A number of members are currently either in the process, or alternatively assessing their options by considering commencing the process of negotiating a new Enterprise Agreement (EA) within their businesses. Giving light to the fact that EA’s are generally negotiated for a nominal period of 3 - 4 years, members are reminded of the key steps and considerations of a bargaining process absent of any Orders from the Fair Work Commission (FWC) or protected industrial action for a single EA.

Part 2-4 of the *Fair Work Act 2009* (the Act) details the requirements, obligations and responsibilities of parties during the bargaining process to ensure that agreements are negotiated fairly, efficiently and have the best prospect of approval by the FWC.

The following overview of the process is from the Fair Work Commission’s Enterprise Agreement Benchbook:

**Step 1 – Employer initiates or agrees to bargain for a proposed enterprise agreement**

The decision to bargain is normally brought about by one of two ways,

- An employer decides to commence bargaining; or

- A majority support determination – where the majority of the employees to be covered by an EA seek an order from the FWC to commence bargaining. This is normally done through a Union, or other bargaining representative.

**Step 2 – Employer issues employees with a notice of employee representation rights**

The Act states that within 14 days of the decision being made to enter into a bargaining period, Employees to be covered by the proposed EA must be provided with a ‘Notice of Employee Representation Rights’ to formally confirm that the employer has entered into bargaining for an EA, as well as advise employee’s of their right for representation through the bargaining period.
An employer must ensure that all reasonable steps are taken to communicate with employees and to inform them of their right to be represented throughout the process.

The form is provided on FWC’s website and under the Act, cannot be modified in any way aside from the addition of the required details as specified on the form.

**Step 3 – Election of bargaining representatives**

Both the employee and employer have the right to be represented during bargaining.

The role of a bargaining representative is to engage in good faith bargaining with all bargaining parties throughout the negotiation process. Bargaining representatives can apply for orders and determinations from FWC and may also be required to represent the parties who nominated them in front of FWC.

Generally for employees, the appointed bargaining representative will be a Union, if that Union is entitled to represent their industrial interests in relation to the work to be performed under the proposed agreement; however an employee can elect to represent themselves or have another person represent them.

The confirmation of appointment for a bargaining representative can only be done in writing via an *Instrument of Appointment* completed by an employee to be covered by the EA. The appointment will come into effect from the day identified on the *Instrument of Appointment* and there are no deadlines relating to when during the process this needs to be completed by. A bargaining representative can be changed or revoked at any time during the process.

**Step 4 – Good Faith Bargaining**

Section 228 of the Act, details Good Faith Bargaining requirements including:

a) attending, and participating in, meetings at reasonable times;

b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative’s responses to those proposals;

e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

f) recognising and bargaining with the other bargaining representatives for the agreement.

2. The good faith bargaining requirements do not require:

a) A bargaining representative to make concessions during bargaining for the agreement; or

b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Should at any point throughout the bargaining process, if either party is of the view that the other is not bargaining in good faith as per the above requirements of the Act, assistance can be sought from the FWC. The FWC may provide mechanisms to support good faith bargaining or alternatively, may issue a bargaining order requiring the Representatives to bargain in good faith.
Step 5 – Employer asks employees to approve proposed enterprise agreement

Following both parties bargaining to achieve a suitable proposed EA, the employer may ask their employees to vote to approve the terms and conditions outlined in the proposed EA.

The Act states that there must be a minimum of 21 days between the day that the last Notice of Employee Representational Rights is issued and a request to Employees to vote on the proposed EA.

Before the vote, the Act states that employer must open an access period of at least 7 days immediately prior to the start of the voting process. During this time all reasonable steps must be taken by the employer to ensure that any employees to be covered by the EA have been provided access to a copy of the proposed EA and any other relevant materials to review.

It is also a requirement under the Act that employees are educated thoroughly on the terms and conditions of the negotiated EA and further provided all relevant details of the voting process to be employed.

There is no prescribed voting method under the Act however some commonly used methods include attendance voting during meetings, postal voting, online voting or telephone voting.

An EA is ‘made’ when a majority of those employees who cast a valid vote approve the EA. The EA can then be lodged with the Commission for approval.

Step 6 – Enterprise Agreement lodged with the Fair Work Commission for approval

Following an agreement being ‘made’, an employer bargaining representative has 14 days to lodge the agreement with FWC for approval. At least one bargaining representative for employees must sign the agreement to confirm support prior to it being lodged with the Commission.

During the time of lodgment, an employee bargaining representative may provide advice to the Commission detailing whether they support or oppose the approval of the document and if they agree that all steps of the process, as prescribed by the Act, have properly been undertaken by the employer.

An employer has an obligation to notify employees to be covered by the Agreement that the document has been lodged with the Commission for approval.

Step 7 – FWC Approval

When assessing whether a proposed EA should be approved, the Commission takes into consideration the following:

- That agreement has been genuinely agreed to by employees to be covered by the agreement
- Whether the group of employees to be covered by the EA were fairly chosen
- The agreement passes the ‘Better Off Overall Test’ (BOOT)
- A nominal expiry date is specified
- A dispute settlement term is included in the proposal
- No unlawful terms are included in the EA
- The agreement does not include any designated outworker terms
- The EA satisfied all required terms for particular groups of workers (i.e. shiftworkers, school based trainees etc.)
- Whether all aspects of the *Fair Work Act 2009* with regard to the bargaining process have been satisfied.

To ensure that the above have been satisfied, FWC may assess the Agreement ‘on the papers’ via oral or written submissions or may request a hearing. Following this assessment the FWC can issue a decision about whether the agreement is approved or not.

In the event that the agreement is not approved, an employer can look to recommence the bargaining process or alternatively continue operating under their current industrial instrument.

Following the FWC’s approval, an agreement will come into operation after 7 days or at a later date if specified in the agreement.

**LASA NSW- ACT Note:** This information is a general level overview of key steps of the EA bargaining process and does not address all employer considerations throughout the process.

Over upcoming editions of Employment Directions, the Employment Relations team at LASA NSW-ACT will be publishing cases and articles of interest related to different aspects of the agreement making process.

For further information, please contact a member of the LASA NSW-ACT Employment Relations team or refer to the Fair Work Commission’s Enterprise Agreement Benchbook: