Employer’s guide to making a single enterprise agreement

This document covers the steps you need to take from the time you consider making a single enterprise agreement (agreement) with your employees to finalising the agreement, lodging the application and the approval process at the Fair Work Commission.

This guide does not apply to multi-enterprise agreements or greenfields agreements.

In this guide you will find:

- A checklist that summarises the key steps to making a single enterprise agreement and allows you to record important events and dates.
- A detailed description of each of the steps.

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This document is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Commission and its work. Reading this document is not a substitute for reading the specific provisions of the Fair Work Act 2009 that relate to agreement making and approval. The Commission does not provide legal advice.
Summary Agreement Making Checklist

Step 1: Before you start bargaining

☐ Understand the purpose of bargaining
Before you start bargaining, ensure that you are familiar with bargaining and the purpose of engaging in it.

☐ Understand the role of bargaining representatives
Bargaining representatives may be nominated to participate in bargaining for an agreement.

☐ Understand your obligations during bargaining
Bargaining representatives are required to act in good faith so that bargaining is fair and efficient, so it is important that you understand your obligations as a representative.

☐ Familiarise yourself with key timeframes
There are several mandatory steps that must be taken when starting to bargain for a proposed enterprise agreement. Some of these steps have specific timeframes set by the *Fair Work Act 2009* (the Act) which must be met. You should familiarise yourself with these timeframes and consider the forms that you will need to lodge with your application.

☐ Familiarise yourself with key terminology
Understand the main terms in the agreement making process including the better off overall test (the BOOT), national employment standards (the NES), access period, notification, award and notice of employee representational rights (NERR).

☐ Familiarise yourself with the application forms
When you are ready to lodge your agreement for approval, it will need to be accompanied by certain forms including a declaration, so it is important to be familiar with these forms at the outset, including the Forms F16, F17, F18 and F18A.

☐ Make a plan for communicating with your employees
Think about how you will communicate with employees during bargaining and the approval process. Consider your usual method of communication and whether you need to make any adjustments so that all reasonable steps are taken. If you have any employees with special needs or circumstances, they may require additional assistance.

Find out more about Step 1
Step 2: Start bargaining

☐ Record the date of notification
This is generally the date you started to bargain or agreed to start bargaining.

☐ Prepare the Notice of Employee Representational Rights (NERR)
The NERR generator will assist you to draft a compliant NERR to provide to your employees.

☐ Distribute the NERR to employees
You must take all reasonable steps to distribute the NERR to all of the employees who will be covered by the agreement and are employed at the date of notification.

☐ Record the date you gave the NERR to employees
You must provide the NERR to employees as soon as practicable and within 14 days from the date of notification.

☐ If you gave the NERR to employees over a period of time, record the date you last gave the NERR to employees
If you issued the last NERR over 14 days from the date of notification, please detail the circumstances in your F17.

☐ Record how you distributed the NERR to employees
Keep records of how you notified each applicable employee of their right to representation. You will need to lodge copies of these records, along with any other materials you gave to employees.

Find out more about Step 2
Step 3: Develop the terms of the agreement

Consider the entitlements in the agreement that employees will vote on. If employees would otherwise be covered by a modern award, you will have to consider the entitlements including rates of pay that employees would receive under the modern award.

Your agreement should:

☐ Contain a coverage term which sets out the employees to be covered by the agreement

☐ Include a dispute settlement term which complies with the requirements in the Fair Work Act (the Act)

☐ Include a consultation term which complies with the requirements in the Act

☐ Include a flexibility term which complies with the requirements in the Act

☐ Have a nominal expiry date that is no more than 4 years from the date the agreement is approved by the Commission (not the date it commences)

☐ Contain other entitlements and conditions for employees, such as monetary and non-monetary entitlements

☐ Not contain any entitlements that displace the National Employment Standards (the NES)

You may wish to include an NES precedence clause which may avoid the need to provide undertakings if there are any terms in the agreement that may be less beneficial than the NES.

Find out more about Step 3
Step 4: Finalise the agreement

Turn your draft agreement into a final copy ready to be voted on by employees.

Check that your agreement:

☐ Contains all of the entitlements that were agreed to during bargaining

☐ Does not contain any typographical or cross-referencing errors

☐ Contains rates of pay that are at least equal to or above the corresponding award classification

☐ Is capable of passing the better off overall test (BOOT)

The Commission Member who deals with your application will ultimately determine if employees are better off compared to the modern award that would otherwise apply.

Performing the BOOT requires the identification of those terms of an agreement that are more beneficial and those that are less beneficial to an employee than the relevant award. An agreement may pass the BOOT even if some award entitlements have been reduced, as long as overall those reductions are more than offset by the benefits of the agreement. Each employee must be better off under the agreement, not just receive benefits equivalent to what they would have received under the relevant award.

Find out more about Step 4
Step 5: Explain the agreement to employees

☐ Explain to all employees the terms of the agreement and the effect of those terms

The Commission Member must be satisfied that all reasonable steps were taken to explain the agreement and the effect of its terms to employees so that employees understood what they were voting for.

The explanation should include a comparison of the terms of agreement compared to the award.

