



Australia's Fair Work system

6. Bargaining in good faith

It is a new requirement under the *Fair Work Act 2009* that bargaining representatives for a proposed enterprise agreement must meet the good faith bargaining requirements. Good faith bargaining encourages parties to communicate openly and to focus their negotiations on key issues.

Under Fair Work, the good faith bargaining requirements are:

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

Good faith bargaining does not require parties to make concessions or sign up to an agreement where they do not agree to the terms. Good faith bargaining orders are therefore be about the process and conduct of negotiations and do not require parties to make or accept particular offers.

Majority support

There is no need for formal notification to commence bargaining—in most cases employees and employers can simply agree to start negotiations. Where an employer refuses to bargain, however, employees or their representatives can ask Fair Work Australia to determine if there is majority employee support for negotiating an enterprise agreement.

Fair Work Australia can determine whether there is majority employee support by whatever method it considers appropriate, such as a ballot or a petition.

If Fair Work Australia determines that there is majority employee support for pursuing an enterprise agreement, the employer is required to bargain collectively with the relevant employees.

The right to be represented

Where Fair Work Australia determines that there is majority employee support for enterprise bargaining or where an employer agrees to or initiates bargaining, or a scope order comes into operation, the employer is required to notify employees within 14 days of their right to be represented in bargaining.

Employees can appoint a bargaining representative to represent their interests. This may be themselves, a colleague, a union or another person (such as a consultant or accountant). The only requirement for a bargaining representative appointed by an employee is that they must be sufficiently independent of influence from the employer. For union members, their bargaining representative will be taken to be their union (if the union is entitled to represent them) unless they appoint someone else or revoke the union's status as their representative. Employers are also able to appoint their own bargaining representative.

When bargaining is not occurring in good faith

The bargaining framework recognises that most employers and employees will voluntarily and successfully bargain collectively in good faith.

However, in the unusual situation where a bargaining representative is not bargaining in good faith, or the bargaining is not proceeding efficiently or fairly, Fair Work Australia can make orders to ensure the integrity and fairness of the bargaining process. Any orders made by Fair Work Australia can be enforced in the courts.

Examples of conduct where Fair Work Australia could potentially make bargaining orders include:

- a refusal by the employees to respond to a proposal from the employer about new work methods to increase productivity
- pursuing a claim that could not be included in an agreement approved by Fair Work Australia—for example, that does not comply with the National Employment Standards or would not pass the Better Off Overall Test, or which is unlawful
- unfair conduct towards a bargaining representative, such as unreasonably preventing the person consulting with employees to be covered by the agreement
- an employer refusing to meet with the employees' bargaining representative or to respond to the representative's correspondence or telephone calls, or
- unfairly selecting the group of people to whom the agreement would apply and who would get to vote on the agreement.

On very rare occasions there may be parties who ignore orders to bargain in good faith if they believe this will advantage them in bargaining.

If a bargaining representative has breached one or more bargaining orders and the breach is serious and sustained and has significantly undermined the bargaining for the agreement, Fair Work Australia may arbitrate by making a workplace determination.

There is a high threshold for access to workplace determinations in these circumstances, meaning their use is likely to be rare. The provision is aimed at conduct where a union or an employer is prepared to flout the law. Fair Work Australia is required to take account of the views of all other bargaining representatives. Fair Work Australia must also be satisfied that all other reasonable alternatives for reaching agreement have been exhausted and there is no prospect that the agreement will be reached in the foreseeable future.

Agreement variations

The *Fair Work Act 2009* allows agreements to be varied before their expiry date, but only by consent. Access to good faith bargaining orders is not available when bargaining for variations, although Fair Work Australia can deal with a dispute if requested by an employee or employer association or an affected employee. Fair Work Australia cannot arbitrate such a dispute, unless all the bargaining representatives have agreed.