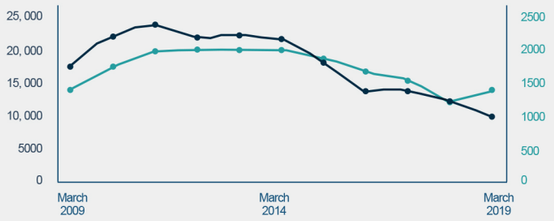
1 Address the rapid decline in agreement making

The complexity of the bargaining framework is greatly contributing to the rapid decline in the number of employers and employees utilising enterprise agreements.

Employers and employees are having to navigate a complex bargaining system that provides fewer productivity gains, allows higher levels of third party involvement in business management and/or operational matters, requires complicated procedures and higher costs. The complexity is compounded by an overly-technical, unduly strict and inefficient application of the approvals process by the Fair Work Commission (FWC). Today, only 12% of Australia's total private sector workforce is covered by an enterprise agreement, despite enterprise-level bargaining believed to be a fundamental principle of a productive and mutually-rewarding Australian industrial relations system since the early 1990s.

AGREEMENTS CURRENT AT THE END OF EACH QUARTER



There has been a 53% decrease in the number of enterprise agreements current in the private sector since the Fair Work Act (FW Act) was enacted in 2009. Most of this decline has occurred in the past five years[1].

Employers who choose to participate in enterprise bargaining are facing roadblocks in the agreement making process. Common issues include whether employees who voted up an agreement "genuinely agreed" to the proposed agreement, the application of the better off overall test (BOOT) and the very few limitations on bargaining content.

Genuinely agreed

The FWC is taking an overly-stringent approach to assessing whether an employer took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the relevant employees. This is particularly the case where there is no union party to an agreement.

THE EMPLOYER EXPERIENCE — PROVING AN AGREEMENT IS GENUINELY AGREED

Numerous reports of members of the FWC going on 'fishing exercises' to find out what hasn't been explained to employees – requiring every single item that is less beneficial to be explained, despite the legislation not requiring that. To demonstrate the impracticality, the Building and Construction Award has 146 pages and over 80 allowances.

One employer which provided a 10-page summary of each individual EA clause and its effect, which was rejected by the FWC finding the employer was required to explain exactly which provisions of the EA were better than the award and which were not.

An engineering and construction member of AMMA faced rejection of its EA, on appeal by a union not a party to the agreement, because it did not have an employee that fell within each classification under several awards its new agreement was seeking to cover.

An AMMA member had an agreement rejected by the FWC, despite being endorsed by over 70% of the workforce, after the union raised during the approval process a very technical issue it had discovered more than 12 months prior, but had failed to ever raise with the employer during long-running bargaining.

[1] *Historical Trends data – current by quarter,* March 2019 (created 31/7/19), Australian Government Attorney General's Department.

The better off overall test

Another reason why employers are choosing to abandon enterprise bargaining is the application of the BOOT. In its current form the BOOT creates uncertainty during the agreement approval process and there are calls to replace it with a no-disadvantage test, including a recommendation in the 2015 Productivity Commission Inquiry into the Workplace Relations Framework.

PRODUCTIVITY COMMISSION RECOMMENDATION 20.5

The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test.

The no-disadvantage test would be conducted by the Fair Work Commission. It would assess that, at the test time, each class of employee, and each prospective class of employee, would not be placed at a net disadvantage overall by the agreement, compared with the relevant modern award(s).

THE EMPLOYER EXPERIENCE — APPLICATION OF THE BOOT

One employer, which does not employ casuals, was required by the FWC to include a part-time clause in its EA in case an employee requested flexibility under s.65 of the FW Act; and then was later required to provide undertakings about casual employment.

The FWC requiring undertakings about hypothetical, highly unlikely scenarios, and about matters that employers are already required to comply with under the law (such as undertakings that employers will comply with the National Employment Standards).

The FWC regularly asking for more information or undertakings to be provided by an employer on three days' notice, despite the agreement sitting in the FWC for weeks or even months.

Sporadic requesting of undertakings or information, such as the FWC raising a number of issues with an agreement in the first round of approval, and then finding further issues requiring information or undertakings in subsequent rounds.

Prohibited content

Employers remain highly concerned about the very few limitations on enterprise agreement content, with unions often pushing for content that infringes on operations. Some of these include restrictions on the manner in which employers utilise labour or engagement of casuals, contractors or labour hire, rates that are payable to contractors, and requirements that an employer must reach agreement (as opposed to consult) with unions before it is entitled to introduce changes to working hours and rosters.

Unnecessary complexity and inefficiencies of this type has greatly contributed to the rapid decline in the number of employers utilising enterprise agreements and employees engaging in collective bargaining. There is an opportunity for the government to simplify Australia's agreement making system and encourage employers and employees to once again bargain over matters that will directly improve productivity and deliver wage increases at the business level.

Recommendations:

- Amend or clarify section 180(5) of the Fair Work Act 2009 regarding "genuinely agreed" to simplify the process for employers, employees and the FWC in approving agreements.
- Replace the BOOT with a simplified "no disadvantage test" that is a truly global test, not a line-by-line exercise in pedantry.
- Allow additional discretion for agreement approval taking into account the vote, views of all parties and the need to provide timely certainty to the business and its employees.
- Fast track approvals for agreements covering a majority of employees over a prescribed wage level / percentage above the safety net.
- Enforce stricter adherence for the FWC benchmark to approve agreements (i.e. 14 days).
- Consider reinstating the prohibition of certain content ("prohibited content") in enterprise bargaining that existed under the *Workplace Relations Act 1996*.