

## ENTERPRISE BARGAINING – PREPARATION &amp; COMMENCEMENT (NSE)

## Enterprise Bargaining – Preparation & Commencement (National System Employers)

These notes apply to national system employers who are governed by the *Fair Work Act 2009* (Cth) (“**Act**”) and are designed to bring to your attention matters that you may not have considered before and/or are outside of the scope of assistance you requested from us.

The Appendix to these notes provides a general outline of the process and procedural requirements to formally commence the bargaining process.

### What is an Enterprise Agreement?

An Enterprise Agreement (“**EA**”) is a legally binding, negotiated agreement which sets out the terms and conditions of employment between an employer and some or all of its employees. It replaces the relevant award or in some cases the existing agreement.

### Union Involvement

The union is automatically a bargaining representative in the negotiation process if any employee to be covered by the proposed EA is a member of the union, unless an employee appoints another person as their bargaining representative or revokes (in writing) the union’s right to represent them.

### Initiating Bargaining Correctly

Bargaining is formally commenced when the employer issues a Notice of Employee Representational Rights (“**NERR**”). There are strict requirements in relation to issuing an NERR – if the NERR is not issued correctly to employees, the EA cannot be approved. The Appendix to these Guidance Notes sets out a general outline of the requirements.

### Preliminary Analysis & Considering the Options

Creating an EA is a business process. Before you initiate bargaining, your organisation should undertake the necessary research and preparation. We recommend beginning with a strategy, including the extent to which existing industrial relations arrangements will influence your strategy and what changes would be most beneficial. Then, consider and take advice on all your options before deciding whether an EA is the most suitable approach for your business.

The planning process is critical and requires a strategic plan including;

- mapping key objectives;
- identifying the business impact of various options;
- achieving a clear management direction;
- building the capability of your team; and
- understanding benchmark performance.

### Undertaking Bargaining

This is sometimes the most intensive and difficult part of the process. It requires a planned and informed approach based on sound negotiating skills and strategies. It requires;

- a negotiation plan;
- a plan and agreement for conducting meetings;
- a method for tracking and costing proposals;
- sound negotiation skills;
- an understanding of good faith bargaining obligations under the Act; and
- a workforce communication plan.

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### Disputes and Industrial Action

In some bargaining processes there are disputes and industrial action about the terms of the EA. These can be complex matters governed by a variety of rules in the Act. If this is possible in your situation, you should be prepared to manage the potential industrial disputes and actions by;

- creating a strategy to deal with industrial disputes and actions
- educating and communication with key stakeholders about these matters

### Requirements for Approval

Once the negotiation process is finalised the EA must be approved by employees. It must also be approved by the FWC in order to take legal effect. The approval process involves a formal review of the procedure for making the EA, and an assessment of the content of the EA including a 'Better Off Overall Test' ("BOOT").

There are strict requirements for approval of the agreement. You must be prepared to;

- explain to employees the terms of the agreement and their effects;
- establishing an access periods and voting processes;
- draft the agreement to give effect to its intention and to comply with the Act
- prepare and file to the FWC an 'Application for Approval of Enterprise Agreement'
- prepare and submit to the FWC an 'Employer's Declaration in Support of Application for Approval of Enterprise Agreement';
- check that your agreement passes the BOOT.

### Passing the BOOT

The FWC decides whether an EA passes the BOOT. This involves an objective consideration of the EA as a whole against the applicable modern award(s) as a whole. Sometimes the EA is quite different from the award (for example different hours of work or a different classification system) and the calculations can be complex.

### Implementing the EA

Once the EA is approved it needs to be properly implemented. Sometimes the new EA will affect a number of personnel, including managers, HR, payroll and of course the employees. You should be prepared to;

- educate those affected about the new EA and its terms; and
- ensure items that need to be actioned in or arising from the EA occur correctly and on time; and
- have a process to track issues that occur during the life of the EA that need to be captured and addressed.

### Require further information/assistance?

If you require further information or advice, please contact your local Consultant at either our Adelaide or Melbourne offices.

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## Appendix: Notice of Employee Representational Rights (NERR)

The following is some general information regarding the NERR and the commencement of bargaining process. This information should be used as a guide only. If you have specific queries regarding your bargaining process, we recommend you contact us to obtain specific advice.

**What is a NERR?**

The first obligation of the employer when commencing the bargaining process is to issue a NERR. The purpose of the NERR is to notify all employees who will be covered by a proposed enterprise agreement of their right to appoint a bargaining representative.

The Act and the *Fair Work Regulations 2009* (Cth) ("**Regulations**") prescribe the form and content relating to the NERR. The prescribed form can be found in Schedule 2.1 of the Regulations, or via a button link on the FWC website ([www.fwc.gov.au](http://www.fwc.gov.au)). Failure to properly implement the NERR may result in the FWC not approving your enterprise agreement. EMA Consulting can help prepare or check your NERR if required.

**When does a NERR have to be issued?**

The issuing of the NERR formally signifies the commencement of the bargaining process. The NERR must be issued as soon as practicable, and not later than 14 days after the 'notification time' of the agreement. The notification time of the agreement is the occurrence of any one of the following events:

- the employer agrees to bargain, or initiates bargaining, for the agreement;
- a majority support determination issued by FWC in relation to the agreement comes into operation;
- a scope order in relation to the agreement comes into operation; or
- a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

**Who receives the NERR?**

The Act requires that the NERR be given to all employees who will be covered by the agreement and who are employed by the employer at the notification time of the agreement. In determining whether an employee is covered by the proposed agreement, you will need to consider the proposed coverage that has been described in the NERR.