☐ Record the steps taken to explain the terms and effect of the agreement to employees

The Form F17 requires the employer to describe the steps taken to explain the agreement and the effect of the agreement, when the steps were taken, by whom, what was explained and how the particular circumstances and needs of employees including those with special needs or circumstances were taken into account.

Keep records of all the steps taken to explain the terms of the agreement and their effect. You will need to lodge copies of these records, along with any other materials you gave to employees.

Find out more about Step 5
Step 6: Prepare employees to vote

To meet the requirements related to voting on the agreement, you must:

☐ Decide on a time, place and method of the vote

   The vote must commence at least 21 clear days after you gave employees the NERR.

☐ Consider and record the date when the access period commences

   The access period is the 7 clear day period before the start of the vote.

☐ Advise employees of the time, place and method of the vote by the start of the access period

☐ Record how and when you advised employees of the details of the vote

   When making your application, you will need to lodge copies of any material you gave to employees to notify them of the details of the vote for example emails, memos, notices placed on noticeboards etc.

☐ Give employees who will be covered by the agreement a copy of, or access to, the proposed agreement and any other incorporated material by the start of the access period

☐ Record how and when you gave employees a copy of, or access to, the agreement and any incorporated material

   When making your application, you will need to lodge copies of any material you gave to employees to provide them with a copy of or access to the agreement and any incorporated material for example emails, memos, notices placed on noticeboards etc.

Find out more about Step 6
Step 7: Conduct the vote

☐ Record the date the vote starts

☐ Record the date voting finishes

The agreement is made when the majority of employees who cast a valid vote, voted to approve the agreement. Your application should be lodged within 14 days of the date the agreement is made.

☐ Record the number of employees covered by the agreement at the time of the vote

☐ Record the number of these employees who cast a valid vote

☐ Record the number of these employees who voted to approve the agreement

Find out more about Step 7
Step 8: Lodge your application & supporting documentation with the Commission

You must lodge your application for approval of your enterprise agreement within 14 days after the agreement is made.

Determine the last date for lodging the application

You must also include the following documentation with your application:

☐ Application Form F16

☐ Employer’s declaration Form F17

☐ A copy of the NERR

☐ A correctly signed copy of the agreement

The agreement must be signed by the employer and an employee or employee representative and include the full name, address and authority of the people who signed.

☐ Copies of any material given to employees including correspondence and documents referred to in your F17 such as explanatory information

☐ Employee organisation Form F18 or employee representative Form F18A if applicable

☐ Any other supporting material, including documents referred to in your application such as classification matching

Find out more about Step 8
Step 9: Process at the Commission

Once your application is lodged, you will receive a matter number. The application will also appear on the Agreements in Progress page of the website.

The application will then be reviewed by the Agreements Team before being allocated to a Commission Member. The Commission Member or their Chambers will be in contact if they have any questions or concerns with your application. You may be requested to provide further information or undertakings in relation to your application in order for the Member to be satisfied that it can be approved.

Find out more about Step 9

Step 10: Approval of your agreement

If your application is approved, a decision will be issued by the Member and the agreement will take effect 7 days after the Commission Member approves it (unless a later date is specified in the agreement).

Once the agreement is in operation, it will operate for a period of up to 4 years from the date of approval until it reaches its nominal expiry date (depending on what is specified in the agreement).

Once the agreement reaches its nominal expiry date, it will continue to operate unless it is terminated or replaced.

Find out more about Step 10
Agreement Making Steps Explored

Step 1: Before you start bargaining

**What you need to do in this step**

- Understand the purpose of bargaining
- Understand the role of bargaining representatives
- Understand your obligations during bargaining
- Familiarise yourself with key timeframes
- Familiarise yourself with key terminology
- Familiarise yourself with the application forms
- Make a plan for communicating with your employees

**Understand the purpose of bargaining**

Bargaining is the process by which the parties to a proposed enterprise agreement negotiate the terms and conditions which will be included in an agreement, including the scope of coverage.

Bargaining helps you and your employees (and/or bargaining representatives) to negotiate an agreement that will take into account both your business needs and the interests of your employees.

**The role of bargaining representatives**

A bargaining representative is a person nominated to participate in bargaining for a proposed enterprise agreement. A bargaining representative can be an employer, employee, union, industrial association, or any other person specified in writing by either the employer or employee.

A union will be the default bargaining representative for any employees who are members of the union, unless the employee(s) have:

- appointed another person in writing as their bargaining representative, or
- revoked the status of the union as the default bargaining representative in writing.

Once bargaining for a proposed enterprise agreement has commenced, all bargaining representatives are required to recognise and bargain with the other bargaining representatives for the proposed agreement.

Please keep any bargaining representative nomination forms that are provided to you by employees as you will need to provide these when lodging your application.
Understand your obligations during bargaining

Once bargaining has commenced, a common first step to continue bargaining is by:

- preparing a draft agreement with the terms you would like to include in your agreement
- holding a meeting to discuss what could be contained in an agreement, or
- alternatively, a bargaining representative (which might include a union) may provide a list of proposals or a draft agreement as a starting point.

Bargaining representatives are required to meet the good faith bargaining requirements. Good faith bargaining requirements aim to ensure that all bargaining representatives act in an appropriate and productive manner. Non-compliance with these requirements exposes a bargaining representative to bargaining orders.

