Enterprise Bargaining outcomes from the Australian Jobs and Skills Summit

Regulation Impact Statement

Department of Employment and Workplace Relations

OBPR ID 22-03169

Introduction

Secure, well-paid jobs are a fundamental part of Australia's social and economic fabric. Beyond enabling financial independence for individuals, fair pay and job security strengthens communities, promotes attractive careers, and contributes to broad-based prosperity. However, real wage growth in Australia has been held back over the past decade and has not kept pace with productivity growth and the increased cost of living.

On 1-2 September 2022, the Government held the Jobs and Skills Summit to bring together business, unions, civil society and state and territory governments to address shared economic challenges. A recommendation that emerged from the Summit was the need to improve enterprise bargaining and ensure greater access for employers and employees. Enterprise bargaining is intended to contribute to cooperative workplace relationships which benefit employees through higher wages and better conditions, and businesses through increased flexibility and productivity, contributing to higher profits.

The enterprise bargaining framework in the *Fair Work Act 2009* 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. Yet the framework 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.

According to the Australian Bureau of Statistics, the proportion of employees covered by enterprise agreements has decreased from its historical peak of 43 per cent in 2010 to 35 per cent in 2021. Over the same period, award reliance has increased from about 15 per cent to 23 per cent.

Enterprise bargaining works for everyone when conducted between equal parties. This is achieved by ensuring the legal framework for collective bargaining recognises and takes steps to address asymmetries in the relative strength of the bargaining parties.

Australia's enterprise bargaining system should enable both productivity growth and secure, well-paid work, by allowing workers to negotiate fair pay and conditions above the safety net of minimum employment conditions. It is the intent of this new legislation, the impact of which is dealt with in the sections below, to reverse this decline of enterprise agreements and increase access to enterprise bargaining for employees and employers.

The Department engaged with the Office of Best Practice Regulation throughout the policy development process. The regulatory impact statement was at the following stages of development at key decision points:

- Government approval – Draft
- Draft bill exposure to Senior Officials and the Council on Industrial Legislation – First pass
- Decision of Government – Second pass

The current collective bargaining framework

The Fair Work Act commenced operation, in part, on 1 July 2009, and in full on 1 January 2010. In 2008, when the Fair Work Bill was introduced into Parliament, the world was in the midst of the global financial crisis. Due to heightened uncertainty globally, the pace of Australia's economic growth had slowed significantly, and the unemployment rate had risen sharply. The Government at the time believed it was important to deliver certainty and stability regarding workplace relations laws through the Fair Work Act.[1]

The Fair Work Act replaced a workplace relations system that had evolved over several major reforms in the 1990s. Those reforms culminated in amendments to the *Workplace Relations Act 1996* that implemented the controversial Work Choices reforms, which provided for a new system of individual agreements operating outside of the then safety net of awards and enterprise agreements. The Fair Work Act was intended to chart a middle course between the various competing stakeholder views and balance the needs of flexibility for employers with the need for fairness for employees.

In part, the intention of the Fair Work Act was to promote productivity and fairness through enterprise bargaining, including by:

- Providing employees and employers with the right to appoint persons of their choice to represent them in negotiations for a proposed enterprise agreement;
- Facilitating good faith bargaining and the making of enterprise agreements including through making bargaining orders and dealing with bargaining disputes where the parties request assistance;
- Enabling low-paid bargaining orders in order to increase bargaining outcomes in low paid sectors; and
- Ensuring that employees covered by an agreement are better off overall against the new safety net.

One of the central pillars of the workplace relations framework has been, for most of the last 30 years, bargaining at the enterprise level. The emphasis on enterprise bargaining has ebbed and flowed but has been a consistent feature of the framework throughout.

Enterprise bargaining is the process of negotiation between an employer, their employees and their bargaining representatives (e.g. unions) to come to an agreement on minimum terms and conditions applicable to their enterprise. Those minimum terms and conditions are formalised through the making and approval of an enterprise agreement. When in operation, an enterprise agreement sets out the minimum terms and conditions of employment between a group of employees and one or more employers. An enterprise agreement can also provide for matters relating to the relationship between an employer or employers and the unions covered by the agreement.

There are four bargaining streams in the existing framework:

- Single-enterprise stream;
- Single-interest employer authorisation stream;
- Multi-enterprise agreement stream; and
- Low-paid bargaining stream.

Please refer to the flow chart of the current bargaining streams at **Annexure A.**

[1] Senate Standing Committee on Education, Employment and Workplace Relations, *Inquiry in to the Fair Work Bill 2008*, February 2009, accessed 12 October 2022, p 6.

Single-enterprise bargaining

Under the single-enterprise agreement stream, an employer, or two or more employers that are single interest employers, may make an enterprise agreement with the employees who are employed at the time the agreement is made and who will be covered by the agreement.[2]

Two or more employers are **single interest employers** if the employers are:

- Engaged in a joint venture or common enterprise;
- Related bodies corporate; or
- Specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.[3]

Multi-enterprise bargaining

Single-interest employer authorisation stream

The single-interest employer bargaining stream under the Fair Work Act allows access to multi-employer bargaining for a limited range of employers. Access to this stream is available where two or more employers (that are not single interest employers) but have a close connection to one another seek to bargain (such as franchisees or employers with closely aligned industrial relations frameworks). Protected industrial action can be taken in this stream.

To use this process employers must apply to the Minister for a declaration that they may bargain together and/or obtain a single interest employer authorisation from the Fair Work Commission. The Fair Work Commission must make a single interest employer authorisation if either:

- The employers are franchisees of the same franchisor or related bodies corporate of the same franchisor (or any combination of these), or
- The employers are specified in a Ministerial Declaration.

Multi-enterprise agreement stream

Access to the multi-enterprise bargaining stream is available to two or more employers that are not single interest employers, allowing then to make an enterprise agreement with the employees who are employed at the time the agreement is made and who will be covered by the agreement.[4] Employers have to consent/opt-in to bargaining for a multi-enterprise agreement. Protected industrial action is not permitted in the current multi-enterprise bargaining stream. Since 2019 there have only been 49 agreements made using this stream in industries including education, health, and financial and insurance services.

Low-Paid Bargaining Stream

The Fair Work Act currently includes a special multi-enterprise bargaining stream for low-paid employees who have not historically had access to collective bargaining or who face substantial difficulty in bargaining at the enterprise level. To access this stream, a bargaining representative or union entitled to represent the industrial interests of an employee in relation to work to be performed under a proposed multi-enterprise agreement can apply for a low-paid authorisation.

If granted, a low-paid authorisation makes additional rules applicable to certain employers in relation to a multi-enterprise agreement. Employers specified in a low-paid authorisation will be obliged to bargain in good faith and will be required to give employees a notice of employee representational rights (which is not generally the case for multi-enterprise agreement making).[5]

[2] *Fair Work Act 2009*, subsection 172(2).
[3] *Fair Work Act,* subsection 172(5).
[4] *Fair Work Act*, subsection 242(1).
[5] Fair Work Bill 2008, *Explanatory Memorandum*, para. 1004.

An application for a bargaining order cannot be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in in operation in relation to the agreement.[6] The Fair Work Commission also has additional powers to facilitate bargaining for the agreement (including on its own initiative).

Facilitating bargaining

Bargaining under the Fair Work Act is generally left to the bargaining parties to determine for themselves the course that bargaining takes. The Fair Work Act creates a framework of good faith bargaining obligations and other mechanisms to assist parties bargain efficiently and to resolve disputes where they occur.

The Fair Work Act sets out the various good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet. The good faith requirements include:

- attending and participating in meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- responding to proposals made by the other bargaining representatives in a timely manner;
- giving genuine consideration to proposals made by other bargaining representatives;
- refraining from capricious and unfair conduct that undermines freedom of association or collective bargaining; and
- recognising and bargaining with the other bargaining representatives.

However, as an exception to the requirements, the Fair Work Act does not require a bargaining representative to make concession during bargaining for an agreement, or require a bargaining representative to reach agreement on the terms that are to be included in the agreement.

Some oversight functions are placed in the independent Tribunal, the Fair Work Commission. The Fair Work Commission can assist parties to initiate bargaining (by the making of Majority Support Determinations), resolve disputes about the bargaining and agreement making process (by issuing bargaining orders) and bargaining itself (by dealing with bargaining disputes). The Fair Work Commission also has responsibility for assessing agreements that have been made and, where satisfied of the relevant statutory criteria, approving agreements to give them the necessary legal effect.

There are currently a number of mechanisms within the Fair Work Act which seeks to remedy bargaining disputes. The Fair Work Commission is empowered with alternate dispute resolution mechanisms such as mediation and conciliation, alongside the right to make a recommendation or express an opinion.[7] The utilisation of alternate dispute resolution frameworks allows for bargaining parties to access an informal and fair system to discuss issues with an impartial member facilitating discussion. The use of mediation and conciliation by the consent of both parties is preferred by the Fair Work Commission as this allows bargaining parties to develop mutually beneficial outcomes to disputes, and empowers them to find common ground when negotiating a new agreement.

Agreement content

Since the enterprise-level bargaining system was introduced in 1993, there have been various restrictions on the content of enterprise agreements. These restrictions have sought to balance the right of employees and unions to bargain for higher wages growth and improved working conditions, with the right of employers to retain managerial prerogative in the operation of their organisations.

[6] *Fair Work Act,* subsection 229(2).
[7] *Fair Work Act*, subsection 595(2).

Agreements may only include clauses pertaining to the employer–employee relationship, employer–union relationship, terms about deductions from wages, and terms about how the agreement will operate. The Fair Work Act requires all enterprise agreements to include terms on flexibility, the employee right to consultation, who is covered by its terms and conditions, and the Nominal Expiry Date of the agreement. An agreement must not derogate from the national employment standards (NES) and must contain a procedure for settling disputes about matters arising under the agreement and the NES.

Under the Fair Work Act, an enterprise agreement cannot include an unlawful term. Unlawful terms include; discriminatory terms, objectionable terms, terms about bargaining services fees, or restricting emergency management bodies from managing volunteers, and terms regarding right of entry and unfair dismissal.

Where did enterprise bargaining come from?

Enterprise level bargaining arose from the wage and price restraints of the 1980s as a solution for unions to exceed government wage controls. Government, unions, and business all considered that it would improve productivity in workplaces. Wage and price fixing was a response to the 'stagflation' of the 1970s. Prior to this, collective bargaining sometimes occurred under the auspices of conciliation and arbitration.

The original policy intent of enterprise bargaining was to 'provide parties at the industry and workplace level with the opportunity to reach agreements directed at lifting productivity and competitiveness'.[8] Agreements which did not directly link pay increases to improving productivity were discouraged, and agreements were encouraged to promote workplace change.

The Fair Work Act promoted collective bargaining over individual bargaining and agreement-making. When the Bill was introduced to Parliament, the Government at the time pointed to evidence that demonstrated that collective bargaining and higher productivity were correlated.[9] Workplace bargaining was seen as providing a framework to assist the redesign of working arrangements and ensuring workers were employed more productively.

Benefits of collective bargaining

This statement does not analyse all the positive effects of collective bargaining but highlights those areas of immediate relevance.

Collective bargaining leads to better wage outcomes

According to table 1 in the Australian Bureau of Statistics (ABS) report *Wage Setting Methods and Wage Growth in Australia,* enterprise agreements provide for the highest percentage of wages growth, in comparison to any other industrial instrument - they contribute almost half of total aggregate wage growth.[10] Employees covered by an enterprise agreement earn 71 per cent more on average than those on Modern Awards, which provide the minimum terms and conditions for workers, as shown in Chart 1.

Chart 1: *Median weekly total cash earnings for employees who have their pay set by a collective agreement or an award, May 2021*[11]

	Employees who have their pay set by a collective agreement	**Employees who have their pay set by an award**
Total	$1,450.20	$849.20

[8] Australian Government, *Accord Agreement 1993-1996,* 1993, subsection 5(3).
[9] Fair Work Bill 2008, *Explanatory Memorandum*, para. 189.
[10] Australian Bureau of Statistics (ABS), *Wage Setting Methods and Wage Growth in Australia*, ABS website, 2018, accessed 6 October 2022.
[11] ABS, *Employees Earnings and Hours,* May 2021, published and unpublished, TableBuilder.

The Department of Employment and Workplace Relations' Workplace Agreements Database shows that enterprise agreements continue to have higher wage increases than the economy-wide average, despite the challenging economic and employment conditions and a general decline in bargaining. In the most recent *Trends in Federal Enterprise Bargaining* publication, the Average Annualised Wage Increase for enterprise agreements was 2.8 per cent in the June Quarter 2022, compared to 2.6 per cent economy wide.[12]

Collective bargaining is a human right

As well as clear benefits to employers and employees from bargaining, Australia has obligations to encourage and promote bargaining. Australia was a founding member of the International Labour Organization (ILO) and is a major budget contributor. The ILO is a tripartite United Nations agency that exists to bring together governments, employers, and workers, is responsible for setting labour standards and promoting decent work for all women and men and has made collective bargaining a fundamental principle and right at work.

Australia has ratified 58 ILO Conventions including the *Right to Organise and Collective Bargaining Convention.* On collective bargaining, the ILO stated:

> "When effective, collective bargaining can help build trust and mutual respect between employers, workers and their organisations, and contribute to stable and productive labour relations. At the same time, weak and ineffective collective bargaining institutions may lead to a rise in labour disputes, with economic and social costs."[13]

Freedom of association and the effective recognition of the right to collective bargaining are fundamental rights.[14] All members of the ILO have an obligation to respect, promote and realise this principle. Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiations. Negotiations occur between employers or employers' organisations and workers organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. As Australia has ratified this convention it has undertaken to apply the Convention in national law and is obligated to report on collective bargaining at regular intervals.

Collective bargaining contributes to equality and positive health outcomes

OECD and academic research show that countries that enable both single and multi-employer bargaining have lower wage inequality and higher employment, particularly for vulnerable groups such as women, and for those in temporary or part-time work. Research also shows that sector-level bargaining is necessary to negotiate targeted increases in female-dominated and low-paid sectors. It has also been shown that collective bargaining is likely to have positive effects on health.[15]

[12] Department of Employment and Workplace Relations (DEWR), Workplace Agreements Database; *Trends in Enterprise Agreements - June Quarter 2022*, DEWR website, accessed 17 October 2022.
[13] International Labour Organisation (ILO), *Collective Bargaining: A Policy Guide*, International Labour Office, Governance and Tripartism Department, Conditions of Work and Equality Department, Geneva, 2015, p. 4.
[14] ILO, *Declaration on Fundamental Principles and Rights at Work*, 1998, subsection 2(a).
[15] L Sochas and A Reeves, 'Does collective bargaining reduce health inequalities between labour market insiders and outsiders?' *Socio-Economic Review*, 2022, 00(0): https://doi.org/10.1093/ser/mwac052, p:9,; Organisation for Economic Co-operation and Development (OECD), *The role of collective bargaining systems for labour market performance*, 2018; OECD, *Can collective bargaining help close the gender wage gap for women in non-standard jobs?*, 2020

Collective bargaining can lead to better productivity outcomes

Economic growth is driven by growth in productivity, participation and population. Productivity measures the efficiency of production. When productivity grows it allows employers to pay higher wages and hire more workers. In the long term, productivity growth is a key driver of living standards.

Over the past 30 years, labour productivity growth has accounted for around 80 per cent of Australia's real GDP per person growth. The link between productivity and wages makes productivity growth a vital area for the industrial relations system to focus on. Wages and productivity are highly correlated.16 Real wages growth is an important indicator of living standards. If wage growth runs ahead of productivity growth, there is a risk of creating inflationary pressure on the economy, making the wage growth unsustainable in the long run.

[16] Treasury, *Analysis of wage growth*, Treasury Working Paper, November 2017, accessed 14 October 2022.

1. What is the problem you are trying to solve?

The utilisation of the enterprise bargaining system under the Fair Work Act is in decline. Without reversing the decline in enterprise agreement uptake, it is likely that real wages will continue to stagnate, wages inequality will continue, and employers will miss out on unrealised business flexibility and productivity gains.

In a confidential submission to the Jobs and Skills Summit, a union observed that the current bargaining framework no longer delivers pay rises in line with productivity growth. The union also said the system is inaccessible to many sections of the workforce and unnecessarily complex for both employers and employees. As a result, the system is no longer fit for purpose and is simply incapable of restoring sustainable wage growth. A large employer organisation also raised wider concerns with the level of complexity and prescription in the regulation of work in Australia, not present in other OECD countries.

