
Guide to collective bargaining facilitation under the Employment Relations Act 2000

What is facilitation?

Facilitation is a process under the **Employment Relations Act 2000** where the **Employment Relations Authority (the Authority)** helps parties to **collective bargaining** resolve serious difficulties. It is **not mediation** – it can be a more structured and formal intervention used when bargaining has broken down. The primary purpose is to assist parties to conclude a collective agreement.

Facilitation is a confidential process. During the facilitation the parties must deal with the facilitator and each other in good faith. The facilitator is independent and promotes good faith bargaining.

Facilitation is not an Authority investigation. While it is an Authority Member who provides facilitation, they will not make findings of fact or issue a determination. While legal issues may arise, the facilitator's role is not to give legal advice.

When can bargaining parties request facilitation?

Facilitation is available in the following situations:

- **serious and sustained breaches of good faith** have or are undermining the bargaining;
- **the bargaining is unduly protracted bargaining** despite extensive efforts including attending mediation;
- **during the bargaining lengthy or acrimonious strikes or lockouts**; or
- **there is substantial impact on the public interest** from proposed strikes or lockouts.

How to request facilitation?

A party or parties involved in collective bargaining can apply for facilitation. The application can be made jointly. An application for referral to facilitation must be lodged with the filing fee and it is useful to provide supporting information such as:

- the relevant **collective agreement**;
- the **bargaining process agreement**;
- a **summary** of outstanding issues including claims; and
- a **timeline** of the bargaining at date of application.

Requests for **referral to facilitation** will typically be dealt with promptly.

Parties will be contacted to progress the application which will be considered and determined by an Authority Member who will issue a written determination.

If the referral to facilitation is accepted a different Member (known as “the facilitator”) will undertake the facilitation. They may be supported by another Member.

What happens during facilitation?

Facilitation is **private**. The process is flexible and tailored to the situation but usually involves the following:

Initial case management conference (CMC)

- Parties are expected to make themselves available at short notice.
 - The CMC sets expectations and outlines the process.
 - Ensures the right people will be involved.
 - Timetables parties to submit documents outlining their positions on key issues (e.g. pay, hours, conditions).
 - The facilitator may provide information before or after the CMC to assist parties' preparation.
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Understanding the parties' positions

- The facilitator needs to understand the parties' positions and may provide information before or after the CMC to assist the parties' preparation.
- Meetings with parties separately may be held before the facilitation meeting.

Facilitation sessions

- The facilitator may meet parties separately or together during such sessions.
- Approaches vary and the facilitator may use "**shuttle-diplomacy**", **joint bargaining** or a **combination of both**.
- The facilitator actively participates in the discussions, challenges parties to reconsider their positions and guides them towards a mutually acceptable solution.
- Parties may make suggestions to the facilitator about processes.
- A list of issues may be maintained and updated as they are resolved. This helps to maintain momentum.
- The list along with any other document, statement or record of the facilitation can only be used for the facilitation and cannot be used in any other process or forum. This means any proposals made during facilitation are not binding unless the parties agree.
- Often issues will be worked through one by one and in an interest-based manner.
- Parties may be asked to work on an issue such as providing wording.
- It is good to raise with the facilitator any reporting back or public statements parties wish to make.

What are recommendations?

The Authority may issue a **recommendation**:

- On how to reach agreement; and/or
 - On the terms and conditions of a proposed collective agreement.
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- Formal recommendations will be in writing and issued to the parties.
 - Recommendations are **not binding** but must be **considered in good faith**. The facilitator may make a recommendation public to support resolution.
 - The facilitator will engage with the parties to seek their views on how a recommendation may be developed and communicated.
 - The facilitation may continue after a recommendation and further recommendations may be issued.

Practical tips

- **Facilitation is not automatic**: an application for facilitation must meet legal criteria for referral.
- **Prepare thoroughly**: resolve as many issues as possible before facilitation. If parties have any questions or requests of the facilitator, ask.
- **Understand the outstanding issues**: be prepared to assist the facilitator to thoroughly understand party's position.
- **Trust-building is key**: between parties and with the facilitator.
- **Representation matters**: those directly involved in bargaining should consider attending.
- **Be flexible**: every facilitation is different and may span several days or weeks.
- **Communications**: seek guidance from the facilitator about talking to those not directly involved with the facilitation process.
- **Information**: the facilitator or parties may ask for more information.
- **Problem solving**: be prepared to work to find creative solutions.