Good faith bargaining means you must genuinely consider and respond to offers and proposals put forward by the other side. It doesn’t mean that you have to make concessions.

Examples of conduct that is consistent with good faith bargaining includes:

- holding meetings to discuss the proposed agreement
- sharing relevant information with each other in a timely manner
- giving genuine consideration to each other’s proposals
- responding to proposals and giving reasons for the response to proposals, and
- recognising and working with each other’s bargaining representatives (if any).

If you think that a party involved is not meeting the good faith bargaining requirements, you may apply to the Commission for assistance to promote fair and efficient bargaining.

What do you need to consider when you are negotiating an agreement?

When you negotiate an agreement, you must make sure that the agreement:

- will lead to each employee being better off overall under the agreement than they would be under the relevant modern award. When you lodge your application, the Commission needs to be satisfied that the agreement passes the better off overall test, and
- does not provide for any entitlements that are detrimental to an employee when compared to those provided under the NES.

To develop the terms of your agreement, it may be helpful to view the following:

- the modern award(s) relevant to your business
- the National Employment Standards (NES)
- your current agreement (if you have one), or
- examples of other agreements made by similar businesses. All agreements that have been approved by the Commission are available on the Find an Agreement page on our website. On the left-hand menu you can choose a relevant industry from the drop-down list.
Modern awards and the NES set out minimum entitlements for employees, such as rates of pay, penalty rates and allowances. You can find the modern award(s) that applies to your business on the modern awards list page of our website.

If you don’t know which award(s) apply to your business, the Fair Work Ombudsman can help. Check their Find my award page on their website or call them on 13 13 94.

**Familiarise yourself with key timeframes**

In order to successfully make an agreement, there are some actions you must perform within particular timeframes in the Fair Work Act 2009 (the Act).

It is very important to comply with the timeframes. If you perform actions outside of the required timeframes, the Commission may not be able to approve your agreement. If this happened, you may need to start the agreement making process again, so it is important to read the rules about timeframes carefully.

The timeframes in the Act are usually expressed as a number of days before or after a particular act or event occurred or is to occur. When applying these timeframes, make sure that you do not count the day on which the relevant act or event occurred or is to occur.

*For more information see section 36(1) of the Acts Interpretation Act 1901 (Cth) as in force on 25 June 2009 (see section 40A of the Fair Work Act 2009).*

**Familiarise yourself with key terminology**

There are many terms that you should familiarise yourself with prior to bargaining.

**What is an award?**

Awards are enforceable documents containing minimum terms and conditions of employment in addition to any legislated minimum terms. Awards provide pay rates and conditions of employment such as leave, ordinary hours of work, overtime and shiftwork entitlements, and other workplace related conditions.

Most modern awards relate to particular industries or occupations.

Before the better off overall test can be applied, it is necessary to correctly identify the modern award(s) that cover the employees and their employer(s) in relation to the work to be performed under the enterprise agreement.

**What is the better off overall test (BOOT)?**

The better off overall test (the BOOT) is a test used by the Commission to determine whether an enterprise agreement can be approved. When an application for approval of an enterprise agreement is made, the Commission must consider whether employees will be better off overall if the agreement applied to them instead of the modern award.

The BOOT involves a comparison of the terms of a proposed agreement with the terms of the modern award that would otherwise apply.

An agreement will pass the BOOT if the Commission Member is satisfied that at the time the application for approval is lodged with the Commission (the test time), each current and future employee who will be covered by the agreement will be better off overall if the agreement applies to them than if the relevant modern award applies to them.

You can find out more about the better off overall test (BOOT) in the enterprise agreements benchbook.
What are the National Employment Standards (NES)?
The National Employment Standards are minimum standards that apply to the employment of employees which cannot be reduced. The NES are set out in Part 2–2 of the Act and relate to:

- maximum weekly hours
- requests for flexible working arrangements
- parental leave and related entitlements
- annual leave
- personal/carer’s leave, compassionate leave and unpaid family and domestic violence leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay, and
- provision of the Fair Work Information Statement.

What is a nominal expiry date?
The date specified in an enterprise agreement which indicates the period of time that the parties intended the agreement to operate.

The nominal expiry date cannot be more than four years after the Commission approves the agreement.

An enterprise agreement has continuing operation and continues to apply even after it has passed its nominal expiry date until it is terminated or replaced.

What is the notice of employee representational rights?
The notice of employee representational rights (NERR) is a document which informs employees of their rights during bargaining including their right to be represented.

It is given to employees at the commencement of bargaining.

What is the date of notification?
The date of notification is the point at which the parties start the bargaining and agreement making process, whether by agreement or order of the Fair Work Commission. The date of notification is the starting point for the agreement making process.

The date of notification for a proposed enterprise agreement is the time when:

- the employer agrees to bargain, or initiates bargaining, for the proposed agreement
- a majority support determination in relation to the proposed agreement comes into operation
- a scope order in relation to the proposed agreement comes into operation, or
- a low-paid authorisation in relation to the proposed agreement that names the employer comes into operation.
What is the access period?
The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process.
The access period consists of 7 clear calendar days.

