



# Enterprise Agreements

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Hannah Mills, Solicitor/Workplace Relations Consultant, EI Legal

# About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- Our services include:
  - Industrial Relations
  - Enterprise Agreement Making
  - Equal Employment Opportunity and Anti Discrimination
  - Terminations and Adverse Action
  - Staying Compliant
  - Legal Advice and Representation

# Topics Covered

- What is an Enterprise Agreement (“EA”)?
- What is the effect of an EA?
- Types of EAs
- Why make an EA?
- How do I make an EA?
- Good Faith Bargaining
- “Better Off Overall Test” (BOOT)
- Tips for making an EA

# What is an EA?

- Collective written agreement
- Sets out minimum terms and conditions of employment for the employees and employer/s it covers
- Can be made by anyone covered by the *Fair Work Act 2009* (Cth) (ie: all companies, sole traders/partnerships in all States except WA)

# What is the effect of an EA?

- Once in operation:
  - replaces Modern Award coverage
  - automatically binds new employees covered by the classifications upon their commencement
- Can always agree to more generous terms and conditions than those contained in the EA (EA sets out minimums)

# Single Employer vs Multi Employer EAs

Agreement Type	Description
Single Enterprise Agreement	Applies to one employer, or a “single interest” employer (eg. franchise network or related bodies corporate)
Multi Enterprise Agreement	Applies to 2 or more employers who are not single interest employers.
Greenfields Single Enterprise Agreement	See “Single Enterprise Agreement” above. Applies to new operation which does not yet have staff to vote and is made between employer and union/s
Greenfields Multi Enterprise Agreement	See “Multi Enterprise Agreement” above. Applies to new operation which does not yet have staff to vote and is made between employers and union/s.

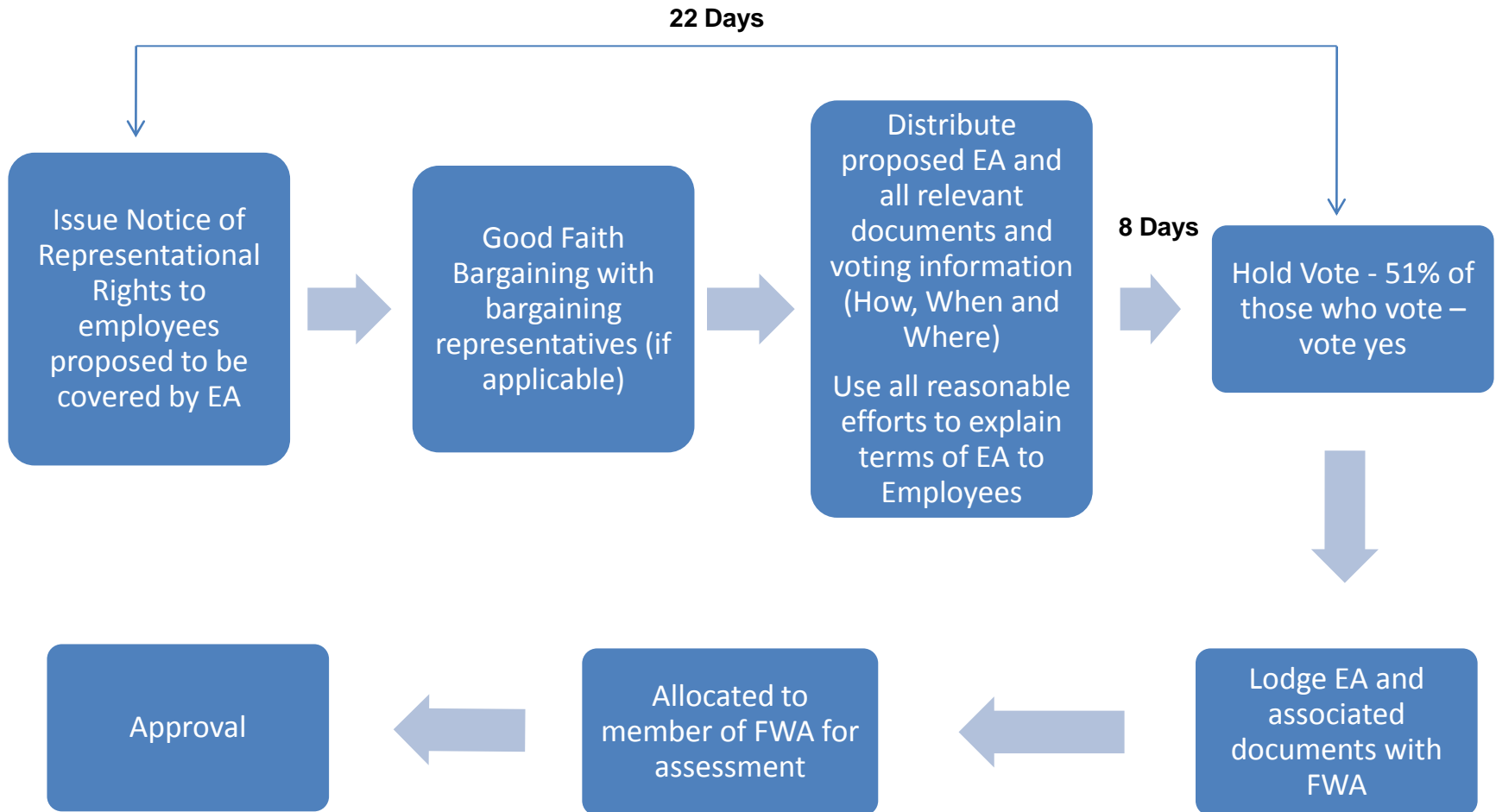
# Why make an EA?

