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AHRI
Fair Work Assist
Legislation in practice



Australian Government



AHRI Fair Work Assist

Senior Executives 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
- Legal 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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Unfair dismissal - key messages

- National system gives most employees protection from unfair dismissal
- Managers need to be aware of the changes and liaise with HR departments or external advisors
- Redundancy changes will affect all organisations and proposed restructures

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Who is covered and when?

- Includes:
 - Some casual employees
- Excludes:
 - Defined small businesses
 - 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
- Limits on representation by lawyers

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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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Redundancy changes and the implication for senior people

- 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

- Examining the possibility of redundancies when engaging in corporate restructures or reviews
- Ensuring internal expertise is utilised (eg HR)
- Making sure you have adequate advice about legal implications stemming from restructures
- Ensuring the company has appropriate consultation and redeployment strategies

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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
- Why you need to consider EAs

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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

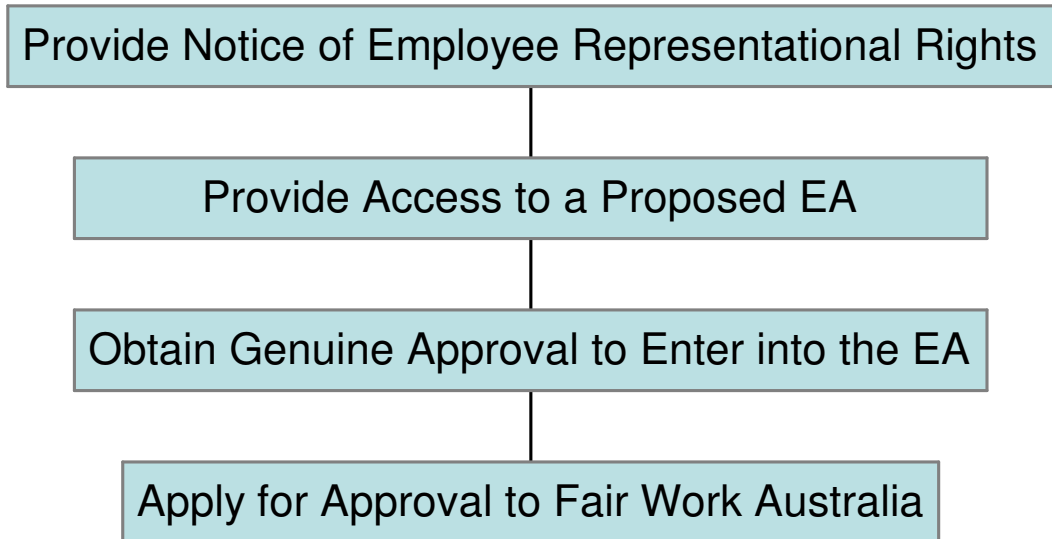
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Individual flexibility agreements

- 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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Do I have to bargain?

- Bargaining is a choice
- Can be compelled if FWA makes a 'majority support determination'
 - *AMWU v Cochlear* [2009] FWA 125
- Majority of employees support bargaining for an EA
- Once made, GFB obligations must be met

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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 (not commercially sensitive or confidential 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