Familiarise yourself with the application forms

When you are ready to lodge the agreement, you will need to lodge it with the Fair Work Commission, and it should be accompanied by a number of forms including:

- Form F16 – this is the application form
- Form F17 – this is the employer’s declaration in support of the application
- Form F18 – this is the employee organisation’s declaration in support of the application (optional), and
- Form F18A - this is the employee representative’s declaration in support of the application (optional).

It is wise to familiarise yourself with these forms at the outset so you are aware of the information that will need to be provided and so that you can have all the necessary information available to lodge your application within 14 days after the agreement is made.

Make a plan for communicating with your employees

You will need to communicate with your employees throughout the process for approving an enterprise agreement.

You will need to provide employees with a copy of the NERR, access to the agreement and any incorporated material, inform employees of the details of the vote, explain the terms and effect of the agreement, and keep employees informed during the bargaining and approval process.

Consider your usual method of communication and whether you have any employees with special needs or circumstances who may require additional assistance, such as junior employees or employees who speak English as a second language.

You must consider the needs and circumstances of employees and take reasonable steps to communicate with them, for example by ensuring they understand the terms of the agreement and how it will affect them.

It’s important to keep records of any communications between yourself and employees. This may include copies of emails, memos or material provided to employees during bargaining. You will need to include copies of these materials when you apply to have your agreement approved.
Step 2: Start bargaining

What you need to do in this step

- Record the date of notification
- Prepare the Notice of Employee Representational Rights (NERR)
- Distribute the NERR to employees
- Record the date you gave the NERR to employees
- If you gave the NERR to employees over a period of time, record the date you last gave the NERR to employees
- Record how you distributed the NERR to employees

Record the date of notification

The day you and your employees start to bargain (or agree to bargain) is called the date of notification. Recording this date is important because it affects the timing of other steps in the agreement making process.

The process of bargaining usually begins with you initiating or agreeing to bargain for a proposed agreement with your employees.

Prepare the Notice of Employee Representational Rights (NERR)

Complete the NERR with the name of employer, proposed title and proposed coverage and select the relevant paragraphs that apply to the workplace.

The NERR comes from the Fair Work Regulations 2009 (Cth) (the Regulations). The NERR must contain only the content prescribed by the Regulations and no other content except that which the Regulations require the employer to insert or omit.

Important

If the NERR is not in the prescribed form, the Commission may not be able to approve the agreement.

Use our NERR generator to make sure your NERR complies with the Regulations.

Distribute the NERR to employees

Distributing the NERR to employees notifies employees that bargaining has started. The NERR informs employees that they have the right to be represented during the bargaining process.

You must take all reasonable steps to give a NERR to all employees to be covered by the proposed agreement who are employed at the time of notification by no later than 14 days after the date of notification.
Example

You decide to start bargaining on 14 May. You have 14 days to give the NERR to your employees.

The first of the 14 days will be 15 May and the last will be 28 May.

You must give your employees the NERR by no later than 28 May.

If you give all of your employees a copy of the NERR on 20 May, you have complied with the timeframe.

You should consider how you will give the NERR to employees who may not be at the workplace on the day (such as employees who may be rostered off, on leave or on long-term absence).

In some cases it may be appropriate to use a variety of methods to give the NERR to different employees including by email, post or handing out copies.

Important

If all reasonable steps are not made to give the NERR to all your employees in the timeframe, the Commission may not be able to approve the agreement. Then you may need to restart the bargaining process. To avoid this, ensure you take all reasonable steps to provide employees with the NERR, and that you document these steps.

Find out more about what all reasonable steps means in our enterprise agreements benchbook.

For more information see sections 173 and 174 of the Act.

Keep records of the date you gave the NERR to employees

Make sure you keep records of when you distributed the NERR to employees.

You will need to provide this information when you lodge your application.

If you gave the NERR to employees over a period of time, record the date you last gave the NERR to employees

The Act requires you provide a copy of the NERR to employees who are engaged at the time of notification.

You do not have to provide a copy of the NERR to employees who are engaged after this point.
Keep records of how you distributed the NERR to employees

Make sure you keep records of:

- how you provided the NERR to your employees,
- the steps taken to provide the NERR to the employees, and
- the appointment of any bargaining representatives that employees give to you in return.

You will need to provide this information when you lodge your application.

For more information see sections 173 and 174 of the Act.
Step 3: Develop the terms of the agreement

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<thead>
<tr>
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<td>Not contain any entitlements that displace the National Employment Standards (NES), or contain an NES precedence clause</td>
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Coverage term

Your agreement must include a coverage term that sets out the employees to be covered by the agreement. It’s common to specify the:

- the employer
- the employees to be covered by the agreement
- the work that the employees covered will perform, and/or
- the location(s) the work will be performed at.

Example coverage clause

Who does this agreement cover?

(a) This agreement will cover:

(1) Darren’s Motor Garage Pty Ltd (Company) in respect of its employees at the Southport garage who are covered by this agreement, and

(2) Employees of the Company at the Southport garage who are covered by the classifications set out in clause X of the agreement undertaking vehicle repair or maintenance activities (Employees).
Dispute settlement term

Your agreement must contain a dispute settlement term which provides a procedure for settling:

- disputes about matters arising under the agreement, and
- disputes in relation to the NES.

