

# Seminar 2009



AHRI  
**Fair Work Assist**  
*Legislation in practice*



Australian Government



# AHRI Fair Work Assist

## HR Practitioner Seminar

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# Overview of session

- What is the *Fair Work Act 2009*?
- Key provisions affecting you:
  - Unfair dismissal
  - Collective bargaining
  - Other provisions
- Q&A session
- Fair Work in Practice - Implementation strategies
- Closure

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# The Fair Work Legislation

- Genesis of the Act
- Recognizing different stakeholder views
- General overview of the Act
- Mechanics and structure
  - Started on 1 July 2009
  - NES and Modern Awards start 1 January 2010
- Other sources of potential obligations

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# Key new features

Enterprise based bargaining	Balancing work and family life
Removal of individual agreements	Ensuring flexibility
Protections from unfair and unlawful dismissal	Providing for workplace representation rights
Providing a safety net for all employees	Establishing new industrial bodies

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# Key provisions affecting you

- Unfair dismissal
- Collective bargaining for stakeholders
- Other areas we will touch on:
  - The Safety Net: National Employment Standards and Modern Awards
  - Workplace Rights
  - Industrial action

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# Unfair dismissal - the basics

- Eligibility and jurisdiction
  - National system employers
  - National system employees
  - Minimum employment period
  - Modern Award Coverage
  - Below the high income threshold

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# Who is covered and when?

- Includes:
  - a small business employer
  - some casual employees
- Excludes:
  - Fixed term employees
  - Trainees
- 14 day time limit

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# What is unfair?

- Determining what is ‘unfair’:
  - Person has been dismissed
  - The dismissal was harsh, unjust or unreasonable
  - The dismissal was not consistent with the Small Business Fair Dismissal Code (**Code**)
  - The dismissal was not a genuine redundancy

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# The process at Fair Work Australia

- Establishing jurisdiction
- Conferencing to resolve a claim
  - Preferred option
  - Informal and confidential
- Hearings where appropriate
- FWA can inform itself of any matter it deems appropriate

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# Outcomes

- Reinstatement
  - Primary remedy and can be to ‘associated entities’
- Compensation
  - Cannot include shock, distress or humiliation
- Other orders
  - If appropriate for the particular matter (eg misconduct contributed to the dismissal)

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# Costs and appeals

- Costs
  - Only available in limited situations against parties
  - Available against agents where appropriate
  - 14 day period for applying for costs order
- Appeals
  - Limited to cases of public interest or where there is a significant error of fact

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# Relevance of the Code

- Elements of the Code
- Checklist in the Code
  - Quick easy and accessible way for checking compliance with the Act
- Not necessary to complete but advisable
- Larger organisations may tailor to their policies and procedures

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# HOT TOPIC: Redundancy

- Two key changes:
  - No longer an automatic bar to an unfair dismissal claim
  - Introduction of consultation obligation for all employees who could be affected by a proposed redundancy

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# Genuine redundancy

Job is no longer required to be performed by **anyone** because of changes in the **operational requirements** of the business

**Operational requirements** can be technological, economic or other structural reasons

Two key issues: **ensuring consultation** and **redeployment to associated entities**

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# What you should be doing

- Ensuring consultation with employees who may be made redundant and considering redeployment to associated entities
- Reviewing policies and procedures
- Reviewing contracts of employment
- Ensuring the organisation and managers are aware of changes to termination processes
- Making informed decisions and getting advice

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# Collective bargaining - types of agreements and their content

- Primary concept of ‘collective bargaining’ for an ‘enterprise agreement’ (**EA**)
- Four types of EAs:
  - Single-enterprise agreements
  - Multi-enterprise agreements
  - Greenfields agreements (single or multi)
- No union / non-union distinction

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# Permitted matters

- EA must contain ‘permitted matters’:
  - Matters pertaining to the relationship between employer and employees
  - Matters pertaining to the relationship between employers and employee organisations
  - Deductions from wages
  - How the agreement will operate

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# Mandatory and unlawful terms

## Mandatory terms

- Flexibility term
- Consultation Term
- Dispute Resolution Term
- Duration of agreement

## Unlawful terms

- Discriminatory
- Objectionable
- Inconsistent with the Act
- Result in exercise of OHS rights inconsistent with the Act