The decline in enterprise bargaining

The enterprise agreement system has evolved since its introduction in 1993 through legislative amendments and case law. The Department of Employment and Workplace Relations' Workplace Agreements Database has recorded the decline in the number of new agreements made from 2014 onwards, with only around half as many new agreements made in 2020-21 as were made in 2013-14.

Chart 2 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 proportion of employees covered by enterprise agreements has decreased from its historical peak of 43.4 per cent in 2010 to 35.1 per cent in 2021.[17]

Over the same period, reliance on Modern Awards (which establish the minimum pay rates and conditions of employment by industry or occupation) to set employees' wages and conditions of employment has increased from 15.2 per cent to 23.0 per cent. Noting this together, the decline in the number of employees covered by enterprise agreements is a result of a reduction in new or renegotiated agreements being made and approved.

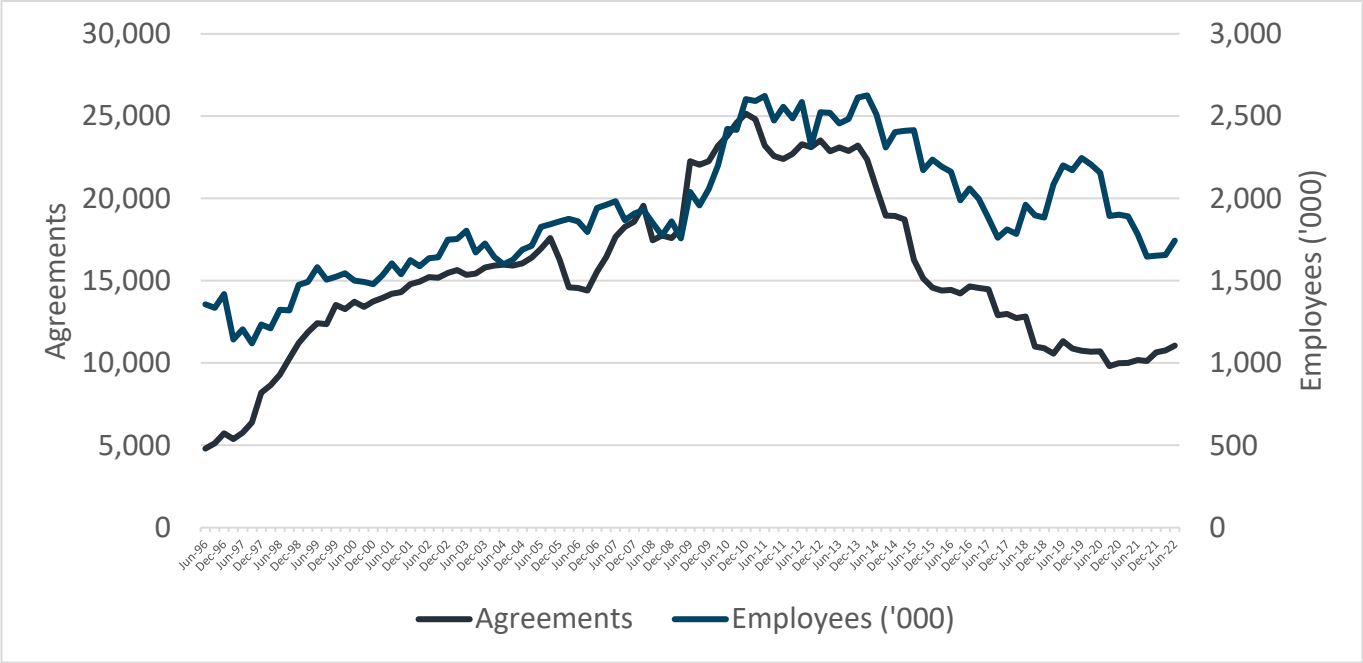
However, there has been an increase in the number of employees covered by current agreements since the start of 2018, which is mainly due to many large agreements being renewed after the parties had relied on their nominally expired agreements for an extended period. The increase in new agreements was particularly in the retail sector (like the Woolworths Supermarket Agreement 2018) and in the education and higher education sectors (with 13 new university enterprise agreements being made).

Agreements **continue to operate** after their nominal expiry date unless they are replaced with a new enterprise agreement or terminated by the Fair Work Commission. The provisions within an enterprise agreement continue to apply to the parties covered by the agreement after the nominal expiry date, and are fully enforceable even if there have been changes made to

[17] ABS, *Employee Earnings and Hours*, Australia, May 2000-2021, published data.

the relevant Modern Award. Although the base rate of pay in an enterprise agreement cannot be less than the base rate of pay the employee would receive under the modern award, agreements can reduce other conditions of the employment, such as penalty rates and allowances, as a trade-off for pay increases, and this benefit diminishes and is then lost when agreements continue to operate long after their nominal expiry date – this can then result in employees' overall pay and conditions being less under an agreement than they would receive under the award. Most agreements provide wage increases for each year the agreement is within its nominal expiry date, and it is uncommon for wage increases to be agreed for the years after the agreement nominally expires, meaning most agreements continue to operate without further increases to wages[18].

Chart 2: Current (not expired or terminated) federal enterprise agreements and employees covered – June 1996 to June 2022[19]



Notwithstanding the recent increase in the overall number of employees covered by enterprise agreements, the proportion of employees covered by agreements has fallen substantially over the last decade.

There are many possible reasons for the decline in enterprise bargaining, 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[20]

[18] Noting that agreement wages cannot fall below the relevant Modern Award base rate of pay.

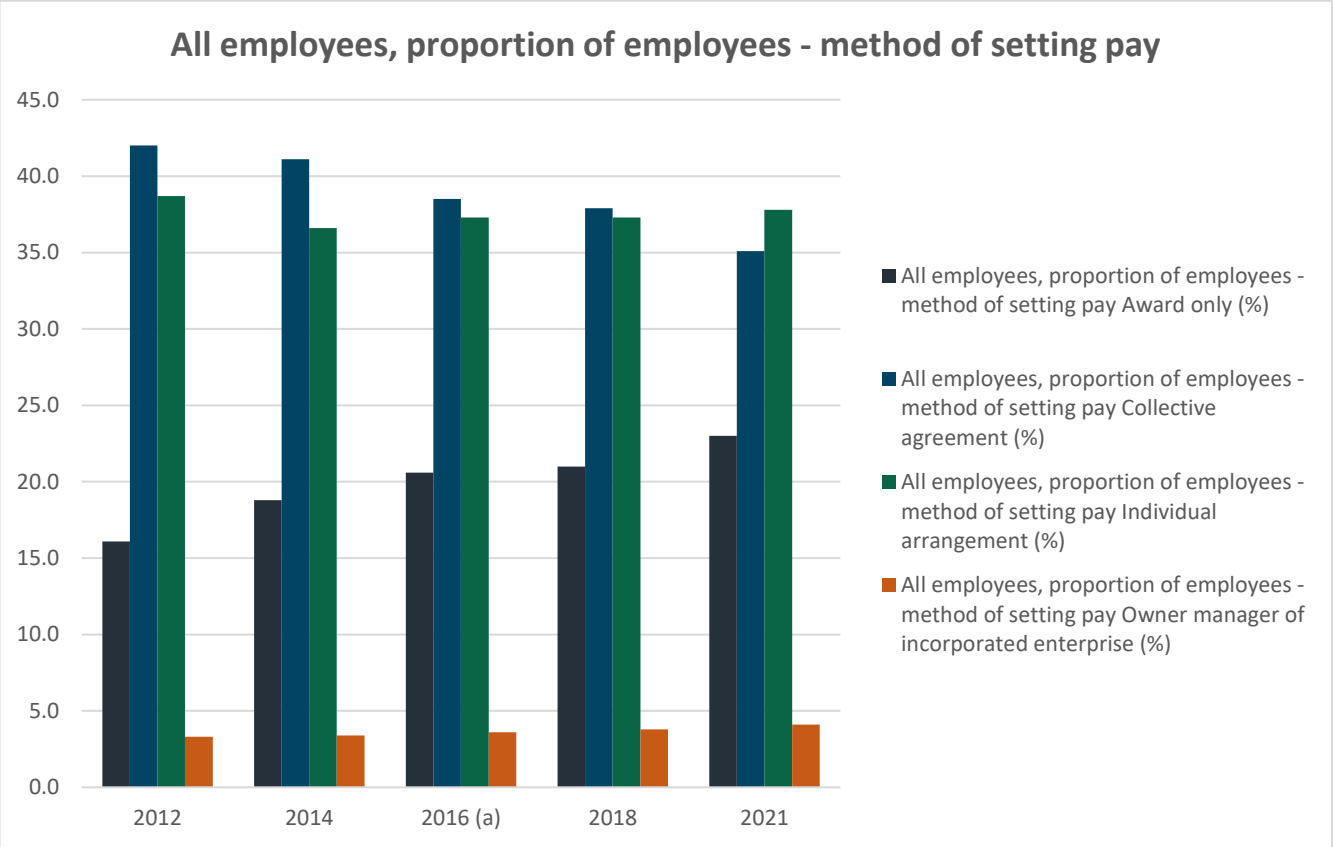
[19] Department of Employment and Workplace Relations, Workplace Agreements Database (WAD). Note: The chart shows the number of agreements current (not expired or terminated) at the end of each quarter between June 1996 and June 2022 and employee figures are based on number of employees on lodgment to 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.

[20] 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

- 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)
- loopholes and inefficiencies in the process, and
- declining union membership.

Chart 3 shows that enterprise agreements remain the dominant industrial instrument,[21] however the use of common law contracts is now the most common method of pay setting.[22] Nearly 40 per cent of employees on enterprise agreements have their pay and conditions set by nominally expired agreements which have not been replaced—indicating that parties are choosing not to bargain. Enterprise agreement coverage has clearly declined over the last decade. This coverage is being replaced by Modern Awards and common law contracts.

Chart 3: Pay setting mechanisms in Australia, May 2021[23]



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.

[21] ABS data refers to an enterprise agreement as 'collective agreement' and common law contract as 'individual arrangement'. A common law contract is not an industrial instrument. (see ABS, A guide to understanding employee earnings and hours statistics, May 2021); A common law contract is not an industrial instrument for the purposes of the Fair Work Act.

[22] This indicates that individual agreements (common law contracts underpinned by the relevant award) may be easier and preferable to making an enterprise agreement. Individual agreements may also be more attractive to employers as policies can be adjusted more easily and remain subject to greater managerial prerogative.

[23] ABS, *Employee Earnings and Hours,* Australia, May 2021. Note: Data for 2016 is based on indicative comparable estimate proportions.

Chart 2 illustrates that one cause of 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 55 per cent of agreements that nominally expired in 2020 were not replaced. Replacement rates are also low for medium and large businesses—39 per cent of medium and 40 per cent of large businesses have not replaced their enterprise agreements that nominally expired in 2020. The industries with the highest non-replacement rate are Accommodation and Food Services (80.8 per cent not replaced) and Administrative and Support Services (74.8 per cent not replaced).[24]

Inequality continues to grow

Australia's gender pay gap, as measured by average weekly ordinary full-time earnings, is currently 14.1 per cent.[25] OECD and academic research show that countries that enable both single and multi-employer bargaining have lower wage inequality and higher employment, particularly for vulnerable groups such as women, and for those in temporary or part-time work.

Research from the Bankwest Curtin Economics Centre and the WGEA shows that the combination of gender concentration and salary differences between men and women within industries contribute to the gender pay gap. If more women were to work within a high-paying industry, the net effect would help decrease the gender pay gap. Research also shows that sector-level bargaining is necessary to negotiate targeted increases in female-dominated and low-paid sectors.[26]

Wages growth is not matching productivity growth

Economic prosperity is promoted by ensuring growth in three interrelated areas: productivity, wages and employment. The Fair Work Act links the achievement of productivity and fairness through an emphasis on enterprise-level collective bargaining. Accordingly, it is prudent to explore the relationship between collective bargaining, productivity and wages.

Productivity is a measure of the efficiency of production, having regard to the relationship between inputs and outputs. It increases if more output is produced using the same amount of inputs (e.g. working hours, capital), or the same amount of output is produced using fewer inputs.

Productivity growth is influenced by a range of factors including economic stability (e.g. low unemployment, low inflation) and capabilities (e.g. skills, technology, and infrastructure). It can also be influenced by factors related to workplace relations such as incentives (e.g. regulatory burden, barriers to competition) and resilience (e.g. flexibility of the workplace relations system, ability to absorb shocks). Labour productivity is driven by capital accumulation, research and development, technologies, innovation, management practices and work arrangements. However, all these can be influenced to varying degrees by an enterprise agreement, especially those factors relating to how employees work.

Labour productivity and real wages growth have historically been highly correlated, with labour productivity considered to be one of the key drivers of real wages growth in the long-term.[27] If workers are more productive relative to their cost to firms, it allows employers to pay higher wages and take on more workers due to the overall increase in income. This, in turn, places upwards pressure on wages. Real wages growth, which is wages growth after accounting for inflation, is an important indicator of living standards.

In some studies, collective bargaining and productivity appear to be correlated. A study undertaken by Tseng and Wooden found that firms with employees on collective agreements experienced, on average, a 9 per cent increase in productivity levels, when compared to firms with employees on awards.[28] The authors point out, however, that their results do not prove that collective bargaining causes higher productivity but that rather, collective bargaining and higher productivity are

[24] Department of Employment and Workplace Relations, Workplace Agreements Database data.
[25] Workplace Gender Equality Agency, *Gender Pay Gap Data*, website, accessed 16 October 2022.
[26] OECD, *Can collective bargaining help close the gender wage gap for women in non-standard jobs?*, 2020
[27] Treasury, *Analysis of wage growth*, Treasury Working Paper, November 2017, accessed 14 October 2022.
[28] Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey,* Melbourne Institute Working Paper No. 8/01, July 2001, p.28.

correlated. Similarly, based on a survey of 281 Australian enterprises, Fry, Jarvis and Loundes found that organisations entering into collective agreements with their workers, reported substantially higher levels of self-assessed labour productivity relative to their competitors.[29]

Productivity and Wages 'Decoupling'

As noted previously, the longstanding relationship between labour productivity and wages growth appears to be breaking down or 'decoupling'. The implication is that workers are not benefitting proportionally from productivity improvements in the form of increased wages.

Productivity growth measures can be volatile, cyclical and subject to revisions. The ABS advises that productivity growth cycles be used to assess changes in labour productivity over time. Productivity growth has been subdued since the early 2000s and remains below the peak of the 1990s. In the latest productivity growth cycle (2009-10 to 2017-18), the average annual growth was 1.7 per cent, lower than the 2.2 per cent growth rate from 1998-99 to 2003-04 but slightly above the annual average growth of 1.3 per cent from 2003-04 to 2009-10.[30]

Decoupling is not a phenomenon exclusive to Australia — it has become widespread across other advanced economies. This implies that ongoing decoupling is the result of underlying long-term changes in the global economy. Over the last decade, productivity in Australia has increased across the economy by 11 per cent while real wages have grown by only 0.1 per cent and have declined substantially over the past year.[31] On a variety of measures, wage growth in Australia has been low in the last decade compared with the decade prior. This has been true across states and territories, across industries and across both the public and private sectors.[32]

The rate of unemployment declined steadily over the life of the Fair Work Act. In mid-2009, shortly after the legislation received Royal assent, unemployment was at 5.8 per cent.[33] Currently, the unemployment rate is 3.5 per cent, one of the lowest rates in 48 years (having dropped to 3.4 per cent in July 2022), due in part to the rebounding of the labour market after the Covid-19 pandemic lockdowns were lifted. However, unlike in the past, the low unemployment rate has not translated into higher real wages for workers with inflation significantly higher than average wage increases. The Wage Price Index increased by 2.6 per cent over the year to June 2022, while inflation increased by 6.1 per cent over the same period, meaning that real annual wages growth decreased by 3.5 per cent.[34]

The decline in enterprise bargaining is of considerable concern. While productivity growth does not automatically lead to real wages growth, given the apparent correlation between labour productivity and real wage growth, and the relationship between labour productivity and collective bargaining, there is capacity to build on the existing framework to reverse the decline in enterprise bargaining and to ultimately influence real wage growth. Without reversing the decline, fewer employees will be covered by an enterprise agreement and therefore will miss out on the benefits that bargaining can provide.

