Australian Government
Attorney-General's Department

December 2020

Regulatory Impact Statement: Enterprise Bargaining Reform

The problem

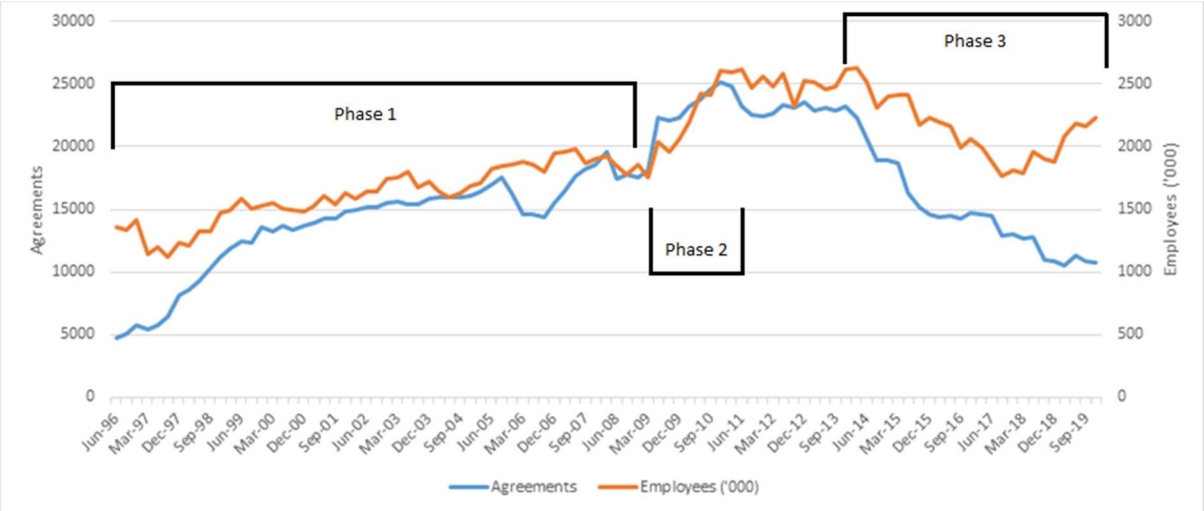
The enterprise bargaining system aims to support businesses and employees to tailor their working arrangements to their unique circumstances. The system provides an incentive for employers, employees and unions to pursue more productive ways of working in exchange for higher wages and better conditions for employees. This bargaining system, governed by the *Fair Work Act 2009* (Fair Work Act), is no longer working effectively and is in decline—fewer businesses are making new enterprise agreements or renegotiating them upon their expiry, and fewer workers are covered by them.

Decline in enterprise bargaining

The enterprise agreement system has evolved since its introduction in 1993 through legislative amendments and case law. The Attorney-General's Department Workplace Agreements Database (WAD) has recorded the decline in the number of new agreements made from 2014 onwards, with only around half as many new agreements made in 2019 as were made in 2014.

Chart 1 shows that enterprise bargaining and coverage steadily increased from 1996 to 2008 while businesses moved into the bargaining system (Phase 1). From 2008 to 2012, there was a spike in new agreements as employers sought to either 'lock in' agreements under the *Workplace Relations Act 1996* or move to agreements made under the Fair Work Act (Phase 2). While coverage remained relatively steady between 2012 and 2014, a decline in new agreements made was recorded from 2014 onwards (Phase 3). The increasing number of employees covered since the start of 2018 is due to many large agreements, particularly in the Retail Sector but also in the Education and Higher Education Sectors, which were renewed after the parties had used their nominally expired agreements for an extended period of time.

Chart 1: Current (not expired or terminated) federal enterprise agreements and employees covered – June 1996 to December 2019[1]



[1] Attorney-General's Department Workplace Agreements Database (WAD). Note: The chart shows the number of agreements current (not expired of terminated) at the end of each quarter between June 1996 and December 2019 and employee figures are based on number of employees on lodgment to the Fair Work Commission or its predecessors. It does not include agreements that have passed their expiry date but are still in use, as the WAD does not have this information.

There are many possible reasons for this decline, including:

- employers and employees choosing not to replace existing agreements
- the procedural complexity and the technical nature of the system
- cost and perceptions around delays in obtaining approval of agreements, including the potential for protected industrial action[2]
- employers who are inclined to bargain have already done so (meaning there may be relatively few employers interested in bargaining that don't already have an agreement), and
- declining union membership.

According to the Australian Bureau of Statistics (ABS), the proportion of employees covered by enterprise agreements has decreased from its historical peak of 43 per cent in 2010 to 38 per cent in 2018. Over the same period, reliance on modern awards[3] (which outline the minimum pay rates and conditions of employment in certain industries or occupations) to set employees' wages and conditions of employment has increased from around 15 per cent to 21 per cent.

As shown in Chart 2 enterprise agreements remain the dominant industrial instrument, setting wages and conditions for the highest proportion of workers (despite the current decline in bargaining). In May 2018, this accounted for an estimated 4 million people, half of whom were on current (in-term) agreements and half of whom were on nominally expired agreements.[4] This data is not able to distinguish between whether pay was set under an in-term/active or nominally expired agreement[5] and only captures information on the industrial instrument which sets an employee's pay. However, it is clear that the decline in the number of employees covered by enterprise agreements has resulted from the reduction in new or renegotiated agreements being made and approved.

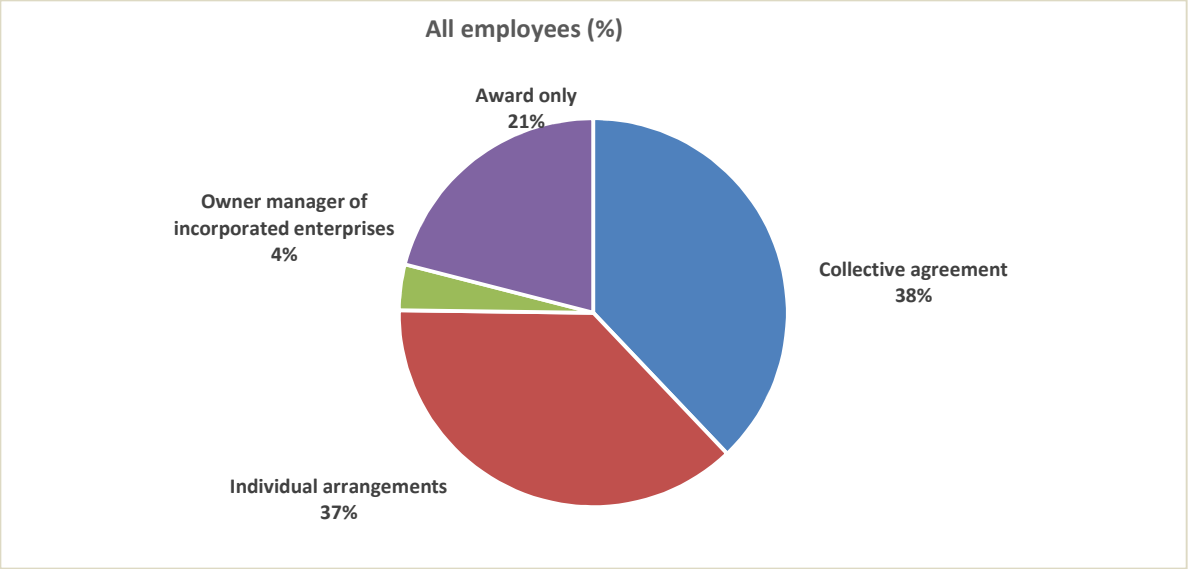
[2] Protected industrial action is industrial action that can be legally taken and must meet certain requirements specified under the Fair Work Act, including that it is in relation to bargaining for a new enterprise agreement where the existing agreement has passed its nominal expiry date, a majority of employees have voted for it in a secret ballot, and the action is taken in support of matters that can be legally included in an enterprise agreement.

[3] There are more than 100 industry or occupation modern awards that cover most people who work in Australia. Awards apply to employers and employees depending on the industry they work in and the type of job worked. Every award has information about who it covers. Awards do not apply when an employer has a registered agreement in place.

[4] ABS (2018) *Survey of Employee Earnings and Hours, Australia, May 2018*, cat. no. 6306.0; ABS (2010) *Survey of Employee Earnings and Hours, Australia, May 2010,* cat. no. 6306.0

[5] Nominally expired enterprise agreements continue to operate until a new agreement is made or the expired agreement is terminated. Under the Fair Work Act, *base* rates of pay payable to an employee must not be less than the base rate of pay that would be payable under the relevant modern award if the award applied. This does not include other conditions such as penalty rates and casual loadings. Parties may however opt to keep a nominally expired agreement in place and make 'over agreement' pay increases outside the agreement.

Chart 2: Pay setting mechanisms in Australia, May 2018[6]

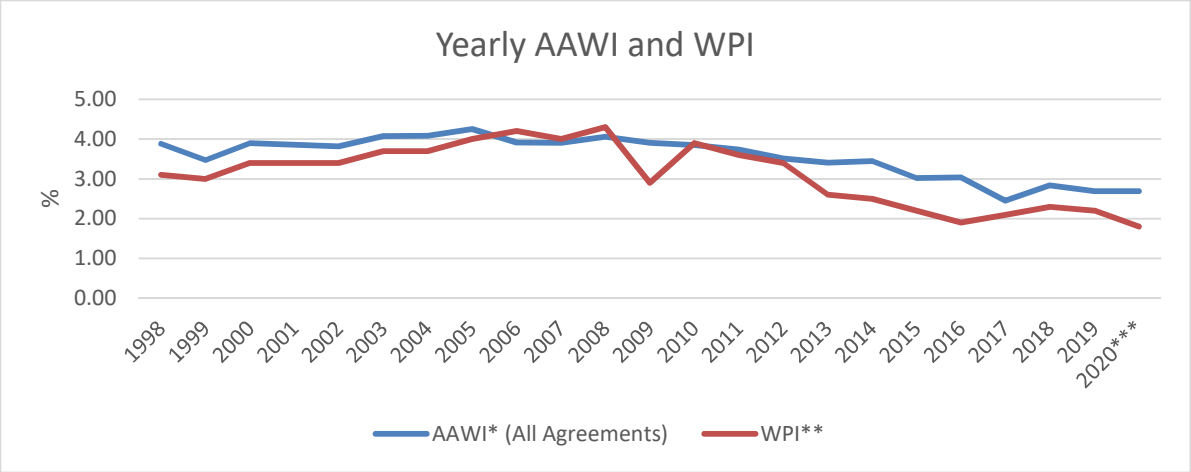


A large number of employees have their pay and conditions set by nominally expired agreements which have not been replaced—indicating that parties are choosing not to bargain. Others have individual agreements which build upon the relevant award, perhaps through company policies, to provide more favourable pay and conditions—indicating this may be easier and more preferable than making an enterprise agreement. Individual agreements may also be more attractive to parties as policies can be adjusted more easily and remain subject to managerial prerogative. Chart 1 demonstrates that the decline in employees covered by enterprise agreements has come from the reduction in new or renegotiated agreements being made and approved.

This is particularly the case for small enterprises, where over 74 per cent of agreements that nominally expired in 2018 were not replaced. Replacement rates are also low for medium and large businesses—49 per cent of medium and 33 per cent of large businesses have not replaced enterprise agreements that nominally expired in 2018. The industries with the highest non-replacement rate are Accommodation and Food Services (86.4 per cent not replaced) and Retail Trade (83.3 per cent not replaced).[7] Enterprise agreements are a vehicle for enhancing labour productivity and innovation because they allow the parties to agree to greater flexibility than exists under awards, improving the allocation of resources within firms. Historically, enterprise agreements have delivered equivalent, or higher, wage increases than the economy-wide Wage Price Index, as shown in Chart 3.

[6] *ABS Employee Earnings and Hours (cat. no. 6306.0), May 2018.*
[7] Attorney-General's Department, Workplace Agreements Database (WAD) data.

Chart 3: Yearly Average Annualised Wage Increases (AAWI) and Wage Price Index (WPI)[8]



Note:

- *AAWI is an estimate of the average annualised wage increases and is based on those federal enterprise agreements that provide quantifiable wage increases over the life of the agreement. AAWI calculations thus exclude agreements where wage increases cannot be quantified, for example they are linked to future events (such as each FWC Annual Wage Review).*
- *For WPI, the December quarter result has been used as the point of comparison with the AAWI Increases for All Agreements*
- *Data for 2020 is to 30 June 2020 (latest available data).*

On average, employees working under a collective agreement also receive higher wages than those working under the relevant modern award, as shown in Chart 4.

Chart 4: Average weekly earnings of all employees by employment instrument[9]

Method of pay	Avg. weekly earnings (FT and PT)
Award only	$788.80
Collective agreement	$1,331.20
Individual arrangement	$1,506.50
Owner managers	$1,486.00

Unnecessary complexity

At the highest level, there is concern from some employers that enterprise bargaining under the Fair Work Act is too focused on process and meeting technical requirements, rather than the end goal of making a mutually beneficial agreement in a timely way.