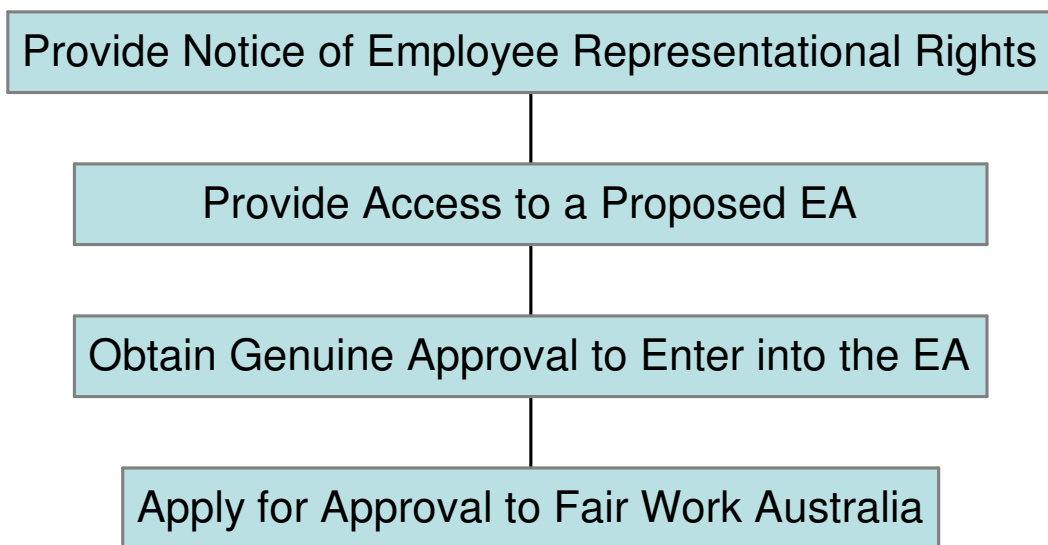
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# Individual flexibility agreements

- Replicated in Modern Awards
- Individual agreements between employee and employer
- Meet the genuine needs of both parties
- Limited to terms identified in the EA
- Must be in writing
- Can be withdrawn / ended on notice

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# Basic bargaining steps



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# HOT TOPIC: Good Faith Bargaining

- A framework for agreement making
- Lot of commentary
- Intention of the Government
- Not about concessions or consensus: simply a framework to remove unfair or capricious conduct

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# GFB: The Act's requirements

- Requires a bargaining representative to:
  - Attend and participate in meetings
  - Disclose relevant information
  - Respond to proposals
  - Genuinely consider proposals and give reasons for responses
  - Recognise and bargain with agents
  - Not engage in capricious or unfair conduct

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# What happens when GFB doesn't occur?

- Apply to FWA for a bargaining order
- Bargaining orders can:
  - focus on types of communications between parties;
  - compel parties to attend meetings; and
  - get bargaining back on track
- Serious breach declarations
  - Serious and sustained non-compliance

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# Other workplace determinations

- 'Low paid' employee workplace determinations
- Industrial action related workplace determinations
- Bargaining related workplace determinations

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# Do I have to bargain?

- Bargaining is a choice
- Can be compelled if FWA makes a 'majority support determination'
- Majority of employees support bargaining for an EA
- Once made, GFB obligations must be met

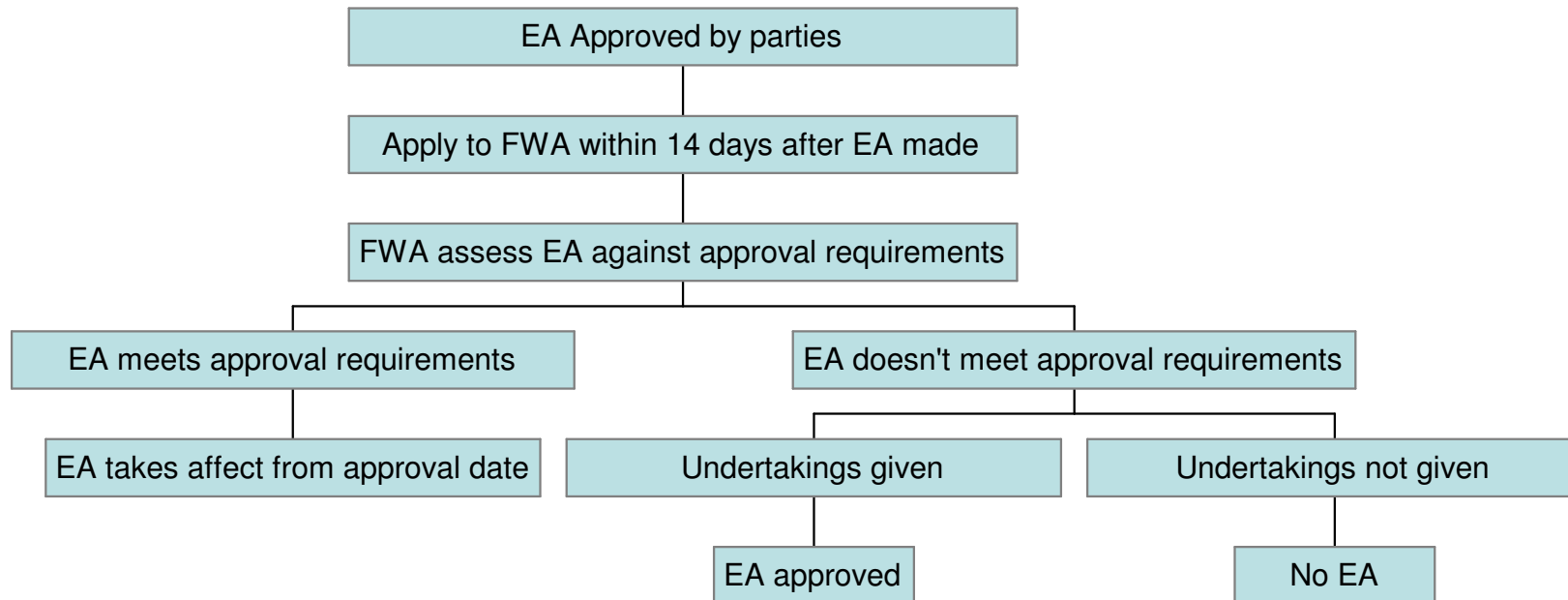
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# The approval process - when is an agreement 'made'?