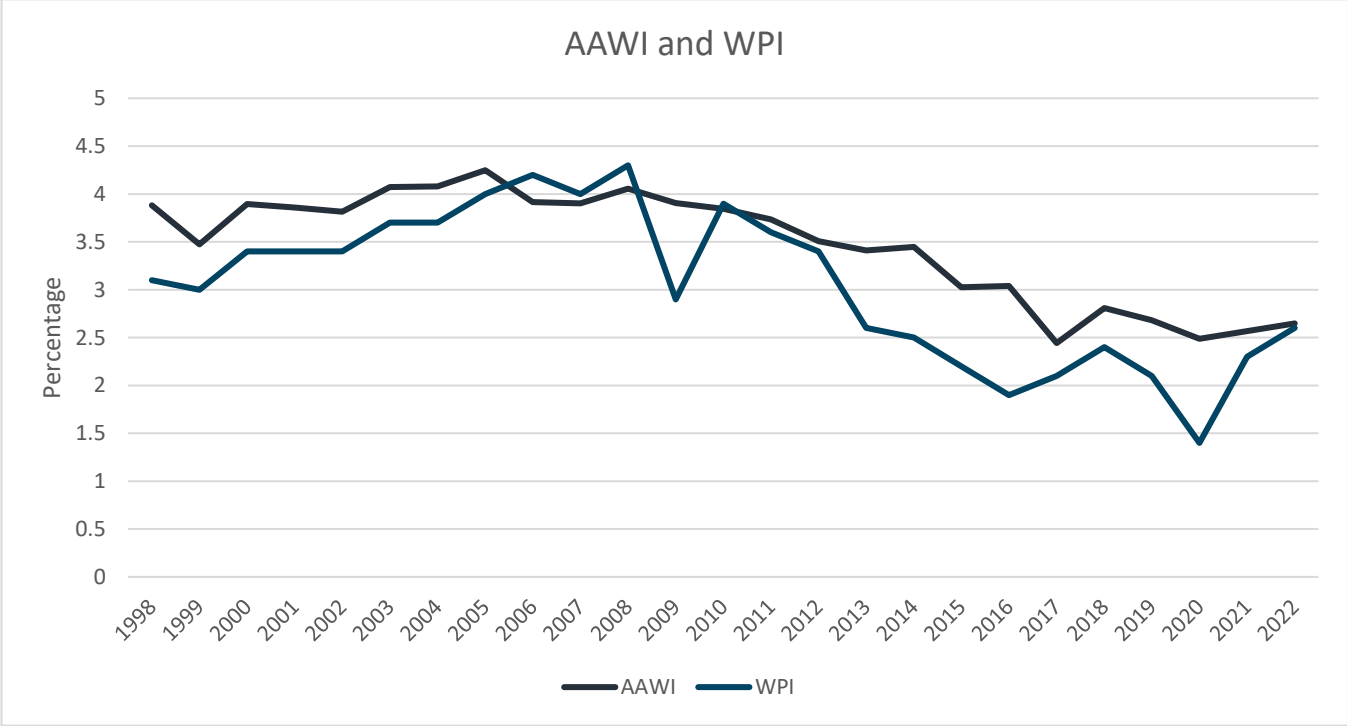
Employers can also benefit from increase bargaining through the potential to increase productivity. Enterprise agreements are a vehicle for enhancing labour productivity and innovation as they allow the parties to agree to greater flexibility than exists under awards, potentially improving resource allocation within firms. Enterprise agreements can also provide certainty about regulations and minimum standards, providing a system that can assist bargaining parties to navigate complex and

[29] T Fry, K Jarvis and J Loundes, *Are Pro-Reformers Better Performers?,* Melbourne Institute Working Paper No. 18/02, September 2002.
[30] ABS, *Australian System of National Accounts 2020-21.*
[31] G Jericho, *Ten Years of productivity growth, but no increase in real wages,* The Australia Institute; Treasury, *Jobs and Skills Summit issues paper*, August 2022, accessed 14 October 2022.
[32] Treasury, *Analysis of wage growth*, Treasury Working Paper, November 2017, accessed 14 October 2022.
[33] ABS, *Labour Force*, 6202.0, Australia, July 2009
[34] ABS, *Wage Price Index*, Australia, June 2022; ABS, *Consumer Price Index*, June 2022.

adversarial processes. Wages and conditions also provide for powerful incentives for training and mobility between businesses, industries and locations.

Historically, enterprise agreements have delivered equivalent, or higher, wage increases than the economy-wide Wage Price Index, as shown in Chart 4. Greater coverage of enterprise agreements means more employees will get access to higher wages and higher wages growth. According to the Department's Workplace Agreements Database, enterprise agreements continue to have higher wage increases than the economy-wide average. In the most recent Trends in Federal Enterprise Bargaining publication, the Average Annualised Wage Increase (AAWI) for new enterprise agreements was 2.8 per cent in the June quarter 2022, compared to a 2.6 per cent annual increase in the Wage Price Index.[35]

Chart 4: Yearly Average Annualised Wage Increases (AAWI) and Wage Price Index (WPI)[36]



[35] Department of Employment and Workplace Relations (DEWR), Workplace Agreements Database; , DEWR website, accessed 17 October 2022.

[36] Department of Employment and Workplace Relations, Workplace Agreements Database; Australian Bureau of Statistics, Wage Price Index, Australia, seasonally adjusted June 2022. 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 Fair Work Commission 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 2022 is to 30 June 2022 (latest available data).

Power imbalance and unintended loopholes

Between 1994 and 2020, union density in Australia decreased from 40 per cent to 14 per cent.[37] While there may be some relationship between bargaining coverage and union density, it is acknowledged that the correlation between the two can vary due to a variety of other factors such as sectoral and workforce composition, firm characteristics and national traditions and practices.[38] While lower union membership may result in unions having less resources to devote to collective agreement negotiations, thus reducing bargaining power, the impact of lower union density on rates of collective bargaining is mixed. The Reserve Bank of Australia notes, for example, that despite declining union membership, unions can still be effective in negotiating larger wage increases.[39]

The enterprise bargaining framework should be fit for purpose and promote the ability for businesses and employees to bargain on an equal footing. Loopholes which have been discovered, or have developed, are contributing to the power imbalance in bargaining. Evolving case law and over a decade of use has revealed loopholes and unintended usage of provisions in the Fair Work Act. In many cases these have contributed to the power imbalance in collective bargaining. For example, the 2015 *Aurizon* case expanded the ability of employers to apply to unilaterally terminate, or threaten to terminate, an expired enterprise agreement during bargaining for a new one to encourage employees to accept inferior wages and conditions.[40] A bargaining system should evolve to accommodate changes in the labour market, the economy and society over time.

Under section 225 of the Fair Work Act, if an enterprise agreement has passed its nominal expiry date, an employer, employee, or union covered by the agreement may unilaterally apply to the Fair Work Commission to terminate the enterprise agreement. The ability to apply to – or even just the threat to - terminate an enterprise agreement has been used by some employers as an unfair bargaining tactic that undermines good faith bargaining. The tactic is unfair because, should an agreement be terminated, employees can revert to the terms and conditions in the relevant Modern Award when an agreement is terminated, which are usually significantly lower. This can influence employees to accept a new agreement during bargaining with inferior pay and conditions to the one which was terminated or that they otherwise may have continued to negotiate for.

Facilitating bargaining

Bargaining disputes, where the employer and employees cannot agree on terms of an agreement, can significantly delay bargaining and have negative impacts on the relationship between the parties. Data from the Department of Employment and Workplace Relations shows that the median time taken to bargain for an agreement ranges from 31 days for a small business to 200 days for a large business. However, where there is protracted bargaining this time can be significantly extended. For example, in the maritime industry, enterprise agreement negotiations took on average 295 days before 2018 and 525 days since 2018.[41] Protracted bargaining can lead to protracted industrial action, which can be costly and disruptive.

Noting the good faith bargaining requirements discussed above, surface bargaining is where a party "goes through the motions of bargaining without any genuine attempt to make an agreement".[42] For example, throughout the bargaining process an employer, as a pretence may actively participate in meetings with employees or employee representatives,

[37] ABS, *Trade union membership,* August 2020.
[38] C Schnabel, *Union Membership and Collective Bargaining: Trends and Determinants*, Institute of Labor Economics, IZA DP No. 13465, July 2020.
[39] J Bishop and I Chan, Is Declining Union Membership Contributing to Low Wages Growth?, Reserve Bank of Australia, 2019.
[40] *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540
[41] Productivity Commission, *Lifting Productivity at Australia's container ports – draft report*, September 2022, p.22.
[42] *Association of Professional Engineers, Scientists and Managers, Australia, The v Peabody Energy Australia Pty Ltd* [2015] FWCFB 1451, [12].

however at the time of committing to the agreement, they refuse to do so. In the 2015 decision of *APESMA*[43] the Full Bench of the Fair Work Commission addressed the issue of the level of engagement a party has with the bargaining process. The Full Bench made bargaining orders ordering (amongst other things), that the employer was to provide the employee representative with a genuine proposal which includes the matters that it may be prepared to accept in an enterprise agreement, concluding that:

> Making of an order in the terms…would assist the bargaining process and allow the parties to better assess the possibilities of an agreement being made. It does not require the company to make concessions or to reach agreement (s. 228 (2)) but it might, in a practical way, assist in facilitating further bargaining between the parties having regard to the conduct which has led us to conclude that the good faith bargaining requirements have not been observed.[44]

Surface bargaining therefore can result in wasted time and resources, where one party has genuinely sought to develop an enterprise agreement, while the other never intended to make the agreement.

Fixing the bargaining system

There are many factors contributing to the inefficiency and decline of the current bargaining framework. This Regulatory Impact Statement does not address all those factors. The next section goes into detail about specific problems with the current bargaining framework under the Fair Work Act that have contributed to the decline in enterprise bargaining, including unnecessary complexity, disputes and protracted bargaining, lack of access for certain groups and unintended loopholes which have led to a power imbalance in bargaining and competitive advantages for some employers.

Unintended loopholes

Unilateral termination

Under section 225 of the Fair Work Act, if an enterprise agreement has passed its nominal expiry date, an employer, an employee or a union can unilaterally apply to the Fair Work Commission to terminate the enterprise agreement. Section 226 of the Fair Work Act provides that the Fair Work Commission must terminate an enterprise if:

> *(a) the Fair Work Commission is satisfied that it is not contrary to the public interest to do so; and*
>
> *(b) the Fair Work Commission considers that it is appropriate to terminate the agreement taking into account all the circumstances including:*
>
> > *(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and*
> >
> > *(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.*

This process effectively allows for a party to apply, without the consent of the other party, to terminate a nominally expired but operational agreement. While the Fair Work Commission must take into account the views of employees in determining whether it is appropriate to terminate the agreement, the views of employees is one factor amongst many. The Fair Work Act does not assign any particular weight to the views of employees and does provide that the views of employees are

[43] *Association of Professional Engineers, Scientists and Managers, Australia, The v Peabody Energy Australia Pty Ltd* [2015] FWCFB 1451.
[44] *Association of Professional Engineers, Scientists and Managers, Australia, The v Peabody Energy Australia Pty Ltd* [2015] FWCFB 1451, [42].

determinative. Each case must be considered on its merits, with the individual Fair Work Commission Member deciding the application taking into account each factor and determining the appropriate weight to be assigned to each factor and balancing the factors overall.

Where an application is made by an employer to terminate an existing agreement without the support of the employees, there may be significant consequences to the employees:

- If the Fair Work Commission does terminate the existing agreement, employees would then be subject to the relevant Modern Award, usually resulting in significantly lower rates of pay and conditions;
- Where an application is made or is even threatened to be made during bargaining negotiations it can severely undermine the bargaining process by tilting the balance of bargaining power unfairly in favour of the employer.

Some examples include *Griffin Coal* where it was reported that employees would have their pay cut by over 40 per cent, and a similar reduction percentage in wages was anticipated in the case of *Parmalat* (although the application was later withdrawn).[45] In the context of enterprise bargaining, the prospect of this magnitude of pay cut generates a significant incentive to accept a substandard enterprise agreement offer, potentially with lesser pay and conditions than the existing agreement.

Historically, the Fair Work Commission has been reluctant to terminate a nominally expired agreement while bargaining negotiations are ongoing. This was the position established in *Tahmoor Coal Pty Ltd,* where Vice President Lawler of the Fair Work Commission found that terminating the agreement would "alter the status quo in a fundamental way", allow the employer to "effectively achieve all that it sought out of the bargaining", and reduce the prospects of another enterprise agreement being made.[46]

However, since the 2015 Full Bench decision in *Aurizon,* the approach taken to unilateral termination and ongoing bargaining has substantially changed. In *Aurizon,* the Fair Work Commission terminated twelve nominally expired enterprise agreements and noted that, "there is nothing inherently inconsistent with the termination of an enterprise agreement that has passed its nominal expiry date and the continuation of collective bargaining in good faith for an agreement".[47]

In *Aurizon*, unions claimed that there was a reduction in entitlements, including those related to no forced redundancy and relocation, free rail passes, dispute procedures, drug and alcohol testing, internal vacancies and rostered days off arrangements. To offset the impact of termination on entitlements, *Aurizon* provided undertakings to preserve wages and allowances entitlements for 6 months from the date of termination or until commencement of a new agreement.

Applying to unilaterally terminate an agreement can undermine ongoing negotiations for a new enterprise agreement by threatening a severe consequence for not agreeing to the terms and conditions of the proposed new enterprise agreement. Enterprise agreements should be negotiated between employers, employees and their union/s in good faith. Using provisions designed for one purpose (to terminate expired enterprise agreements) in order to influence a separate process (negotiating an enterprise agreement) is a loophole that creates a power imbalance in enterprise bargaining. Employees can face pressure to accept less favourable pay and conditions in the new agreement, potentially inferior to those in the agreement that would be terminated, or risk having their wages governed by their Modern Award. This ability of employers to put this pressure on employees is unfair and employees have no corresponding tools at their disposal.

Examples

The Department notes the example of a large business threatening to terminate an existing nominally expired agreement due to deadlocked bargaining negotiations. An approximate 97.5 per cent of eligible employees voted against the employer's proposed agreement terms. Following this, the employer sought to apply to the Fair Work Commission to terminate the

[45] *The Griffin Coal Mining Company Pty Ltd* [2016] FWCA 2312; Senate Standing Committee on Education and Employment, *Report on Corporate Avoidance of the* Fair Work Act 2009, Chapter 4, September 2017.
[46] *Tahmoor Coal Pty Ltd* [2010] FWA 6468.
[47] *Re Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540, para 158.

existing agreement which would have resulted in employees reverting to the Modern Award and a 37 per cent pay cut for some of those employees according to union estimates.

In another example, a company sought to terminate an existing enterprise agreement covering approximately 600 employees after 2 years of negotiations. A union claimed this would result in pay cuts of up to 50 per cent due to employees returning to the Modern Award. This occurred after various attempts between bargaining parties to resolve a bargaining impasse. The employer claimed they applied to terminate the enterprise agreement because it contained restrictive work practices that interfered with managerial and operational decision-making.

Employers have other options available to them if they want to amend or reduce the terms and conditions of employment in their workplace, such as jointly agreeing with their employees to terminate their agreement or negotiating a new agreement, which are more consistent with the objectives of enterprise bargaining to foster cooperation within the workplace.

Legacy or 'zombie' agreements

A legacy agreement refers to instruments made prior to the commencement of the Fair Work Act and during the 'bridging period' (1 July-31 December 2009). These legacy agreements are commonly referred to as 'zombie' agreements and include both Australian Workplace Agreements (individual agreements) and historic collective instruments.

Zombie agreements were not required to be compared against Modern Awards when they were made (unlike enterprise agreements) and continue to operate unless they are terminated or replaced. Employees covered by zombie agreements are very likely to have less beneficial terms and conditions than they would otherwise receive under the relevant Modern Award.

It is not possible to quantify the precise difference in entitlements between zombie agreements and Modern Awards. Each zombie agreement will provide for different entitlements compared with the underpinning Modern Award/s. For example, one zombie agreement terminated in January 2022 deprived employees of approximately $5 per hour on Saturdays, $10 per hour on Sundays and $24+ per hour on public holidays.[48]

Zombie agreements can present a significant financial incentive for employers to retain the agreement and not engage in bargaining for a replacement instrument. This competitive advantage not only impacts employees that remain on inferior wages and conditions, but also competitors of these businesses that must operate with a higher wages and conditions under the modern safety net.

While most employees covered by zombie agreements will have less beneficial terms and conditions than they would otherwise receive under the relevant Modern Award, there are limited instances where workers are better off under the terms of a zombie agreement. Access to bargaining

As outlined above, the proportion of employees covered by enterprise agreements has been decreasing since its peak in 2010. Many of those employers that did bargain in the past are now not renegotiating their agreements after the nominal expiry date. This suggests that significant numbers of employees and employers are finding it too difficult or are not sufficiently incentivised to reopen bargaining negotiations. Because of their access to resources and workplace relations and legal expertise, enterprise bargaining has generally been the domain of large employers in the public and private sectors. Small and medium business and certain sectors have not had the same ease of access and therefore have missed out on the benefits of bargaining. While smaller employers can pool their resources to bargain collectively as a unit, access to multi-enterprise bargaining is currently limited.

