

All Things Enterprise Bargaining

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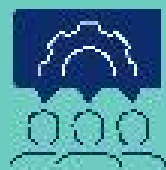
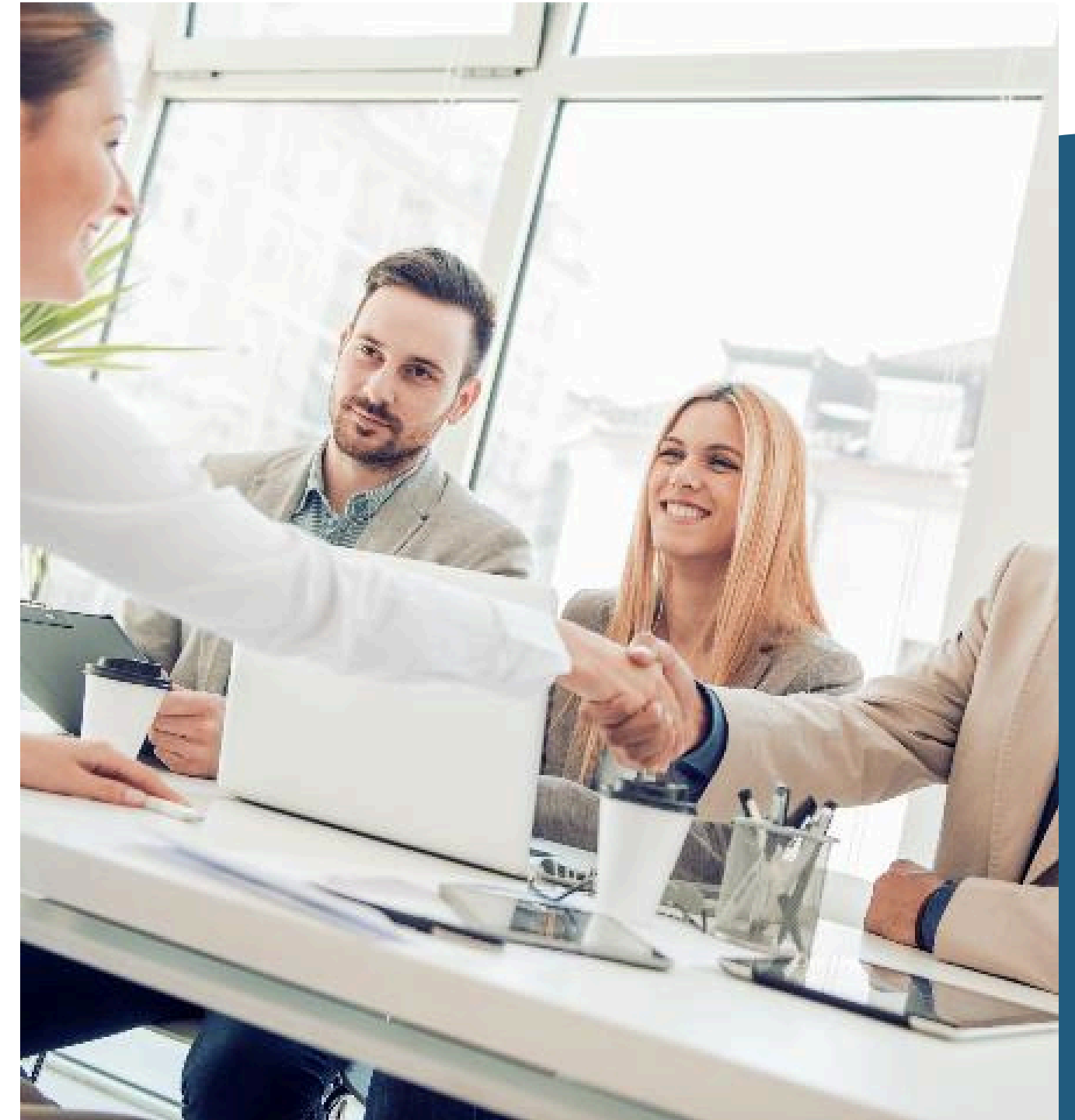
**BUSINESS
NSW**

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**Productivity, Education
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EA Architecture



Why



Important things to consider



The Bargaining Process



Bargaining Architecture

Industrial Instrument Food-chain

Award Free

(NES, Contract of
Employment, typically
managers, some types of
professionals)

Award Covered

*No Enterprise Agreement
(Still NES + Contract)*

Enterprise Agreement Covered

(Award doesn't apply* *,
Contract)

Who has EAs

Size

Industry

Union Density

What is in EAs

**Mandatory
Content**
(Disputes, Nominal
Term, Consultation
etc)

**Employment
Conditions**

Pay

Key Concepts

BOOT

Unions

Industrial
Action



Culture

1

‘Single Employer’
Bargaining

‘Multi-Employer’
Bargaining
“Single Interest
Authorisation”

‘Multi-Employer’
Bargaining
“Supported
Bargaining
Authorisation”