[8] Source: Attorney-General's Department, Workplace Agreements Database; Australian Bureau of Statistics, Wage Price Index, Australia,
Cat. No. 6345.0, seasonally adjusted – September 2020

[9] Source: *ABS Employee Earnings and Hours, May 2018*

Much of the complexity in the bargaining system arises from prescriptive legislative requirements under the Fair Work Act, many of which exist to ensure employee rights are protected during the enterprise bargaining process.[10] For example, when an employer agrees to bargain or initiates bargaining for an agreement, it must take all reasonable steps to give their current employees, will be covered by the proposed enterprise agreement, notice of their right to be represented by a bargaining representative. The form and content of this Notice of Employee Representational Rights (NERR) is prescribed by the *Fair Work Regulations 2009* (the regulations) and it must be provided as soon as practicable, and not later than 14 days after the notification time (which is when the employer initiates, agrees or is required to bargain).[11]

In some historical matters, applications to approve agreements were dismissed by the Fair Work Commission (FWC) as the content or form of the NERR did not match that prescribed in the regulations or the NERR was issued after the 14 day timeframe—this meant parties would have to repeat parts of the agreement making process.[12]

Similarly, many employers argue that the prescriptive genuine agreement requirements create too much opportunity for error and are unnecessary to achieve the purpose of the requirement, which is to ensure that employees are fully informed about the agreement they are voting on and they are not misled in the process. An enterprise agreement is taken to be genuinely agreed to by the employees it covers if the FWC is satisfied, among other things, that the employer complied with the pre-approval steps for the agreement (that is, the employer took all reasonable steps[13] to explain the terms of the agreement and their effect, notified the employees of when and how to vote and provided a copy of the agreement and any other material incorporated by reference),[14] and there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.[15]

Issues at the approval stage and increasing concern from some employer stakeholders has led to uncertainty about the scope of the genuine agreement requirement, even where employers try to act in compliance with the requirements.[16] This extends to matters as important as

[10] For example, an employer made an agreement with two employees that were covered by the relevant modern award, and went on to employ approximately 50 employees. The employer failed to explain the base rates of pay in the agreement compared to the rates and allowances payable under the relevant modern award, including how it was detrimental in a number of ways. The Full Bench of the FWC considered that the employer had not taken all reasonable steps to explain the terms of the agreement to the employees: *Construction, Forestry, Mining and Energy Union v Karijini Rail Pty Ltd* [2020] FWCFB 958.

[11] Fair Work Act ss. 173(1)-(3).

[12] *Peabody Moorvale Pty Ltd* [2014] FWCFB 2042; *Appeal by Uniline Australia Limited* [2016] FWCFB 4969

[13] What constitutes 'all reasonable steps' to explain the terms of the agreement and their effects under subsection 180(5) will depend on the circumstances. For example, in one matter concerning an agreement incorporated policies and procedures, work health and safety (WHS) laws and industry codes of practice, the FWC found that while WHS laws were in the public domain, industry codes of practice are not easy to find and employees were given no direction about how to find these. The employer also failed to provide employees with copies of all workplace policies and procedures for sites to which they were hired out. The FWC held this was a failure to take all reasonable steps by the employer; *Construction, Forestry, Mining and Energy Union – Mining and Energy Division v Sparta Mining Services Pty Ltd* [2016] FWCFB 7057; [2016] FWC 8520.

[14] Fair Work Act s. 180.

[15] Fair Work Act s. 188(1)(c).

[16] An employer gave employees details about the upcoming vote on the proposed agreement, but scheduled the vote one calendar day before the required access period had ended. The Full Bench of the FWC quashed the initial decision by the FWC Member to approve the agreement and dismissed the agreement: *Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd* [2018] FWCFB.

determining which employees may be eligible to vote on a proposed agreement, which can be challenging for businesses and industries that have a large casual workforce, some of whom may be 'on the books' but have not worked during negotiations for, or engaged during the access period in respect of, a new agreement. For example, in one matter the employer was unsure how to determine which employees were eligible to vote on a proposed agreement.[17] With over 21,000 casual employees of a total workforce of over 32,000, the agreement was challenged for both casting the net too wide—allowing casuals to vote that had not worked a shift recently enough—and casting the net too narrow—not allowing certain employees engaged during part of the voting period to vote. This issue caused the application to be dismissed just under 9 months after it had it been lodged with the FWC (and over 2 years since bargaining had begun). While this decision was later quashed by a Full Bench, this initial interpretation prompted the withdrawal of another major enterprise agreement covering over 106,000 employees, the majority being casual employees.[18]

Numerous reviews[19] have found that the agreement making and approval process can be complex, cumbersome and highly technical, resulting in process delays. This may also be a factor inhibiting effective relationships between employers and employees, in turn leading to adversarial relationships, disputes and mistrust.

In an attempt to address some of the concerns about complexity and unnecessary prescription in the Fair Work Act, amendments passed in December 2018 provided the FWC with ability to approve enterprise agreements despite minor procedural or technical errors made in relation to the requirements concerning genuine agreement (including the NERR), provided the error was not likely to have disadvantaged employees.[20] Any disadvantage experienced by employees must relate to the procedural requirements relating to reaching a 'genuine agreement' or the requirements relating to the NERR, rather than the substance of those requirements. It may be necessary to consider the particular circumstances of the employees concerned at the time the error occurred and the impact of the error on the subsequent course of bargaining, including any steps taken by the employer to address the adverse impact of the non-compliance.[21]

[17] *Kmart Australia Ltd* [2019] FWC 6105; and *Appeal by Shop, Distributive and Allied Employees Association (SDA); Appeal by Kmart Australia Limited t/a Kmart (Kmart); Appeal by the Australian Workers' Union (AWU)* [2019] FWCFB 7599.

[18] In September 2019, McDonald's withdrew its application for approval of its 2019 Enterprise Agreement which was initially lodged in June 2019. McDonald's cited the Kmart decision as a reason for its withdrawal.

[19] This includes the *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation* (Post-Implementation Review of the Fair Work Act 2009), June 2012, the Productivity Commission Inquiry Report into the Workplace Relations Framework, December 2015, and two independent reviews commissioned by Attorney-General's Department and the FWC, conducted in 2019 respectively by Boston Consulting Group and Pivot Management Group.

[20] *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018.*

[21] *Huntsman Chemical Company Australia Pty Limited (t/as RMAZ Rigid Cellular Plastics)* [2019] FWCFB 318 at [117].

The 2018 amendments have, to some extent, addressed the problems identified above. As of 13 November 2020, the FWC has approved approximately 325 agreements that were affected by minor procedural or technical errors which were not likely to have disadvantaged employees, for which it would previously have needed to refuse approval. The FWC has found that an error was not a minor procedural or technical error only 18 times since commencement of the 2018 amendments.

While these figures indicate that the 2018 amendments have positively impacted on the approval of enterprise agreements when parties have made a minor procedural or technical error, the agreement making process is still uncertain and prolonged, as the FWC needs to undergo an additional assessment about whether an error falls within that category and may have affected agreement approval. If agreement approval is delayed, this may also impose additional costs on an employer and employees.

Approval tests and process delays

The most consistently raised issue by employers in enterprise bargaining is the application of the better off overall test (BOOT) by the FWC. The BOOT is the key mechanism in enterprise bargaining to safeguard employee wages and conditions. It requires that each award covered employee and each prospective award covered employee would be better off overall if they were employed under the agreement, rather than under the relevant modern award.[22]

However, both the *2012 Post-Implementation Review of the Fair Work Act* and the *2015 Productivity Commission Inquiry into the Workplace Relations Framework* noted issues with the application of the BOOT which made it substantially more difficult to apply, and discouraged agreement making.[23] The Productivity Commission also found this discouraged innovation and caused businesses to retain inefficiencies for fear of failing an unclear test.[24] The views expressed in both reviews are supported by anecdotal evidence from employers.

The BOOT was intended to be an 'on the papers' assessment of the pay and entitlements of an agreement and was designed to ‘simplify agreement processing’ by avoiding ‘complicated assessment procedures’ as well as the need for undertakings in most circumstances.[25] Undertakings[26] may be required where the FWC has concerns that an enterprise agreement does not meet approval requirements and are binding on the employer.

[22] Fair Work Act s. 193(1).

[23] Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work Legislation (Post-Implementation Review of the Fair Work Act 2009), June 2012, p 165.

[24] Productivity Commission Inquiry Report into the Workplace Relations Framework, December 2015, Vol. 2, p 695.

[25] Explanatory Memorandum to the Fair Work Bill 2008, paras 160 and 192. Paragraph 160 also noted that ‘undertakings will not be a feature of the approval process except where [Fair Work Australia, now the FWC] is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement.’

[26] The FWC may approve an enterprise agreement that may not meet certain requirements of the Fair Work Act if satisfied that a written undertaking meets the concern. The FWC will not accept an undertaking if it will result in substantial changes to the agreement and must be satisfied that accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement. An undertaking is a commitment that the employer will comply with what is written in the undertaking in addition to or instead of a term of the agreement, and forms a legally binding part of the agreement.

More recently, concerns have been raised that the BOOT is being applied as a forensic, clause-by-clause assessment against the relevant award,[27] rather than a more global test against the award, weighing up the monetary and non-monetary elements of the agreement.[28] Assessment of monetary and non-monetary elements can be a complex process. Generally, monetary benefits will include any benefits which provide a financial benefit to employees. This could include, for example, rates of pay, penalties, allowances and redundancy entitlements. Often more challenging to quantify, non-monetary elements such as access to workplace flexibility in hours or location, certain leave types (i.e. for volunteering or being a blood donor), counselling or support services and diversity programs, are nevertheless very important for employee welfare. As well as calculating monetary and non-monetary benefits, the FWC must also consider the relative value of any enhancements that are likely to be contingent on employee circumstances. For example, enhanced redundancy is a monetary benefit that is contingent on an employee being eligible for redundancy, and so will hold lower value than enhanced annual leave entitlements. Contingent non-monetary benefits will also carry lower weight in assessment.

The FWC may also choose to assess agreements for all hypothetical scenarios covered by the relevant modern award, even where it may not be relevant to the patterns or kinds of work of the enterprise. An example was provided of an enterprise agreement for a stationery and office supply retailer where undertakings were sought by the FWC relating to service of alcohol, despite these not being relevant to the enterprise.[29]

The FWC's current approach has seen a rise in the number of agreements requiring undertakings generally, including to address non-compliance with the BOOT. From 2013 to 2017, the proportion of agreements approved with undertakings increased from 22 per cent to 70 per cent, declining to 63 per cent in July to December 2019. In respect of BOOT non-compliance, in 2019, 77 per cent of the undertakings in agreements approved by the FWC related to conditions, which includes compliance with the BOOT. While an agreement can have multiple undertaking types, which are not exclusive of each other, conditions-related undertakings have been the most common type of undertaking sought each year since 2015.[30]

A more forensic approach to interpretation of the BOOT makes the process more complex, lengthy and challenging for parties, and may, ultimately, discourage engagement in the agreement making process. In some circumstances, it is also denying work arrangements agreed to, and even preferred by, employees and employers. For example, in determining whether

[27] For example, the *Loaded Rates* matter concerned five applications to approve enterprise agreements that each provided for 'loaded' or higher rates of pay, intended to incorporate penalty rates and other monetary benefits in relevant comparator modern awards. The FWC confirmed that the BOOT requires every existing and prospective award covered employee to be better off overall under the agreement than the relevant modern award. The starting point for the BOOT assessment will be an examination of the agreement terms of the agreement, and the selection of a class of employees for the purpose of s 193(7) will only be relevant if the agreement affects members of the class in the same way, such that there is likely to be a common BOOT outcome: *Loaded Rates* [2018] FWCFB 2610.

[28] Previous FWC decisions in regard to the BOOT have upheld the principle that the test is not to be applied 'line by line' but requires a 'balancing exercise': *AKN Pty Ltd* [2015] FWCFB 1833; requires an overall assessment of more the beneficial and less beneficial terms be made: *Armacell Australia Pty Ltd* [2010] FWAFB 9985; and requires the FWC to take an 'impressionistic' approach to the agreement when applying the BOOT: *National Tertiary Education Industry Union v University of New South Wales* [2011] FWAFB 5163.

[29] *Officeworks Store Operations Agreement 2019* [2019] FWCA 6900.