Multi-enterprise bargaining

Single-interest employer authorisation stream

Under s.247 of the Fair Work Act, two or more employers that are not single interest employers but that have a close connection to one another, may be permitted to bargain for a single-enterprise agreement. To use this process the employers must apply to the Minister for a declaration that they may bargain together and then obtain a single interest

[48] *Empire Holdings (Qld) Pty Ltd t/a Empire Hotel and Cloudland* [2022] FWCA 62.

employer authorisation from the Fair Work Commission. In deciding whether to make a declaration the Minister considers factors set out in section 247(4), which include whether the employers have bargained together, have common interests, operate collaboratively rather than competitively and are substantially government funded.

Applicants for a single-interest employer authorisation are usually franchisees or organisations in feminised and substantially government funded sectors, such as independent schools and health service providers, and franchisees. The process to access this stream is onerous and the unnecessary limits of the current provisions are evidenced by the fact that only five applications for Ministerial declarations and 10 applications for single interest employer authorisations are made per year on average. It is unclear on what basis the single interest stream provides such strict entry rules, particularly given the largely unrestricted provisions under the multi-enterprise agreement stream.

Multi-enterprise agreement stream

Employer engagement with the multi-enterprise agreement stream has been limited – only 18 multi-enterprise agreements were approved in 2020-21.[49] Departmental data shows there are 15.2 employers covered per agreement on average, with 80.2 employees per employer covered, amounting to over 1,200 employees.[50] Industries covered under this framework include education, health and financial and insurance services. These data outline the lost opportunity for other industries and businesses to engage within this stream and indicate the potential for increases in both businesses and employees able to take advantage of improved wages and conditions with reforms to encourage their entrance to the bargaining space.

Low-Paid Bargaining Stream

The low-paid bargaining stream has been very rarely used since the commencement of the Fair Work Act. Bargaining representatives must gain approval to use the stream by the Fair Work Commission, who must find that the relevant industry has not historically bargained, and that bargaining will improve productivity or service delivery. A special power within this stream is the Fair Work Commission's right to create a binding determination if the bargaining parties are unable to meet agreement. Reforms to remove the high barrier of entering this scheme will help improve access for industries which currently provide low pay for its workers.

It was hoped that the low-paid bargaining stream would address pay outcomes for low-paid workers.[51] These provisions have not been successful, with only four applications under the stream and only one application granted. The current criteria for a low-paid bargaining authorisation are too onerous and are a major barrier to entry.

Unnecessary complexity and delays

Some employers have indicated that they are turning away from bargaining for enterprise agreements as the process is too complex and technical and it is not worth their while. Much of the perceived 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.[52] In addition, evolving case law has at times compounded the complexity of the bargaining process.

[49] Fair Work Commission, *General Manager's Report 2018-21*, November 2021, p.35.
[50] Department of Employment and Workplace Relations, Workplace Agreements Database
[51] Fair Work Bill 2008, *Explanatory Memorandum*, para 992.
[52] In *Construction, Forestry, Mining and Energy Union v Karijini Rail Pty Ltd* [2020] FWCFB 958, 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 Fair Work Commission considered that the employer had not taken all reasonable steps to explain the terms of the agreement to the employees.

There is consensus among unions, employer organisations, academics and the Government that pre-approval requirements for enterprise agreements are onerous, complex and unnecessarily prescriptive. Approval delays or withdrawn applications caused by a procedural error made during the bargaining process has significant consequences for employers and their employees by delaying necessary change and withholding pay increases. A 2018 amendment to the Fair Work Act has ensured that many minor errors in relation to pre-approval steps no longer jeopardise agreement approval.[53] However, as outlined, the process remains highly prescriptive. While the approach set out in the legislation represents one way of ensuring genuine agreement, it does not allow for alternative approaches to securing genuine employee consent. Notably, it does not allow for situations where the bargaining parties have longstanding consultative arrangements and equally effective, but alternative, ways of ensuring the workforce is informed and engaged in the agreement-making process.

As well as the concern over the genuine agreement requirements, employers have consistently raised issues about the application of the Better Off Overall Test, which is the key mechanism in bargaining to safeguard employee wages and conditions. An enterprise agreement currently passes the Better Off Overall Test if the Fair Work Commission is satisfied that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant Modern Award applied.

In the *Coles* decision of 2016, a Full Bench of the Fair Work Commission found that, although the Better Off Overall Test is a global test, if any individual employees or prospective employees are found to not be better off, the agreement cannot be approved without undertakings. [54] In the months after this decision, the number of agreements requiring undertakings increased. This suggested the Fair Work Commission was taking a highly forensic approach to analysing agreements against the Better Off Overall Test, increasing the complexity and uncertainty of the process. The *Coles* decision – and the subsequent increase in agreements being approved with undertakings – caused a substantial increase in the time taken to approve enterprise agreements, from a median of 18 days (from lodgement to approval) in 2015-16 to a high of 76 days in 2017-18. While the Fair Work Commission's 2021-22 report indicates it is now meeting its timeliness benchmarks (of 8 weeks to finalise approvals in 90 per cent of cases), it is accepted that the detailed approach to applying the Better Off Overall Test remains in place. Employer groups are strongly of the view that the broader decline in enterprise agreement coverage across the labour market is, in part, referrable to these changes in the application of the test and the uncertainty it has resulted in.

Taking industrial action

The ability to take industrial action is an important negotiating tool for parties engaging in enterprise bargaining. During bargaining, there is often an unavoidable asymmetry of information and bargaining power between the negotiating parties, which is in part counterbalanced by the capacity for employees to take industrial action.

The process for taking protected industrial action is highly regimented. Currently, employees and employers can only take protected industrial action when they are negotiating for a proposed enterprise agreement and that agreement is not a greenfields agreement or a multi-enterprise agreement. Protected industrial action can only occur when all the following conditions are met:

- the nominal expiry date of an existing agreement has passed,
- bargaining for a new enterprise agreement has commenced,
- a protected action ballot order has been approved by the Fair Work Commission,
- a majority of eligible employees have supported the action through a secret ballot, and
- the required notice has been given.

Unprotected industrial action is not permitted and may be stopped or prevented by the Fair Work Commission.

[53] *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*, Schedule 2.
[54] *Hart v Coles Supermarkets Australia Pty Ltd* and *Bi-Lo Pty Ltd* [2016] FWCFB 2887.

An employer must not pay employees while they are taking protected industrial action and must not threaten to dismiss or discriminate against an employee for participating in industrial action. Employers are also permitted to take industrial action by locking employees out of the workplace. However, a lockout can only be instituted in response to protected industrial action being taken by employees. Solidarity, sympathy or secondary action (action against an employer who is not party to a dispute), is not lawful under the Fair Work Act.

The definition of industrial action in the Fair Work Act excludes action by an employee if the action is based on a reasonable concern of the employee about an imminent risk to his or her health or safety and the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Agreement content

The current agreement content provisions have been outlined earlier in this Regulatory Impact Statement.

It is noted that the Fair Work Commission has determined that agreement terms relating to positive gender quotas is not a matter pertaining to the employment relationship.[55] As mentioned above, Research from the Bankwest Curtin Economics Centre and the WGEA shows that the combination of gender concentration and salary differences between men and women within industries contribute to the gender pay gap. Positive gender measures may encourage more women to work in high-paying industries, with the net effect helping to decrease the gender pay gap.[56] This research found that Australia's gender pay gap would fall by more than a third if a 40:40:20 gender concentration were to be achieved across all industries and occupations.[57]

The effect of current judicial interpretation of permitted matters in enterprise agreements prevents positive terms being agreed to address pay disparity as effectively as might otherwise be possible.

Pre-approval steps

The Fair Work Act has a range of pre-approval requirements that must be considered by the Fair Work Commission in the approval process. They include the requirement that the agreement be genuinely agreed, that the employees to be covered are fairly chosen and that it doesn't contain unlawful terms. The Fair Work Commission may request additional information beyond what is provided by employers in their application and seek to examine witnesses to inform their decision about whether to approve the agreement. If the application for approval is contested in the Fair Work Commission, this could also contribute to delays in the commencement of the agreement. Additionally, if the agreement is appealed this can also contribute to costs and uncertainty.

Genuine Agreement

An enterprise agreement has been genuinely agreed to by the employees to be covered by the agreement if the Fair Work Commission is satisfied that:

- the employer, or each of the employers, covered by the agreement:

[55] *United Firefighters' Union of Australia (259V) v Metropolitan Fire & Emergency Services Board* [2016] FWCFB 2894.
[56] Duncan AS, Mavisakalyan A and Salazar S (2022), Gender Equity Insights 2022: The State of Inequality in Australia, BCEC|WGEA Gender Equity Series, Issue #7, October 2022, page 31.
[57] Duncan AS, Mavisakalyan A and Salazar S (2022), Gender Equity Insights 2022: The State of Inequality in Australia, BCEC|WGEA Gender Equity Series, Issue #7, October 2022, page 63.

- took all reasonable steps to ensure that during the access period for the agreement, the employees were given a copy of the written text of the agreement, and any other material incorporated by reference in the agreement or that the employees had access through the access period to those materials
- took all reasonable steps to notify the employees, by the start of the access period for the agreement, of the time and place at which the vote will occur and the voting method
- took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the employees and the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees, and
- did not request the employees to approve the enterprise agreement until 21 clear days after the last notice of employee representational rights was given;

- The agreement was made:
  - if the proposed agreement is a single-enterprise agreement – when a majority of those employees who cast a valid vote approved the agreement, or
  - if the proposed agreement is a multi-enterprise agreement – when a majority of the employees of at least one employer who cast a valid vote approved the agreement; and
  - there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

The Better Off Overall Test

The Fair Work Commission must be satisfied that the agreement passes the Better Off Overall Test. An agreement passes the test if the Fair Work Commission is satisfied, as at the test time, that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant Modern Award applied.

An award covered employee is an employee who is covered by the agreement and at the test time, is covered by a Modern Award. Prospective award covered employees are considered in the application of the better off overall test because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time.

Facilitating bargaining

Currently, the options to progress bargaining that has become protracted or to deal with surface bargaining under the Fair Work Act are limited. Where parties cannot agree on a new enterprise agreement and bargaining becomes intractable, the ability to draw negotiations to a close is limited. The Fair Work Commission can arbitrate a dispute under section 240 with the agreement of the bargaining parties; or in circumstances where industrial action has been terminated; where bargaining is intractable under the low-paid bargaining stream; and following the making of a 'serious breach declaration' for repeated breaches of the good faith bargaining requirements. Instances of this are rare, with approximately 6 known industrial-action related workplace determinations issued since the commencement of the Fair Work Act. There is no data available concerning the number of section 240 arbitration decisions issued by the Fair Work Commission and there have been no low-paid or bargaining-related workplace determinations issued.

Workplaces with an entrenched and historic disputative relationship are more likely to experience protracted bargaining. This is usually because bargaining disputes are not resolved in a manner that is both quick and agreeable to both bargaining parties. Options to progress bargaining at these stages is practically limited to industrial action, and once a protected industrial action order is made, a wide range of actions can be pursued. Industrial action can then also become protracted, further extending the bargaining period unless and until the dispute is resolved. Protracted industrial action can be costly and highly disruptive to both the employer and the employees. The employer is also limited in resolving the dispute, as while it

can lock workers out of the workplace, this does not resolve the core bargaining issue and continues to extend the bargaining period.

Alternative dispute resolution methods such as arbitration[58] can provide a pathway out of protracted bargaining and can provide bargaining parties with an alternative to industrial action. The Fair Work Act contains an existing framework to arbitrate disputes, however, arbitration can only be accessed by mutual consent in normal circumstances. Mutual consent may be difficult to achieve in industries especially with historic and entrenched disputation. However, arbitration can resolve disputes sooner and reduce the bargaining period (especially where bargaining would otherwise have become protracted).

The lack of access to arbitration means that employers or unions with significant bargaining power can refuse to make concessions during bargaining (surface bargaining). One-sidedness in collective bargaining can dissuade the weaker party from participating meaningfully, which is likely contributing to the low level of bargaining that is currently occurring under the Fair Work Act. This can be the intended effect of bargaining tactics, such as threats to terminate existing enterprise agreements, which can cause employees to accept offers they otherwise would not agree to, and bring bargaining to an end.

[58] Arbitration utilises an independent third-party umpire (i.e. the Fair Work Commission), to settle a dispute

2. Why is Government action needed?

The Government held the Jobs and Skills Summit in September 2022. The Summit demonstrated that workplace relations stakeholders including employers, employees and those from the broader community including academics have a sincere desire to reform the bargaining system. The Government received submissions from various employer and employee groups prior to the Summit which highlighted a need for an overhaul of the industrial relations system to increase dialogue between businesses and workers, to simplify the existing system, and increase access to enterprise bargaining.

Consensus reached at the Jobs and Skills Summit confirmed the need to modernise Australia's workplace relations laws to make bargaining accessible for all workers and businesses. Further, following the conclusion of the Jobs and Skills Summit the Government undertook consultation with employer organisations, unions, academics and some of Australia's major employers to continue the development of the various policy reform options.

The proposed reforms require action from the Government, since the bargaining framework exists in Commonwealth legislation, which requires amendment for the framework to function differently. The Fair Work system generally covers the majority of, but not all, employers and employees in Australia.[59] The system establishes a range of rights and obligations of employers and employees in the workplace. If an employer or employee is not part of the national system, the industrial relations system in their state or territory covers them.

The enterprise bargaining reform measures seek to address issues within the Fair Work Act which have led to a bargaining system that is onerous, prescriptive and overly complex. The system is no longer working as it was intended to operate when initially introduced.

A key metric which will measure the success of its reforms to enterprise bargaining is increasing the number of new collective agreements lodged in the Fair Work Commission, and the proportion of the labour market covered by a collective agreement. The Department considers that reforms which address access to bargaining, and the ease of bargaining, will be directly responsible for this change.

More broadly these reforms seek to improve real wage growth and rebalance bargaining. These will be indicated by wages which are higher than the rate of inflation, and which are sustained by productivity. Increasing the rate of bargaining will help to achieve this, but so will more direct government intervention in the bargaining framework, by closing loopholes which contribute to employees having low wages, and by ensuring the Fair Work Commission is able to assist parties in bargaining to reach outcomes.

Legislation is required

The continued presence of zombie agreements, and the ability for employers to influence bargaining outcomes by threatening to apply to terminate an enterprise agreement, are legislative issues which require a legislative solution. The Department is unaware of non-legislative measures or market initiatives which would address these problems. The Department considers the longer action is delayed on closing these loopholes, the more the bargaining framework as a whole will be undermined.

[59] For instance, state and local government employees are excluded in some states and territories. Western Australia maintains its own system for non-constitutional corporations.

The declining rate of enterprise agreements means that additional options to come to agreement like multi-enterprise bargaining should be considered. The very low use of the multi-enterprise bargaining provisions due to prescriptive and complex requirements means that legislation is required to improve access to enterprise bargaining, particularly for employees in low paid industries.

The procedural requirements for making an enterprise agreement and its approval are prescribed in the Fair Work Act, and stakeholder views are now aligned that these requirements should be amended. Legislation is needed to reduce complexity and simplify these processes to boost bargaining and provide more certainty to bargaining parties over requirements like 'genuine agreement' and the Better off Overall Test.

Parties currently have limited access to dispute resolution options while bargaining which can lead to delays and costs. Legislation is needed to provide additional powers to the Fair Work Commission to help assist parties to bargain.

Market failure

Relying on market correction to resolve long-running labour market problems is the status quo option. The Department considers that helping to lift the rate of bargaining across the economy is one way to ensure Australians benefit from sustainable wages growth – underpinned by rising productivity. Low wages growth is partly a symptom of bargaining power imbalance and is partly due to the failure of the market to work within a legislative framework which presently does not adequately promote collective bargaining.

A successful collective bargaining system will ensure that all parties can bargain, and are able to bargain on an equal footing. Previous experience suggests that the current low rate of unemployment should have lifted wages growth in Australia - employees should be attaining a reasonable share of productivity growth, expressed by an improvement in wages. Neither of these have occurred, indicating a failure for the market to correct labour prices in response to high demand. The Department considers improving accessibility to bargaining and taking steps to rebalance bargaining power will assist the labour market to reflect the cost of labour. Rather than taking active steps to address the current issues with the labour market, allowing market forces to dictate sub-optimal outcomes from the bargaining system is likely to perpetuate these problems. Legislative intervention is therefore the preferred option over market forces.