‘Multi-Employer’
Bargaining
“Co-operative
Workplace”

Do not apply to building and
construction

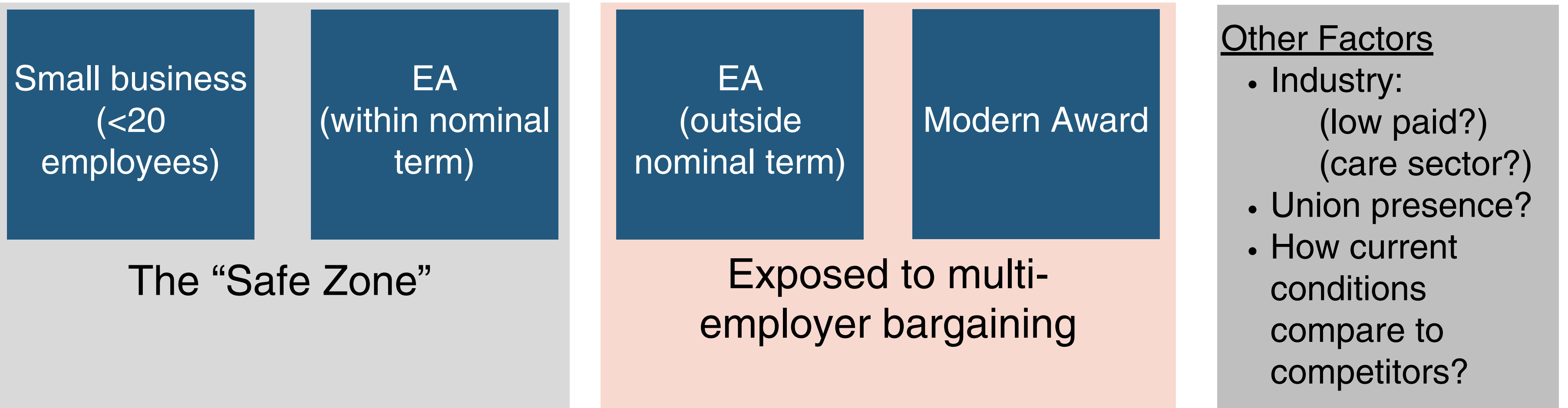
Bargaining Changes

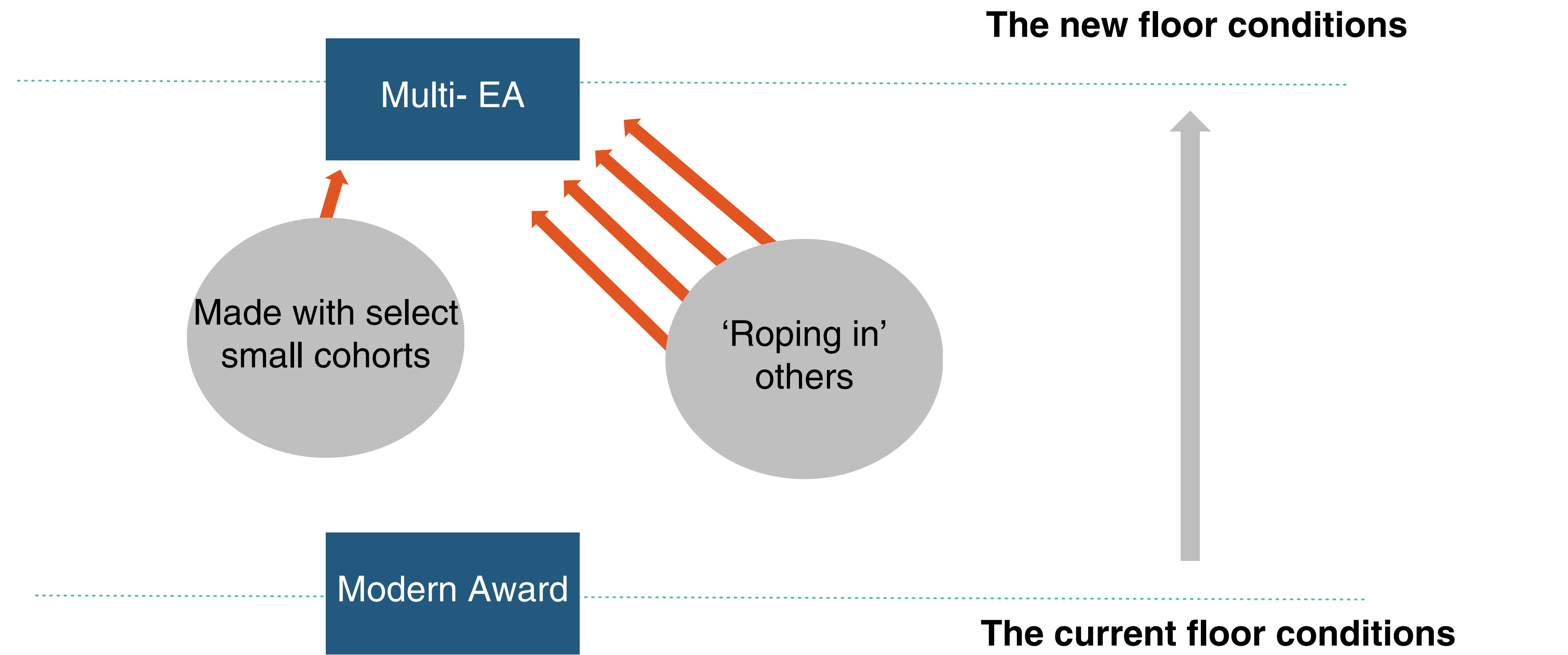
- Amendments to allow parties to voluntarily replace a supported bargaining or a single interest agreement with a single enterprise agreement at any time.
- Where this happens, the BOOT will be conducted against the existing agreement and not the Modern Award.
- Changes will also be made enabling multiple franchisees to access the traditional single enterprise bargaining stream.
- From 26 February 2025, new powers for the FWC to issue model terms for enterprise agreements with respect to flexibility, consultation and disputes.
- Previously, these model terms are included in the regulations, drafted by the Minister.