The term must require or allow the Commission, or another person who is independent of those covered by the agreement, to settle a dispute.

A dispute settlement term must not, for example, provide for disputes to be resolved solely by:

- the managing director of the employer, or
- a disputes board made up of officials of a union covered by the agreement.

The term must also allow for the representation of employees during the dispute.

You can include the model dispute settlement term in the Regulations, or you can draft your own term, but this term must comply with the requirements of the Act.

If the agreement does not contain a dispute settlement term, or the term does not comply with the requirements in the Act, the Commission may:

- refuse to approve the agreement, or
- approve the agreement with undertakings (see discussion below on ‘Undertakings’).

For more information see section 186(6) of the Act.

Consultation term

Your agreement must contain a consultation term which requires you to consult with employees about:

- a major workplace change that is likely to have a significant effect on your employees, and
- a change to their regular roster or ordinary hours of work.

The consultation term must allow for employees to be represented during consultations.

For changes to employees’ regular roster or ordinary hours of work, the consultation term must require the employer to:

- provide information to employees about the change
- invite employees to give their views about the change, and
- to consider the views of employees.

You can include the model consultation term in the Regulations, or you can draft your own term, but this term must comply with the requirements of the Act.

If the agreement does not contain a consultation term, or the term does not comply with the requirements in the Act, the model consultation term will be taken to be a term of the agreement.

For more information see section 205 of the Act.
Flexibility term

Your agreement must contain a flexibility term that allows you to make an individual flexibility arrangement (IFA) with an employee which varies the effect of specified terms of the agreement in order to meet the genuine needs of you and the individual employee.

You can include the model flexibility term in the Regulations, or you can draft your own term, but this term must comply with the requirements of the Act.

If the agreement does not contain a flexibility term, or the term does not comply with the requirements in the Act, the model flexibility term will be taken to be a term of the agreement.

For more information see sections 202, 203 and 204 of the Act.

Nominal expiry date for the agreement

Your agreement must include a nominal expiry date. An agreement comes into operation 7 days after it is approved by the Commission (or later if specified in the agreement). The nominal expiry date can be no later than 4 years from the date the agreement is approved by the Commission. It can be sooner than that, but not more than 4 years.

Agreements continue to operate after their nominal expiry date until they are replaced or terminated by the Commission.

Important

Some agreements incorrectly specify a nominal expiry date of 4 years from commencement (rather than approval).

However, as an agreement’s commencement date is at least 7 days after approval, an expiry date of 4 years from commencement exceeds the allowable maximum.

You can make the nominal expiry date 4 years from approval but not 4 years from commencement or operation.

Commencement date

By default, an agreement will take effect 7 days after the Commission approves it. You may specify a later date in your agreement on which it will commence (pending approval) for example, to provide time to update your payroll system.

Entitlements and conditions for employees, such as monetary and non-monetary entitlements

Agreements commonly contain the following terms and clauses:

- definitions or glossary
- hours of work
- classification structure and rates of pay
- penalty and overtime rates
- allowances
- breaks
• deductions authorised by an employee
• shiftworkers for the purposes of the NES, and
• relationship to the modern award such as whether the award is incorporated.

To help ensure that the terms of your agreement meet the requirements of the Act, read our Guide to making compliant agreement applications (PDF).

For more information see sections 54, 58 and 186(5) of the Act.

The National Employment Standards (NES)

The NES are minimum standards that apply to all employees employed by a national system employer. However, only certain entitlements apply to casual employees.

It is not necessary for an enterprise agreement to expressly include each NES entitlement. Terms that are included in an enterprise agreement cannot be less beneficial than those provided in the NES. An enterprise agreement can provide more favourable entitlements than those provided in the NES.

The minimum standards under the NES relate to:
• maximum weekly hours
• requests for flexible working arrangements
• parental leave and related entitlements
• annual leave
• personal/carer’s leave, compassionate leave and unpaid family and domestic violence leave
• community service leave
• long service leave (under State or Territory laws or as a preserved award-derived or agreement-derived entitlement)
• public holidays
• notice of termination and redundancy pay, and
• provision of a Fair Work Information Statement.

NES precedence term

The increasing proportion of agreements requiring undertakings to address deficiencies, impacts on the time it takes the Commission to finalise applications. Many of these undertakings are requested when an agreement provides entitlements that are inconsistent with, or less beneficial than the National Employment Standards (NES). In order to reduce the incidence of Members requesting undertakings, it may assist if a term is included in an enterprise agreement when it is made providing that where there is any inconsistency, more generous entitlements under the NES will prevail over provisions in an agreement.
An example of an NES precedence term that you may wish to include in your agreement is set out below:

**Example NES precedence term**

This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.
Step 4: Finalise the agreement

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<td>Is capable of passing the better off overall test (BOOT) ☐</td>
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</tbody>
</table>

**Include all the entitlements agreed on during bargaining**

Ensure that your agreements includes all of the entitlements agreed on during bargaining. This may include rates of pay, entitlements for employees and classification descriptions for employees.

**Check for typographical or cross-referencing errors**

Check your agreement for any errors that aren’t meant to be included as once the agreement is voted on by employees, you won’t be able to simply amend these errors in the final version of the agreement voted on by employees.