Non-legislative options

The Government must directly intervene in the workplace relations framework to resolve the myriad of issues present in the bargaining system. There are no programs or funding measures which will address serious loopholes, the marked decline in bargaining, or complex processes.

An alternative option to enacting new measures is to rely on the Fair Work Commission to effect change. The Fair Work Commission is pivotal in the enterprise bargaining process however it cannot amend legislation or reduce regulatory burden. The Courts and Fair Work Commission interpret and apply existing legislation consistent with the principles of the common law. An example of the Fair Work Commission acting on its own initiative was when sought to improve its enterprise agreement approval timeliness performance. It achieved this by tightening its benchmarks and digitising some aspects of its agreement lodgement process. However, during this period, enterprise agreement lodgement and coverage rates continued to decline.

3. What policy options are you considering?

3.1 Unilateral termination of agreements

Option 1 – Status Quo

Under this option, there will be no amendment to the legislation. Employers can continue to rely on the precedent set by the Fair Work Commission regarding unilateral termination and continue to apply, or threaten to apply, to the Fair Work Commission to terminate a nominally expired agreement. Enterprise agreements are not intended to operate in perpetuity, and there are legitimate reasons for the unilateral termination provisions to exist, like terminating an agreement which no longer covers any employees.

This is not the preferred option, since continuing to allow what is seen to be an evasive practice will further undermine confidence in the enterprise bargaining system and inhibit the use of more cooperative methods for setting terms and conditions of employment.

Option 2 – Ensure the process for agreement termination is fit for purpose and fair (preferred)

This option implements an immediate outcome of the Jobs and Skills Summit to ensure that the process for agreement termination is fit for purpose and fair. This option prefers a flexible approach to address a complex problem. Terminating agreements can be appropriate in some circumstances. This flexibility must be balanced against negative behaviours that the power to terminate has given rise to.

Applying to terminate an agreement that is the result of good faith bargaining is a significant procedural power. Termination of, or threatening to terminate, an agreement can have significant effects for employees (discussed above) and, when used as an unfair bargaining tactic, can have a negative effect on good faith bargaining and bargaining outcomes.

This proposal would be implemented by amending s.226 of the Fair work Act to provide that the Fair Work Commission cannot terminate an agreement that has passed its nominal expiry date other than where the continued operation of the agreement would:

- be unfair to employees; or
- pose a significant threat to the viability of the employer's business, and that termination would likely reduce the potential of redundancy-related terminations of employment of employees covered by the agreement, and terms providing termination entitlements are preserved by a guarantee of termination entitlements from the employer; or
- where the agreement does not cover any employees and is not likely to cover any employees.

In addition, the Fair Work Commission must not terminate an agreement if it considers that bargaining for a proposed agreement with the same or substantially the same coverage has commenced, is occurring, and termination could negatively influence the bargaining position of employees that will be covered by the proposed agreement.

An employer, employee, or union covered by an agreement would still be able to unilaterally apply to the Fair Work Commission to terminate an agreement in the exceptional circumstances outlined above. The proposal will prohibit the

process from being used as an unfair bargaining tactic while ensuring that legitimate applications can continue to be made. Employers and employees would continue to be able to terminate enterprise agreements by consent at any time.

In considering whether to terminate an enterprise agreement on the basis of business viability, the Fair Work Commission will be required to be satisfied that each employer covered by the agreement has given the Fair Work Commission a 'guarantee of termination entitlements' in relation to terms providing entitlements relating to the termination of employees' entitlements. A guarantee of termination entitlements protects additional termination entitlements of employees to prevent employees being short-changed in the event of business insolvency and redundancy. A guarantee of termination entitlements will be in force for a maximum of 4 years.

Under this proposal, the Fair Work Act will also be amended to provide that all applications to unilaterally terminate an enterprise agreement after its nominal expiry date, where the enterprise agreement still covers employees, must be dealt with by a Full Bench of the Fair Work Commission. Agreements that do not cover any employees at the time of the application can continue to be dealt with by a single Member, as can applications made by consent under s 222.

This option is preferred because it acknowledges the significance of unilaterally terminating, or threatening to terminate, an agreement. This option balances the legitimate need to terminate an agreement in appropriate circumstances against the harm that can be caused by misuse of the power. This option retains the ability to terminate agreements in exceptional and appropriate circumstances and directly addresses the emergence of the unfair bargaining tactic of applying to, or threatening to, terminate agreements.

Option 3 – Ensure the process for agreement termination is fit for purpose and fair through a 'front end' test

This option proposes a strict rule prohibiting applications to terminate agreements if certain conditions are met.

This option would apply a barrier to applications to prevent the Fair Work Commission from considering applications to terminate an enterprise agreement after the nominal expiry date under s. 225. A barrier to applications would operate by preventing termination applications being made during bargaining which results in significant pressure on employees to accept the new agreement.

An example of a barrier to applications which could be applied to s.225 is:

- Limiting applications until a certain period after the nominal expiry date of an agreement, such as 3 or 6 months. This approach is consistent with the approach taken in Schedule 3, Part 8 of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, which proposed to prevent applications to terminate an enterprise agreement being made within 3 months of that agreement's nominal expiry date; and
- Preventing applications while bargaining is occurring to ensure that the dynamic of bargaining cannot be disrupted either by making or threatening to make an application to terminate an enterprise agreement.

This option is not preferred because it would remove any flexibility to terminate agreements if bargaining is occurring, even if termination is otherwise considered appropriate. This option does not balance the legitimate need to terminate an agreement in appropriate circumstances against the harm that can be caused by misuse of the power.

3.2 Zombie Agreements

Option 1 – Status Quo

Under this option no action would be taken to sunset 'zombie' agreements. 'Zombie' agreements will continue to operate until terminated on application to the Fair Work Commission or, in relation to collective agreement-based transitional instruments, they are replaced by an enterprise agreement or workplace determination. Individual agreement-based transitional agreements will also continue in operation until terminated by the Fair Work Commission on application by an employee or employer covered by the agreement. Employers with zombie agreements will retain their advantage over competitors to the detriment of their employees, who will remain on wages and conditions inferior to the modern safety net.

This option is not preferred because zombie agreements preserve conditions of employment that are not consistent with the modern safety net and continues an unfair competitive advantage for some businesses. Employees covered by zombie agreements are very likely to have less beneficial terms and conditions than they would otherwise receive under the relevant Modern Award. In private consultations, stakeholders were generally in agreements that action should be taken to terminate zombie agreements.

Option 2 – Sunset 'zombie' agreements but provide employers and employees with the ability to extend (preferred)

This option legislates to automatically sunset agreement-related instruments made prior to the commencement of the Fair Work Act and during the 'bridging period' (1 July-31 December 2009). These legacy agreements are commonly referred to as 'zombie' agreements and include both Australian Workplace Agreements (individual agreements) and historic collective instruments. This was agreed as an immediate outcome of the Jobs and Skills Summit.

This option would be implemented by:

- Automatically terminating all zombie agreements 12 months after the commencement of the provisions; and
- Permitting applications to the Fair Work Commission by an employer or employee covered by a zombie agreement to preserve the agreement for up to a 4-year period after sunset if it is otherwise appropriate in the circumstances to do so, and:
    - Employees covered by the collective zombie agreement are better off overall under the agreement when compared with the Modern Award (considered as a group, rather than for individual employees); or
    - The employee covered by the individual zombie agreement is better off overall when compared with the Modern Award; or
    - Bargaining for a replacement agreement is occurring.

The Fair Work Commission would also be able to preserve a zombie agreement if it is reasonable in the circumstances to do so.

This proposal provides that an employee or employer covered by a zombie agreement (either individual, such as an Australian Workplace Agreement, or collective) could apply to the Fair Work Commission to preserve the agreement for a further period to prevent the agreement from sunsetting. Within 6 months of the commencement of the bill, employees covered by a zombie agreement must be notified by their employer that the zombie agreement that covers them will sunset.

When implemented, the options for parties covered by a zombie agreement would be to bargain for a replacement agreement that would be subject to the Better Off Overall Test or revert to the terms and conditions of the relevant Modern Award. The net outcome for some employers may be that they opt to default to the relevant Modern Award. However, this

measure is part of a broader package of reforms to encourage and facilitate agreement- making, so employers may be more willing to engage with the agreement framework.

This option is preferred because it automatically terminates all zombie agreements, it provides a grace period to permit employers currently covered by zombie agreements to take necessary action (discussed above) and provides the ability to extend the grace period (via application to the Fair Work Commission) in certain circumstances and where appropriate. This option evens the playing field for workers covered by these outdated agreements and for businesses that have had a competitive advantage over their competitors. The option recognises that termination of zombie agreements is the appropriate step to take but retains flexibility to preserve the status quo for a further period with oversight by the independent Tribunal.

The Department has considered whether a shorter or longer timeframe for preserving zombie agreements should be preferred. Based on confidential stakeholder consultations the proposed periods were reviewed, and the Department considers the periods proposed are reasonable and preferred.

Option 3 – Sunset 'zombie' agreements only

This option would automatically terminate all 'zombie' agreements 12 months from the commencement of provisions. Employers and employees covered by 'zombie' agreements that have sunset would then have their safety net of entitlements derived from the relevant Modern Award or, in the case of some individual agreement-based transitional instruments, enterprise agreement (if one is in operation and covers them). It would be open to employers, employees and unions to bargain for a new enterprise agreement or revert to the relevant Modern Award/s.

This approach is not preferred as it would not include the capacity to apply to the Fair Work Commission to preserve the agreement for a further period to prevent the agreement from sunsetting. This may mean that the small number of employees on zombie agreements that are more generous than the Modern Award do not have time to negotiate new arrangements and may be left worse off as a result. It may also lead to employees agreeing to a substandard agreement in order to avoid falling back onto the safety net.

3.3 Improving access to single and multi-employer agreements

Option 1 - Status Quo

Under this option, there will be no amendment to legislation to improve access to single and multi-employer agreements.

Initiating single enterprise bargaining

Under this option, the current Majority Support Determination would not change. The current process allows employers to be required to come to the table and engage in good faith negotiations only if the relevant employees agree via a Majority Support Determination that they wish to bargain in the stream.

Single interest bargaining stream

Single-interest employer authorisations under section 247 of the Fair Work Act currently allows access to the single-enterprise agreement making framework for a limited range of groups of employers that are closely related, e.g. government funded independent school systems and public hospitals. The provisions were established to allow such employers to bargain together because their industrial relations frameworks are closely aligned, despite not being structured in a way that

necessarily allows immediate access to the single-enterprise bargaining framework (I.e., they may not be related bodies corporate or engaged in a joint venture or common enterprise). For employers other than franchisees, the process currently involves two steps: an application for a Ministerial declaration, followed by a further application to the Fair Work Commission for a single interest authorisation. Franchisees must only seek an authorisation from the Fair Work Commission. In deciding whether to make a declaration the Minister considers factors set out in section 247 (4) of the Fair Work Act, which include whether the employers have bargained together, have common interests, operate collaboratively rather than competitively and are substantially government funded. The inclusion of franchisees was intended to clarify any uncertainty arising from the jurisprudence about whether franchisees are engaged in a common enterprise.

The narrow scope of the existing stream is reflected in there having recently been around only five applications for Ministerial declarations and 10 applications for single interest employer authorisations per year. Applicants are usually organisations which are feminised and substantially government funded, such as independent schools and health service providers.

Only employers can initiate an application for a single interest authorisation. Employers can be added or removed from an authorisation, on application. They are removed if the Fair Work Commission is satisfied it is appropriate due to a change in the employer's circumstances (section 251).

Low-paid bargaining stream

To access the low-paid bargaining stream, a bargaining representative or a union entitled to represent the industrial interests of an employee in relation to work to be performed under a proposed multi-enterprise agreement may apply for a low-paid authorisation which requires the employers to bargain. Employers may be removed by variation if the Fair Work Commission is satisfied their circumstances have changed and it's no longer appropriate for them to be specified in the authorisation. The current low-paid bargaining stream is rarely used and has not resulted in a single multi-enterprise agreement. There have only been 4 applications for a 'low-paid authorisation' under the current framework, with the only application granted in the aged care sector.[60] The 'low-paid authorisation' made in that matter did not result in the making of a multi-enterprise agreement, but the application was observed to have inspired a number of enterprises to reach their own single-enterprise agreements and so to successfully apply to be removed from the authorisation.

Multi-employer bargaining

Bargaining for a multi-employer agreement can only occur where two or more employers voluntarily agree to bargain together. A Majority Support Determination is not available in respect of a multi-enterprise agreement. This means that under the current framework, employers have to consent/opt in to bargaining for a multi-enterprise agreement.

Protected action

Current protected action for multi-employer agreements notes that union members must undertake industrial action within a period of 30 days (with an additional 30-day extension available on application to the Fair Work Commission).

The maintenance of the status quo continues the need by employees to undertake all forms of industrial action as listed on their protected action ballot within the initial 30 days (or the additional 30 days) to maintain their right to take protected action. This requirement may cause the unnecessary inflaming of bargaining disputes as it provides a built-in incentive to take industrial action. Extending the opportunity to apply protected action will reduce the likelihood of it being taken prematurely or taken at all, which will help to avoid unnecessary conflict and the possibility of a bargaining impasse.

[60] *United Voice v The Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633.

Positive measures in agreements

Enterprise agreements can be made regarding permitted matters such as matters pertaining to the employer–employee relationship matters pertaining to the employer–union relationship terms about deductions from wages, and terms about how the agreement will operate. Currently positive measures terms are not permitted matters in enterprise agreements.

Summary

This option is not preferred because it does not address the decline in collective bargaining and the positive outcomes that accompany an effective collective bargaining system. Maintaining the status quo is likely to mean that collective bargaining will continue to decline, real wage growth will continue to stagnate, real wage growth will continue to fall behind productivity gains, and inequality will be harder to address.

Option 2 - Improving access to single and multi-employer agreements (preferred)

This option implements immediate outcomes of the Jobs and Skills Summit to ensure workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to existing single and multi-employer bargaining arrangements under the Fair Work Act by:

- increasing access and simplifying the process for bargaining for a single-interest agreement under the existing framework;
- removing barriers to the existing low-paid bargaining stream; and
- reforming the existing multi-employer agreement stream into an opt-in 'cooperative workplaces' bargaining stream.

This policy proposal also proposes to:

- ensure the process for taking industrial action is robust and fair; and
- amend content restrictions in enterprise agreements.

Details on the proposals that aim to provide quicker access to arbitration for intractable disputes, incentivise the parties to bargain reasonably and in good faith and in less time, and reduce the prospects of industrial action, are outlined in increase the Capacity of the Fair Work Commission to help workers and businesses reach agreements.

Initiating single-enterprise bargaining

This option retains Majority Support Determinations for the single enterprise bargaining stream. To overcome the difficulty in obtaining a determination this option supports those workplaces that have bargained in the past by removing the requirement to obtain a Majority Support Determination where the following two conditions are met.

- the employees are covered by an agreement that has passed its nominal expiry date within the last five years; and
- the scope of the proposed agreement is substantially similar to the expired agreement.

Single-interest bargaining stream

This option makes the Single Interest Bargaining Stream fair, simple and more accessible for employers. The proposed changes will increase the ability for multi-employer bargaining amongst businesses with common interests by:

- Removing the requirement to obtain a Ministerial declaration.

- Removing unnecessary criteria and instead requiring the Fair Work Commission to be satisfied of the following when considering a single interest bargaining authorisation:
    - the employers have clearly identifiable common interests (for example geographic location and/or a common regulatory regime); and
    - the authorisation is not contrary to the public interest.
- Existing requirements to consider the history of bargaining between the parties, whether it is more appropriate to make separate agreements, whether the employers operate competitively and whether they are substantially government funded will be removed.
- Allowing employers to be required to come to the table and engage in good faith negotiations only if the relevant employees agree via a Majority Support Determination that they wish to bargain in the stream. (Utilising the existing definition of small business employer in section 23 of the Fair Work Act, employers with less than 15 employees are exempt from this process. It is intended small businesses will instead access the Cooperative Workplaces Bargaining Stream – see below.)
- Allowing the Fair Work Commission to decide (on application by either party or on its own motion) that bargaining representatives who have a history of repeated non-compliance with the Fair Work Act are not permitted to enter the stream.
- Allowing employers to 'opt-out' of the stream if the Fair Work Commission is satisfied that it is no longer appropriate for the employer to be covered because of a change in the employer's circumstances; and
- Allowing employers to voluntarily apply to be covered by an existing single interest agreement where the relevant employees of the employer have agreed by majority vote, where this is not contrary to the public interest. Non-consenting employers could also be brought into an existing single-interest agreement if a Majority Support Determination is successful, the employers already covered by the single-interest agreement do not object and the Fair Work Commission is satisfied the coverage of the new employer is appropriate.
- Requiring at least some of the employees involved in bargaining to be represented by a registered organisation.