Why?

Where does your business sit?







Some important things

Things to consider

- Once started you are on the 'bargaining hamster wheel' and it's hard to get off.
- You may increase or introduce union involvement in your business.
- You will increase a collective culture over an individual culture.
- Depending what is in your EA you may reduce your operational flexibility.
- You don't need one to give someone a pay increase!

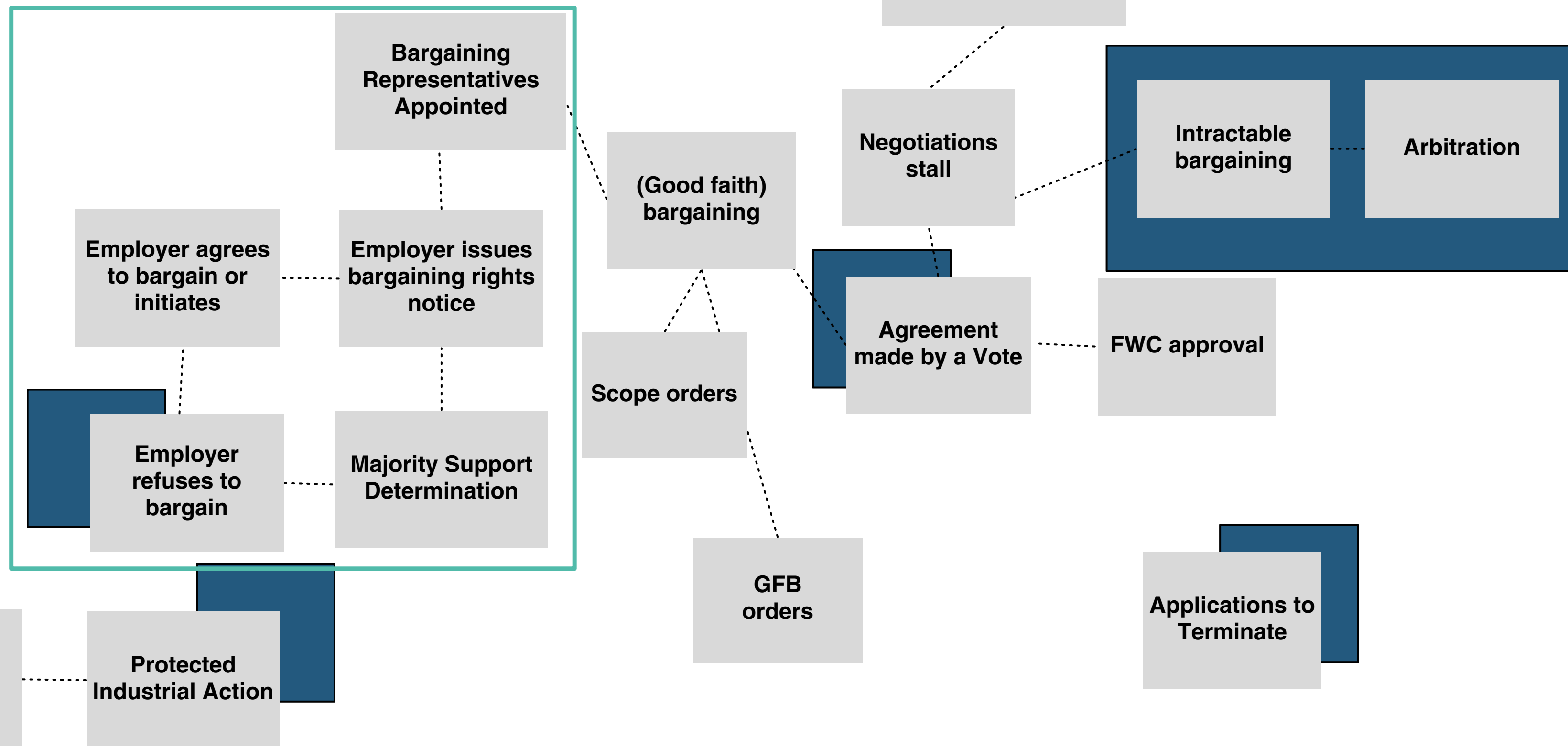


Yes we want to do it!

