

ENTERPRISE BARGAINING – GOOD FAITH BARGAINING (NSE)

Enterprise Bargaining – Good Faith Bargaining

These notes apply to national system employers who are governed by the Fair Work Act 2009 (Cth) ("Act"). These are general in nature, and are designed to bring to your attention matters that you may not have considered before and/or are outside of the scope of advice you requested from us.

These guidance notes are provided as general information that you can then research and apply to your situation, or alternatively, use to determine if you need to seek specific advice on the matter.

What are the Good Faith Bargaining Requirements?

Section 228(1) of the Act sets out the good faith bargaining ("GFB") requirements that must be met by all bargaining representatives for enterprise agreements. Details regarding each of these requirements are set out below.

Attending, and Participating, in Meetings at Reasonable Times

All Bargaining Representatives ("BRs") are required to attend, and participate in, meetings at reasonable times. The number of meetings required will depend on the particular circumstances – if the agreement is relatively short and there are only a few issues to be negotiated between the parties, then only a few meetings may be considered reasonable. On the other hand, if there are numerous parties involved and a large number of issues to be negotiated, then a larger number of meetings may be required.

In terms of timing, this will again depend on your particular circumstances. If there are a large number of issues to be negotiated, scheduling meetings every couple of weeks in order to keep things moving may be considered reasonable. However, the party scheduling the meetings will need to ensure that adequate time is provided between each meeting in order to allow time for the other parties to action or seek feedback on any items arising out of the previous meeting.

It is important to note that this provision does not simply require attendance, but also active participation. A BR may be at risk of breaching the GFB requirements if they merely attend the scheduled meetings but refuse to play any active role in the actual negotiations.

Tips for ensuring that you meet this requirement:

- At the commencement of bargaining, meet with all of the BRs and agree on a timetable of bargaining meetings.
- Keep minutes of all meetings, including details of all attendees and apologies.
- If you need to make a change to the meeting timetable, ensure that you write to all BRs explaining the reasons for the proposed change and seek feedback on any proposed alternatives dates.

Disclosing Relevant Information (other than Confidential or Commercially Sensitive Information) in a Timely Manner

This requirement is often subject to debate as the legislation does not define what is meant by 'relevant information' or 'confidential or commercially sensitive information'.

However, based on the wording of section 228(1)(b), it is reasonable to assume that all BRs have an obligation to disclose information that may be considered relevant by the other parties as part of the negotiation process. For example, if the employer was intending to put a proposed agreement to vote, it would be reasonable to assume that this intention would be disclosed to the other BRs in advance.

Decisions by the Fair Work Commission ("FWC") have confirmed that a failure to disclose the following may be considered a breach of the provision:

- a document prepared by an employer which stated which negotiation items were 'negotiable' and 'non-negotiable';

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- an intention to put the proposed agreement to a ballot of employees; and
- the employer's decision that it would not consider any suggested amendments to a draft agreement after a certain date.

Tips for ensuring that you meet this requirement:

- During negotiations, consider any information that may be relevant to your negotiating position (e.g. financial position, recent wage increases) and ensure that this is disclosed to all BRs (to the extent possible).
- Prior to undertaking any actions that may be relevant to negotiations (e.g. putting agreement out to vote, awarding a salary increase, etc.) ensure that all BRs have been notified in writing. Where possible, provide reasons for your actions.
- If you are unsure as to whether certain information is 'confidential or commercially sensitive', seek independent advice prior to disclosure.
- If there are multiple BRs for the same agreement, ensure that relevant information is disclosed among all BRs. This may include claims and responses between the employer and a single BR.

Responding to proposals made by other bargaining representatives for the agreement in a timely manner

This obligation is relatively straightforward – if another BR makes a proposal in relation to the draft agreement, you have an obligation to respond to that proposal. Whether you agree to the proposal or not is not relevant for the purposes of this obligation – the requirement is simply that you provide a response within a timely manner.

Tips for ensuring that you meet this requirement:

- When another BR makes a proposal in relation to the agreement, ensure that you provide a written response as soon as possible. Note that a 'proposal' can include various suggestions, such as a claim, a suggested amendment to the draft agreement or a proposal for a change in the meeting schedule.
- Keep copies of all responses you provide on file.
- If you are unsure as to whether another BR has actually made a proposal, ask them to confirm.