Low-paid bargaining stream (supported bargaining)

This option clarifies access to the low-paid bargaining stream and changes the name of the stream to the 'Supported Bargaining Stream'. The entry test for the stream would be replaced with the requirement that to make a supported bargaining authorisation, the Fair Work Commission must be satisfied that it is appropriate for the employers and employees to bargain together, having regard to:

- The prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and
- Whether the employers have clearly identifiable common interests (for example, geographical location, nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises, being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory; and
- Whether the likely number of bargaining representatives would be consistent with a manageable collective bargaining process; and
- Any other matters the Fair Work Commission considers appropriate.

The Fair Work Commission must also be satisfied that at least some of the employees involved in the bargaining are represented by an employee organisation. An employer and employees covered by a single-enterprise agreement that has not passed its nominal expiry date could not be compelled to bargain in the Supported Bargaining Stream.

However, if on application of a relevant union, the Fair Work Commission is satisfied that the single-enterprise agreement was made with the main intention to avoid being brought under a Supported Bargaining Stream authorisation , the employer could be required to bargain in the stream.

Where an employer is covered by a current Supported Bargaining Stream authorisation, that employer would not be able to agree to, initiate or be required to bargain for a single-enterprise agreement at the same time.

Employers could become covered by an existing Supported Bargaining Stream agreement where appropriate:

- if the employer consents and the relevant employees of the employer have agreed by majority vote, or
- if employees obtain a Majority Support Determination.

Special rules already apply to bargaining under the current low-paid stream, which will be retained in the Supported Bargaining Stream. These include:

- Bargaining orders are available and applications to deal with bargaining disputes can be made by one bargaining representative only.
- The Fair Work Commission can provide assistance to bargaining representatives on its own initiative, including by directing relevant third parties (e.g., third party funding providers) to attend conferences if their participation is necessary for the making of an agreement.
- The Fair Work Commission can make a binding workplace determination, setting terms and conditions of employment, if the parties are unable to reach agreement through the new intractable bargaining dispute process.

The Fair Work Commission will be empowered to arbitrate where, taking into account the views of the bargaining parties, it is satisfied there is no reasonable prospect of agreement by other means, and the making of an intractable bargaining declaration requiring the Fair Work Commission to arbitrate the dispute is reasonable in all the circumstances.

Protected industrial action will be permitted under the Supported Bargaining Stream, subject to a successful protected action ballot; and the provision of 120 hours' notice; and a mandatory requirement for the parties to attend Fair Work Commission conciliation concurrent with the Protected Action Ballot process. The requirement for conciliation will significantly minimise the likelihood of industrial action being taken and the requirement for 120 hours' notice will provide employers adequate time to put in place contingencies.

Bargaining representatives with a history of repeated non-compliance with the Fair Work Act will not be permitted to enter the stream.

Multi-employer bargaining stream (cooperative workplaces stream)

This option is to amend the existing multi-employer bargaining stream to create the Cooperative Workplaces Bargaining Stream. The Cooperative Workplaces Bargaining Stream will be open to employers of all sizes and is expected to be particularly attractive to smaller businesses. Since 2019 there have only been 49 agreements made using the existing stream, in industries including education, health and financial and insurance services.

Under the proposed Cooperative Workplaces Stream:

- At least some of the employees involved in the bargaining must be represented by a registered organisation.
-
- No party has a right to take industrial action of any kind.
- The Fair Work Commission cannot issue orders, mandate conciliation, or arbitrate an outcome, other than conciliation or arbitration by consent of all parties.

- Bargaining parties may access additional support to make an agreement through the Fair Work Commission's cooperative workplaces program, upon request.
- Bargaining parties with a history of repeated non-compliance with the Fair Work Act will not be permitted to enter the stream.
- Employers can opt into a Cooperative Workplace Agreement, provided their employees genuinely agree, and it is not contrary to the public interest.

Industrial action

This option retains Protected Action Ballots, although extends the validity of a protected action ballot to three months from the date it was approved by employees to reduce unnecessary administrative burden and de-escalate disputes where protected industrial action is on the table.

It adds an additional requirement before protected industrial action can be taken: parties must attend Fair Work Commission conciliation during the industrial action notice period before the first industrial action is taken under each Protected Action Ballot (i.e. 120 hours for Single Interest and Supported Bargaining Stream multi-employer agreements; and 3 working days for single-enterprise agreements).

Lastly, the Fair Work Commission will be empowered to establish a publicly-accessible panel of pre-approved ballot providers. Currently, the Fair Work Commission needs to certify on each occasion that a ballot agent other than the Australian Electoral Commission (AEC) satisfies the criteria for appointment. Pre-approval will reduce inefficiencies by providing stakeholders with assurance of integrity and avoiding the need for Fair Work Commission Members to undertake unnecessary work on each occasion. Further, electronic ballot providers will enhance the accessibility and reduce the time and cost of undertaking protected action ballots, relative to the current default option of postal or on-site ballots via the AEC.

Positive measures in agreements

This option amends the Fair Work Act to ensure that positive measures to address gender and other forms of discrimination are permitted. This reform is consistent with the outcomes of the Jobs and Skills Summit, as noted above. Positive measures in male-dominated industries may assist in substantive equality by providing women the opportunity to seek roles in higher-paying industries, which would then assist in decreasing the gender gap. This will be enacted in tandem with government support to increase female participation within the workforce as a whole and male-dominated sectors

Summary

This option is preferred because it improves access to single and multi-employer bargaining and returns fairness to Australia's collective bargaining framework. Those businesses and employees that wish to make single-enterprise agreements will be able to do so. The proposed amendments give businesses and workers more flexible and supported options to engage in collective bargaining, including for multi-employer agreements, to achieve positive outcomes for both. The proposal encourages employers to bargain voluntarily with their workers but also strengthens the options for workers to bring their employer to the bargaining table and to achieve positive bargaining outcomes

Option 3 - Ease some restrictions and remove some limitations to access single and multi-employer bargaining

Single enterprise bargaining stream

Under this option, there would be no changes to the Majority Support Determination process for the single enterprise bargaining stream.

Single-interest bargaining stream

This option retains the existing framework for the Single Interest Bargaining Stream but removes the requirement for a Ministerial declaration, instead requiring the Fair Work Commission to be satisfied that:

- the employers have clearly identifiable common interests (for example geographic location and/or a common regulatory regime), and
- the authorisation is not contrary to the public interest.

Existing requirements to consider the history of bargaining between the parties, whether it is more appropriate to make separate agreements, whether the employers operate competitively and whether they are substantially government funded will be removed. This would reduce complexity of provisions, but retain some red tape.

Low-paid bargaining

It is proposed that access to the low paid bargaining stream is broadened, and the name is changed to Supported Bargaining Stream. Access to the stream would be on application by a relevant union and the Fair Work Commission would need to be satisfied that there is:

- some commonality or nexus between employers such as geographic or common regulatory regime; or
- employee support for entering into the Supported Bargaining Stream

The Fair Work Commission would provide assistance to bargaining representatives to facilitate bargaining in this stream. This option would allow access to industrial action in order to make it more attractive to employees and unions, with a ballot required at each individual employer. This addresses issues about the current complexity of requirements and also the lack of bargaining power for low paid workers.

Multi-employer bargaining stream

Under this stream, the only change proposed is to require that employers can only use the stream if the employer and employees are adequately represented. The parties would be adequately represented if the Fair Work Commission is satisfied that their bargaining representatives are either registered organisations or have sufficient training, experience and expertise to represent the parties having regard to the circumstances of the particular bargain.

Industrial action and positive gender measures in agreements

Under this option there would be no changes to industrial action or to allow Positive Gender Measures in Agreements.

Summary

This option is not preferred because it would not allow for greater access to enterprise bargaining for low paid sectors. It retains the level of red tape for the single interest stream that has been a consistent barrier to entry and doesn't rectify issues with starting bargaining.

3.4 Remove unnecessary complexity and make the Better Off Overall Test simple, flexible and fair

Option 1 - Status Quo

Under this option, there will be no amendment to the legislation. Employers and employees will continue to bargain in accordance with the framework established by the Fair Work Act and the Fair Work Commission will continue to assess applications for approval of enterprise agreements against current rules and the interpretation of those rules.

Maintain the enterprise agreement approval process

- Under the Fair Work Act an enterprise agreement has been genuinely agreed to by the employees covered by the agreement if the Fair Work Commission is satisfied that:
- the employer, or each of the employers, covered by the agreement:
    - took all reasonable steps to ensure that during the access period for the agreement, the employees were given a copy of the written text of the agreement, and any other material incorporated by reference in the agreement or that the employees had access through the access period to those materials
    - took all reasonable steps to notify the employees, by the start of the access period for the agreement, of the time and place at which the vote will occur and the voting method
    - took all reasonable steps to ensure that the terms of the agreement, and the effect of those terms, were explained to the employees and the explanation was provided in an appropriate manner, taking into account the particular circumstances and needs of the relevant employees, and
    - did not request the employees to approve the enterprise agreement until 21 clear days after the last notice of employee representational rights was given;
- The agreement was made:
    - if the proposed agreement is a single-enterprise agreement – when a majority of those employees who cast a valid vote approved the agreement, or
    - if the proposed agreement is a multi-enterprise agreement – when a majority of the employees of at least one employer who cast a valid vote approved the agreement; and
- there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

Maintain the current Better Off Overall Test

An enterprise agreement currently passes the Better Off Overall Test if the Fair Work Commission is satisfied that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant Modern Award applied.

Summary

Consensus was reached at the Jobs and Skills Summit that the existing genuine agreement requirements are onerous, complex and unnecessarily prescriptive. This option is not preferred because it retains unnecessary complexity and red tape.

Without improvements to the pre-approval and approval process for agreements, the other preferred measures in this package will be undermined.

Option 2 - Remove unnecessary complexity and make the Better Off Overall Test simple, flexible and fair (preferred)

This option includes amendments to simplify the enterprise agreement pre-approval process and the Better Off Overall Test. This option ensures that the pre-approval process is flexible, common sense and user-friendly. The approval process will be returned to its original intent reducing regulatory burden while ensuring the independent Tribunal is adequately empowered to oversee bargaining and bargaining outcomes, ensuring fairness and efficiency.

Simplifying the enterprise agreement approval process

This option would replace the above steps and the current genuine agreement requirements in the Fair Work Act with a broad requirement that the Fair Work Commission must be satisfied that the agreement has been genuinely agreed. To assist parties, guidance (such as a statement of best practice) would be issued by the Fair Work Commission to set out clear expectations for the bargaining parties. The guidance would include requirements to consider matters such as:

- the ability of employees to vote in a free and informed manner on the agreement
- the active participation of employees or their representatives in the bargaining process (including their access to relevant expertise, advice and representation)
- whether employee bargaining representatives, and employees representing registered organisations, have been provided sufficient training and time during working hours to effectively represent their constituents in bargaining
- the authenticity and fairness of the agreement-making process as identified by the Federal Court in cases concerning 'genuine agreement'.

Making the Better Off Overall Test simpler

This option would amend the Fair Work Act to provide that:

- When considering whether a proposed enterprise agreements meets the Better Off Overall Test, the Fair Work Commission give primary consideration to the views of the bargaining representatives;
- The Better Off Overall Test is applied as a global test and does not require comparison with awards on a line-by-line basis, consistent with the original intention;
- The 'any prospective employee' test is replaced with a 'reasonably foreseeable circumstances' test, to address a major complexity with the current requirements.

As a safeguard, the option includes a new 'reconsideration process' which will allow employees or their representatives to seek a reconsideration of the Better Off Overall Test where there has been a material change in working arrangements, or where their circumstances were not properly considered during the approval process. Reconsideration might involve the employer providing an undertaking at approval that says they will provide reconciliations and backpay if required, or by amendment to the agreement, or both of these measures. The intention of these provisions is to address potential issues relating to material changes to work not considered at the initial approval stage. The reconsideration process is not intended to undermine the validity of the agreement or open the agreement up for renegotiation or complete reconsideration.

The Fair Work Commission will be given discretion to work with the parties during the approval process in a constructive manner, to consider specific objections and to vary or excise terms that do not otherwise meet the Better Off Overall Test.

The aim of this proposal is to limit undertakings (which can make it far harder for workers and managers to interpret the document and lead to future legal disputes if poorly drafted) and delays in agreement commencement.

Summary

This option is preferred because it addresses procedural inefficiencies that have developed over the life of the current bargaining framework. Addressing onerous pre-approval steps, returning the Better Off Overall Test to its original intent and ensuring that agreements reached in good faith between bargaining parties are respected, makes the bargaining process more attractive to all. This option supports the other preferred options by making the bargaining process itself flexible, simple and fair.

Option 3 – simplifies the enterprise agreement approval steps and amend the Better Off Overall Test to apply to classes or groups

This option includes amendments to simplify the genuine agreement requirements by reducing them to the employee ballot to approve an agreement and amend the Better Off Overall Test.

Simplifying the enterprise agreement approval steps

This option would remove most of the pre-approval steps and only retain the employee ballot to approve the agreement. For example:

- The agreement was made:
    - if the proposed agreement is a single-enterprise agreement – when a majority of those employees who cast a valid vote approved the agreement, or
    - if the proposed agreement is a multi-enterprise agreement – when a majority of the employees of at least one employer who cast a valid vote approved the agreement.

Better Off Overall Test

This option would amend the Better Off Overall Test to apply the test to specified classes or groups of employees, removing the requirement that it be applied 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.

Summary

This option is not preferred because by removing all pre-approval requirements apart from the employee vote, there are no safeguards to ensure that employees genuinely agreed to the agreement. The preferred option however also simplifies the current pre-approval steps but includes safeguards such as the statement of best practice issued by the Fair Work Commission to assist parties to ensure that employees genuinely agree to the enterprise agreement. Similarly, changes to the Better Off Overall Test must be carefully considered to ensure that independent oversight is not removed at the expense of fairness in bargained outcomes.

3.5 Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements

Option 1 - Status Quo

Under this option, there will be no amendment to the legislation and the powers of the Fair Work Commission to assist parties in bargaining will remain as they are. As discussed above, under section 240 of the Fair Work Act a bargaining party may apply to the Fair Work Commission for assistance to deal with a bargaining dispute and the Fair Work Commission can arbitrate the dispute with the agreement of both bargaining parties. For voluntary multi-employer bargaining under section 172 (3) of the Fair Work Act, all bargaining parties must agree to the Fair Work Commission conciliating and/or arbitrating a dispute.

This option is not preferred because it does not address the inefficiencies caused by surface and protracted bargaining. The options for parties to progress bargaining where negotiations are at a deadlock, or to bring protracted bargaining to an end, are limited. Generally, the only option is industrial action, which can inflame tensions and harm businesses and employees. Stakeholders agree that inefficiencies in the bargaining system can act as a disincentive for employers to come to the table and bargain with their employees. Maintaining the status quo is likely to contribute to a decline in bargaining or act as a dampener on the anticipated positive effects of the other measures proposed by this reform.

Option 2 - Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements (preferred)

This option increases the capacity of the Fair Work Commission to deal with bargaining disputes under the Fair Work Act. It applies to the Supported Bargaining Stream, Single Interest Bargaining Stream and Single Enterprise Bargaining Stream, but not the Co-Operative Workplaces Stream (use of which is entirely voluntary). These changes:

empower the Fair Work Commission to make a newly created intractable bargaining declaration if, taking into account the views of the bargaining parties, it is satisfied that there is no reasonable prospect of agreement by other means, and making the declaration is reasonable in all the circumstances.

- Permit a bargaining representative to unilaterally apply to the Fair Work Commission for an intractable bargaining declaration;
    - Once the Fair Work Commission has decided to arbitrate the agreement (by making an intractable bargaining declaration), the Fair Work Commission be given discretion to order the parties into a further negotiation period, for example 21 days, to reach agreement by themselves to avoid arbitration, and encourage parties to take a proportionate approach to proceedings (for instance, last-offer arbitration rules).
    - The Fair Work Commission would determine all terms of the agreement not agreed at the point it decides to arbitrate, to avoid agreement-making becoming a series of arbitrated outcomes.
    - The Fair Work Commission would issue an intractable bargaining workplace determination, incorporating all agreed and arbitrated terms, at the conclusion of the arbitration process, which brings the bargaining period to an end.