[30] Attorney-General's Department Workplace Agreements Database (WAD).

employees would be better off overall under an agreement with loaded rates of pay, the FWC Full Bench has expressed this task may be particularly difficult in respect of casual employees who could be engaged to work at any given point in time that would attract additional penalty rates.[31] For instance, in a recent case, an agreement approved by over 76 per cent of employees and the main employee union (which included pay rises and improvements to penalty rates) was eventually withdrawn for approval by the employer because of the 'never-ending cycle of review and bargaining' to make the agreement fully compliant with the BOOT.[32]

The BOOT is not the only matter in respect of which the FWC can and does seek undertakings. For example, the FWC often requires undertakings regarding compliance with the National Employment Standards (NES).[33] While the Fair Work Act requires the FWC to be satisfied that an agreement does not include terms that would exclude the NES at the agreement approval stage, it also provides that a term of an agreement has no effect to the extent that it excludes the NES.[34] A 2019 review by the FWC of 421 agreements identifying common trends and issues in a sample of agreement matters found NES inconsistencies to be the second most common issue affecting applications, at 38 per cent.[35] Undertakings require parties to provide additional assurances and paperwork to the FWC. In 2019-20, the median calendar days was 46 days for all agreement with undertakings, almost three times the median time to approve all agreements without undertakings (17 calendar days in 2019-20).

As an agreement only comes into effect once the FWC approves it (or at a later date specified in the agreement), stakeholders have raised concerns about the amount of time this process takes. Delays in the approval process can affect delivery of agreed pay increases for employees and result in uncertainty for employers, hampering their ability to plan for labour costs and patterns of work.[36] This makes employers more inclined to disengage from the process, which in turn has a negative impact on workplace cooperation and adds to the overall decline in bargaining.

For example, in one matter, it took more than 2 years from the commencement of bargaining, and just under one year from lodgement with the FWC, for an agreement to be approved. In this matter, full hearing and appeal rights were exercised before the FWC.[37] During this period, approximately 32,000 employees remained on a nominally expired 2012 agreement which left them worse off than if the new agreement had commenced more quickly.

---

[31] *Loaded Rates Agreements* [2018] FWCFB 3610.

[32] The *Bunnings Warehouse & Smaller Format Stores Agreement 2019* was challenged at approval on a number of grounds, including the agreement did not pass the BOOT and had not been genuinely agreed. Over 6-7 months it was opposed by the main employee union and another non-registered employee organisation bargaining representative, but was eventually supported by the union as it said it would leave the overwhelming majority of staff better off. The non-registered employee organisation continued to oppose the agreement.

[33] The NES are 10 minimum employment entitlements that have to be provided to all employees. The national minimum wage and the NES make up the minimum entitlements for employees in Australia.

[34] Fair Work Act ss. 55 and 56.

[35] This is based on an internal review performed by the FWC in May 2020, of all agreements applications determined in November and December 2019.

[36] Fair Work Commission: Enterprise agreements update 1/2020
https://www.fwc.gov.au/documents/documents/media/enterprise-agreements-update-24-02-2020.pdf.

[37] *Kmart Australia Ltd* [2019] FWC 6105; and *Appeal by Shop, Distributive and Allied Employees Association (SDA); Appeal by Kmart Australia Limited t/a Kmart (Kmart); Appeal by the Australian Workers' Union (AWU)* [2019] FWCFB 7599; [2019] FWCFB 7891.

The above example illustrates that despite an agreement being supported by the vast majority of employees, the employer and the relevant union, the approval process can be delayed by individuals and unregistered organisations who challenge the approval of the agreement on highly technical grounds. The lengthy period it took the FWC to determine this matter, including the Full Bench's decision to ultimately approve the agreement, raises questions about whether a more streamlined approval process could result in quicker approvals, while maintaining important protections currently built into the system.

While each application to approve an enterprise agreement is different, and some involve more complex operations or wage structures for the FWC to consider, a frustration for bargaining parties is the perception that the FWC does not communicate why delays happen nor facilitate timely approval.[38] According to the FWC's triage teams, common reasons for longer approval times are incomplete applications for approval (requiring further information), possible non-compliance or high complexity.

In practice, while there is currently no standard timeframe to deal with an application to approve an enterprise agreement, the FWC sets timeliness benchmarks through its annual Budget Papers to indicate expected timeframes for parties in the majority of cases. In 2019-20, these internal benchmarks were for 50 per cent of all simple applications (being applications which are submitted decision ready) to be finalised within 3 weeks, and 100 per cent in 8 weeks. Complex applications (all other applications, including those that require undertakings or follow up after lodgement) had an internal benchmark of 50 per cent finalised in 10 weeks and 100 per cent in 16 weeks.

While the FWC's approval times have improved since 2018-19,[39] data for the period of 1 July 2019 to 31 December 2019 shows that the median time for the FWC to approve all agreements was 37 days.[40] However, as per Table 5, in 2018-19 the median number of days for the FWC to approve single-enterprise agreements with undertakings was 122 calendar days, over 3 times longer.[41]

[38] For example, the employer applied for approval of the *Wesley Mission Queensland Care and Support Enterprise Agreement 2018* in October 2018. The FWC took nearly five months to contact the employer to raise concerns about the agreement. After a prolonged approval and appeals process, predominantly initiated by the dominant industry union, the agreement was eventually approved by the FWC with undertakings in July 2020.

[39] The median calendar days from lodgement to approval: for agreements approved without undertakings has reduced from 30 days in 2018-19, to 20 days in July-Dec 2019, 20 days; and for all agreements approved (with & without undertakings) from 79 days in 2018-19 to 37 days in Jul-Dec 2019.

[40] Fair Work Commission: Enterprise agreements update 1/2020. https://www.fwc.gov.au/documents/documents/media/enterprise-agreements-update-24-02-2020.pdf

[41] Fair Work Commission Annual Report 2018-19 https://www.transparency.gov.au/annual-reports/fair-work-commission/reporting-year/2018-2019-17.

Table 5: Timeliness of approval of agreements with and without undertakings[42]

Agreement type	Proportion of approvals	Time to approve without undertakings (median calendar days)				Time to approve with undertakings (median calendar days)			
		2018-19	2017-18	2016-17	2015-16	2018-19	2017-18	2016-17	2015-16
Single-enterprise agreements	95%	34	32	15	15	122	93	48	27
Multi-enterprise agreements	1%	86	69	22	21	145	115	101	28
Greenfields agreements	4%	17	32	13	11	48	54	43	21

Delays in the approval process can be exacerbated by the FWC's power to inform itself in relation to any matter before it in such a manner as it considers appropriate.[43] In agreement approval hearings, this can include hearing from parties who are not parties to the agreement but may have relevant information, such as industry specific information. While it does not keep data on the number of applications for intervention by such parties at the agreement approval stage, the FWC notes the experience of senior FWC Members is that a 'non-party' would intervene in less than 2 per cent of matters, with the percentage being slightly higher in the construction sector.

Analysis of the requests by unions and third parties to view the forms submitted with an application—often, but not always, a preliminary step to seeking to intervene—shows that there were approximately 177 requests in 2019–20. Many of these will have resulted in no further action. Analysis of decisions issued shows that in only 36 agreement-related decisions issued in 2019-2020, reference was made to a party intervening, noting that some Members do not make explicit reference to involvement of a third party in their written decisions.

While noting the above, when a third party intervenes in the agreement approval process, the impact on the approval process can be significant and leave employees and employers in limbo despite months or even years of bargaining for better conditions. As an example, following over 3 years of bargaining, despite a significant majority vote in favour of the proposed agreement (76.7 per cent) and union support for the agreement, a third party lodged a submission with the FWC opposing approval. This led to a protracted approval process and a hearing where both the supporting union and third party argued for different undertakings to further improve entitlements. More than 8 months after lodging, the employer chose to withdraw its application for approval without resolution. The supporting union indicated disappointment as they argue

[42] Fair Work Commission Annual Report 2018-19 https://www.transparency.gov.au/annual-reports/fair-work-commission/reporting-year/2018-2019-17.
[43] Fair Work Act s. 590.

the majority of employees would have been better off, and the employer has indicated it did not want to spend any more time on a 'never-ending cycle of review and bargaining'. Consequently, over 35,000 employees who were to be covered by the proposed agreement are still covered by the 2013 enterprise agreement which expired in 2016.[44]

Other problems

The continuing preservation of agreements made under previous workplace relations laws, or legacy agreements, is also a known problem of the current system, potentially harming employee interests and fair market competition between employers. Of particular concern are legacy agreements made under the former *Workplace Relations Act 1996* or other predecessor legislation that have been preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Legacy agreements can disadvantage workers because, while their rates of pay need to equal the *base* rates of pay in relevant modern awards, other conditions such as penalty rates and casual loadings do not need to meet award standards. Employees are often unaware they are receiving less than the terms and conditions in a relevant modern award and workers such as young people and migrant workers are the most vulnerable in this regard. As legacy agreements continue to operate until replaced or terminated, they can also provide an ongoing unfair competitive advantage to employers using them to pay lower labour costs than the award.

There are many reasons why parties may not choose to replace a legacy agreement. For employers, as noted above, there can be cost reasons for doing so, including for those who regard their agreement as 'good enough', and will opt to merely provide wage increases for employees to maintain conditions. For employees, there may be a lack of familiarity with the process involved in terminating an agreement.[45] For unions, there may not be an incentive to apply to terminate an agreement, or start bargaining for a new agreement if the employer is not inclined to make a new agreement, as the process may be very drawn-out and ultimately harm employees if they were to revert to inferior wages and conditions under a modern award.

There are also concerns about employers seeking to terminate agreements during bargaining, which may affect the dynamics of bargaining between employers and employees. While enterprise agreements are not intended to operate forever and may be terminated in some circumstances, union stakeholders have alleged that some employers threaten or apply to terminate existing enterprise agreements during bargaining, as a means of shifting the bargaining power in their favour, and that this undermines a fair and genuine agreement making process.[46]

---

[44] The *Bunnings Warehouse & Smaller Format Stores Agreement 2019*.

[45] While not exceptional, it is uncommon for employees to apply to terminate an agreement. One example occurred in February 2018—
a teenage employee of a yoghurt shop (represented by a parent) was able to successfully apply to the FWC to terminate *The Yoghurt Shop Pty Ltd Collective Agreement Number One (2006)* on the basis that it did not align with contemporary minimum standards set by awards. The agreement passed its nominal expiry date in November 2009, and the employee's application was not opposed by the employer (though they did request a delay of two months to canvass the views of other impacted employees). The FWC granted a transition period of two full fortnightly periods: *Application by Olivia May Johnston-Wyly* [2018] FWCA 908.

[46] For example, the Streets' Minto factory (owned by parent company Unilever) was publicly accused of this by the Australian Manufacturing Workers' Union (AMWU) in 2017. The AMWU alleged that Streets application to terminate the *Unilever Australia Trading Ltd (Trading As Streets Ice Cream, Minto) Enterprise Agreement 2013* would result in worker pay being reduced by 46 per cent. Ultimately, the employer withdrew its application, making a new agreement with employees in 2017: [2017] FWCA 6389.

Although no hard evidence for the scale of the problem exists, the perception of the problem strains confidence in the system.

There is evidence that the framework is too inflexible in other areas, preventing employers from using simple and common sense approaches to make and vary agreements, and therefore minimise costs and streamline processes. One example is requiring new franchisees to negotiate their own agreement with employees, when it may be more efficient and effective to join an existing single enterprise agreement that covers an existing group of employers operating under the same franchise (made under a single interest employer authorisation).

Another example of the unnecessary process for employers is a requirement to seek an order from the FWC to stop the transfer of an industrial instrument, even when employees initiate the transfer to an associated entity of their employer. Having multiple enterprise agreements for employees at an enterprise may complicate operations and increase labour costs for the business, and should not be necessary where an employee voluntarily agrees to the transfer. Particularly following the recent COVID-19 pandemic, these additional costs and time delays are unnecessary for the efficient operation of productive business.

The need for government action

The bargaining system requires reform to re-enliven it, to encourage employers and employees to bargain and make new agreements, and provide incentives for productive and innovative ways of working. Effective reform should be geared to addressing the problematic elements of the current system, as outlined above.

Informed by a number of independent reviews, stakeholder advice and most recently, stakeholder discussions and evidence submitted as part of the Industrial Relations Working Group process,[47] the Government has an opportunity to simplify legislative requirements and streamline FWC procedures aiming to reduce the red tape, complexity and timeframes currently impeding an efficient bargaining process.

Reducing regulation is a priority of the Government, particularly where it imposes an unnecessary burden on the population. The proposed reforms will reduce unnecessary burden, and create a bargaining system that is more attractive to employees, employers, unions and other representatives. The reforms will ensure that the bargaining system is easy to navigate, use and understand; reverse the decline in agreement making; and ultimately lift productivity, wages and promote better workplace relations.