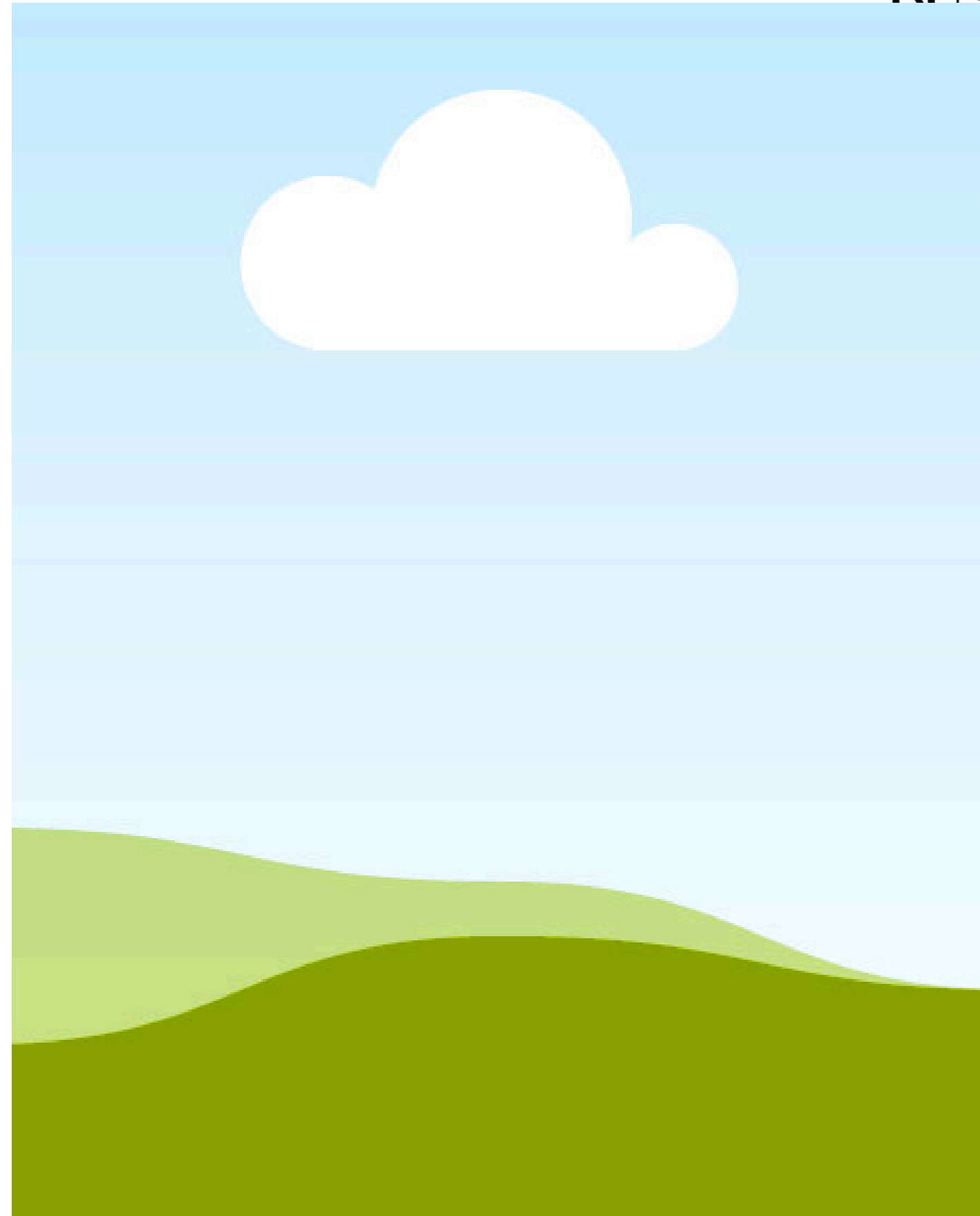


Bargaining Process

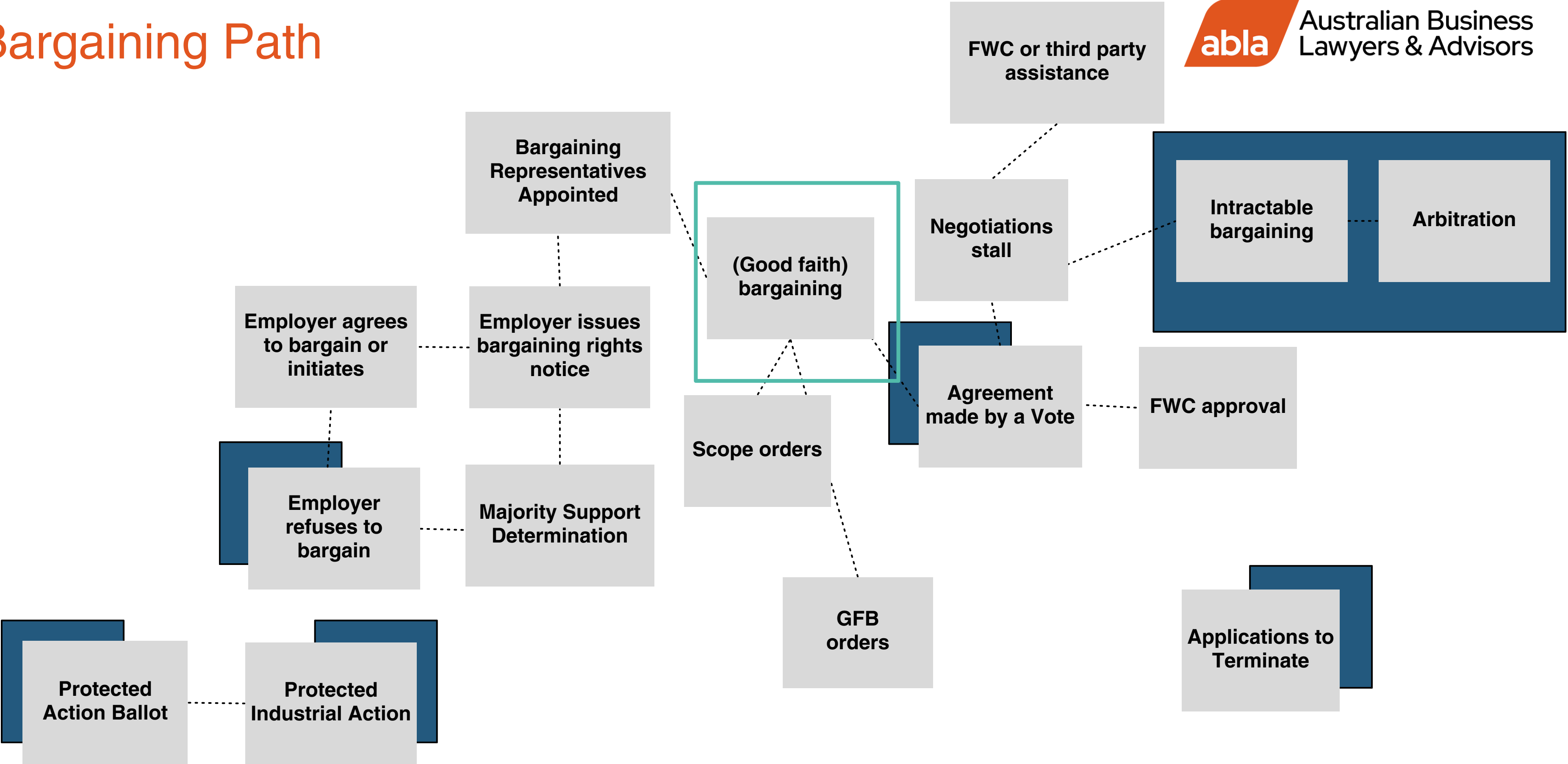
Bargaining Path



NERR



Bargaining Path



Good Faith Bargaining

What does bargaining in good faith involve?

- Must recognise BRs
- Attending and participating in negotiations at reasonable times
- Timely disclosure of information (not commercial confidential)
- Responding to proposals
- Genuine consideration of the proposals of the other bargaining representatives and providing reasons for responses
- No capricious or unfair conduct that undermines freedom of association of collective bargaining

Process based.
Not about
reasonableness
of claims.

Agreement Content

Permitted matters



- Employment relationship
- Industrial/Union matters

Mandatory content



- Flexibility clause
- Consultation clause (major change – significant effect)
- Dispute settlement