This option addresses a gap in the framework for progressing bargaining where surface bargaining is occurring or parties are in deadlock or protracted bargaining and is preferred. This proposal gives bargaining representatives alternate options to progress bargaining with the assistance of the independent Tribunal. The proposal ensures that bargaining continues in good faith and that the Fair Work Commission does not become a default or preferred option. The Fair Work Commission will only be able to arbitrate when it considers that bargaining is genuinely intractable, and it will have the powers to bring parties together for 'last-ditch' attempts at resolution before arbitration

Option 3 - Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements

This option still uses mandatory arbitration like option 1 but stipulates the method of arbitration and sets boundaries to the outcomes that the Fair Work Commission can order.

This option would see the Fair Work Commission required to finalise arbitration within a set period of time (for example 3 months) after the intractable bargaining declaration is made and would require the Commission to determine outcomes within defined boundaries.

There are several options for defining the boundaries of the Fair Work Commission's power to determine agreements. The employer and employees could be required to make their 'last-offer' and the Fair Work Commission determine which of the two offers should be accepted, the power to award increases in wages could be limited to no more than an objective marker (e.g. CPI) +/- a pre-determined percentage, the parties can put in their log of claims on outstanding matters and the Fair Work Commission be required to issue a determination that is no lower or higher than the two positions .

This option is not preferred. Defining the process and limits of the Fair Work Commission's powers to arbitrate has the potential to undermine good faith bargaining generally (i.e. leads to gaming the system) and unnecessarily limits the ability of the Fair Work Commission to act flexibly and work with the parties to reach positive outcomes. Setting a defined period of time in which the Fair Work Commission has to arbitrate will provide comfort to those concerned that third-party arbitration is a lengthy and costly process but any period of time chosen would be artificial and arbitrary. Dictating process to the independent, quasi-judicial Tribunal also undermines the independence and expertise of the Fair Work Commission and its Members. The Commission generally has a positive track record as relates to measuring and setting its own performance measures to meet community expectations and should be permitted the broadest discretion to continue doing so

4. What is the likely net benefit of each option?

There are limited observations able to be made through macroeconomic data, which may not be ideally suited to isolating the effects of reform. Related to this, there is no single measure by which to gauge whether a workplace relations system overall has been successful – examples of measures used previously are:

- lower unemployment
- fairer terms and conditions of employment
- anchoring low inflationary expectations
- higher real net national disposable income
- increased productivity.

As such, formally outlining the precise impacts of individual proposals with any certainty is not possible – rather we have shown, based on the research and data available, the probable impacts on employees and employers, while acknowledging the limitations of the data. Beyond this, the outcomes of any negotiation between employers and employees is determined by the parties, and the results can be wide-ranging and difficult to predict. This is because a business or businesses and employees will make enterprise agreements that suit their specific circumstances and though there is some evidence of higher wages and productivity improvements from enterprise bargaining, that may not be directly attributable to any one aspect of the system.

4.1 Ensure the process for agreement termination is fit for purpose and fair

Problem: Employers applying to unilaterally terminate an agreement can undermine ongoing negotiations for a new enterprise agreement by threatening a severe consequence for not agreeing to the terms and conditions of the proposed new enterprise agreement.
Option 1 is the status quo. There will be no amendment to the legislation. Employers can continue to rely on the precedent set by the Fair Work Commission regarding unilateral termination and continue to apply, or threaten to apply, to the Fair Work Commission to terminate a nominally expired agreement.
Option 2 (preferred) ensures the process for agreement termination is fit for purpose and fair. This option retains the ability to terminate agreements in exceptional and appropriate circumstances and directly addresses the emergence of the unfair bargaining tactic of applying to, or threatening to, terminate agreements.
Option 3 (not preferred) ensures the process for agreement termination is fit for purpose and fair through a 'front end' test. The test would prevent the Fair Work Commission from considering applications to terminate an enterprise agreement after the nominal expiry date under section 225 of the Fair Work Act, such as preventing an application from being made during bargaining.

Option 1 – Status Quo

The net effect of not modifying current provisions is that the behaviour of some employers who choose to terminate an enterprise agreement past its nominal expiry date will continue and ultimately contribute to a bargaining process that is not constructive for either party. On termination of an enterprise agreement, employees will have their pay and conditions determined by the relevant Modern Award or the minimum safety net, which would have a significant detrimental effect on them. If a termination occurs during bargaining, it may force employees to vote for an agreement that provides for less beneficial terms than their current agreement, and significantly strengthen the bargaining power of the employer.

The Department considers that the ongoing impact on employees of the ability for employers to seek to terminate their enterprise agreements unilaterally is unacceptable. The impact the status quo also has on the dynamics of enterprise bargaining, by allowing employers to circumvent existing dispute resolution processes, harms the workplace relation system and may be contributing to declining rates of bargaining.

Case study
In January 2022, a major Australian employer applied to the Fair Work Commission to terminate its nominally expired enterprise agreement due to deadlocked bargaining negotiations. The employer had been bargaining with its employees for a new agreement for the last 6 months, but that agreement had been rejected by employees with 97 per cent voting no. The new agreement included a 2 year pay freeze and more flexible rostering. If the Fair Work Commission had agreed to terminate the agreement, employees would have reverted to the Modern Award, resulting in a 37 per cent pay cut to some of those employees according to union estimates.
A few months after the employer lodged the termination application, 85 per cent of its employees voted to approve the new agreement, even though the terms and conditions were largely the same as the agreement that had attracted the 97 per cent 'no' vote.

Option 2 – Ensure the process for agreement termination is fit for purpose and fair (preferred)

The Department recognises that the reasons for making an application to terminate an enterprise agreement are multifaceted and can be legitimate. Agreements are often terminated for administrative reasons (there are no employees covered by the agreement) or out of fairness (terminating a 'zombie' agreement) and these applications should be able to continue.

The preferred option promotes enterprise bargaining in the workplace. Ensuring the Fair Work Commission is satisfied that the continued operation of the agreement satisfies one of the statutory criteria will mean that employers must clearly demonstrate the basis for their application to the Fair Work Commission, which may increase the cost of applying to have an agreement terminated. There will also be a financial impact for employers whose application to terminate an enterprise agreement might otherwise have succeeded and resulted in savings in employee entitlements.

Impacts on employers

The cost impact of this proposal has been estimated by assessing the impact on employers from having to comply with the new requirements. The number of agreement termination applications from 2020-21, the most recent year for which data is available, has been used as the base for the costing. Out of 270 applications, 1 matter potentially would have been impacted by this option, as it was made by an employer and opposed by employees.[61] On this basis, the Department estimates that the regulatory burden would be minimal.

We assume that a business that is having issues with financial viability will have readily available evidence to demonstrate that. Then we make a conservative assumption that it would take a full time HR Professional an additional 3 days to prepare and lodge material that illustrates that the businesses enterprise agreement is affecting business viability.

[61] *Ladehai Pty Ltd ATF Kessells Road Unit Trust T/A BIG 4 North Star Holiday Resort & Caravan Park* [2021] FWCA 3504

- Therefore, the following formula will be used to calculate the cost to business:
    - (Total hours x labour cost) X number of applications 2020-21, where:
        - Total hours = Number of days X number of working hours in a day
        - Labour cost = $79.63 per hour

Based on data from past reporting year, the impact to business per annum would be:

((3 x7.5) x $79.63) x 1 = $1,792

Employers who previously would have had their agreement terminated will have to apply their current agreement or replace it with a new agreement. These costs are firm specific and impossible to cost accurately. A major benefit for employers of all the enterprise bargaining reforms is flexible options to come to agreement that meets the needs of their business and a new streamlined approval process .

The Department considers that this modest impact to business is warranted given the gravity of consequences for employees if their enterprise agreement is terminated without their consent.

The Department estimates that it will take approximately 15 mins for an employer to read a factsheet at the Fair Work Commission website on these provisions at a cost of approximately $20 (25% of $79.63).

Impacts on employees

This option will rebalance the power in bargaining by ensuring that employees cannot be coerced into accepting inferior conditions due to the threat of falling back on the Modern Award. Such was the case in the *Griffin Coal* termination case where employees would have had their pay cut by an estimated 40 per cent, or the case study above where employees did accept inferior conditions after being threatened with termination of their existing agreement. Because termination is often used as a threat but is not acted on, i.e. no termination application is lodged with the Fair Work Commission, there is no way of measuring how many employers use the threat of termination as a bargaining tactic, and what sort of reduction in pay and conditions employees therefore accept. However, closing this loophole in the current bargaining framework will help to level the playing field in bargaining for a new agreement.

Employees may still face the impact of resisting an application for unilateral termination of their agreement. However, the application, or the threat of an application, will carry less weight as the outcome will not result in the loss of take-home pay. This will allow employees to continue to engage with enterprise bargaining in a manner intended by the Fair Work Act. This option will also reduce the likelihood of a significant loss of entitlements for employees because of their agreement being terminated.

There will be some cases where the Fair Work Commission can terminate an agreement resulting in a loss of employee pay and conditions, where there is a significant threat to business viability, termination would likely save jobs, and if the agreement includes termination entitlements above the award, that the employers give a guarantee that these will be maintained. The Department considers that in situations of a significant threat to viability, it would be preferable to terminate an agreement if it will maintain employees' jobs, even if there is a reduction in pay and entitlements.

Option 3 – Ensure the process for agreement termination is fit for purpose and fair through a 'front end' test

This option applies a 'front end test' to agreement termination. There may be some minimal costs on businesses, 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. There may, for example, be rationalising

agreements or other functions of an old agreement which 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.

While this option goes some way to addressing the behaviour the Government is seeking to prevent, the blunt nature of a barrier to applications limits the ability of the Fair Work Commission to exercise discretion and judgement as to the merits of each matter. It may also not be effective in overall preventing this behaviour, as employers may find ways to bring viable applications outside these windows of opportunity.

4.2 Sunset 'zombie' agreements

Problem: Zombie agreements were not required to be compared against Modern Awards when they were ~~first~~ made (unlike enterprise agreements) and continue to operate unless they are terminated or replaced. Employees covered by zombie agreements are very likely to have less beneficial terms and conditions than they would otherwise receive under the relevant Modern Award.
Option 1 is the status quo. Under this option no action would be taken to sunset 'zombie' agreements. 'Zombie' agreements will continue to operate until terminated on application to the Fair Work Commission or, in relation to collective agreement-based transitional instruments, they are replaced by an enterprise agreement or workplace determination.
Option 2 (preferred) sunsets 'zombie' agreements but provides employees with the ability to extend. This option would automatically sunset all 'zombie' agreements after three months after the commencement of the provisions, but also permit applications to the Fair Work Commission by anyone covered by a collective zombie agreement to preserve their agreement for a 12-month period if they meet certain criteria.
Option 3 (not preferred) sunsets 'zombie' agreements only. This option would automatically terminate all 'zombie' agreements 12 months from the commencement of the provisions.

Option 1 – Status Quo

The net effect of not modifying the current provisions is that 'zombie' agreements will continue to operate, resulting in employees continuing to be disadvantaged by inferior entitlements when compared with the modern employment safety net. Employers on the other hand will continue to enjoy a competitive advantage over their competitors who must comply with the modern employment safety net.

Assessing the precise number of 'zombie' agreements has always been difficult.[62] There is no way of measuring exactly how many 'zombie' agreements continue to operate and how many employees they may cover. In September 2019, the Department estimated that 300,000 to 450,000 employees could still be covered by 'zombie' agreements, 95 per cent of which were in the private sector. This figure was derived using internal analysis based on the ABS Employee Earnings and Hours publication and the Department's Workplace Agreements Database.

In some instances, while an agreement-based transitional instrument applies, a Modern Award does not apply. This rule applies if the transitional instrument is a workplace agreement or determination, preserved State agreement, Australian Workplace Agreement or pre-reform Australian Workplace Agreement. In other instances, the old agreement-related instrument prevails over the Modern Award to the extent of the inconsistency.

As it is difficult to assess how many zombie agreements are still in operation, there is no way of measuring how many of those zombie agreements include conditions that fall below the minimum provided for in Modern Awards, or how many might pay above award entitlements. A Senate Committee inquiry from the early 2000s reported that only 38 per cent of

[62] See for example comments made in https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_Employment_and_Workplace_Relations/Completed_inquiries/2004-07/indust_agreements/report/c01.

Australian Workplace Agreements covered by a survey made reference to wage rises, and in 41 per cent of Australian Workplace Agreements one or more loadings such as overtime had been 'absorbed' into an overall rate of pay. One recent agreement that have been terminated on application to the Fair Work Commission were depriving employees of approximately $5 per hour on Saturdays, $10 on Sundays and $24+ on public holidays.[63] Another agreement from 2011 provided casuals with 20 per cent loading while under the award they would have been entitled to 25 per cent.[64]

Under the status quo, there must be an application to terminate a zombie agreement, or they continue to operate in perpetuity. This means that the onus is on employees (where they are not represented by a union), to apply to the Fair Work Commission to terminate the agreement. For employees, there is an incentive to apply to terminate their agreement if the Modern Award would provide for better pay and conditions, but many employees are not familiar with the process involved in terminating an agreement and so may not have acted to terminate it. While not unheard of, it is uncommon for employees to apply terminate an agreement. In many instances, due to the age of the instruments, confidentiality in relation to individual instruments, and difficulty in locating some older instruments, employees may not be able to access relevant information to make a complete application for termination.

For most employers that are currently able to pay below award rates through the continued operation of their zombie agreements, they benefit from the status quo as they have a lower wage bill than they would have under the Modern Award. Therefore, these employers enjoy an unfair competitive advantage over other businesses in their sector who pay award rates at a minimum.

Even a small number of zombie agreements that pay under the minimum wages and entitlements is inconsistent with Government's objectives to boost wages and to create fair workplaces.

Option 2 – Sunset 'zombie' agreements but provide employers and employees with the ability to extend (preferred)

This option creates some increased regulatory costs for those businesses that are covered by a zombie agreement. These businesses will need to engage in the bargaining system to agree new and fair entitlements or otherwise revert to the relevant Modern Award.

The regulatory cost on the business will most likely be the impact of having to change their payroll system to reflect the changes from either reverting to the Modern Award or from being covered by a new agreement. Payroll usually costs about $10 a month per employer so we would cost in an additional $5 per employee for one month to change their payroll.[65]

For an average size small business of 10 employees the cost would be $5x10 = $50

For an average size medium business of 100 employees the cost would be $5x100 = $500

For an average sized large business of 300 employees the cost would be $5x300 = $1,500

Employers wishing to be covered by an enterprise agreement would need to negotiate a new enterprise agreement, comply with the relevant bargaining obligations and seek approval for any proposed enterprise agreement by the Fair Work Commission. If employers choose to bargain rather than be covered by the Modern Award, the cost to bargain under the existing bargaining system is calculated as

The time spent by staff on bargaining per day is 4.6 hours per day per during the bargaining period for an employer, which is based on the methodology developed in the RIS for the Fair Work Amendment Bill 2014 and the Fair Work Amendment (Securing Australia's Jobs and Economic Recovery) Bill 2020. The Department has estimated that a staff member on a bargaining team would spend approximately 23 hours per week on the negotiations and an employee would spend 60% of

[63] *Empire Holdings (Qld) Pty Ltd t/a Empire Hotel and Cloudland* [2022] FWCA 62.
[64] *Zentfeld v IPCA (VIC, ACT & NT)* [2022] FWCA 1941
[65] Bark.com, *How much do Payroll Services cost?*, accessed 3 October 2022,

their ordinary weekly hours on bargaining. The median bargaining time is calculated using data from the forms used to apply for agreement approval and is the time taken from when bargaining commences to the ballot for the agreement.

Hours per day bargaining x labour cost x median bargaining time per employer (by size of business)

Small business: 4.6 x $79.63 x 62 = $22,710

Medium Business: 4.6 x $79.63 x 150 = $54,944

Large Business: 4.6 x $79.63 x 225 = $82,417

However, if the reforms to simplify the agreement pre-approval steps and the Better Off Overall Test (outlined in section 3.4 and 4.4) are agreed to, the process will be simpler and quicker for bargaining parties, therefore resulting in a cost reduction compared with the costs outlined above.

Bargaining could disrupt business operations – for example, there may be front-end costs of bargaining such as preparing agreement terms and explanatory materials. These issues are, however, unlikely to have a significant impact for most businesses, noting that the sunset period is 12 months so employers can fit tasks such as preparing material around their business operations. Any costs incurred would have been significantly offset over time by having an agreement that paid below the rates that their competitors would have paid. Where employers have voluntarily maintained employment conditions in line with Modern Award entitlements, employers may be able to maintain existing arrangements without bargaining for a new enterprise agreement.

