



# NECA Legal Webinar Series: Session 4

Enterprise Bargaining  
Agreements





## Presenter:



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# Webinar Agenda

1. What is an EBA?
2. Types of EBAs
3. Steps to making an EBA
4. Considerations of Fair Work
5. Pros and Cons of EBA's and Contracts of Employment





# 1. What is an EBA?





## What is an EBA?

- Collective agreement between employer and employees governing employment conditions
- Employment conditions:
  - Rates of pay
  - Hours of work and overtime
  - Consultative mechanisms
  - Dispute resolution procedures





## 2.Types of EBA's



# Types of EBA's

**Single-  
Enterprise  
Agreements**



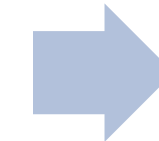
Between a single employer and employees

**Multi-Enterprise  
Agreements**

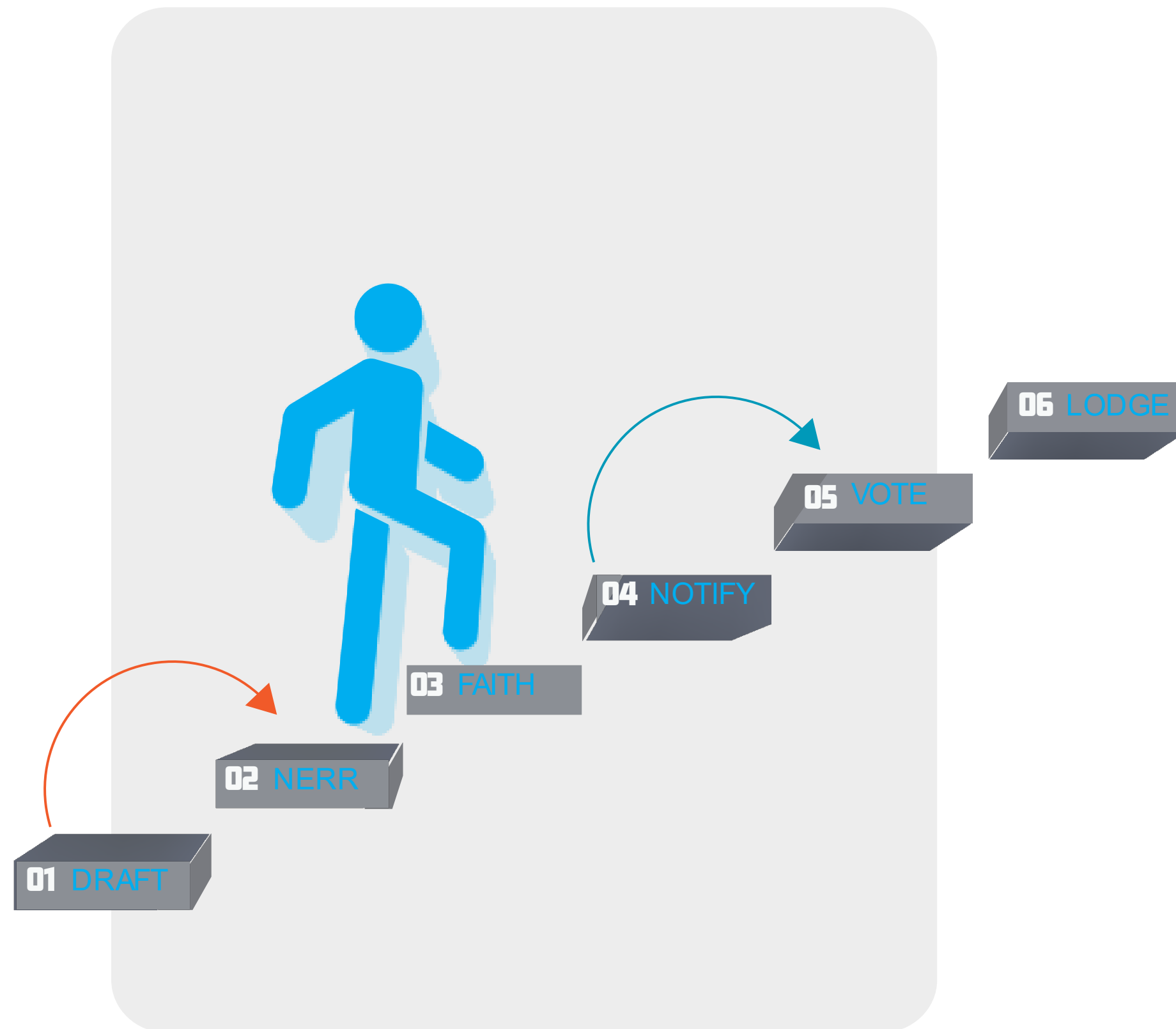


Between two or more employers and employees

**Greenfields  
Agreements**



In relation to new enterprise of employer or employers before the employment of employees



## 3. Steps to making an EBA





# Step 1: Draft

- Prepare a draft agreement
- Terms of agreement may change during stages of negotiation
- Replaces the Award
- Clear and unambiguous choice of words

**DRAFT**





# Terms

Terms to Include	Terms to Avoid
Nominal expiry date – no longer than 4 years	Discriminatory terms
Dispute settlement procedure	Objectionable terms
Flexibility terms – permits creation of Individual Flexibility Agreements – varies the terms and conditions of an Enterprise Bargaining Agreement to meet the genuine needs of the employer and employee	Terms that exclude or modify unfair dismissal provisions that are detrimental to employee
Consultation terms – work place changes and their effects	Terms inconsistent with industrial action provisions
	Terms that provide for entitlement to right of entry