Giving Genuine Consideration to the Proposals of other Bargaining Representatives for the Agreement, and Giving Reasons for One's Responses to Those Proposals

It is not enough to simply respond to a proposal made by another BR – you must also be able to demonstrate that you have given 'genuine consideration' to the proposal and that you have provided reasons for your response.

FWC decisions have confirmed that simply saying that a log of claims is unrealistic or unacceptable is not giving 'genuine consideration' to the proposal as it does not assist the parties in advancing their negotiations in any way.

Tips for ensuring that you meet this requirement:

- When providing a response to a proposal, ensure that each element of the proposal is dealt with. For example, if a BR has prepared a log of claims, your response should deal with each claim separately.
- Do not provide blanket responses such as "the proposal is unacceptable".
- Always ensure that a reason is provided for your response.
- Ensure that all of your responses are either sent in writing or are recorded in meeting minutes.

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Refraining from Capricious or Unfair Conduct

The Act requires that all BRs refrain from 'capricious or unfair conduct that undermines freedom of association or collective bargaining'.

Whether a BR's actions constitute 'capricious or unfair conduct' will ultimately be a matter for FWC and will depend on the circumstances of each case. However, cases on this point have suggested that the following conduct may be considered 'capricious or unfair':

- refusing to allow union delegates to participate in bargaining meetings;
- shifting position in relation to the scope of the proposed agreement late in negotiations; or
- unilaterally altering working conditions during the bargaining process (e.g. awarding pay increases to employees whilst refusing to make a pay offer to the employees' representatives as part of negotiations).
- unilaterally putting an agreement out to a vote during the bargaining process without informing the bargaining representatives.

Tips for ensuring that you meet this requirement:

- Ensure that all negotiations are conducted in a fair manner.
- Inform other BRs before taking action on any internal decisions that may relate to matters that are the subject of bargaining.

Recognising and Bargaining with Other Bargaining Representatives for the Agreement

The final requirement is to recognise and bargain with other BRs for the agreement. Although this requirement may seem straightforward, often it will not be clear who is a BR. Therefore it is important that all parties clarify their status at the commencement of bargaining. As mentioned above, an employee delegate acting on behalf of a union may be considered a BR.

Tips for ensuring you meet this requirement:

- Confirm who is acting as a BR at the commencement of negotiations.
- Ensure that you allow all BRs to attend meetings and that you provide responses to all claims and correspondence.

Do the GFB requirements require a BR to make concessions as part of bargaining for an enterprise agreement?

No. The GFB requirements do not require a BR to reach agreement or make concessions. As a general rule, holding steadfastly to a particular position as part of the negotiation process will not be a breach of the GFB requirements. However, as discussed above, there are requirements to give genuine consideration to proposals made by other BRs, to respond to such proposals and to provide reasons for such responses. Provided this is done, a BR will not be in breach of the GFB requirements simply because they have not agreed to what has been proposed.

What will occur if a BR does not meet their GFB obligations?

If a BR fails to adhere to the GFB requirements, there is no automatic consequence. However, a failure by a BR to adhere to the GFB requirements may cause another BR to seek a bargaining order from FWC. A BR may seek a bargaining order from FWC if:

- another BR is not meeting their good faith bargaining obligations; or
- if bargaining is not proceeding efficiently or fairly because there are multiple BRs.

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If granted, a bargaining order made by FWC will usually specify the actions that must be taken by the relevant BRs in order to rectify the problem. Such orders may include requirements to attend meetings at scheduled times, to respond to claims of other BRs or to appoint one person to act as representative on behalf of a group.

Where a bargaining order has been made, a person to whom it applies must comply with the order. A failure to do so may result in penalties or other court orders.

Best Practice Procedures, tools, services and templates that may assist employers in the discharge of their industrial obligations

EMA Consulting has significant expertise and industry experience to assist your management in any aspect of enterprise bargaining. If you require further information or advice, please contact your local Consultant at either our Adelaide or Melbourne offices.

Require further information/assistance?

As mentioned above, the information set out in this letter should be used as a guide only. If you have any good faith bargaining queries arising from your negotiations, we recommend that you contact us so that we can provide advice specific to your organisation and circumstances.