The Coronavirus pandemic has caused significant disruption to the labour market

The COVID-19 pandemic has significantly impacted the Australian labour market. In September 2020, just under one million Australians were looking for work and 1.6 million Australians were receiving unemployment benefits including Jobseeker and Youth Allowance.[48] The seasonally adjusted unemployment rate was 6.9 per cent. This represents a slight decrease from the 7.5 per cent unemployment rate in July 2020, which was the highest unemployment rate experienced in

[47] Further information on the Industrial Relations Working Group process is included in the Consultation section of this Regulatory Impact Statement.

[48] ABS, Labour Force Statistics September 2020, https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release#data-download.

Australia since 1998. Treasury forecasts in the 2020-21 Budget released in October are that the unemployment rate may reach 8 per cent by the end of 2020, before falling to 6.5 per cent by the June quarter of 2022 as economic activity recovers. Payroll jobs, where employees are entitled to receive pay from an employer, have fallen across most industries (excluding the electricity, gas, water and waste services, and the financial and insurance services industries). While the labour market has recovered since the depths of the COVID-19 pandemic in May 2020 (when the number of employed people was at its lowest), between March and October 2020, the number of accommodation and food services industry payroll jobs reduced by approximately 18 per cent, and in the arts and recreation services industry, payroll jobs have fallen by approximately 15 per cent.[49]

This disruption occurred in a labour market that was already not performing at its peak

Even before COVID-19, labour productivity growth in Australia had been slowing, contributing to slower real wage growth. Average annual productivity growth in the market sector from 2015-16 to 2019-20 slipped to 0.7 per cent per annum compared with growth of 2.0 per cent on average over the past 25 years.

Treasury research shows that a significant cause of Australia's declining productivity was a decrease in the number of people moving from low productivity firms to high productivity firms.[50] This kind of dynamism can lead to better job matching between employees and firms, better quality jobs with higher wages, and is associated with higher aggregate productivity.[51] The features of the industrial relations system are important for the operation of the labour market in Australia. While the Productivity Commission found no direct evidence linking productivity effect from industrial relations reforms, it noted that there is considerable 'noise' in productivity data and it is difficult to control for other factors.[52] Additionally, taking into account cyclical factors, there is evidence that higher firm productivity leads to higher wages.[53] Noting this, it is highly likely there is a link between the industrial relations system, labour market adjustment and productivity.

In this context, industrial relations reforms play an important role in improving productivity, and ultimately in supporting the growth of real wages and living standards in Australia. Enterprise bargaining is a vehicle for achieving this.

[49] ABS, Weekly Payroll Jobs and Wages in Australia, Week ending 17 October 2020, https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/weekly-payroll-jobs-and-wages-australia/latest-release.

[50] Andrews, D, Deutscher, N, Hambur, J, and Hansell, D, 2019, Wage Growth in Australia: Lessons from Longitudinal Microdata, Treasury Working Paper, 2019-04 – '... the period of low aggregate wage growth has coincided with a slowdown in the extent to which labour is reallocated from less productive to more productive firms. Given high productivity firms pay higher wages, slowing reallocation implies that fewer high paying jobs are being created than otherwise. We consider this compositional effect separate from the relationship between wages and productivity, as it implies both lower aggregate productivity and wage growth.'

[51] Andrews, D, Deutscher, N, Hambur, J, and Hansell, D, 2019, Wage Growth in Australia: Lessons from Longitudinal Microdata, Treasury Working Paper, 2019-04.

[52] Productivity Commission (2015), Appendix G, p. 1134.

[53] Andrews, D, Deutscher, N, Hambur, J, and Hansell, D, 2019, Wage Growth in Australia: Lessons from Longitudinal Microdata, *Treasury Working Paper*, 2019-04.

Stakeholders agree that reform is necessary

Stakeholders agree on the scale of the economic challenge facing Australia following the COVID-19 pandemic, and agree that the enterprise bargaining system requires reform in order to contribute to the economic recovery and job creation. However, while unions have publicly acknowledged that aspects of enterprise bargaining are not working effectively, they reject some of the specific claims regarding the system's complexity and technicality. Unions argue that the prescribed and technical requirements in the system are essential to protect the rights and interests of employees and guarantee procedural fairness. While supporting the creation of more and better enterprise agreements with employees, unions argue that any options for reform must be carefully balanced against the need to ensure the system is fair. For employees, the decline in bargaining has negative implications for wages and conditions, workplace engagement and cooperation.

Employers, on the other hand, argue the complexity of the process and uncertain outcomes discourage engagement in enterprise bargaining. They argue that the system cannot deliver the benefits it intends because its procedural requirements deny parties negotiating flexibility and productivity gains through bargaining. These requirements dictate a process that is needlessly long, costly and may not result in agreement. In their view, using enterprise agreements as a mechanism to tailor productivity-enhancing workplace changes[54] and employment conditions is prevented by the current framework in the Fair Work Act.

Despite the varied stakeholder positions, there is a clear impetus for change and need to amend aspects of the bargaining system which are no longer fit for purpose. With this in mind, the objectives of enterprise bargaining reform are to:

- encourage employers to engage in the bargaining system by improving policy settings to support parties to make new enterprise agreements
- encourage more employers to renegotiate nominally expired enterprise agreements, and
- over the longer term, contribute to labour market productivity improvements, increased workplace cooperation, flexibility and innovation, and improved wages and conditions for workers.

In the absence of reform, it is likely that the decline in enterprise agreements will continue. This will have enduring negative effects on productivity, innovation, and lower wages and conditions for workers.

[54] These might include, for example, more streamlined rostering arrangements, more flexible use of staffing through increased span of hours, improved access to skills and training for employees, which may benefit productivity and engagement.

Policy Options

The Government has considered a number of possible options to address those problems identified in the bargaining system. The options range from simplifying and streamlining current approval processes, to ensuring core concepts such as the BOOT and genuine agreement are simpler to apply, without undermining employee protections. Additional reforms to address concerns regarding perceived manipulation of the system are also canvassed. It is anticipated that the final, preferred reform package will either decrease or leave relatively static the overall regulatory burden for parties, and improve their experience of the system – particularly for employers who are new to enterprise bargaining. Discussion of the policy benefits and impacts of each option are outlined in the Net Effects section of this Regulatory Impact Statement.

In addition to the regulatory reforms listed below, non-regulatory reform is being progressed in parallel to provide the FWC with additional resourcing for online guidance and an enterprise agreement approval application portal tool, to make the process simpler, more efficient and easier for users. The Office of Best Practice Regulation has assessed this proposal and found that it has nil regulatory impacts (OBPR ID 42986).

1. Objects

Option 1.1 – amend the objects of Part 2-4 of the Fair Work Act (preferred option)

This option would amend the objects of Part 2-4 of the Fair Work Act to highlight that enterprise agreements should, in addition to the existing objects (outlined under option 10.2 below), enable business and employment growth and reflect the needs and priorities of employers and employees. Amendments will also clarify that the FWC is to deal with approval applications in a timely, practical and transparent manner.

Option 1.2 – maintain status quo

This option would not make changes to the objects included in section 171 in Part 2-4 of the Fair Work Act. Currently, the objects are:

- to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits, and
- to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:
    - making bargaining orders,
    - dealing with disputes in where the bargaining representatives request assistance, and
    - ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

2. Notice of employee representational rights (NERR)

Option 2.1 – amend the Fair Work Act to extend the timeframe for issuing the NERR and clarify how it can be provided (preferred option)

This option would amend 2 specific aspects of the NERR under the Fair Work Act:

- extending the timeframe in which the employer must give the notice from the current 14 days to 28 days, to give employers more time to comply with the requirement to give the notice and reduce the risk of agreements being challenged on technical grounds at the approval stage, and
- providing that the FWC must publish on its website the prescribed NERR form that employers are required to provide to employees.

This will make compliance with the NERR requirements easier and reduce the likelihood of errors in both providing the NERR on time and correctly.

Option 2.2 – maintain status quo

The option proposes no changes to the current Fair Work Act requirement that after the 'notification time' for a proposed agreement (for example, when an employer agrees to bargain, or initiates bargaining for a new agreement), an employer must take all reasonable steps to give the NERR to each employee who will be covered by the agreement and is employed at that time, to inform them of their right to be represented by a bargaining representative. The NERR must be provided as soon as practicable, and not later than 14 days after the notification time. If it is not provided within the prescribed time, the agreement cannot be genuinely agreed to by the employees. Content of the NERR is prescribed by the regulations55 and cannot contain any other content. Failure to comply with these requirements may mean the FWC is unable to approve the agreement.

3. Pre-approval requirements—genuine agreement

Option 3.1 – reduce prescription and red tape in genuine agreement requirements (preferred option)

This option would replace the current pre-approval requirements that must be met for employees to have 'genuinely agreed' to the agreement with a broad requirement that the employer must take reasonable steps to give employees a fair and reasonable opportunity decide whether or not to approve the agreement. The balance of 'fair' and 'reasonable' is a necessary and appropriate safeguard for employees, taking into account the repeal of the prescriptive steps in previous subsections 180(2), (3) and (5).

This takes a purposive approach to the pre-approval requirements, while maintaining the protections they provide to employees when making an enterprise agreement. Employers would still be required to provide employees a fair and reasonable opportunity to decide whether or not to approve the agreement prior to any vote. What is a 'fair and reasonable opportunity' would depend on the particular circumstances of the workplace and may include seeking advice from their union. The FWC could take into account any explanation given by an employee

[55] Regulation 2.05 – Schedule 2.1 –Notice of Employee representational rights.

organisation to the relevant employees, along with any other matter the FWC considers appropriate.

Option 3.2 – expand and clarify genuine agreement requirements

This option would expand and clarify the existing genuine agreement requirements to provide that:

- employers can provide access to materials in paper or electronic form
- employers do not need to provide employees with copies of documents referenced in the agreement which are available in the public domain
- employers only need to explain the terms of any legislation or industrial instruments incorporated by reference in an agreement insofar as the agreement alters the effect of the terms in the legislation or industrial instrument, and
- the FWC may take into account the extent of any differences between the proposed enterprise agreement and any previous enterprise agreements applicable to the employees.

Option 3.3 – maintain the status quo

This option would maintain the status quo in respect of genuine agreement, which requires the FWC to be satisfied that an employer has complied with a number of key steps, including provision of the Notice of Employee Representational Rights (NERR)[56] and that there are no other reasonable grounds for believing that an agreement has not been genuinely agreed upon.[57] The FWC may also be satisfied that an agreement has been genuinely agreed despite any minor procedural or technical errors made in the process, as long as the employees covered by the agreement were not likely to have been disadvantaged by the errors.[58]

4. Voting requirements

Option 4.1 – amend the Fair Work Act to clarify when a casual employee can vote for an agreement (preferred option)

This option would amend the Fair Work Act to provide certainty as to when casual employees are entitled to vote on an agreement. It would relevantly provide that a casual employee may vote to approve an enterprise agreement if they performed work at any time during the access period (which is the period of 7 calendar days before the day the request to vote is made). Casual employees who did not perform work at any time between the start of the access period and the time the request to vote is made would not be eligible to vote. This approach is based on relevant case law from the Full Court of the Federal Court and the FWC.[59]

[56] For example, section 173 of the Fair Work Act provides that after an employer agrees to bargain, or initiates bargaining for a new agreement, it must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement and is employed at that time (the 'notification time'). This NERR must be given as soon as practicable, and not later than 14 days after the 'notification time'. If not provided within the prescribed time, the agreement cannot be 'genuinely agreed' to by the employees.

[57] Fair Work Act ss. 186(2) and 188.

[58] Fair Work Act s. 188(2).

[59] *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98.

Option 4.2 – amend the Fair Work Act to enable the FWC to overlook minor errors and omissions

This option would allow the FWC to overlook minor errors and omissions in calculating the cohort of casual employees invited to vote on an enterprise agreement. As already noted, the FWC already has the ability to overlook minor procedural or technical errors, so changing this to include minor errors or omissions is not likely to make a substantive difference in the operation of the requirement as it is broadly analogous.

What constitutes a minor error is dependent on the circumstances, the underlying purpose of the relevant requirement and the level of non-compliance. Generally, the lower the level of non-compliance the more likely it is to be characterised as a minor error. For example, informing the employees of the time and place at which the vote will occur, and the voting method that will be used,[60] just after the start of the seven day access period specified in the Fair Work Act (for instance 6 days before the start of the voting process) is likely to be a minor error in most cases.