There is no obligation to issue further NERRs to employees who commence employment after the notification time and before the vote occurs (although such employees will have the right to be represented and to vote for the agreement if they fall within the proposed coverage).

Whilst the Act does not oblige you to provide a copy of the NERR to the relevant unions, we recommend that as a matter of courtesy you do so where it is clear that one or more unions will be involved in the bargaining process (for example in situations where the union has members in the work group and/or has previously been involved in bargaining).

Any employees who are currently on Australian Workplace Agreements ("**AWA**") or Individual Transitional Employment Agreements ("**ITEA**") but who fall within the proposed coverage of the agreement will still need to receive a copy of the NERR. However, whether such employees will be able to participate in the bargaining process (e.g. appointing a bargaining representative, voting for the agreement) and subsequently have the agreement apply to them will depend on a number of factors. This is briefly summarised in the NERR. Further advice regarding employees on AWAs or ITEAs can be provided upon your request.

**How must an NERR be issued?**

The Regulations specify various ways in which the NERR can be issued to employees who will be covered by the agreement. These are:

- giving the notice to the employee personally;
- sending the notice by pre-paid post to the employee's residential address or a postal address nominated by the employee;

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- sending the notice to the employee's email address at work or another email address nominated by the employee;
- sending to the employee's email address at work or another email address nominated by the employee an electronic link which takes the employee directly to a copy of the notice on the employer's intranet;
- faxing the notice to the employee's fax number at work, at home or at another fax number nominated by the employee; or
- displaying the notice in a conspicuous location at the workplace that is known and readily accessible to the employee.

Simply holding discussions with employees about their right to be represented during the bargaining process will not meet the requirements of the Act.

We also note that the employer carries the burden of proof to demonstrate that every employee employed at the notification time has been notified, and if one employee can show that they were not notified, FWC may refuse to approve the agreement. For these reasons, simply displaying a notice at the workplace carries an element of risk and we do not recommend relying on this.

Because the NERR is a prescribed form, it is unlawful to include any content that has the effect of altering, adding to, explaining or qualifying the NERR. However, employers can validly give extra information to employees (on a separate document) at the same time as providing the NERR, as long as it doesn't form part of the notice. Where the additional material is misleading or intimidatory, it may form part of FWC's assessment of whether the EA has been 'genuinely agreed' by the employees. We therefore recommend that you seek specific advice if any attachments or cover letters are to be provided when issuing a NERR.

### **Who is a bargaining representative?**

The parties involved in bargaining for the agreement are referred to as 'bargaining representatives'.

An employee is, as a general rule, entitled to be represented by a bargaining representative during negotiations for an agreement. That may include the employee appointing themselves, appointing another employee, appointing a person external to the employer or being represented by his or her union.

Bargaining Representation by the union is automatic where the employee is a member of the union. However, an employee who is a member of a union will not be represented by the union if they appoint another person as their bargaining representative or if they revoke the union's right to represent them in writing.

Regardless of whom an employee appoints as a bargaining representative (other than automatic representation by the employee's union), the appointment must be in writing and a copy of the appointment must be provided to the employer.

In decisions of FWC, employees who are union delegates have been afforded a right to participate in bargaining even if they have not been appointed in writing by another employee. These decisions were based on a condition that the attendance of the union delegate would not unreasonably interrupt or inconvenience the employer's operations.

An employee can decide to not appoint a bargaining representative – there is no obligation for them to do so.

The employer's nominated managers are automatically considered to be a bargaining representative, unless it decides to appoint another person (such as EMA) to bargain on its behalf. Such an appointment must also be made in writing and must be provided to the employees' bargaining representatives upon request.

### **Do I have to issue a separate NERR for each proposed agreement?**

Yes. If you are intending to bargain for numerous enterprise agreements to cover different parts of your business, you will need to prepare separate NERRs for each proposed agreement.

### **What are the key dates that I need to be aware of?**

Below is a summary of some key dates that you should keep in mind throughout.

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Action	Timeframe	Other Requirements
Issuing of NERR	No later than 14 days after the 'notification time' of the agreement.	See above for further definition of 'notification time'.
Access Period	The 7-day period between providing the employees with copies or, or access to, the final version of the agreement to be voted on, and ending immediately before Commencing the Voting. In order to be sure that this requirement is met, we recommend that you allow at least 8 clear days.	<p>At the start of Access Period the employer must ensure employees are given access to a copy of:</p> <ul style="list-style-type: none"> <li>the agreement; and</li> <li>any other material incorporated by reference in the agreement.</li> </ul> <p>The employer must also notify employees of:</p> <ul style="list-style-type: none"> <li>the time and place at which the vote will occur; and</li> <li>the voting method that will be used.</li> </ul>
Commencing the Voting Process (which includes the provision of ballot slips, etc.)	<ul style="list-style-type: none"> <li>No sooner than 21 days after the day on which the last NERR was issued to employees who were employed at the notification time; and</li> <li>after the conclusion of the Access Period.</li> </ul>	
Lodging the EA with the FWC	<ul style="list-style-type: none"> <li>Within 14 days after the agreement is made (the agreement is 'made' on the day that the votes are counted and show a valid majority).</li> </ul>	<p>The application to approve the EA must be lodged by a bargaining representative, and must be accompanied by the relevant prescribed forms.</p> <p>A copy of the NERR issued must also be attached to the application.</p>