Single enterprise EA - one employer	When approved by majority of employees
Single enterprise EA - two or more employers	When approved by majority of group employees
Multi-enterprise EA	Approved by majority of employees at one employer
Greenfields agreement	When signed by employer and employee organisation

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# Approval steps



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# The Better Off Overall Test (BOOT)

- EA's must pass the BOOT to be approved
- Assessment against relevant Modern Award
- Point in time test - impact on increased wages
- Classes of employees
- Approval in exceptional circumstances

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# The BOOT

## BOOT passed

- EA commences on date of approval
- Nominal expiry date no more than 4 years after approval date
- Exceptional circumstances - 2 years

## BOOT not passed

- Undertaking may be accepted
- Multi-employers: only one giving undertaking covered
- Undertaking - FWA must assess and consider matters

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# Other key provisions

- NES and Modern Awards
- Workplace Rights
- Industrial Action
- Transfer of business

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# Your questions answered



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# Implementation strategies - AHRI Fair Work Implementation Cycle

Workplace determinations

Unfair dismissal

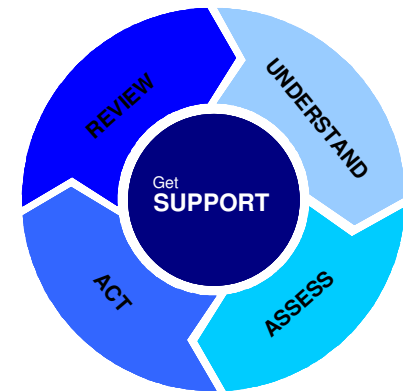
Flexibility agreements

## What are your priorities?

Good faith bargaining

Permitted content

Writing an agreement



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# AHRI and Government Resources

- You can find more information at:

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

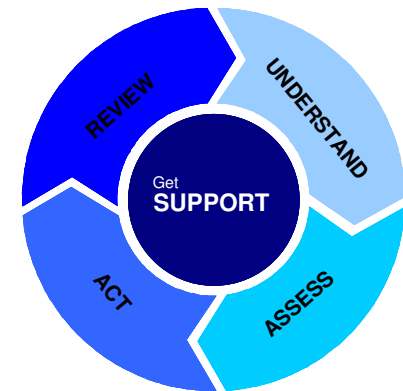
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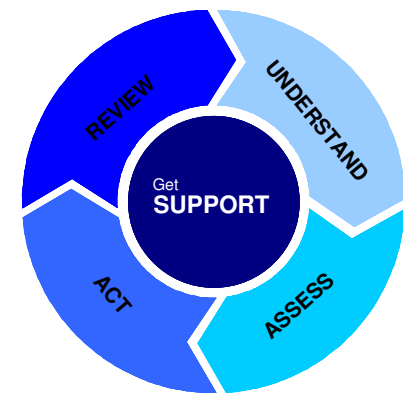
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# Additional AHRI Fair Work Assist Resources

- AHRI Fair Work *Assist* E-Learning Module
- AHRI Fair Work *Assist* Video Podcast
- AHRI Fair Work *Assist* Phone Hotline
- AHRI Fair Work *Assist* Discussion Forum
- AHRI Fair Work *Assist* ‘Ask the Expert’
- AHRI’s **Survey** on the Fair Work Act 2009



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**Thank you  
for completing our  
feedback questionnaire!**

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