Option 4.3 - maintain the status quo

This option would make no amendments to the Fair Work Act regarding when casuals are entitled to vote on an agreement. As noted under option 4.1, the authority on when casuals can vote is established under case law,[61] with recent 'genuine agreement' cases having illustrated the difficulties users currently face in determining when casual employees are entitled to vote on an enterprise agreement.[62]

5. Better off Overall Test (BOOT)

Option 5.1 – combination of amendments to the BOOT (preferred option)

This option would amend the BOOT so that it:

- limits the FWC's ability to consider patterns or kinds of work to only those currently engaged in by award covered employees for the agreement, or are in any case reasonably foreseeable at test time
- is made clear the FWC may have regard to the overall benefits (including non-monetary benefits) an employee would receive under the agreement compared to the relevant modern award
- provides that the FWC must consider the views of employees and employers covered by the agreement about whether the agreement passes the BOOT, and
- includes an additional provision (to sunset automatically 2 years from commencement) allowing the FWC to approve an agreement that did not pass the BOOT where it is not contrary to the public interest and it is appropriate to do so taking into account all the circumstances, including:
    - the views of the employees, employers and bargaining representatives for the agreement

[60] Fair Work Act ss. 180(3)(a) and (b).
[61] *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98.
[62] *Kmart Australia Ltd* [2019] FWC 6105; and *Appeal by Shop, Distributive and Allied Employees Association (SDA); Appeal by Kmart Australia Limited t/a Kmart (Kmart); Appeal by the Australian Workers' Union (AWU)* [2019] FWCFB 7599.

- the circumstances of those employees and employers and any employee organisations
  (for example, unions) covered by the agreement, including the likely effect that approving or not approving the agreement would have on them
- the impact of COVID-19 on the enterprise to which the agreement relates, and
- the extent of employee support for the agreement as expressed in the outcome of the vote to approve the agreement.

Option 5.2 – amend the BOOT to apply to classes or groups

This option would amend the BOOT to apply the test to specified classes or groups of employees, removing the requirement that it be applied as against each award covered and prospective award covered employee. For example, a class or group could include employees within the same classification or working the same roster pattern.

Option 5.3 – maintain the status quo

This option would make no amendments to the current operation of the BOOT under the Fair Work Act. The BOOT currently requires the FWC to be satisfied that each employee and each prospective employee covered by a modern award would be better off overall under the enterprise agreement compared to the relevant award.[63] If a class of employees would be better off, the FWC is entitled to assume that an individual *within the class* would also be better off, in the absence of evidence to the contrary.[64] This generally allows a more practical application of the BOOT for the FWC, but does not remove the expectation that each award covered employee, and each prospective award covered employee, must be better off overall under the agreement.[65]

6. National Employment Standards (NES) compliance requirements

Option 6.1 - amend the Fair Work Act to no longer require the FWC to be satisfied an agreement does not include any terms excluding the NES (preferred option)

This option would amend the Fair Work Act to remove the requirement that, when determining an application to approve an enterprise agreement, the FWC must be satisfied that the agreement does not contain any terms that contravene or undercut the NES. The Fair Work Act already provides that an agreement must not exclude the NES or any provisions of it, and that a term of an agreement has no effect to the extent that it contravenes the NES. This option removes an unnecessary procedural step with respect to NES compliance only.

Option 6.2 – amend the Fair Work Act to require agreements to include a term that explains the interaction between the NES and the agreement (preferred option)

This option adopts option 6.1 and requires an enterprise agreement to include a model NES interaction term, or would read one into an agreement that does not have one, to explain the

[63] Fair Work Act s. 193(1).
[64] Fair Work Act s. 193(7).
[65] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo [2016] FWCFB 2887* (Watson VP, Kovacic DP, Roe C, 31 May 2016) at para. 6.

provisions of the Fair Work Act that deal with the interaction between the NES and enterprise agreements. This is consistent with the advice currently provided in the FWC Enterprise Agreements Benchbook.[66] Where there is inconsistency between a term in the agreement and the NES, and the NES provides a greater benefit, the NES provisions will apply. If an enterprise agreement does not include the model NES interaction term, the model term is taken to be a term of the agreement.

The purpose of this amendment is to simplify the enterprise agreement approval process by avoiding the need for the FWC to examine each clause of an agreement to determine whether it is inconsistent with the NES. Instead, the FWC only needs to consider whether the agreement includes the model NES interaction term.

Option 6.3 - maintain the status quo

This option would make no amendments to the current requirements under the Fair Work Act that an enterprise agreement cannot contain a term that excludes the NES or any provision of the NES. It also provides that where there is an inconsistency between a provision in the agreement and the NES, the term that is more beneficial to the employee shall apply. Terms of an agreement that contravene the NES have no effect.[67]

7. Franchisee agreements

Option 7.1 – allow new franchisees to opt-in to existing single enterprise agreements made with a group of employers operating under the same franchise (preferred option)

This option would allow anew franchisee employer to apply to be covered by an existing single enterprise agreement that covers multiple employers that operate under the same franchise that are single-interest employers, such as under a single interest employer authorisation (for example, large fast food franchises). The option would not allow modification of the existing agreement.

Option 7.2 – maintain status quo

This option would make no amendment to existing provisions, which only allow a new franchisee employer to seek to be covered by a single-enterprise agreement before it is made. For example, the FWC can vary a single-interest employer authorisation to add another employer if each employer specified in the authorisation has agreed to the employer's name being added and the requirements which deal with franchisees and employers that may bargain together for a proposed enterprise agreement are met.[68] If an employer is not included in the authorisation, or is otherwise not a single-interest employer with the other employers before the agreement is made, it could make its own enterprise agreement with their employees. This agreement may be exactly or substantially the same as the existing agreement made under the single interest employer authorisation.

[66] The NES Precedence Clause in the FWC's Enterprise Agreements Benchbook provides that: *This Agreement will be read and interpreted in conjunction with the National Employment Standards (NES). Where there is an inconsistency between this agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency*.

[67] Fair Work Act ss. 55 and 56.

[68] Fair Work Act ss. 251 and see also 249 (2) or (3) for requirements regarding franchisees.

8. Terminating agreements after nominal expiry date (NED)

Option 8.1 – modify termination of agreement provisions (preferred option)

This option would make amendments to the enterprise agreement termination provisions of the Fair Work Act to provide that a unilateral application by a party to terminate an enterprise agreement after its NED cannot be made until at least 3 months after the nominal expiry date of the agreement.

Option 8.2 – maintain status quo

This option would make no amendments to the termination of agreement provisions in the Fair Work Act, which provide that when an agreement has passed its NED, an employer, employee, or employee organisation covered by the agreement may apply to the FWC to terminate it.[69]

9. How the FWC may inform itself

Option 9.1 – amend the Fair Work Act to restrict who can be heard by the FWC at agreement approval, and allow non-bargaining representatives to be heard in exceptional circumstances (preferred option)

This option would modify how the FWC can inform itself in relation to an application to approve an enterprise agreement or a variation of an enterprise agreement. The FWC could only inform itself in relation to such applications on the basis of information that is publicly available, and accept submissions and evidence from prescribed persons (generally, the parties involved in bargaining for an agreement). This would rectify unnecessary delays in the approval process caused by intervention from parties which were not party to the bargaining for the agreement. This option still allows the FWC to consider information from a party not involved in bargaining for the enterprise agreement, if the FWC is satisfied that there are exceptional circumstances that justify it doing so.

Option 9.2 – adopt option 9.1, but do not allow non-bargaining representatives to be heard in any circumstances

This option would adopt option 9.1, but would not permit non-bargaining representatives to intervene at the approval stage. Only the parties involved in bargaining for an agreement would have capacity or standing to make submissions to the FWC at this stage.

Option 9.3 – maintain the status quo

This option would make no amendments to the Fair Work Act regarding how the FWC may inform itself in regards to, and who is able to intervene in, agreement approvals. Currently, when determining an application to approve an enterprise agreement, the FWC may inform itself in any manner it considers appropriate.[70] The FWC can hear also submissions from persons not involved in bargaining.

[69] Fair Work Act s. 225.
[70] Fair Work Act s. 590.

10. Time limits for determining certain applications

Option 10.1 – amend the Fair Work Act to require the FWC to approve agreements within 21 days (preferred option)

This option would legislate that the FWC must determine applications to approve agreements within 21 working days,[71] as far as practicable. The FWC can determine an application to approve or vary an enterprise agreement after that time but it must, as soon as practicable, give written notice to specified persons, setting out why it was unable to determine the application during that period, including whether any exceptional circumstances exist. The FWC would also be required to publish the notice on its website.

This option is intended to be combined with the package of other preferred options, such as significantly reducing red tape and prescription for employers during the bargaining and approval processes and limiting intervention in the approval of agreements by non-bargaining representatives. As part of the package, this option will address problems concerning the timeframes for agreement approval by requiring the FWC to approve agreements within 21 working days, as far as is practicable.

Option 10.2 - amend the Fair Work Act to require the FWC to approve agreements within 14 days

This option would require the FWC to determine agreement approval applications within 14 days. Where this timeframe is not met, the FWC must provide explanation of the circumstances that prevented it from meeting this timeframe to the parties.

Option 10.3 – maintain status quo

This option would make no amendments to the Fair Work Act relating to the time taken by the FWC to determine agreement approval applications. While the Fair Work Act does not currently specify a particular timeframe during which approval must take place, the current objects of Part 2-4 of the Fair Work Act require the FWC to ensure that applications '…for approval of enterprise agreements are dealt with without delay.'[72]

11. Transfer of business

Option 11.1 – amend the Fair Work Act to ensure instruments do not transfer for voluntary transfers of staff between associated entities (preferred option)

This option would allow an employee to transfer more easily to another business that is an associated entity where the employee initiates the transfer, without necessarily requiring the new business to take on the transferring employees' industrial instrument. This would apply only when the employee seeks employment with the new employer at their own initiative—that is, for entirely voluntary moves.

[71] Fair Work Act s. 12 – **working day** means a day that is not a Saturday, a Sunday or a public holiday.
[72] Fair Work Act s. 171(b)(iii).

Option 11.2 – exempt transfers of employees between associated business entities made in order to avoid redundancies

This option would allow employees to transfer more easily between businesses within associated entities where employees may be made redundant, without necessarily requiring the new business to take on the transferring employees' industrial instrument.

Option 11.3 – amend the Fair Work Act to require FWC to consider the job or redundancy implications when considering whether to grant an order relating to a transfer of business, in the case of distressed businesses

This option would amend the statutory criteria the FWC must consider when determining whether to grant an order under section 318 of the Fair Work Act so that the FWC must also consider the job or redundancy implications. Orders under this section can be made that a transferable instrument will not apply to the new employment relationship, or that an instrument that covers the new employer will apply to the new employment relationship. Requiring the FWC to take into account the job or redundancy implications will be particularly relevant in the context of applications made under section 318 by distressed businesses.

Option 11.4 – maintain status quo

This option would make no amendments to current transfer of business provisions in the Fair Work Act, which deal with the transfer of enterprise agreements and other industrial instruments when a business transfers from one national system employer to another national system employer. The provisions seek to balance the protection of employees' terms and conditions of employment under enterprise agreements and other industrial instruments, with the interests of employers in running enterprises efficiently.

12. Legacy Agreements

Option 12.1 - cease pre-Fair Work Act agreements by 1 July 2022 (preferred option)

This option would mean that agreements made prior to the commencement of the Fair Work Act and during the Fair Work Act 'bridging period' (between 1 July 2009 to 31 December 2009, before the commencement of the BOOT and modern awards) would automatically cease to set the terms and conditions of employees covered by those agreements by 1 July 2022. It would be open to the employer whose business operates under such an agreement to negotiate a new agreement or revert to the relevant modern award/s.

Option 12.2 – create a scheme for pre-Fair Work Act agreements to be re-approved by the FWC

This option would establish a transition scheme for employers with pre-Fair Work Act agreements and agreements made during the 'bridging period' by 1 July 2022. They would be able to resubmit the agreement to the FWC for approval, provided it still met necessary requirements under the Fair Work Act. It may also require current employees to vote to reapprove the agreement. After 1 July 2022, the agreement would have no effect, unless it had been transitioned under the scheme.

Option 12.3 – maintain status quo

This option would allow agreements made prior to the commencement of the Fair Work Act and agreements made during the 'bridging period', to continue to operate after they have nominally expired, by virtue of the *Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009*. Employees employed under these agreements may be paid lower penalty rates or allowances than they would otherwise receive under the relevant modern award.

Net effects of policy options

1. Objects

Neither **options 1.1 (the preferred option) or 1.2** would have any regulatory impact—while the objects in section 171 establish the broad purpose for agreement making, they do not directly impact the operative provisions in Part 2-4 which determine how agreement making occurs or how the FWC performs its functions under this Part. The FWC must take into account the objects and Parts of the Fair Work Act when exercising its powers and performing its functions, including in respect of determining applications to approve or vary enterprise agreements. While it may not make a substantive difference to the enterprise agreement system (absent other reforms), it would at the very least be an important optical reform that would influence how those functions and powers are exercised and on that basis would have significant merit.

2. Notice of employee representational rights

Option 2.1 (the preferred option) would provide that the prescribed NERR form must be provided on the FWC's website and would have small positive regulatory impact. Ensuring employers have a reliable source for the form will reduce uncertainty for employers when accessing the form, noting that employers are concerned an inadvertent error in the approval process (such as issuing the wrong version of the NERR) can require bargaining to recommence. It will address stakeholder concerns that the current NERR requirements are overly technical. It would also make engagement with the FWC for support in the bargaining process simpler, as it creates a logical first resource for employers and employees new to enterprise bargaining.

