

Cooperative Bargaining

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Introduction

The cooperative bargaining stream is best understood as a minor adjustment of what remains from the existing multi-enterprise agreement bargaining stream. It permits the making of multi-employer agreements (including greenfields agreements) between willing parties without the suite of rights associated with other forms of bargaining. A multi-enterprise agreement is defined as a cooperative workplace agreement if no supported bargaining authorisation or single interest employer authorisation was in operation in relation to it at the time it was made. It is the only form of multi enterprise agreement that can cover employees in respect of general building and construction work, and it can only do so if it made as a greenfields agreement.

Operation of the new provisions

Initiating Bargaining and representation

No FWC procedures need to be invoked to initiate bargaining for a cooperative workplace agreement.

The rules that determine bargaining representatives are the same as would be the case for other non-greenfields agreements.¹ This in practice means that a union would need members (or a member) employed by each employer that it sought to be covered by the proposed agreement, in order to be a default bargaining representative in respect of bargaining for a proposed agreement that included that employer. It is not possible to be a bargaining representative for a cooperative workplace agreement that is a greenfields agreement.

Bargaining

There is no requirement or option for an authorisation to be issued in respect of bargaining for a cooperative workplace agreement. Applications can be made to FWC for assistance in resolving bargaining disputes if the proposed cooperative workplace agreement is a non-greenfields agreement, however this requires the consent of other bargaining representatives.² Aside from this, there are no options beyond negotiation to progress bargaining:

- If the proposed agreement is not a greenfields agreement, the good faith bargaining requirements are not enforceable³;

¹ S. 176

² S. 240(3).

³ S. 229(2)

- If the proposed agreement is a greenfields agreement, the good faith bargaining requirements do not apply at all⁴;
- Applications for protected industrial action ballots cannot be made⁵;
- Scope orders are not available⁶; and
- Notices of representational rights are not required.⁷

1.3 Conclusion of an agreement

Additional features of the approval process for a cooperative workplace agreement to be aware of, in the case of non greenfields agreements are:

- (1) The agreement cannot be circulated for a vote in the absence of the agreement of each registered union that is a bargaining representative, unless a voting order is made.⁸
- (2) The agreement can only be approved in respect of the employers of employees who have voted in favour of it. There is an onus on the bargaining representative who applies for the approval to vary the agreement to confine it to those employers in respect of whom the majority was reached and give notice to all bargaining representatives of that variation.⁹
- (3) The FWC must be satisfied that the agreement does not cover employees in relation to general building and construction work¹⁰

Further information on how the approval requirements for enterprise agreements have been amended is provided in the briefing note/s [insert final names and hyperlink]

Arbitration

Issues in bargaining can only be arbitrated by consent. This involves a bargaining representative making an application under section 240, which is agreed to by all bargaining representatives.

Operation of an agreement

Cooperative workplace agreements are capable of being varied with respect to their content and the scope of employees they cover¹¹ and also the scope of employers they cover¹². A variation that does not involve the adding of an employer but does involve adding of employees cannot be approved by the FWC if those employees are specified in a single interest employer authorisation or supported bargaining authorisation.¹³ Nor can it be approved if the effect of the variation is that it would cover employees in relation to building and construction work, unless the agreement being varied is a greenfields agreement.¹⁴

⁴ S. 228

⁵ S. 437(2).

⁶ S. 238(1)

⁷ S. 173(1)

⁸ See the briefing note on Agreement Approval

⁹ S. 182(2), 184, 187(3)

¹⁰ S. 186(2B)

¹¹ Subdivision A of Division 7 of Part 2-4

¹² In either case however it is not possible to vary the agreement so as to cover employees in relation to general building and construction work.

¹³ S. 211(1A)

¹⁴ S 211(3A)

Cooperative workplace agreements, except for those which are greenfield agreements that cover employees in relation to general building construction work¹⁵, can be varied to add employers, but only on the application of the employer. It will not be possible to extend the agreement to cover an employer that is specified in a supported bargaining authorisation or single interest employer authorisation in relation to any of the affected employees¹⁶, or to cover employees of the new employer in relation to general building and construction work¹⁷.

An application by an employer first requires that a variation is made with its affected employees, which requires both a vote and that the terms of the agreement as proposed to be varied (and their effect) is explained.¹⁸ The FWC's approval is based upon it being satisfied that the variation has been made as required and a variation of the "genuinely agreed" test will apply which omits consideration of representation and whether an employee organisation agreed to the vote proceeding. It must also be satisfied that it is not contrary to the public interest for the employer and the affected employees to be covered by the agreement.

In order to be approved by the FWC, variations to remove an employer from the coverage of a cooperative workplace agreement require in all cases both a majority vote of the affected employees and the consent of each registered union that is both covered by the agreement and entitled to represent the industrial interests of the affected employees.¹⁹ It is not possible to remove employers from cooperative workplace agreements that are greenfield agreements.²⁰

Key considerations for unions

If a union commences discussion using the cooperative stream, then that union can at any time of its choosing move to any other bargaining stream. A union may want to consider this approach in determining its overall bargaining strategy.

For example, a union might attempt to begin bargaining in this stream as part of developing a better understanding of the employers' businesses, its employment structures and their staffing number and types.

Whilst a union can move from this stream to any other stream unilaterally, it might also be able to obtain the agreement of the employer to move to a different stream for various strategic reasons.ⁱ

ⁱ The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.

¹⁵ S. 216CB(2)(a)

¹⁶ S. 216CB(3)

¹⁷ 216CB(2)(b)

¹⁸ S. 216C, 216CAA.

¹⁹ Subdivision AE of Division 7 of Part 2-4

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S. 216E(2)