**These are required but
raise major issues for
consideration**

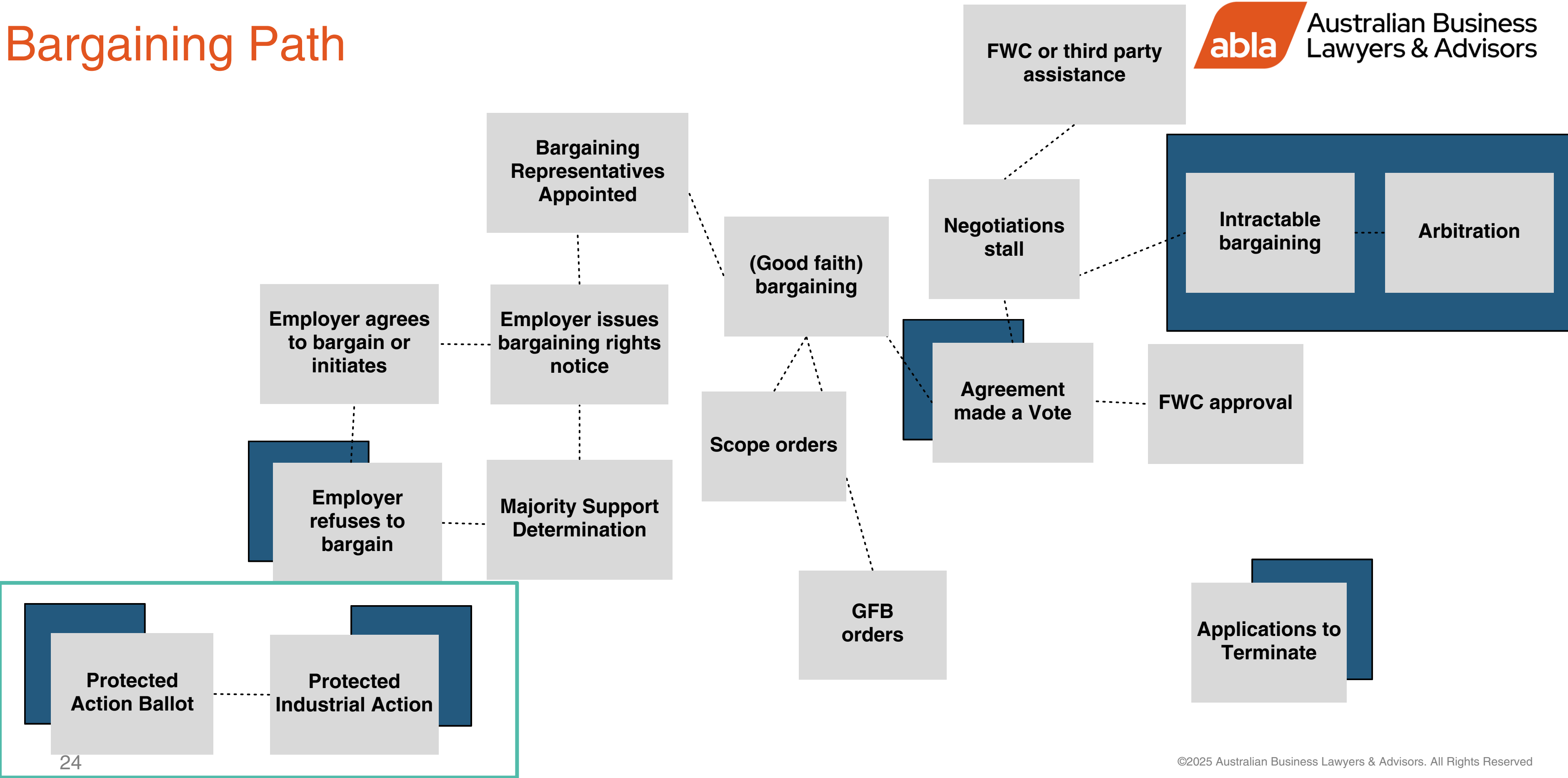
Unlawful terms



- ‘Unfair Dismissal’ terms
- Discriminatory terms

- Objectionable terms
- Right of entry (where dealt with under the act)

Bargaining Path



Protected Industrial Action

Industrial Rights settled by
Enterprise Agreement still
in its nominal term

=

Industrial action
unprotected and unlawful

Industrial Rights not settled
No EA or Expired

=

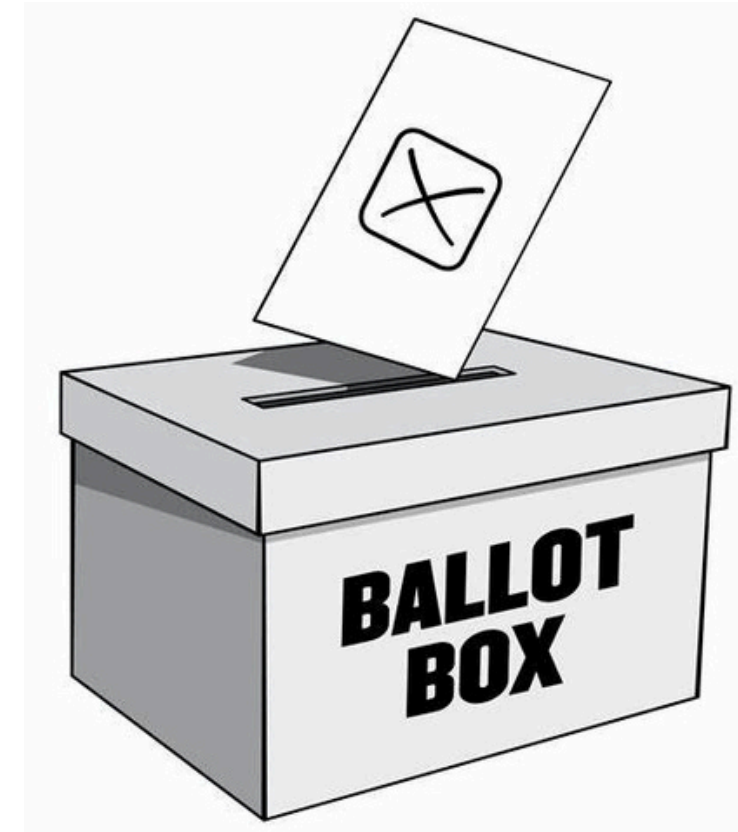
Subject to Protected Action
Ballot industrial action
protected and lawful

