreement is a multi-enterprise agreement, all employers have genuinely agreed to make the agreement, and no person coerced, or threatened to coerce, any of the employers to make the agreement.

An agreement will come into operation seven days after Fair Work Australia approves it, or a later date if one is specified in the agreement.

The Better Off Overall Test

Fair Work Australia will apply the Better Off Overall Test to ensure that each award-covered employee and each prospective award-covered employee who will be covered by the agreement will be better off overall in comparison to the relevant modern award.

Fair Work Australia may examine classes of employees in applying the Better Off Overall Test. Fair Work Australia will assume, in the absence of evidence to the contrary, that an employee will be better off overall if their class of employees will be better off overall in comparison to the relevant modern award.

The Test will be applied as a point in time test. Minimum wage provisions in awards or the national minimum wage order will override less generous minimum wage provisions in an enterprise agreement, to ensure that agreements are not made with the intention of bypassing the safety net. This will mean that where minimum award rates increase during the life of an agreement to above the agreement rates, employers will have to pay the higher rate.

Content of agreements

Agreements are able to contain permitted matters, which include matters pertaining to the relationship between:

- a. the employer and the employees, and
- b. the employer and any union to be covered by the agreement.

Deductions from wages for any purpose authorised by an employee such as salary sacrifice or deduction of union dues may also be included, as will terms dealing with the operation of the agreement.

Terms that are not about permitted matters cannot be the subject of protected industrial action. If terms in agreements do not meet these criteria, they will be void and unenforceable.

If a term in an agreement is not about a permitted matter, it will have no effect.

The expression 'matters pertaining to the relationship' has been used for over 100 years and brings with it established legal principles.

Courts in the past have found certain kinds of claims do not pertain to the employment relationship, such as clauses requiring an employer to make a donation to a third party, requiring an employer to only use certain suppliers or that outright prohibit the engagement of contractors.

To be approved, agreements are also required to contain terms that provide for:

- a nominal expiry date, and
- a procedure that requires Fair Work Australia or another independent person to settle disputes about any matters arising under the agreement and in relation to the National Employment Standards. The term must also allow for the representation of employees in the dispute settlement procedure.

Agreements must also contain terms about:

- individual flexibility arrangements that can be made between the employer and individual employees, and
- consultation on major workplace change.

Parties are able to negotiate such terms to meet their particular circumstances. Where an agreement is silent on these two matters, the model terms set out in regulations will be deemed to be incorporated.

Terms about certain matters will be classed as unlawful content and cannot be included in agreements. These include terms that:

- are discriminatory
- breach the general protections
- require the payment of a bargaining services fee to a union
- provide remedies for unfair dismissal to persons who have not served the applicable minimum employment period (i.e. six or 12 months), or exclude or modify unfair dismissal protections to the detriment of a person
- provide for right of entry to an employer's premises in a way that is inconsistent with certain right of entry laws, or
- purport to authorise industrial action during the life of the agreement.

Fair Work Australia will not approve agreements that contain unlawful content.