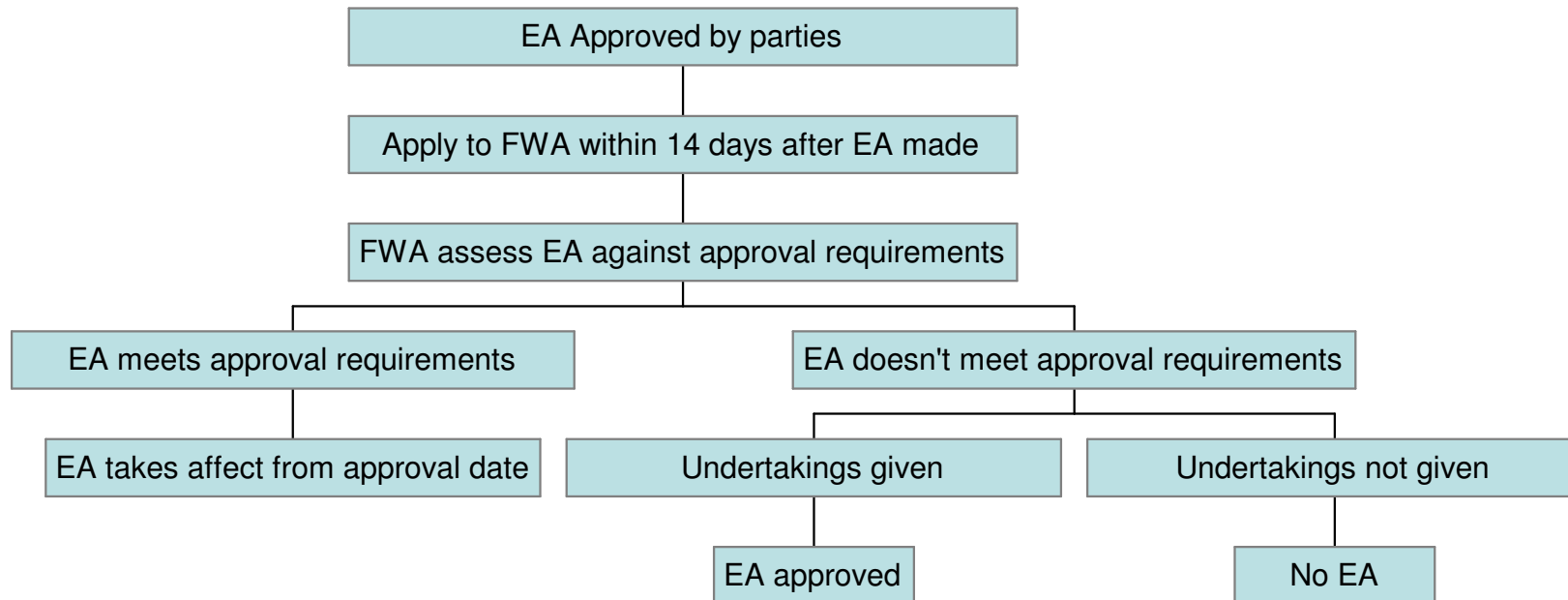
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Other workplace determinations

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

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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

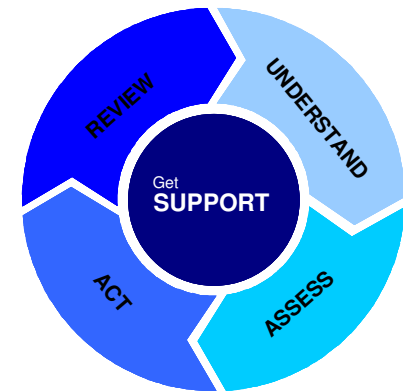
Flexibility agreements

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

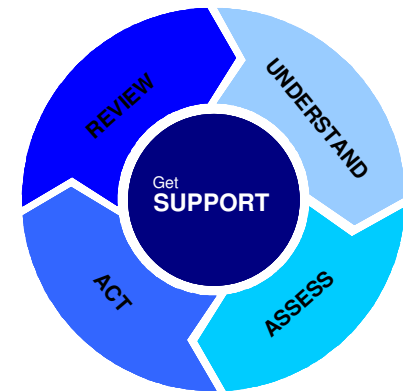
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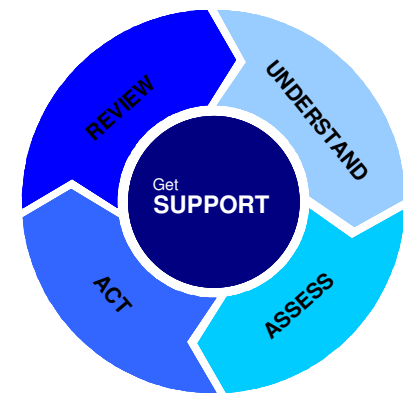
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Additional AHRI Fair Work Assist Resources

- 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
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