The other component of **option 2.1** is that it gives parties more time to comply with the requirement to issue a NERR at the commencement of bargaining. This is a significant benefit as although the overall regulatory burden for employers does not change, in practice there is often confusion regarding when the notification period starts. Providing a greater window to alert employees that bargaining has commenced and that they have representational rights is not likely to harm their interests, but appropriately balances concerns from some employers that the current 14 day timeframe is challenging to meet.

While making no amendments to the NERR provisions **(option 2.2)** does not technically create additional regulatory impacts, it would not achieve the same net regulatory savings and net benefits as option 2.1. It also does not address persistent concerns about NERR requirements from stakeholders, outlined in the previous paragraphs.

3. Pre-approval requirements – genuine agreement

Option 3.1 (the preferred option) will minimise the current regulatory burden on users by reducing the current prescriptive requirements relating to genuine agreement[73] in the Fair Work Act and focusing instead on the substance of the requirements, which is to ensure that employees understand, and are able to participate in, the agreement making process and vote on a proposed agreement. This option would simplify the procedural steps employers must take in order to make an enterprise agreement and the matters the FWC is required to be satisfied of when approving an enterprise agreement. It will simplify the agreement making and approval process by reducing the likelihood that the FWC will not approve an agreement because of procedural errors concerning genuine agreement. This aims to increase user confidence in the system and make bargaining more appealing, particularly for small and medium enterprises (SMEs) and less sophisticated users. This option will provide employers with clear guidance to assist SMEs on how to comply with the requirements, while not prescribing exact steps or timeframes for most aspects of the process. Furthermore, this option may reduce the overall time taken to approve agreements, and limit delays in an agreement commencing.

While this option removes the prescription around the current genuine agreement requirements, it retains the legislative purpose of the requirement, meaning there is limited scope for employers to misuse the option. Employers will be required to take reasonable steps to ensure employees are given a fair and reasonable opportunity to approve the agreement or not – however they will have discretion to choose what is fair and reasonable based on their workplace and employees – for example, emails vs on-site meetings. The FWC must still be satisfied that employees have genuinely agreed before approval, and may request further information if needed. This is consistent with established case law.[74]

Option 3.2 does not address the underlying issue with the genuine agreement requirements, namely that they are too prescribed. It maintains, and arguably adds to, the regulatory burden experienced by employers in meeting the genuine agreement requirements. It would clarify areas of particular concern for employers in respect of existing prescription, but would not make genuine agreement requirements simpler or reduce the likelihood of errors.

Employers argue that the status quo **(option 3.3)** is too prescriptive and more complicated than is needed, to ensure employees have genuinely agreed to a proposed enterprise agreement. This can, in turn, hamper effective and timely bargaining processes and approval—the level of prescription can leave otherwise fundamentally sound agreements open to challenge, delaying (and potentially preventing) their approval.[75]

---

[73] Fair Work Act s. 180.

[74] The FWC will have scope to request additional information, and or issue guidance regarding what it expected of employers to meet the genuine agreement requirement.

[75] The requirement for strict compliance has been amplified by Federal Court findings that in order for the FWC to reach the requisite state of satisfaction in relation to these requirements it must have sufficient information before it, and if that information is not made available, then the FWC cannot approve the agreement: *CFMEU v One Key Workforce Pty Ltd* [2017] FCA 1266.The One Key case concerns 3 One Key employees, with whom it subsequently made the *RECS (Qld) Pty Ltd Enterprise Agreement 2015* (the RECS Agreement). The Federal Court concluded that One Key 'unquestionably' made the RECS Agreement with these employees 'with the intent [to] preclude a genuine bargaining process'. The Court also stated that '...without knowing the content of the explanation, it was not open to the Commission to be satisfied that all reasonable steps had been taken to ensure that the terms and their effect had been explained to the employees who voted on the Agreement or that they had genuinely agreed to the Agreement.'

Additionally, while the FWC has scope to overlook minor or technical errors, this can create uncertainty about whether an agreement will be approved, and a determination by the FWC may lead to future appeals. While the approval process will continue to involve a thorough examination of the proposed agreement, timely approval should not be hindered by minor or technical errors in an otherwise sound agreement which benefits both employers and employees. The net effect is a system which is less user friendly and more rigid than required. The current process creates a considerable compliance burden for employers, which may be reduced by a more purposive and less prescribed approach.

4. Voting requirements

Option 4.1 (the preferred option) would not increase the existing regulatory requirements, as users of the system are already required to act in accordance with applicable case law to ensure approval by the FWC. The proposed legislative amendments would instead clarify the requirements and provide certainty of process and criteria for employers and employees, reducing the current confusion and risk of non-approval and having to repeat the agreement making process. The amendments would provide greater clarity about which casuals are eligible to vote on an enterprise agreement, and improve the likelihood of accurate and authoritative votes occurring. The voting rights of casual employees would not be diminished as a result of this option; rather, it ensures the validity of those casual employees who do vote.

Option 4.2 is intended to lessen the regulatory impact of having to repeat certain steps for parties, however there would be no regulatory impact as it is effectively the status quo. It would clarify the requirements and provide certainty of process for employers and employees, reducing the current confusion and risk of having to repeat minor steps in the agreement making process, non-approval and/or having to repeat the agreement making process. It should be noted that the proposed legislative amendments of changing 'minor procedural or technical errors' to 'minor errors or omissions' in section 188(2)(a) are unlikely to substantively change the operation of the provision, as the phrases are broadly analogous.

Lack of clarity on when a casual employee is entitled to vote (as per the status quo in **option 4.3**) has resulted in uncertainty amongst employers and risk with determining which employees are entitled to vote an agreement. Anecdotal evidence was presented to the Agreement Working Group that some businesses have abandoned agreement making because of the 'minefield' caused by the lack of clarity on casuals.

5. Better off Overall Test (BOOT)

Option 5.1 (the preferred option) would make a suite of changes to streamline the BOOT, the net effect of which would be to make the BOOT simpler to apply whilst retaining key protections. Removing hypothetical scenarios would focus the BOOT on the realities of employment at the time the agreement is negotiated and lodged with the FWC, ensuring that it is fit for purpose in respect of patterns or kinds of work, or types of employment, that exist at the time the agreement is made or are reasonably foreseeable to employers. Examples of reasonably foreseeable circumstances may include Christmas casuals for department or retail stores, and seasonal fruit pickers in horticulture. This would be in contrast to unlikely or unrealistic employment scenarios (such as employees working patterns or kinds of work that are not offered or contemplated by the employer at test time) and the resulting need for employers to provide undertakings

addressing such scenarios. This option will lead to more consistent and predictable outcomes in how the BOOT is applied. It also aims to result in a faster approval process through the FWC. Furthermore, in the rare circumstances where patterns or kind of work or types of employment that were not reasonably foreseeable at the time the agreement was approved do eventuate when the agreement is in force, the enterprise agreement can be varied in accordance with existing variation provisions in the Fair Work Act.[76]

Requiring the FWC to consider the views of the employer and employees on whether the agreement passes the BOOT and on the overall benefits under the agreement, including both monetary and non-monetary benefits gives legislative effect to the policy intent expressed in the explanatory memorandum to the Fair Work Bill 2008. It provides that the subjective preferences of the employee would be relevant in assessing the relative value of a non-monetary benefit. There is benefit in clarifying this in legislation, to provide certainty to parties and guidance to the FWC, and it may assist in improving confidence in enterprise bargaining.

The FWC may well continue to take an overly forensic approach to assessing the BOOT. This is likely to be a concern for employers since the *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo*[77] decision in 2016, which reaffirmed that the BOOT requires every individual employee and potential employee to be better off. Since then, the perception has been that the application of the test has become overly technical. This option seeks to address this issue by focusing the test on realistic patterns and kinds of work and requiring the FWC to more broadly consider the views of the parties to the agreement. In addition, this option is being proposed with a package of other proposed options which are intended to make enterprise bargaining less complex.

Overall, option 5.1 is unlikely to impact the existing regulatory requirements or rights and protections of users of the enterprise bargaining system. Instead, the changes should make it easier for users to navigate the system in a timely fashion. The option is designed to minimise delays in consideration of the BOOT by the FWC, by making it simpler to apply, which will have flow on regulatory benefits for parties because the approval process is expedited and employers are able to pass on enhanced wages and conditions to employees under an agreement that is approved more quickly. Limiting the FWC to considering the patterns or kinds of work for only those currently engaged in by employees, or that are reasonably foreseeable at the test time, should also lead to more predictable and consistent outcomes for parties engaged in the system.

The impact of **option 5.2,** which would remove reference to individual employees in the BOOT in favour of classes or groups of employees, is that the revised BOOT would become a 'majoritarian' test rather than an 'individualistic' test. This may allow agreements to disadvantage certain employees where the group of employees is, as a whole, advantaged. Option 5.2 would simplify the assessment of the BOOT, as broader classes or groups of employees can be more quickly assessed against the relevant modern award, and there is less scope for individual roster variations or technical considerations which could slow an approval down. If a simpler BOOT resulted in a shorter approval process, with less undertakings sought by the

[76] The variation process is broadly similar to the enterprise bargaining process – section 208-211. An agreement to vary an enterprise agreement may be made when a majority of the affected employees cast a valid vote to approve the variation. The FWC must then approve the variation if certain requirements are met, including the BOOT.

[77] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo:* [2016] FWCFB 2887.

FWC, arguably this would reduce the regulatory burden on parties. However, depending on how the FWC applies the BOOT to classes or groups of employees, it could leave some employees worse off under the agreement than the relevant modern award despite the relevant group of employees to which they belong being, as a whole, advantaged.

Maintaining the status quo for the BOOT (**option 5.3**) would see no change in respect of the complexity of agreement making, the often lengthy process it takes for the FWC to approve agreements and the challenges users experience when attempting to apply the BOOT. Under this option, the identified regulatory burden attached to the current BOOT would continue, alongside uncertainty about the BOOT's application.

A significant number of stakeholders find the FWC's current approach to assessment of the BOOT to be overly technical. Employers argue that the BOOT is being applied as a forensic, clause by clause assessment against the relevant award, with the FWC assessing the effect of the agreement on each award covered employee and prospective award covered employee. As a result, bargaining is no longer flexible to a particular enterprise's circumstances, and does not provide for productivity gains by employers and employees alike.

The FWC's current approach has seen a rise in the number of agreements requiring undertakings to address non-compliance with the BOOT. In 2019, 77 per cent of the undertakings sought by the FWC related to conditions which included compliance with the BOOT. While an agreement can have multiple undertaking types, and are not exclusive of each other, conditions-related undertakings have been the most significant type of undertakings sought each year since 2015.[78]

There are significant regulatory burdens associated with the increased number of undertakings required by the FWC. There are also costs associated for employers by a longer approval processes. Employers and employees are also impacted by delays in approving a new agreement which may provide for productivity gains and wage increases. Ultimately, the effect of the current process may be discouraging engagement in the agreement making system.

6. National Employment Standards (NES) compliance requirements

Options 6.1 and 6.2 (the preferred options) would not introduce additional regulatory burdens on parties using the enterprise bargaining system. Neither would the options remove compliance requirements with respect to the NES, since the Fair Work Act already provides that an agreement must not exclude the NES or any provisions of it, and a term of an agreement has no effect to the extent that it contravenes the NES. As such, there is no risk posed by these options to ensure ongoing compliance with the NES. Both options are designed to reduce the need for the FWC to seek undertakings addressing NES compliance and to speed up the approval process.

The FWC has advised that there are significant regulatory savings associated with reducing the incidence of applications with incomplete documentation or which require undertakings, as these options will do. ABS data (Survey of Employee, Earnings and Hours 2018) states the hourly earnings for managers is $60.40. Modelling based on this data indicates that, for each hour of time saved in preparation or by avoiding follow up activity, there is an estimated saving of

[78] Attorney-General's Department Workplace Agreements Database (WAD).

$214,800 for small-medium sized businesses and for $26,800 for larger businesses.[79] Currently, approximately 50 per cent of enterprise agreement applications are identified as having incomplete documentation or requiring undertakings. While the number of applications to approve a single enterprise agreement dipped in 2019-20 to 3,526 applications, in the 4 previous years, the FWC received an average of over 5,000 application per year.

Maintaining the status quo in relation to the NES (**option 6.3**) would result in continued unnecessary regulation on business and likely see a continuation of the approach adopted by some FWC members to seek undertakings in relation to the NES which are strictly unnecessary. The complexity of ensuring all agreement approval requirements are met can delay wage increases, increase costs to parties and drive perceptions of inconsistency in FWC decision making if some Commissioners require undertakings to ameliorate concerns about one agreement, while others in similar circumstances do not require undertakings.