Settled Rights Period

Unsettled Rights Period

Protected action ballots

- Bargaining Representative may apply on behalf of the employees it represents.
- Test - Genuinely attempting to bargain.
- 50% of persons Bargaining Representative is acting for voted and 50% of those voting voted for action.



**FWC Conciliation
Conference
between
Application and
Ballot vote
closure.**

Protected Industrial Action – ‘rules’



- Action cannot commence until after any existing enterprise agreement expires.
- Employers must receive three working days notice of intention to take actual protected action (note law on ignoring or withdrawing).
- To be protected action must start within 30 days of ballot result.

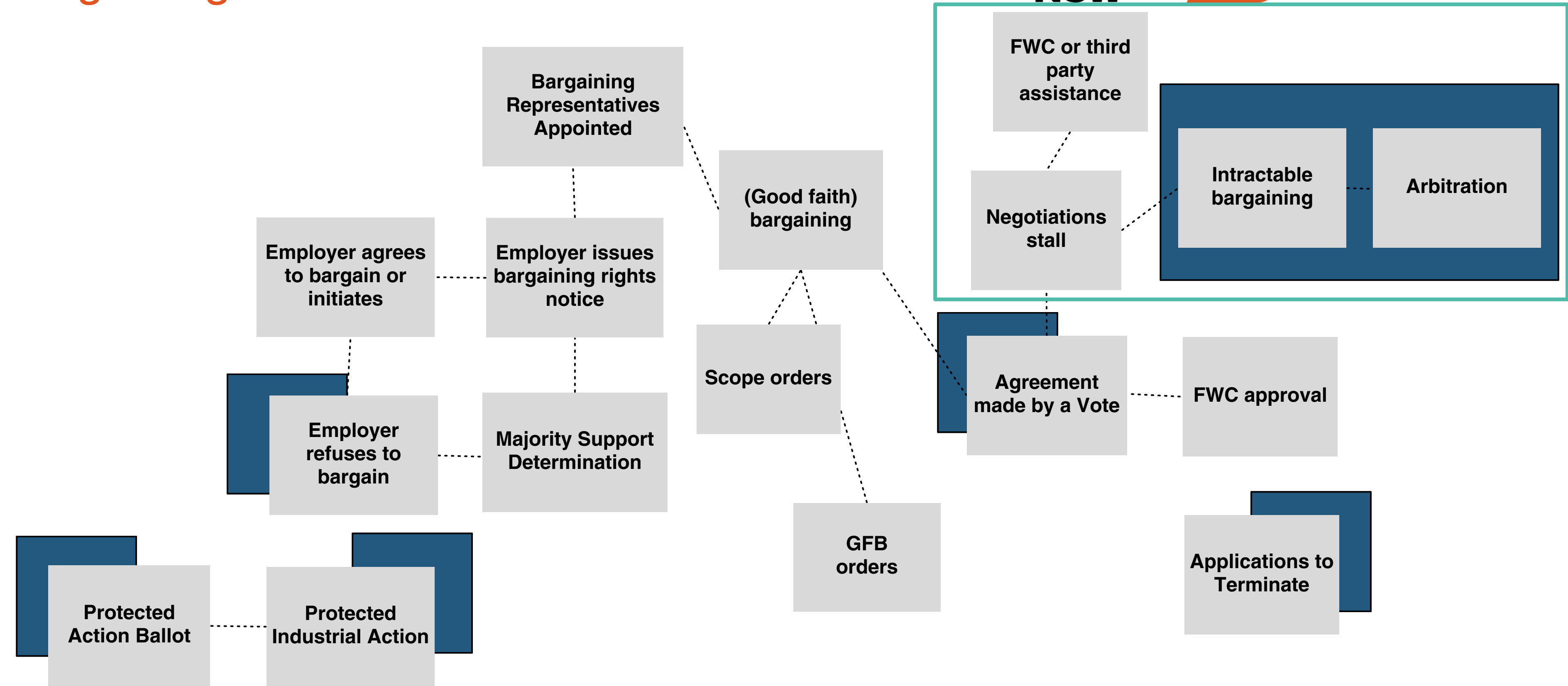
Protected Industrial Action

Partial Work
Ban

Stoppages of
Work

Lock Outs

Bargaining Path



Seeking assistance if negotiations stall

Various people can assist parties if negotiations stall.