**Check rates of pay are at least equal to or above the corresponding award classification that would otherwise apply**

Check the rates of pay in the agreement are not falling below the rates of pay in the modern award. If they are below, this may delay the approval of your agreement or mean that the agreement cannot pass the BOOT.

**Is your Agreement capable of passing the better off overall test (BOOT)?**

The Commission Member needs to be satisfied that the agreement passes the BOOT. An agreement will pass the BOOT if the Commission Member is satisfied that at the time the application for approval is lodged with the Commission (the ‘test time’), each current and future employee who will be covered by the agreement, will be better off overall if the agreement applies to them rather than the relevant modern award. The agreement will only apply to an employee once it is approved by the Commission.

The BOOT requires the identification of agreement terms which are more beneficial and less beneficial when compared to the relevant modern award, then balancing the terms to come to an overall view.

An agreement may pass the BOOT even if some award benefits have been reduced or removed entirely, so long as overall those reductions are more than offset by the benefits under the agreement. However, an agreement cannot set a base rate of pay for an employee that is less than the base rate of pay in the relevant modern award.
When you are finalising your agreement, make sure to consider all of the classifications in the agreement, including juniors and apprentices. The Commission has to be satisfied that all classifications are better off.

Prepare a pay rate comparison document to help the Commission determine and match the corresponding award rates.

**Example**

The rate of pay for a panel beater under a proposed agreement is $820.00 per week.

If the same panel beater was being paid under the Vehicle Manufacturing, Repair, Services and Retail Award 2010, the minimum weekly wage would be $862.50*.

Even though the agreement says the employee should be paid only $820.00 per week and may provide other more beneficial terms, the employee must be paid at least the $862.50 minimum weekly wage from the modern award.

* Vehicle industry RS&R tradesperson or equivalent Level I R6 Award rate correct as at 1 July 2019

The Commission Member may ask you for more information if the material you have provided is not clear or does not allow for the agreement to be properly assessed.

The Commission Member may ask you to re-lodge documents or provide additional material that will help in the assessment of the agreement. For example, if your agreement contains job titles that are different to the award, you may be asked how the classifications align.

If your agreement meets all of the requirements in the Act, including the BOOT, the Commission Member may approve it.

*For more information see sections 186(2)(d), 193 and 206 of the Act.*
Step 5: Explain the agreement to employees

<table>
<thead>
<tr>
<th>What you need to do in this step</th>
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<tbody>
<tr>
<td>You must take reasonable steps to:</td>
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<tr>
<td>Explain to all employees the terms of the agreement and the effect of those terms</td>
</tr>
<tr>
<td>Record the steps taken to explain the terms and effect of the agreement to employees</td>
</tr>
</tbody>
</table>

Explain the terms and effect of the agreement to your employees

You must take all reasonable steps to ensure that your employees understand the agreement by:

- explaining the terms of the agreement, and the effect of those terms compared to their entitlements under the award, to employees covered by the agreement, and
- ensuring the explanation is given in an appropriate way taking into account any special needs or circumstances of the relevant employees.

Examples of circumstances and needs of employees that need to be taken into account include:

- employees from culturally and linguistically diverse backgrounds including those who speak English as a second language
- young employees, and
- employees who didn’t have a bargaining representative for the agreement.

If you do not take reasonable steps to communicate with employees (by providing information and explaining the terms of the agreement and their effect to employees in an appropriate manner), the agreement may not be approved and the bargaining process may have to start again.

Reasonable steps can include you arranging for bargaining representatives to inform employees (for example a meeting run by a union delegate to explain the effect of the agreement on your behalf) however the information provided should be recorded and mentioned in the F17.

**Keep records of the steps you took to explain the terms and effect of the agreement to employees**

You may need to give the Commission evidence that shows how you gave employees copies of the agreement (or access to it) and how you explained it to them. You should document the steps that you take as you will need to provide evidence when you lodge your application.

*For more information see section 180 of the Act.*
Step 6: Prepare employees to vote

What you need to do in this step

To meet the requirements related to voting on the agreement, you must:

- Decide on a time, place and method of the vote
- Consider and record the date when the access period commences
- Advise employees of the time, place and method of the vote by the start of the access period
- Record how and when you advised employees of the details of the vote
- Give employees who will be covered by the agreement a copy of, or access to, the proposed agreement and any other incorporated material by the start of the access period
- Record how and when you gave employees a copy of, or access to, the agreement and any incorporated material

Decide on a time, place and method of the vote

When you think that a suitable agreement has been negotiated with your employees (or their bargaining representatives) and drafted, you may put the proposed agreement to a vote of your employees.

The date of the vote or the start of the voting period must commence at least 21 clear days after the date the last NERR was given to employees.

Put simply, when calculating 21 days, do not include the day on which you gave the last NERR — it is 21 clear days after that day. You can use our Date calculator to ensure you comply with timeframes. If in doubt, add an extra day or two, just to be safe.

**Example**

You cannot hold a vote for your agreement until at least 21 days after you provide your employees with the NERR.