The time taken for the FWC to approve agreements has increased in recent years, mainly due to an increase in non-compliant agreements for which undertakings are sought and this includes undertakings in relation to the NES.[80] This approach is viewed as excessively technical, a fetter on fast and efficient approvals, and a disincentive to agreement making. While requiring undertakings addressing the NES does not materially impact the operation of the agreement, it does represent a cost to employers and delays for all parties to the agreement.

7. Franchisee agreements

Option 7.1 (preferred option) would result in a net regulatory benefit, as new franchisee employers would be able to apply to be covered by existing enterprise agreements made with a larger group of single interest employers that operate under the same franchise. This has net benefits as operations and duties across all franchisees are broadly identical and pay rates are consistent. This option would lead to a significant saving in time and resources for the employer, as they could avoid undertaking a full bargaining process for a new agreement. It would not result in any negative impacts for employees, as employees of the new franchisee would be required to vote before the agreement covers them, and employees of franchisees already covered would not be affected.

In circumstances where employees choose not to vote in favour of such an enterprise agreement, the employer would still have the option of negotiating a single enterprise agreement with their employees directly, or relying on the relevant modern award.

Maintaining the status quo **(option 7.2)** retains the existing unnecessary regulatory burden and cost which requires new employers/franchisees to negotiate substantively identical agreements

[79] **Note:** Agreement size is used as a proxy for the size of the employer (e.g. a single enterprise agreement application for 1-19 employees is a reflection of a small sized enterprise where 'Small' refers to employers who employ less than 20 employees (44.5%); 'Medium' refers to employers who employ between 20 and 199 employees (44.5%); 'Large' refers to employers who employ 200 or more employees (11%); adapted from Australian Bureau of Statistics classifications of business size. Savings are based on 4000 applications per year.

[80] There is no single explanation for the increase in non-compliant agreements. One likely factor is developments in case law which affect FWC processes for assessing applications to approve an agreement. For example, the *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* matter led to an increase in non-compliant BOOT findings by the FWC. This is because the matter upheld an interpretation of the BOOT which had implications for how the FWC would then assess subsequent approval applications to ensure compliance, leading to more undertakings being sought adjusted to the more strict interpretation adopted by the FWC.

at a new workplace, as there is no simple mechanism to extend coverage of an existing agreement made under a single interest employer authorisation. This does not provide any additional benefit to employees, as it makes negotiating an enterprise agreement less appealing and may also result in employees having less favourable terms and conditions under the award.

8. Terminating agreements after nominal expiry date

Option 8.1 (the preferred option) is intended to support bargaining for new agreements by preventing employers threatening to terminate current agreements and put employees back on the relevant modern award(s) rates during the 3 month period after the agreement nominally expires, when bargaining for a new agreement may be occurring.

While agreements are tested by the FWC against the relevant award, the previous enterprise agreement is, in practice, the relevant 'baseline' against which a new agreement will be negotiated. Employers are generally criticised for unilaterally seeking to terminate an enterprise agreement past its NED during bargaining. The FWC must approve an application to terminate an agreement past its nominal expiry date if it is satisfied that it is not contrary to the public interest to do so, and it is appropriate to do so, taking into account all the circumstances, including the views and circumstances of employees, employer/s and employee organisation/s covered by the agreement.[81] Data from 2019-20 shows that the FWC received 432 applications to unilaterally terminate an enterprise agreement which had passed its NED, of which the majority – 290 were approved. Employer initiated applications made up the bulk of all applications, submitting 365 applications, with 264 applications being approved by the FWC. This data does not show if employers are making termination applications during the course of enterprise bargaining, nor does it provide the reasons given for termination.

The Full Bench of the FWC has found that there is nothing 'inherently inconsistent' between terminating an agreement that has passed its NED and the continuation of bargaining for a new agreement.[82] However, unions consider this to often be a bargaining tactic used by employers to force employees to agree to terms and conditions they would not otherwise agree to, when faced with reverting to the relevant modern award/s under which they would be worse off. The FWC has acknowledged that termination may disturb parties' current bargaining positions and, in a recent decision, refused to terminate an agreement during bargaining, as it was of the view that terminating the agreement would change the dynamics of bargaining such as to cause unfairness to certain employees.[83]

This option would appropriately balance employer and employee bargaining power during the 3 month period after an agreement nominally expires. As noted above, the FWC must only terminate an enterprise agreement past its NED if it meets certain requirements under the Fair Work Act[84]. Regardless of these limitations, the act of applying for termination of an enterprise agreement (even if the termination is not approved) may disturb efforts to genuinely engage in enterprise bargaining. By restricting termination of agreements at the commencement of a new bargaining period, the option ensures existing bargaining positions are not disturbed and

[81] Fair Work Act s. 226.
[82] *Aurizon Operations Limited* [2015] FWCFB 540, and upheld by the Full Federal Court in *CEPU v Aurizon Operations Limited* [2015] FCAFC 126.
[83] *Esso Australia Pty Ltd* [2020] FWCFB 1077.
[84] Fair Work Act s. 226.

disproportionate industrial pressure is not exerted in the initial phase of bargaining. This option will ensure employers engage more cooperatively with employees and their representatives in replacing an agreement past its nominal expiry date, as well as promoting better workplace relations and reinforcing 'fairness' within the system.

There may be some minimal costs, though no new regulatory burden, for a small number of employers unable to apply to terminate their existing agreements for reasons unrelated to bargaining tactics but which fall within the prohibited timeframe. This may be because for example, they are rationalising agreements or other functions of their old agreement are no longer competitive. However, any impact should be minimal, as the timeframe during which termination is prohibited is relatively short and the employer may be able to achieve a similar objective through a new enterprise agreement negotiation process with employees.

The net effect of not modifying current provisions **(option 8.2)** is that the behaviour of some employers who choose to terminate an enterprise agreement past its NED will continue and ultimately contribute to a bargaining process that is not constructive for either party. While there is no clear evidence of the proportion of employers that may be choosing to do this, the ability for employers to threaten this action reduces trust and undermines constructive bargaining between the parties. Where an agreement can be terminated during bargaining, it would be seen as an incentive for employees to make a new agreement as soon as possible, rather than engage in protracted bargaining or industrial action (particularly where the employer has given an undertaking to maintain pay and certain conditions for a limited period of time, before employees then drop to the award).[85] When a new agreement is eventually made, it may include less favourable wage and condition outcomes for employees. While unilateral termination of enterprise agreements after the NED has passed can be done for legitimate reasons by an employer, on balance, modifying these provisions will support more efficient and productive agreement making.

9. How the FWC may inform itself

Option 9.1 (preferred option) would limit the rights of non-bargaining representatives to intervene at the approval stage while preserving the FWC's power to inform itself in any manner it considers appropriate by allowing any person to apply to the FWC to be heard in exceptional circumstances. As a result, it will impose a small regulatory burden on non-bargaining representative parties as it requires an additional administrative process to demonstrate exceptional circumstances (for example, by providing evidence that an employee would be worse off under the agreement) before standing can be granted by the FWC.

This is a proportionate and balanced response to the current issue of parties intervening in the approval process with the objective of causing significant delay or disruption, resulting in generally negative outcomes for employers and employees. Sometimes, a party who has not been involved in bargaining as a bargaining representative may seek to intervene and raise an extensive log of claims that were not provided to the employer during negotiations where they may have been addressed. The preferred options seek to ensure that, for the most part, only

[85] For example, when the Full Bench of the FWC upheld the termination of Aurizon's enterprise agreements in April 2015, the employer and employees had agreed new enterprise agreements within 6 months. See: [2015] FWCA 5740 and [2015] FWCA 6097.

those involved in bargaining can be heard at approval. This minor regulatory impact is justified as reducing the potential for intervention to generally only include bargaining parties at the approval stage will assist in a faster approval process. This will help reduce the overall costs and uncertainty for employers associated with an extended approval process, often requiring further submissions to the FWC.

Option 9.2 has the same benefits as option 9.1, but by prohibiting non-bargaining representatives from intervening at the agreement approval stage it would disproportionately infringe on freedom of association and is not preferred on that basis.

Option 9.3 is the status quo and would make no change to the regulatory burden imposed on all parties to the agreement when a person not involved in bargaining intervenes in the approval process and engages in delaying tactics. While it may, in limited cases, provide an additional path for deficiencies in an agreement to be brought to the FWC's attention, it does not improve the overall concerns of parties regarding the time it takes to approve agreements and the uncertainty that can result from a protracted process, which can (and has) caused some parties to disengage with the agreement making framework.

10. Time limits for determining certain applications

Option 10.1 (the preferred option) would have an overall positive regulatory impact, with minimal additional regulatory burden, in that it would speed up the approval processes for the majority of enterprise agreements. The option for the FWC to determine an enterprise agreement approval application within 21 days, as far as practicable, reflects the latest approval data. In 2019-20, the median time to determine all agreement applications was 33 days, and 17 days for agreements without undertakings. Requiring the FWC to determine applications in a shorter timeframe than 17 days may not be achievable, given this is a median timeframe and only relates to relatively simple approval processes. The requirement that the FWC notify bargaining parties in the event that it cannot approve an determine the application within 21 days mitigates the risk that it rushes its approval assessment, while simultaneously addressing stakeholder concerns around uncertainty brought by protracted approval processes.

The proposal, when combined with the other preferred options, seeks to address lengthy delays in the approval process. It will also provide greater certainty to parties about the likely timeframe for approval of the enterprise agreement and faster passing on of beneficial wages and other conditions to employees. It will also help build confidence in the agreement approval process if the FWC is able to meet the 21 day timeframe, and will encourage users to engage with the system again.

A faster approval process would also benefit SMEs and businesses who are new to enterprise bargaining, and are often dissuaded from engaging in bargaining because of the cost impact and uncertainty of approval delays on the business. While enterprise bargaining is less common among SMEs, the benefit of getting new agreements approved and implemented faster, increasing operational certainty and giving them and their employees faster access to flexibility and wages is considerable. Requiring the FWC to inform the parties why the application was not determined in this time, including whether there were any exceptional circumstances, has no regulatory impact for users of the system. It is designed as an accountability measure for the FWC, and allows for this option to be appropriately tracked and assessed to ensure the FWC is,

more often than not, meeting the 21 day timeframe. There are limited risks with option noting FWC currently sets timeliness benchmarks through its annual Budget Papers to establish expected approval timeframes for parties in the majority of cases.

Separate to option 10.1, additional non-regulatory funding is being provided to the FWC to provide parties with an online guidance and application tool, which is designed to simplify and help users through the bargaining and approval processes. Providing enhanced assistance to parties at the bargaining stage is designed to equip them with the tools to make compliant agreements, which in turn will positively impact the time the FWC needs to assess approval applications within the 21 working day timeframe.

While **option 10.2** is likely to speed up approval processes for a large proportion of enterprise agreements, it may also have an unintended consequence if the FWC fails to meet the 14 day timeframe. For example, if the FWC did not meet the 14 day timeframe, this could result in increased uncertainty for businesses who may not know when their agreement would be approved. If the FWC fails more often than not to meet the 14 day timeframe, this could result in constant notifications from the FWC to the parties that it has not met the timeframe, which could undermine stakeholder confidence in the simplified system and cause parties to disengage with the process. By imposing unrealistic timeframes on the FWC, the FWC is also more likely to adopt a lower threshold for what constitutes the concept of 'as far as practicable', extending it to more and more applications. This reduces the likelihood that it will generally meet legislated timeframes for approval. It will also likely increase the regulatory burden if there are additional processes for the extension beyond the 14 days the FWC needs to initiate for a significant proportion of approval matters. While this option also addresses employer concerns about approval times, the FWC has advised it would require significant additional resources and may not be a realistic timeframe.

The net effect of **option 10.3** in maintaining the status quo will likely be a continuation of the current slow approval processes experienced by users, with the attendant regulatory burden it brings. While FWC approval times have improved since 2018-19[86] and consideration of agreements is admittedly complicated by complex legislative requirements (such as the BOOT and genuine agreement), stakeholders have expressed concern that the process creates uncertainty for parties who are not clear on timeframes for approval and when they can begin to implement agreed terms under the new agreement. This results in greater burden for users in terms of increased costs as the process continues and they must rely on less efficient industrial instruments for longer than anticipated while waiting for their agreement to be approved. Sometimes, the process is so long or unreasonably delayed that parties opt out of bargaining altogether. This option does not address these reasonable concerns about the length of time taken in bargaining. Furthermore, concerns over the proposed time limit causing a time pressure for the FWC would be alleviated by the effect of related reforms, such as significantly reducing red tape and prescription for employers during the bargaining and approval processes and limiting intervention in the approval of agreements by non-bargaining representatives. Providing that the FWC determine applications to approve agreements within 21 days will address problems concerning the timeframes for agreement approval.