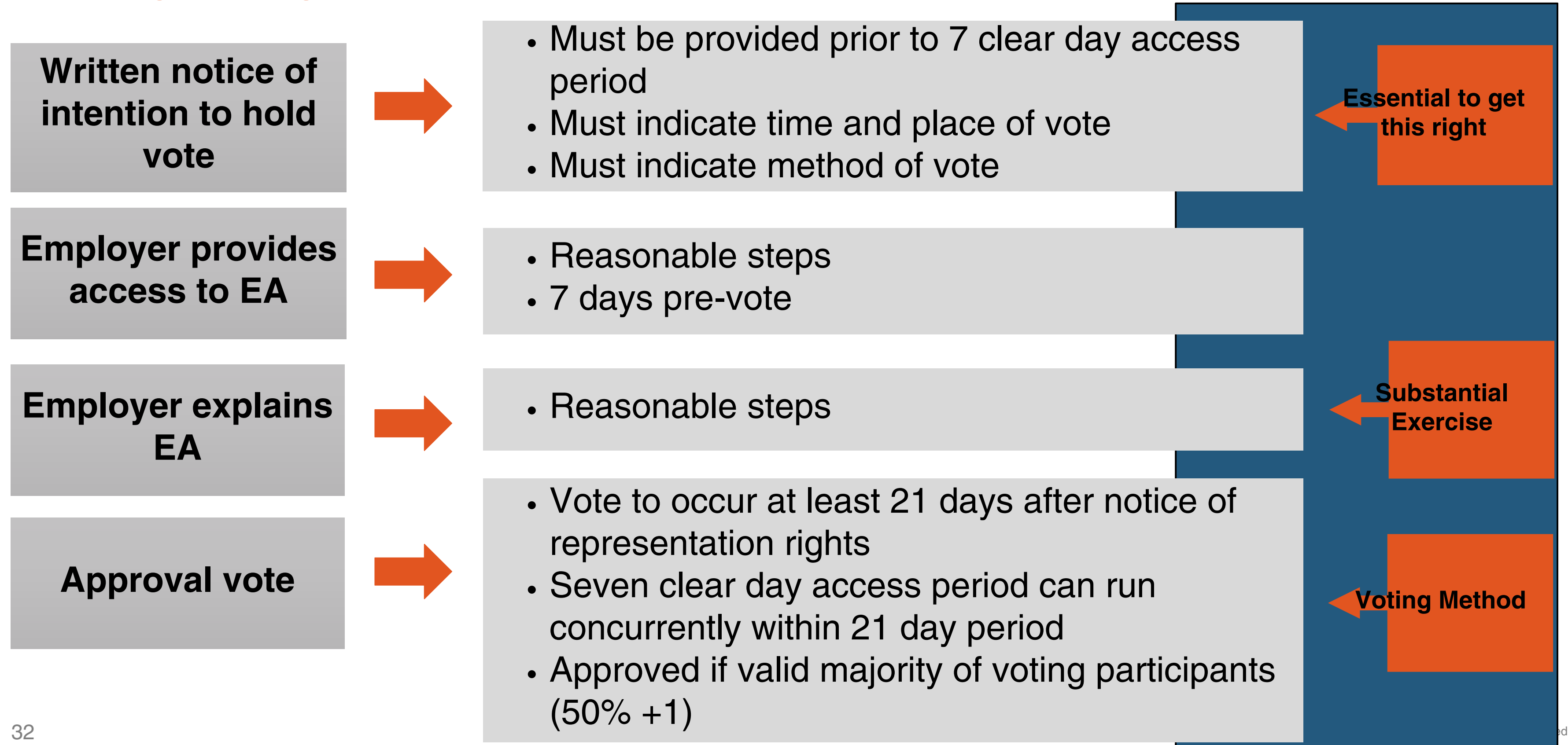
- The parties can agree to use a third party to assist.
- FWC can assist “conciliation/mediation”



Under the new rules

- Intractable bargaining (no reasonable prospects of an agreement)
- Application to FWC to conciliate (pre-condition)
- Application for declaration “intractable bargaining declaration”
- Possible further conciliation period
- Arbitration
- S 275 test in arbitration – merits

Making an Agreement



1. EA must be lodged within 14 days of approval
2. Genuine employee approval
3. NES not offended
4. Better Off Overall compared to relevant Modern Award (employee by employee)
5. Scope (fairly chosen)
6. No unlawful terms
7. Must contain nominal term – max four years
8. DSP, Consultation and IFA
9. GFB requirements met





Phone Conference
to a Full Hearing

Be Careful! (Limited)
undertakings to meet
FWC concerns



Questions

How we can help

-  Train your team – dedicated Enterprise Bargaining course in April
-  Mediation and dispute resolution
-  Representation at Fair Work Commission proceedings
-  Subscribe to ABLA updates at ablawyers.com.au/subscribe
-  For legal assistance email info@ablawyers.com.au or call **1300 565 846**



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