For example, you provide your employees with the NERR on 28 May 2020. The first clear day after you provided your employees with the NERR is 29 May 2020, and the twenty-first day is 18 June 2020. This means that your employees cannot start voting until on or after 19 June 2020.

The method of voting

There are a number of ways in which a vote for a proposed agreement can take place. The method that you choose will depend on the size and operations of your business. Some common voting methods are voting by written ballot and electronically.

Find out more about voting methods in the enterprise agreements benchbook on our website.
Consider and record the date when the access period commences

When you decide to hold the vote, you should determine when the access period commences, so you can be ready to provide employees with the necessary material and information including details of the vote and a copy of the agreement for consideration prior to the vote.

The 7 day access period can run concurrently with the 21 day period (between the day the last NERR was given and voting commences) but must be 7 clear days.

Example

An employer gave the last NERR on Thursday, 6 February.

The employer cannot request that employees vote to approve the proposed agreement until on or after Friday, 28 February.

If the vote is held on 28 February, the access period must begin on 20 February.

For more information see section 181 of the Act.

Advise employees of the time, place and method of the vote by the start of the access period

The 7-day period ending immediately before the start of the voting process is known as the 'access period'.

By the start of the access period, you must take reasonable steps to notify your employees of:

• the time and place at which the vote will occur, and
• the voting method that will be used.

Important

It is important that you notify employees of the time, place and method of the vote by the start of the access period.

Failure to comply with these requirements may mean that the Commission is unable to approve your application.

Record how and when you advised employees of the details of the vote

It’s important to keep records of any communications between yourself and employees. Copies of emails, memos or material provided to employees during bargaining should be lodged as part of your application for approval.
Example

An employer wants employees to vote on a proposed agreement on Friday, 21 February.

This means the access period will run from the morning of Friday, 14 February to the evening of Thursday, 20 February.

The employer must notify employees of the upcoming vote by Thursday, 13 February at the latest.

Give employees who will be covered by the agreement a copy of, or access to, the proposed agreement and any other incorporated material by the start of the access period

During the access period, you must take all reasonable steps to ensure you:

• give all employees a copy of the written text of the agreement and any other material incorporated by reference in the agreement, for example the Award, or

• give all employees access to a copy of those materials throughout the entire access period for the agreement.

Record the steps that you take as you may need to provide evidence when you lodge your application (see Step 5).

Note that material can be incorporated into an agreement even if the agreement doesn’t expressly state that it has been incorporated. For example, if an agreement states that employees must comply with a workplace health and safety (WHS) policy, then that WHS policy may be incorporated even if it doesn’t expressly say that it is incorporated.

Important

It is important that you give employees a copy of the proposed agreement and any incorporated material during the access period or provide employees with access to the proposed agreement and any incorporated material throughout the access period. Incorporated material may include any Awards that are incorporated by reference.

Failure to comply with these requirements may mean that the Commission is unable to approve your application.

Record how and when you gave employees a copy of, or access to, the agreement

It’s important to keep records of any communications between yourself and employees. Copies of emails, memos or material provided to employees during bargaining should be lodged as part of your application for approval.

Important

Use the Date calculator to check that your dates comply with the legislation.
Step 7: Conduct the vote

What you need to do in this step

- Record the date the vote starts
- Record the date voting finishes
- Record the number of employees covered by the agreement
- Record the number of employees who cast a valid vote
- Record the number of employees who voted to approve the agreement

Record details of the vote

You will need to keep record of the following:

- the date the vote starts
- the date voting concludes
- the number of employees covered by the agreement
- the number of employees who cast a valid vote, and
- the number of employees who voted to approve the agreement.

You will need to provide this information to the Commission when you are making your application.

When is an agreement made?

An agreement is made when a majority of employees who cast a valid vote, vote in favour of making the agreement.

If the majority of employees vote against the agreement, bargaining can continue. There is no limit to the number of times that you can put a proposed agreement to a vote. However, each time you put the proposed agreement to a vote, you must meet the timeframes of the voting process outlined above in this step.

For more information see section 182 of the Act.
Step 8: Lodge your application & supporting documentation with the Commission

What you need to do in this step
You must lodge your application for approval of your enterprise agreement within 14 days after the agreement is made.

You must also include the following documentation with your application:

1. Application Form F16
2. Employer’s declaration Form F17
3. A copy of the NERR
4. A correctly signed copy of the agreement
5. Copies of any material given to employees including correspondence and documents referred to in your F17 such as explanatory information
6. Employee organisation Form F18 or employee representative Form F18A if applicable
7. Any other supporting material, such as documents referred to in your application

Once the agreement has been made, you need to apply to the Commission to have the agreement approved. To do this you must lodge the agreement along with the relevant application forms (see immediately below) to the Commission within 14 days of the agreement being made.

Important
Make sure you lodge your application within 14 days of the agreement being made. The Commission may not be able to approve the agreement if the application is not lodged in time.

For more information see section 185 of the Act.

What do you need to lodge with the Commission?

1. Form F16—Application for approval of an enterprise agreement
2. Form F17—Employer’s declaration in support of an application for approval of an enterprise agreement.
   - The responses you provide in the Form F17 declaration, along with the terms of the agreement, will help the Commission determine if the above statutory requirements and timelines have been complied with.
   - To assist the Member to make their decision and reduce delays in the approval process you should also provide copies of any materials provided to employees that:
Employer’s guide to making a single enterprise agreement

- notify them of the time and place at which the vote was to occur and the voting method to be used, and
- explain the terms of the agreement and the effect of those terms.