[86] Data for the period of 1 July 2019 to 31 December 2019 shows that the median time for the FWC to approve all agreements was 37 days.

11. Transfer of business

Option 11.1 (the preferred option) would reduce the regulatory and administrative costs associated with voluntary transfers of staff between associated entities. It would allow employees to transfer without requiring the new business to take on the transferring employees' industrial instrument, removing the requirement for an employer to have to apply to the FWC for an order that the instrument not apply, or for it to be varied. As this only applies to voluntary transfers of staff, this is unlikely to negatively affect employees. The option removes the need for employers to secure orders from the FWC when an employee initiates a transfer of this kind, and will simplify and improve an employer's ability to operate more flexibly across associated entities. , in the event that the FWC declined to make an order and the industrial instrument transferred with the employee, this amendment will mean the employer will no longer be required to maintain 2 different payroll systems to manage the transferring employee. It also provides more certainty around fixed labour costs and facilitates redeployment of labour.

Option 11.2 would also reduce some regulatory burdens for employers, by removing the requirement for them to apply to the FWC for an order that a transferrable instrument not apply, or for it to be varied, if the transfer of employees is made to avoid redundancies. However, as these transfers are not voluntary, there is a risk that employees may be significantly disadvantaged by such a change. A sufficient case for this amendment has not been presented by stakeholders and it is disproportionate in its potential impact on employees. This option would be open to misuse by employers who keep transferring employees between associated entities so as to avoid paying redundancy entitlements.

Option 11.3 would have a limited regulatory impact—while ultimately it would not change the process to apply for a transferrable instrument to not apply or be varied, adding it as a factor the FWC must take into account when deciding such application adds complexity to the factors the FWC must take into account, which could in turn lead to slight delays in the application process. As with option 11.2, a sufficient case for this amendment has not been made by stakeholders, noting that the FWC must already take into account whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer,[87] and the impact option 11.3 may have on employee protections means that it is not appropriate to pursue. Currently, redundancies are not a matter the FWC must take into account under section 318 of the Fair Work Act when determining whether to grant an order.

Maintaining the status quo **(option 11.4)** will continue to require employers to seek an order from the FWC to stop an employee's industrial instrument transferring to the new employer where an employee voluntarily moves between 2 employers that are associated entities. This will continue to place an administrative burden on employers in terms of time and resources in preparing an application to the FWC, and may diminish opportunities for employees within the group structure due to the cost of seeking an order. Alternatively, the employer will have the cost of having different industrial instruments applying to the same group of employees. While the quantified costs identified are not significant, the effect of maintaining the status quo would potentially reduce mobility for employees between associated entities and the benefits this may have delivered to employees and their employers. Some stakeholders argue that the transfer of

[87] Fair Work Act s. 318 (3)(e).

business provisions may be a disincentive to transferring staff to an associated entity. However, transfer of business provisions in the Fair Work Act play a key role in protecting employee rights, so any reforms need to be balanced.

12. Legacy Agreements

Option 12.1 (the preferred option) will create some increased regulatory costs for a small number of impacted businesses, by requiring them to engage in the agreement making system again or by reverting to the relevant award. As a consequence of any pre-Fair Work Act agreements, and agreements made during the Fair Work Act 'bridging period', terminating by the set date, affected employers wishing to continue to benefit from the arrangements established under their agreement would need to negotiate a new enterprise agreement, go through the approval process and ensure they are compliant with the current requirements in the Fair Work Act. For the affected employers, this requirement to undertake negotiations could disrupt their business operations, which may be a significant impact for some businesses recovering from the impacts of COVID-19. However, noting the broader impact of the preferred policy options is to simplify and improve the bargaining system, this impact should be significantly lessened if it is not as onerous for parties to make for a new agreement.

There is no reliable data for the net number of employers which may be impacted by option 12.1. However, the possible impact of implementing this option is outweighed by the benefits to employees and the broader economy of terminating legacy enterprise agreements. As at 30 September 2019, the department estimates that around 300,000-450,000 employees are currently covered by agreements made prior to the Fair Work Act that have expired, and have not been replaced or terminated, and which may still be operational. This may represent between 2.7 per cent and 4.1 per cent of all employees, of which the majority (almost 95 per cent) are in the private sector.[88] This is a significant number of employees who may be currently receiving penalty rates and allowances lower then currently provided for in the relevant modern award (the Fair Work Act guarantees employees must receive the relevant base rate of pay). This also has potentially serious consequences for market competition, if there are employers that are able to undercut market rates of labour by maintaining lesser rates in legacy agreements.

The net outcome for some employers may be that they opt to default to the relevant modern award to avoid the costs associated with negotiating a new agreement. However, when taken with the broader package of reforms to the agreement making system, employers overall will be more willing and confident in re-engaging with an agreement system that is more simple, less technical and has a faster approval process.

However, **option 12.2** may also allow employers to transition their pre-Fair Work Act agreements to the Fair Work Act system, reducing the risk of reverting to awards. It does still impose new regulatory costs, as it would require an application process to the FWC to reapprove. To ensure

[88] The department does not have any data regarding the actual operational status of agreements that have expired and have not been terminated or replaced. Employers have not been approached to verify their current method of setting pay. Employee Earnings and Hours (EEH) survey data used in these calculations is from May 2018 which is the most recent data available, and excludes the Agriculture Forestry and Fishing industry. Employee coverage data in the Workplace Agreements Database (WAD) reflects the coverage of an agreement at the time it is made. While the actual number of employees covered by an agreement can vary and fluctuate (sometimes significantly) over the life of an agreement, these changes are not recorded in WAD data. For this reason, there are likely some discrepancies between WAD data and EEH data.

it also corrects unfair and market distorting agreements which can have employees receive some rates and conditions lower than the award, re-approved agreements would likely require an employee vote and assessment against the BOOT. This means the additional regulatory and administrative imposts may be only slightly lower than **option 12.1**.

Continuing to allow pre-Fair Work Act agreements to operate **(option 12.3)** does not create any regulatory impacts. However, the net effect does not align with the intention of the Fair Work Act, which is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. It creates situations where employees can lawfully receive less than their modern award entitlements, potentially for many years, and distorts fair competition in the market.

Consultation

On 11 June 2020, the Government established 5 working groups to consider how to improve the operation of the Australian industrial relations system, looking at the following key areas for reform: agreement making; modern awards; greenfields agreements; casuals and fixed term employees; and compliance and enforcement. Discussions were facilitated by the Government, chaired by the Attorney-General and Minister for Industrial Relations with the assistance of a Deputy Chair, and took the form of a series of engagements between the employer and employee representative groups. The groups identified problems in the 5 areas for discussion and experts were invited to present to the groups to help develop an evidence base to consider the issues identified and discuss possible reform options.

The Agreement Working Group met 5 times between 7 July and 15 September 2020, with members meeting between formal meetings as needed. The working group comprised representatives from the following employer and employee representatives:

- **Employer groups**: Australian Chamber of Commerce and Industry , Australian Industry Group, Business Council of Australia, Australian Mines and Metals Association, Master Builders Australia.
- **Employee representatives:** Australian Council of Trade Unions, Community and Public Sector Union, Shop, Distributive & Allied Employees' Association, Electrical Trades Union, Transport Workers' Union.

While noting the in-confidence nature of the Agreement Working Group, members were presented with a broad remit to raise issues which could contribute to consensus solutions regarding:

- reforming enterprise bargaining to focus on mutual gains and productivity and improve cooperative relationships between employers and employees in workplaces, and
- reversing the decline in overall agreement making.

Working Group consultations were held in-confidence to promote increased engagement and assist negotiations. In general, employer organisations advocated for changes that improved the simplicity and increased the efficiency of the bargaining and approval process while unions considered that any changes needed to ensure workers were not disadvantaged or employee protections diminished. The views of the working groups were the primary mechanism for putting forward the above policy options. Where agreement was reached between working group members, this strongly influenced final proposals for reform. Where agreement could not be reached, views of stakeholders were taken into account in the final design of the options to balance all stakeholders' needs. As the discussions of the working groups were held in-confidence and the final outcomes non-binding, this RIS will not discuss in detail the proposals put forward, concessions made or agreement reached to respect confidentiality and not prejudice future discussions.

Preferred Options

For the reasons outlined above, the following are the preferred options:

- amend the objects of Part 2-4 of the Fair Work Act (option 1.1)
- amend the Fair Work Act to extend the extend the time for giving the NERR and clarify how the NERR can be provided (option 2.1)
- reduce prescription and regulation in genuine agreement requirements in the Fair Work Act (option 3.1)
- amend the Fair Work Act to clarify when a casual employee can vote for an agreement (option 4.1)
- combination of amendments to the BOOT (option 5.1)
- amend the Fair Work Act to no longer require the FWC to be satisfied an agreement does not include any terms excluding the NES (option 6.1), and require agreements to include a term that explains the interaction between the NES and the agreement (option 6.2)
- allow new franchisees to opt-in to existing single enterprise agreements made with a group of employers operating under the same franchise (option 7.1)
- modify termination of agreement provisions in the Fair Work Act (option 8.1)
- amend the Fair Work Act to restrict who can be heard by the FWC at agreement approval and allow the FWC to consider information from other persons only in exceptional circumstances (option 9.1)
- amend the Fair Work Act to provide that the FWC to determine applications to approve agreements within 21 days as far as is practicable (option 10.1)
- amend the Fair Work Act to ensure instruments do not transfer for voluntary transfers of staff between associated entities (option 11.1), and
- cease pre-Fair Work Act agreements by 1 July 2022 (option 12.1).

As outlined above, the Government has worked closely with the Agreement Working Group to find consensus positions and compromises to improve the enterprise bargaining system. The employer organisations and unions involved in the working group represent a large number of businesses and employees, and the government is committed to implementing pragmatic solutions to address the current issues identified in agreement making, and reversing its trending decline.

This balanced package represents the most proportionate and effective response to the issues raised. When compared to other options considered above, where there is either no or minimal net benefit or the option has been judged as unsupported by the evidence or too heavy-handed, this preferred package ensures that there is an improved focus on productivity and mutual gains for employers and employees. It addresses a number of technical complexities and will make the system simpler and faster to engage with for all parties, while maintaining important safeguards for employees. These options will also be supported by additional non-regulatory reforms described above.

Implementation and Evaluation of Options

Implementation risks: The most significant risk to successful implementation is that the necessary legislative amendments may not obtain passage through Parliament. The risk to legislative passage has been partly addressed through the industrial relations working group process, which involved extensive consultation with key stakeholders to develop balanced recommendations.

There is also a risk that the benefits resulting from these reforms may be subject to a time delay, reflecting the time taken by employers and employees to understand the new system(s). This will be mitigated through the educational and technical support solutions designed to support implementation. This includes through the non-regulatory FWC practice changes already outlined above. As part of the broader IR Reforms, the government is also progressing a communications package for stakeholders. This will inform and provide support for stakeholders about amendments to industrial relations, including enterprise bargaining.

A further risk, albeit minimal, is that the legislation is not applied in the way it is intended, resulting in unintended consequences. This will be mitigated by a post-implementation review which will assess whether the improvement have met their objectives and are having their intended effect.

Transitional arrangements: Employers, employees and representative organisations will need sufficient time to review changes made to the bargaining system and adapt to the new rules for agreement making. While the proposed options will change the way in which parties have previously bargained, challenges will be mitigated by the non-regulatory FWC practice changes outlined above. In addition to technological solutions which will reduce red tape and assist first-time and experienced users of the bargaining system alike, the FWC will develop user-friendly education and guidance for the parties. This will be important to ensure employers, employees and representative organisations understand the changes and feel confident to overcome any challenges.

Monitoring and evaluation: Difficulties in measuring industrial relations characteristics at the enterprise level inhibits analysis of the extent to which improvements to bargaining are likely to improve firm-level, and ultimately, aggregate productivity. The volatility of aggregate indicators of macroeconomic performance also makes it difficult to pinpoint the effects of discrete and often minor changes in industrial relations policy settings on productivity. Nonetheless, the fact that enterprise agreements set the pay and conditions for nearly 40 per cent of the labour force, implies improvements in process should benefit significant numbers of Australian workplaces and

reduce the current regulatory burden on the large number of businesses which currently rely on bargaining to find arrangements which suit their specific circumstances.

Reform options will be evaluated by a post-implementation review which will assess whether the policies have had their intended effect, and most importantly, if employers are more willing to bargain. This will be assessed by the number of new enterprise agreements approved by the FWC—data which is held by the Attorney-General's Department (the Workplace Agreement Database) and the FWC itself. The FWC provides its reasons for approval and dismissal which will also provide insight on how the amended provisions are understood by parties and interpreted by the FWC. The use of technological solutions will also provide more data to assess performance and allow the FWC to assist parties as appropriate.