## Step 2: NERR

- Notice of Representation Rights
- All employees must have a copy at least 22 days before vote
- Employees have 14 days to nominate a bargaining representative
- Unions with members under agreement have the right to participate



# Who can be a bargaining representative?

- Employers covered by the agreement
- Trade unions that have a member that will be covered by the agreement
- Trade unions that are entitled to represent one or more employees who will be covered by a Greenfields agreement
- Trade unions that have applied to the Fair Work Commission for a low paid authorisation that relates to the agreement
- A person specified in writing as a bargaining representative by an employer or employee that will be covered by the agreement



# Disclosure Requirements of Bargaining Representatives

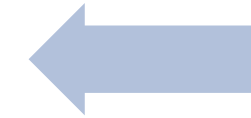
- Bargaining representatives need to disclose financial benefits that they will or could get as a term of a proposed agreement
- The disclosure must be set out in a document with the relevant details
- The disclosure document must be available to employees
- Failing to provide such document can result in penalties of:
  - \$13,000 for an individual; and
  - \$66,000 for a company.



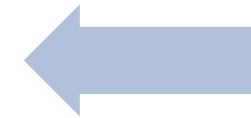
Attending and participating in meetings at reasonable times



Responding to proposals made by other bargaining representatives for the agreement in a timely manner



Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining



Disclosing relevant information (other than confidential information) in a timely manner



Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's response to those people



Recognising and bargaining with the other bargaining representatives to reach an agreement



## Step 3: Good Faith Bargaining: Requirements





# Checklist for Best Practice Bargaining

- ☐ Parties understand their obligation to bargain in good faith and apply those principles
- ☐ Parties understand what must and what cannot be included in an Enterprise Bargaining Agreement
- ☐ Ensure that all parties understand the terms of the proposed Enterprise Bargaining Agreement
- ☐ Negotiate for outcomes that focus on fairness, cooperation and mutual benefit



# Bargaining Dispute?

- Where a bargaining dispute cannot be solved by the bargaining representatives themselves, an application may be made to the Fair Work Commission for assistance.
- The Fair Work Commission may issue a bargaining order including the actions that they require to be taken and other matters that the Commission considers necessary to promote fairness and efficiency in the bargaining process.
- Where a bargaining order has been contravened, the Fair Work Ombudsman may take legal action for penalties in excess of \$13,000.00 for individuals and \$66,000.00 for companies.



## Step 4: Notifying Relevant Parties

- Employees to be provided with copies of:
  - The proposed Enterprise Agreement
  - Other material incorporated by reference in the Agreement
- Employees must be notified of:
  - The date, time and place the vote will occur
  - The voting method to be used
- This documentation must be provided to the employees by the start of the access period.



## Step 5: Vote

- After at least 21 days from the date that employees were notified of their right to have a bargaining representative.
- Successful vote for Single Enterprise Agreements – majority of employees endorse the agreement
- Successful vote for Multi-Enterprise Agreements – majority of employees of at least one of the employers endorse the agreement. Those employees who do not endorse the agreement should be removed from it.



- Application lodged with FWC within 14 days of Agreement being made
- Application accompanied by:
  - Signed copy of Agreement
  - Declarations required by FWC to accompany the Application

## Step 6: Lodgment





# 4. Considerations of Fair Work



# Considerations of FWC

- ☐ Agreement has been genuinely agreed to by those involved
- ☐ Agreement passes the Better-Off-Overall Test (BOOT)
- ☐ Agreement does not include any unlawful terms or terms that are inconsistent with the National Employment Standards
- ☐ The employees covered by the Award were fairly chosen
- ☐ The Agreement provides a dispute settlement procedure and nominal expiry date
- ☐ The Agreement provides a flexibility and consultation clause



# 5. Pros and Cons:

## EBA

### -v-

## Employment Contract

# Contracts of Employment

- Employment contracts are contracts between employers and employees that cover aspects of employee work rights, pay and conditions.
- Contracts of employment usually contain the following terms:
  - Role of employee
  - Remuneration
  - Hours of work
  - Leave entitlements
  - Termination of employment
  - Agreed employer policies
  - Confidentiality clauses
  - Intellectual property and moral rights clauses
  - Post-employment restrictions
  - Restraint of trade clauses



# Can an employment contract provide for less than the legal minimums?

- Employment contracts cannot provide for less than:
  1. The National Employment Standards; and
  2. Relevant Awards that may apply.
- However, in order to amend certain clauses in an employment contract to better suit the needs of the employee and the needs of the organisation itself, both parties can enter into an EBA alongside the contract.





# Advantages and Disadvantages – EBA

Advantages	Disadvantages
Legally-binding agreement on engagement, remuneration and management of employees	Time and cost required to negotiate, draft and approve an EBA
Establishes binding employment conditions suitable to the needs of employers and employees	Its is not an easy process to obtain approval for changes to the EBA during its term
Improves procedures for handling employee grievances or consulting on workplace issues	Breaches of an EBA may amount to civil penalties
Assurance for employees that terms of EBA put them in a position that is Better-Off-Overall than if they were under the Award	An employee cannot opt out of the Agreement once it is approved, even if they did not vote in favour of it



# Advantages and Disadvantages – Employment Contract

Advantages	Disadvantages
Offers a form of job security – specified start and end date of employment	Less flexibility to adapt to changing conditions -parties must reach an agreement to amend terms of contract
Specifies pay rate or salary of employee	Limits employers ability to terminate employee - employment ends at the conclusion of the contract period
Provides resolution of disputes procedures to follow	Can be costly to be drafted
Each party has an implied duty to act in good faith and fair dealings	Legal ramifications and remedies of a breach of term or condition



national electrical and communications association



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