Enterprise agreement making – Undertakings

1. If the Commission has a concern that an enterprise agreement does not meet the approval requirements in ss.186 and 187 of the FW Act (which includes passing the BOOT), the Commission can approve the agreement if it receives and accepts a written undertaking from the employer(s) covered by the agreement which address that concern. The undertaking is a commitment that the employer will comply with what is written in the undertaking in addition to or instead of a term of the agreement. The undertaking forms a part of the Agreement and is legally binding on the employer.

2. As the employees have voted on the agreement as it was lodged, an undertaking will not be accepted if it will result in substantial changes to the agreement. Further, the Commission must also be satisfied that accepting the undertaking is not likely to have the effect of causing financial detriment to any employee covered by the agreement.

3. Undertakings are often used to address technical deficiencies in an agreement such as where a nominal expiry date is more than 4 years after the approval date or when a provision is expressed to exclude or reduce a provision of the NES. Undertakings cannot be accepted to fix some deficiencies such as non-complying flexibility and consultation terms.

4. Before accepting an undertaking, the Commission must seek the views of each person the Commission knows to be a bargaining representative for the agreement. A bargaining representative can be the employer (or someone appointed by the employer), an employee organisation who represents an employee covered by the agreement and/or anyone appointed as such by an employee. Consequently, the Commission may ask for evidence that the undertaking was provided to the bargaining representatives. This may be in the form of copies of emails from bargaining representatives confirming they approve the undertakings.

5. An undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking.

6. Any accepted undertaking(s) is both noted in the decision and is attached to the copy of the agreement which is published on the Commission’s website. A copy of the decision accompanied by the agreement with the undertaking attached is sent to the employer and all the persons named on the Form F16 when the agreement is approved.

Undertakings and applications to vary agreements

7. The practices above also apply to undertakings to variations to agreements (except the variation of the agreement will be approved under s.212, and the undertaking will be used to address a failure to meet the requirements of s.211).

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1 FW Act s.190(2).
2 FW Act s.191(2).
3 FW Act s.190(3); see also [2014] FWC 1955.
4 FW Act ss.190(3) and 190(4); see also SDA v Beechworth Bakery [2017] FWCFB 1664 which deals with the requirements before the Commission will allow undertakings and whether ‘make good’ clauses in undertakings are enforceable.
5 FW Act s.190(4).
6 Fair Work Regulations 2009 reg 2.07.
How do I provide an undertaking to the Commission?

8. An undertaking may be sent to the Commission by emailing member.assist@fwc.gov.au. The undertaking should be addressed to the Member who is dealing with your application. Undertakings are commonly submitted to the Commission in Word or PDF format as email attachments; however, there are no specific requirements for the format of undertakings, other than that they must be signed by all employers covered by the agreement.

**Example 1:**

Dear Commissioner X

**ABC Enterprise Agreement 2018–2020 (AG2018/44444)**

**Written undertakings under section 190 of the Fair Work Act 2009**

ABC Pty Ltd hereby undertakes the following in relation to the **ABC Enterprise Agreement 2018–2020:**

1. **Annual leave**
   
   For the purposes of the …

2. …

Signed for and on behalf of the employer

*signature*

Jane Citizen
Managing Director

20 February 2018

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**Example 2:**

Dear Deputy President Y

**DEF Enterprise Agreement 2018–2020 (AG2017/55555)**

**Undertaking (s.190 of the Fair Work Act 2009)**

I John Citizen, HR Manager for DEF Pty Ltd give the following undertaking with respect of the **DEF Enterprise Agreement 2018–2021:**

1. I have the authority given to me by DEF Pty Ltd to provide this undertaking in relation to the application before the Fair Work Commission.

2. In clause 7.6 of the Agreement dealing with severance pay, we undertake that employees aged under 45 years of age will be paid in accordance with the following scale: …

*signature*

Signed

*Date: Date*
Examples of undertakings

9. The following undertakings have been accepted by Commission Members to address concerns raised in applications to approve enterprise agreements.

It should be noted that every agreement is considered independently and the terms of an agreement are assessed globally. The undertakings below may not be sufficient to address Member’s concerns in respect of other agreements.

(i) Annual leave and shiftworkers

A. For the purposes of the additional week of annual leave provided for in the National Employment Standards of the *Fair Work Act 2009* (Cth), a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.  

*AG2017/4301 – Masson DP: [2017] FWCA 1095*

B. For the purposes of the National Employment Standards (NES) a shiftworker will be an employee who works a roster and who, over a roster cycle, may be rostered to work ordinary time shifts on any of the seven days of the week, and who is regularly rostered to work on Sundays and public holidays.

*AG2017/5306 – Gostencnik DP: [2017] FWCA 1114*

(ii) Annual leave expressed as hours rather than weeks

C. Clause 27.1.1 of the agreement provides that an employee shall be entitled to 152 hours leave on ordinary pay per year of continuous service with the employer. This clause is intended to provide for 4 weeks of paid annual leave in accordance with the National Employment Standards.

*AG2017/4836 – Lee C: [2018] FWCA 1193*

(iii) NES precedence term

*Rather than providing an undertaking that addresses a particular concern regarding an NES issue, an effective remedy may be to insert an ‘NES precedence’ clause that specifies that where there is an inconsistency between a provision in the agreement and the NES, the more beneficial term shall apply.*

A. This Agreement will be read and interpreted in conjunction with the NES. If there is any inconsistency between this Agreement and the NES, the more beneficial provision to an employee will take precedence.

OR

B. 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.

OR

C. The National Employment Standards (NES) as prescribed by the FW Act will apply to all employees covered by the Agreement. This Agreement provides terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES, or terms that supplement the NES, but only to the extent that the effect of those terms are not detrimental to an employee in any respect, when compared to the NES.

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7 The shiftworker definition should reflect the definition in the relevant award
(iv) **Incorporation of award in agreement**

**Incorporation: Clause 1.5**

This agreement shall incorporate the provision of the Award, as varied from time to time, provided that where there is any inconsistency between this Agreement and the Award, the Agreement shall prevail to the extent of the inconsistency.

*AG2017/4683 – Harper-Greenwell C: [2018] FWCA 978*

(v) **Abandonment of employment**

**Termination: Clause 3.6.7**

The employer, Ventia Utility Services, hereby undertakes notwithstanding clause 16.2, employees who abandon their employment prior to the end of the notice period, will be entitled to payment for all time actually worked up until the time of termination.

*AG2017/4683 – Harper-Greenwell C: [2018] FWCA 978*

(vi) **Example of clause that will not apply**

...  
3. That cl.27.6 of the Agreement shall not apply.

*AG2017/6676 – McKinnon C: [2018] FWCA 2548*

(vii) **Undertaking to variation**

...  
3. The second paragraph under clause 3.1 of the varied agreement is to be deleted and replaced with the following:

"The following are members of an employee's immediate family:

\( \text{a. A spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or} \)

\( \text{b. A child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.} \)"

*AG2017/6576 – Gostencnik DP: [2018] FWCA 1644*