- Simplification, certainty and customisation of terms and conditions of employment
- To be on the “front foot”:
  - where you have union involvement
  - before expiry of old Employee Collective Agreement
- Businesses covered by multiple Modern Awards
- Long term business asset
- Businesses covered by multiple instruments after a “transfer of business”

# How do I make an EA?

1. Employer decides to make an EA
2. Majority Support Determination from Fair Work Australia
3. Low-paid Authorisation by Fair Work Australia

# Fair Work Act Procedural Requirements



# 1. Notice of Representational Rights

- Prescribed form notice which sets out employee's right to be represented in bargaining process
- Employer must take "all reasonable steps" to give such notice to employees covered by EA within 14 days of deciding to bargain, low-paid authorisation or majority support determination being issued
- Can be delivered personally, by post, fax, email, intranet or displayed in conspicuous place

## 2. Good Faith Bargaining

- Any employee can nominate themselves or any person as a bargaining rep in writing
- Union member representing the interests of one or more employee may be involved and will be the default representative for union employees
- Employer can also nominate bargaining rep

# 3. EAs and Associated Documents

- For at least a full 7 days before vote, employer must take “all reasonable steps” to ensure employees covered by EA have access to:
  - EA
  - any other associated documents
- Employer must explain terms of EA, having regard to individual circumstances of employees (eg. non-english speaking employees and under 21s)

## 4. Voting Process

- Employer must take all reasonable steps to notify employees of how, when and where vote will take place, for a full 7 days before date of vote
- EA “made” = majority of those who vote, vote in favour of EA

# 5. Lodgment

- Employer must lodge EA (and Fair Work Australia prescribed forms) with Fair Work Australia within 14 days of vote
- Unions may elect to become party to EA after EA lodged with Fair Work Australia

# 6. Assessment

- Fair Work Australia's main considerations:
  - BOOT
  - "genuinely agreed to"
  - any terms contravene National Employment Standards
  - group of employees covered by EA were fairly chosen
  - unlawful terms
  - EA has a nominal expiry date of 4 years or less
  - EA has an appropriate dispute resolution clause

# Undertakings

- Undertakings may be required for EA to pass BOOT
  - cannot be of financial detriment to employees
  - cannot constitute “substantial change” to EA

# 7. Approval

- EA will commence 7 days after approval

# Questions?



# Good Faith Bargaining

- Attend, and participate in meetings at reasonable times
  - no set amount of meetings, use a common sense approach
- Disclose relevant information in a timely manner (except confidential information or commercially sensitive information)
  - keep employees up-to-date with developments in negotiations
  - be prepared to provide evidence/data to quantify claims

# Good Faith Bargaining (Cont...)

- Respond to proposals made by bargaining reps, giving reasons
  - set limits upon when you will respond to proposals made by bargaining reps
- Refrain from capricious or unfair conduct that undermines freedom of association
  - provide reasonable opportunity for bargaining reps to confer with their members and discuss the offer
  - don't unilaterally vary terms without notice to bargaining reps

# Good Faith Bargaining (Cont...)

- Give genuine consideration to the proposals of other bargaining reps for the agreement, and give reasons for the bargaining reps responses to those proposals
  - don't say one thing and do another
  - be prepared to provide evidence of the company's financial position if you say "we can't afford a wage increase"
- Recognise and bargain with bargaining reps

# Good Faith Bargaining Reminders

- Good faith bargaining does NOT mean you have to make concessions or reach agreement
- Employers are not required to provide paid leave to bargaining rep/s who are employee/s
- Once an EA is “made” (ie: 51% of those who vote, vote in favour), bargaining obligations are of very little relevance

# Fair Work Australia Role in Bargaining

- Scope Orders
- Bargaining Orders

# Scope Orders

- Bargaining rep for proposed single-enterprise agreement can apply for scope order
- Scope order specifies which employer/s and employees should be covered by proposed EA
- Factors for FWA to consider
  - bargaining for the agreement is progressing efficiently or fairly?
  - all appropriate employees are covered by the agreement (“fairly chosen”)

# Bargaining Orders

- Bargaining rep may apply to Fair Work Australia for a bargaining order in relation to an EA if they have concerns that:
  - one or more of the bargaining reps for the agreement have not met, or are not meeting, the good faith bargaining requirements
  - the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining reps for the agreement

# The Better Off Overall Test (“BOOT”)

*"The BOOT, as the name implies, requires an overall assessment to be made. This requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the Agreement."*

*Armacell Case [2010] FWAFFB 9985, 41*

# BOOT

- Each award covered employee, or prospective award covered employee, must be better off under the EA, for the life of the EA
- When taken as a whole, do all the benefits provided under the EA more than make up for any loss of award conditions and entitlements?

# Takeaways

- Be on the “front foot”
- Document everything
- Analysis and preparation are key
- Communication
- Be alive to “bad faith” bargaining tactics

# Questions?

[www.theeigroup.com.au](http://www.theeigroup.com.au)

Email: [info@eilegal.com.au](mailto:info@eilegal.com.au)