3. A copy of the NERR that was given to employees during bargaining.

4. A correctly signed copy of the agreement. The agreement must:
   - be signed by you (the employer) and an employee representative, and
   - include the printed name of each signatory, their address, and an explanation of the person’s authority to sign the agreement, that is their role or position title (see the Regulations, reg. 2.06A).

![Important]

The signed copy of the agreement must include the full name and address of each person who signs the agreement; and an explanation of the person’s authority to sign the agreement (that is their role). Please note the agreement will be published on the Commission’s website so to protect your privacy, you may use your business address rather than your home address.

5. Copies of any materials given to employees related to the making and voting of the agreement and its effect, as well as information about their representational rights and the voting process.

6. Employee organisation Form F18 or employee representative Form F18A if applicable.

   If bargaining representatives were involved in the agreement making process, they may wish to advise the Commission about whether they support approval of the agreement or agree with the statements in the employer’s Form F17.

   They can do this by lodging a completed:
   - Form F18—Declaration of employee organisation in relation to an application for approval of an enterprise agreement (for union bargaining representatives), or
   - Form F18A—Declaration of employee representative in relation to an application for approval of an enterprise agreement (for employee bargaining representatives).

7. Any other supporting material, including documents referred to in your application, such as classification matching.

How to lodge your application & documents

Email the documents listed above to the relevant State or Territory Commission office.

You must notify the employees who will be covered by the agreement, through your usual means of communication (for example, by email), that you have applied to the Commission for approval of the agreement.
Step 9: Process at the Commission

What happens when I lodge my application?

Once you lodge your agreement with the Commission you will be sent a ‘service email’ by
the Commission with a reference number (for example AG2020/54321).

A copy of the agreement will be published on the Commission’s Agreements in Progress
webpage.

You may be contacted by staff of the Commission who will check your application to ensure
all relevant information has been provided and forms are complete.

The application will then be assessed against the requirements of the Act by the Agreements
Team.

The agreement will then be allocated to a Member of the Commission who will determine
whether the agreement can be approved.

What does the Commission consider when approving an agreement?

Before the Member can approve the agreement, he or she must be satisfied about a number
of matters including that:

1. the pre-approval requirements have been met (including providing a valid NERR to all
   employees and complying with the legislative timeframes)
2. the agreement was genuinely agreed to by the employees covered by the agreement
3. the terms of the agreement and the effect of those terms were adequately explained to
   all employees
4. other requirements relating to good faith bargaining have been complied with
5. the group of employees covered by the agreement was fairly chosen
6. employees will be ‘better off overall’ under the agreement at test time than they would be
   under their applicable modern award(s)
7. the terms of the agreement do not contravene the National Employment Standards
8. the agreement includes a compliant dispute settlement term, flexibility term and
    consultation term
9. there are no unlawful or designated outworker terms in the agreement, and
10. the agreement specifies a nominal expiry date and that date will not be more than
    4 years after the day on which the Commission approves the agreement.

For more information see Parts 2-2 and 2-4 of the Act.

What is an undertaking and when will you need to provide one?

In many cases the Commission Member may seek further information, or clarification on
certain aspects of the application for approval and the agreement itself. In order to satisfy
any concerns the Commission Member may have, you may be requested to provide or wish
to offer a written undertaking(s) to address the concerns so that the agreement can be
approved.
An undertaking is a written commitment by an employer to replace or modify a term of the agreement with alternative text set out in correspondence to the Commission.

An **undertaking** is taken to be a term of your agreement if requested and accepted by the Member.

*For more information see sections 190 and 191 of the Act, or consult our [Undertakings Fact Sheet (PDF)](https://www.fwc.gov.au).*

**Hearings**

Hearings are not required for the majority of agreement approval applications. However, if there are any issues relating to the approval of the agreement, the Commission may schedule a hearing for you, your appointed bargaining representative (if any) and an employee (or their bargaining representative) to attend. Hearings can occur in person or by video or teleconference.

You will be provided with more information if the Commission decides to schedule a hearing.

**Step 10: Approval of your agreement**

**Approval**

Once the agreement is approved, a copy of the Commission Member’s approval decision and the approved agreement with any undertakings and model terms will be posted on the Commission’s website and emailed to the parties. The agreement will come into operation **7 days** after the Commission Member approves it, unless a later day is specified in the agreement.

**Find out more**

Use our [Enterprise agreement date calculator](https://www.fwc.gov.au).


Read our [10 tips for agreement making](https://www.fwc.gov.au).


Read our [Enterprise Agreement Benchbook](https://www.fwc.gov.au). The benchbook is an overview of the Fair Work legislation and case law, setting out the key principles of case law on enterprise agreements.

Access the [forms](https://www.fwc.gov.au) required to lodge an application.

If you have any questions in relation to the agreement making process, this guide or the annexed documents, please contact the Commission for assistance at [member.assist@fwc.gov.au](mailto:member.assist@fwc.gov.au).