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Improve the performance of the Fair Work Commission

The experiences and frustrations of employers regarding the structure, operation, processes and performance of the FWC are well-documented. Enterprise agreements are taking on average 76 days, and in many cases several months, to approve. This delays pay rises for employees and forces employers to operate under outdated terms and conditions. Many ultimately bypass the enterprise bargaining system altogether.

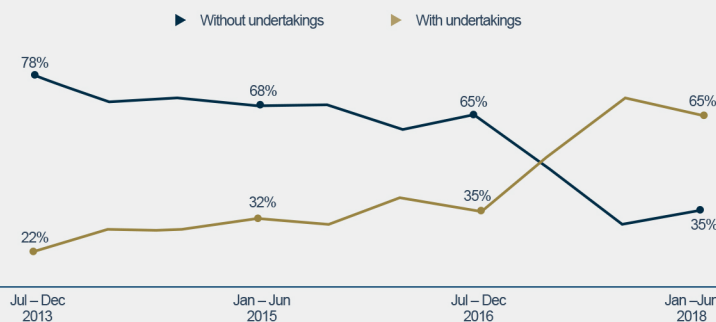
There is also a great degree of variability in agreement approval under the FW Act, including inconsistent approaches by the FWC as to whether an agreement meets statutory criteria, the BOOT, or requires undertakings in order for agreements to be approved. As a result of the pedantic assessment process employers are increasingly required to make undertakings, adding to the administrative burden on employers seeking approval of enterprise agreements. There needs to be significant improvement to the approval process for employers to have confidence in the system into the future.

THE EMPLOYER EXPERIENCE — DELAYS AND FRUSTRATION AT THE FWC

One AMMA member waited 125 days to receive agreement approval, delaying pay rises and other benefits for employees. With approximately 80 enterprise agreements being made by this employer, most are requiring undertakings which were virtually unheard of five years ago.

One contractor providing services to an onshore and offshore gas employer has been fighting to have its enterprise agreement approved by the FWC since its approval by employees and lodgement with the FWC more than 12 months ago.

AGREEMENTS APPROVED WITH VS WITHOUT UNDERTAKINGS



In December 2018, the FWC approved 65% of enterprise agreements with undertakings compared to December 2016 where the same percent of enterprise agreements were approved without undertakings.⁴

Other areas of concern about the performance of the FWC include the unfair dismissal and general protections matters. The FWC is failing to effectively mediate Adverse Action matters at the tribunal level, instead seeing a record number of matters reach the costly Federal Court jurisdiction. The high degree of inconsistency in decision making from the FWC is causing great frustration and confusion for employers.

Recommendations:

- » Enact the changes to agreement approvals and unfair dismissal laws recommended within this policy booklet.
- » Appoint new tribunal members with real-life business experience to restore confidence in the FWC as an administrative tribunal that understand the practical realities of running a business.
- » Create a new specialist appeals jurisdiction within the FWC to provide clarity and consistency to stakeholders and be consistent with the process in many other courts and tribunals.

⁴ Annual Report 2017-18, June 2018 (released 18 September 2018), Fair Work Commission. Retrieved from fwc.gov.au.