Businesses currently using zombie agreements to pay below market rates for labour and therefore gain a competitive advantage will be impacted by this option. The Department observes that these businesses may not be operating at the same level of efficiency as their competitors, as they have not had to face the discipline of paying market rates for labour. The looming sunsetting of their zombie agreements will cause these businesses disruption, but over time may improve their productivity as they must adapt their business practices to modern workplace conditions. This will also have positive impacts for businesses not using zombie agreements, since they will not be facing competitive pressure based on labour costs.

The ability to apply for a transition period of up to four years will minimise regulatory burden and cost by giving employers and employees more time to explore alternate options and, where appropriate, negotiate replacement conditions and entitlements in a new enterprise agreement, measured against the modern safety net.

The Fair Work Commission can approve an extension of the sunset date if it is satisfied that employees would otherwise be better off overall when compared to the Modern Award. This would ensure that those 'zombie' agreements that disadvantage employees would be captured by the policy, while allowing those that do not disadvantage employees to continue for a further period to allow the participants to modernise their industrial arrangements.

The Department recognises that employees covered by individual-based agreements like Australian Workplace Agreements could be impacted by the automatic sunsetting of their agreement. One benefit for employees is for those covered by Australian Workplace Agreements who are unable to terminate their instrument because they have lost the paperwork necessary to make an application. The Department is aware the Fair Work Commission receives regular inquiries from applicants without the requisite information to terminate their Agreement.

The Department is cognisant of the risks automatic sunsetting poses. Employees on individual agreements are generally paid in excess of award rates, and the Department is aware of their use in the mining sector, for instance. The risk posed by this would be that those affected employees would be only covered by their relevant Modern Award. The Department considers this risk is mitigated by the following factors:

- An employee covered by an Australian Workplace Agreement can currently unilaterally apply to the Fair Work Commission to terminate the instrument.
- Employees still covered by Australian Workplace Agreements tend to be in high-paid, high-skilled roles. Employers are likely to retain these employees by offering commensurate remuneration via a common law contract.

- The ability to apply to extend the sunset date of these instruments offers a safeguard against disadvantage.

A new process in the Fair Work Commission to apply for an extension of the sunset date would involve some complexity and regulatory burden as employers would need to fill out and submit an application to extend and engage with requests from the Fair Work Commission to submit material or attend conferences. The Fair Work Commission is currently in the process of moving all agreement related forms online, and conferences are generally held virtually which is more convenient for most users.[66] It is not anticipated that there are significant numbers of 'zombie' agreements that would have superior employee entitlements as they were made so long ago, although it is impossible to be precise about expected numbers.

The Department estimates that it will take approximately 15 minutes for an employer to read a factsheet at the Fair Work Commission website on these provisions at a cost of approximately $20 (25% of $79.63).

The Department considers that this minor regulatory cost for businesses is acceptable, when compared to the significant impact that the status quo has on affected employees, businesses without zombie agreements, and the confidence the public has in the enterprise bargaining system.

Option 3 – Sunset 'zombie' agreements only

This option creates some increased regulatory costs for impacted businesses. These businesses will need to engage in the bargaining system to agree new and fair entitlements or otherwise revert to the relevant Modern Award. The cost to bargain is the same as the bargaining costs provided in option 2 above:

Hours per day bargaining x labour cost x median bargaining time per employer (by size of business)[67]

Small business: 4.6 x $79.63 x 62 = $22,710

Medium Business: 4.6 x $79.63 x 150 = $54,944

Large Business: 4.6 x $79.63 x 225 = $82,417

Employers wishing to negotiate a new enterprise agreement would need to comply with the relevant bargaining obligations and seek approval for any proposed enterprise agreement by the Fair Work Commission. The Fair Work Commission would assess any new enterprise agreement in the ordinary way. Bargaining could disrupt business operations, although is unlikely to have a significant impact for most businesses. In some instances, employers may be able to maintain existing arrangements without bargaining for a new enterprise agreement by, for example, varying common law contracts of employment or by relying upon individual flexibility arrangements under Modern Awards.

Employers wishing to revert to the relevant award will be required to review HR/payroll arrangements to ensure compliance As payroll usually costs about $10 a month per employer, we have calculated an additional $5 per employee for one month to update payroll systems to reflect the pay and conditions under the Modern Award.

For an average size small business of 10 employees the cost would be $5x10 = $50

For an average size medium business of 100 employees the cost would be $5x100 = $500

For an average sized large business of 300 employees the cost would be $5x300 = $1,500

There is a risk that for some employees, automatic termination of 'zombie' agreements will disadvantage them. This risk would arise where a 'zombie' agreement provides for superior entitlements overall than those in the relevant Modern Award or enterprise agreement. The Department does not have data on how many employees have superior entitlements under their zombie agreement, but the Department assumes the number would be low, as any superior rates would likely have now fallen

[66] Fair Work Commission, *President's Statement - Enterprise agreements timeliness and online forms*, 20 October 2022.
[67] Department of Employment and Workplace Relations, Workplace Agreements Database, 2022, unpublished data. Median bargaining time for all agreements

below the award. It is possible that in some cases, employers have chosen to voluntarily pay above award rates despite being covered by a zombie agreement. . The risk would only arise where an employer is not willing to voluntarily maintain those better entitlements if not otherwise bound to do so (for example, by contract), and decides to revert the employee to the minimum entitlements in the Modern Award or otherwise applicable enterprise agreement.[22]

The Department does not prefer this option because there is a risk of a small number of employees being adversely impacted by their zombie agreements being terminated without being given the opportunity to extend their current arrangements in order to put in place alternative arrangements.

4.3 Improving access to single and multi-employer agreements

Problem: The proportion of employees covered by enterprise agreements has been decreasing since its peak in 2010.
Option 1 is the status quo. Under this option there will be no amendment to legislation to improve access to single and multi-employer agreements.
Option 2 (preferred) improves access to single and multi-employer agreements. This option ensures workers and businesses have flexible options for reaching agreements, including removing unnecessary limitations on access to existing single and multi-employer bargaining arrangements under the Fair Work Act.
Option 3 (not preferred) proposes to ease some restrictions and remove some limitations to access single and multi-employer bargaining.

Option 1 - Status Quo

While the current provisions allow access to single-interest bargaining for both private and public sector employers, there are additional steps for employers that are not franchisees. For those employers the process currently involves two steps: an application for a Ministerial declaration, followed by a further application to the Fair Work Commission for a single interest authorisation. Franchisees only need to seek an authorisation from the Fair Work Commission.

The cost of having to apply for a Ministerial declaration is calculated at three full days of labour:

3 x 7.5 x $79. 63 = $1,791

The unnecessary limits of the current provisions are evidenced by the fact that only five applications for Ministerial declarations and 10 applications for single interest employer authorisations are made per year. Applicants are usually organisations in feminised and substantially government funded sectors, such as independent schools and health service providers, and also franchisees. Since 2019, there have been 19 applications for Single Interest Employer Authorisations for Ministerial Declaration.

The Fair Work Act currently includes a special multi-enterprise bargaining stream for low-paid employees who have not historically had access to collective bargaining or who face substantial difficulty in bargaining at the enterprise level. It was hoped that these provisions would assist in closing the gender pay gap by lifting wages and conditions in feminised sectors, including community services sectors, cleaning and early childhood education and care.[68] These provisions have not been successful and require substantial reform. To access the low-paid bargaining stream, a bargaining representative for a

[68] Fair Work Bill 2008, *Explanatory Memorandum*, para 992.

proposed multi-enterprise agreement or a relevant employee organisation needs to apply to the Fair Work Commission for a 'low-paid authorisation'. There have been 4 applications for a Low Paid Authorisation with only 1 application granted.

For the multi-employer stream, since 2019 there have only been 49 agreements made using this stream, in industries including education, health and financial and insurance services. Maintaining the status quo will not lead to an increase in bargaining in the multi-employer stream.

The Department considers that the impact on employees, many of whom are low paid, of not having the opportunity to negotiate and be covered by a collective agreement, is significant and warrants the selection of an alternative option other than the status quo. The Department also considers that the inefficiencies present in the current multi-enterprise agreement process are dissuading employers from making collective agreements, which means they are impacted by missing out on the potential benefits of enterprise bargaining.

Option 2 - Improving access to single and multi-employer agreements (preferred)

This policy proposal builds upon the existing framework within the Fair Work Act and removes unnecessary regulatory burdens such as Ministerial declarations and expands and clarifies the scope of existing bargaining streams such as the low-paid bargaining stream.

Ensuring greater access to enterprise bargaining for employers and employees to negotiate fair pay and conditions can drive productivity improvements and innovation at the firm level. This generates cooperative workplace relationships that benefit employees through higher wages and better conditions, and businesses through productivity improvements and higher profits.

The proposal does expand the requirement for employers to be required to come to the table and engage in good faith negotiations, but only where the majority of their employees who will be covered by the agreement demonstrate majority support to the Fair Work Commission. Additional safeguards around taking protected industrial action will help to reduce the likelihood of industrial action and allay concerns about widespread action being taken. The unnecessary limits of the current provisions are evidenced by the low usage of these streams: between 2018-2021 there were on average less than 8 applications for a single interest employer authorisation made per year, and a lower number of Ministerial declarations. Applicants are usually organisations in feminised and substantially government funded sectors, such as independent schools and health service providers, and also franchisees. Since 2019, there have been 19 applications for Single Interest Employer Authorisations for Ministerial Declaration. Making the single interest stream more accessible will increase the uptake of bargaining particularly amongst related businesses and franchisees.

The Supported Bargaining Stream will address limitations with the current framework and ensure that workers in lower paid, government-funded sectors have an improved pathway to the benefits of bargaining that are disproportionately currently enjoyed by male-dominated sectors.

The Cooperative Workplaces Bargaining Stream will allow businesses to voluntarily opt in to be covered by one industrial instrument instead of multiple awards. Small business in particular has previously found bargaining difficult at the single enterprise level due to the expertise and resources required. Having an "opt in" opportunity to bargain across multiple employers will create economies of scale and will particularly benefit smaller businesses.

Small businesses, those in temporary or part-time work, women and feminised and service sector industries have historically had limited access to bargaining. Targeted multi-employer bargaining will ensure that these groups enjoy the benefits of bargaining, such as higher wages and improved productivity, that are disproportionately enjoyed by men, big business, and those outside low-paid and care sectors.

For small business an enhanced multi-employer bargaining stream will result in improved efficiencies by having, in most cases, one industrial instrument to apply instead of the administrative burden and complexity of having to apply multiple

awards. Small business has previously found bargaining difficult at the single enterprise level due to the resources required to bargain which larger businesses have ready access to. Having an opportunity to bargain across multiple employers will reduce the resources necessary to bargain for these businesses. The benefit to employers may increase where employers voluntarily opt into agreements that are already made, as they receive the benefits of the enterprise bargaining without the cost of bargaining. It is noted however that such employers will not have had the opportunity to influence bargaining.

Impacts on employers

In assessing the impacts on employers from amendments to multi-employer bargaining we have assumed that employers whether they are voluntary participants or compelled, will likely share costs among employers. Small business (< 15 employees) will be exempt from the single interest stream, so where costs are presented for small business, they are for the supported bargaining stream. It is assumed that new participants will likely require the need of an external consultant to assist with the bargaining round. The average number of employers covered by a multi-enterprise agreement is used as the base number for the costings, which has been calculated using data from the Department's Workplace Agreements Database. Each application form for a multi-enterprise agreement includes the number of employers to be covered by an agreement. The average number of employers is calculated by dividing the total number of employers covered by the number of multi-enterprise agreements (51 agreements). The median bargaining time for an agreement has been calculated using the days between the notification time (when the employer notifies employees of bargaining) and the day the employees vote.

The time spent by staff on bargaining per day is 4.6 hours per day per bargaining period for an employer, is based on the methodology developed in the Regulator Impact Statement for the *Fair Work Amendment Bill 2014* and the *Fair Work Amendment (Securing Australia's Jobs and Economic Recovery) Bill 2020*, as the basis for these calculations. The Department has estimated that a staff member on a bargaining team would spend approximately 23 hours per week on the negotiations and an employee would spend 60% of their ordinary weekly hours on bargaining.

Therefore, the following formula will be used to calculate the cost for business.

Average number of employers per multi-enterprise agreement x 4.6 hours x labour cost x median days of bargaining per multi-enterprise agreement by size of business.[69]

15.2 x 4.6 x $79.63 x 31 days divided by 15.2 (small business) = $11,355 per small business

15.2 x 4.6 x $79.63 x 170 days divided by 15.2 (medium business) = $62,270 per medium business

15.2 x 4.6 x $79.63 x 200 days divided by 15.2 (large business) = $73,259 per large business

We anticipate that an employer organisation or one or two employers may lead negotiations for the employer side in negotiation of a multi-enterprise agreement and may incur external costs as a result for professional services to manage the bargaining process. It's likely as well that these employers will share external costs with other employers involved in the bargaining process.

For this costing we have used an estimate that two employers will lead the negotiations for a multi-enterprise agreement and factored in a professional services fee of $175 per hour.[70]

$175 x 4.6 x 31 days (small business) x 2 = $49,910

$175 x 4.6 x 170 days (medium) x 2= $273,700

$175 x 4.6 x 200 days (large) x 2 = $322,000

Then we will divide it by the average number of employers currently covered by multi-enterprise agreements.

[69] Department of Employment and Workplace Relations, Workplace Agreements Database, 2022, unpublished data.
[70] How Much Should I Charge As A Consultant In Australia? (authentic.com.au)

$49,910 divided by 15.2 = $3,283 per small business

$273,700 divided by 15.2 = $12,878 per medium business

$322,000 divided by 15.2 = $21,052. per large business.

Therefore the total cost per business using these estimates are:

Cost of bargaining per business plus cost of external consultants per business[71]

Small business: $14,638

Medium Business: $75,148

Large Business: $94,311

Positive Impacts for Business

The significant benefits of being covered by an enterprise agreement and the costs that may be associated with remaining covered by a Modern Award outweigh the additional cost for businesses to engage with the new multi-enterprise bargaining streams. Businesses are often covered by multiple Modern Awards which can be complicated and difficult to interpret. An enterprise agreement enables an employer to have one industrial instrument which applies to a business which simplifies their workplace relations arrangements There are also the significant productivity improvements that can come with bargaining like training incentive schemes which can help foster a more educated, productive workforce. Employers may raise concerns about being compelled to bargain. The Fair Work Act has provisions for Majority Support Determinations which compel businesses to bargain for single enterprise bargaining. This option extends ability to seek a Majority Support Determination to the single interest stream. There are safeguards in place to ensure that if an employer is compelled they cannot be a small business employer, not be covered by an existing single enterprise agreement, parties must have a chance to express their views, the employees have voted by majority vote to bargain and all requirements of the single interest stream such as common interests are met. Employers can also apply to the Fair Work Commission to remove themselves from bargaining for a single interest agreement if the Commission is satisfied their circumstances have changed and it's no longer appropriate.

Case Study

10 medium-sized fish and chip shops with seafood processing plants in Queensland have decided or been compelled to bargain together in the single interest stream. In their current arrangements they must enforce 4 awards to run their business, the Seafood Processing Award, the Retail Award, the Fast Food Award and the Restaurant Award. This has led to increased compliance costs for business. As part of the single interest stream the business now is now covered by one enterprise agreement, instead of four awards. The employees of the fish and chips shops now have had the opportunity to bargain in the single interest stream, which has changed the power balance. The agreement has productivity benefits as it contains incentives for staff to undertake training for new seafood processing equipment and has wages that are higher than the relevant Modern Awards.

There are no regulatory impacts from change to the multi-enterprise stream, now called the Co-operative workplaces stream. The stream retains the majority of existing provisions and is completely voluntary to enter and leave as is currently the case. There will no access to Majority Support Determinations or to industrial action in this stream.

The changes regarding agreement content for positive measures is non-regulatory. It allows parties to bargain over such measures but does not impose an outcome.

In regard to industrial action, employers have also raised concerns about the potential for protected industrial action as part of multi-employer bargaining. The purpose of these reforms is not to allow for industry-wide strikes. Industrial action will be extended to the Supported Bargaining Stream with additional safeguards, which will also apply to the Single Interest Stream (which already permits taking protected industrial action). These include compulsory conciliation, an extended notice period

[71] These costs are estimates only, based on Departmental data and external sources. Many employers may be members of employer organisations which will reduce their costs significantly. Also, many businesses already incur costs for bargaining as part of business as usual processes and do not have to make major changes within their business cost structure to facilitate bargaining. The Department estimates that it will take approximately 15 minutes for an employer to read a factsheet at the Fair Work Commission website on these provisions at a cost of approximately $20 (25% of $79.63).

of 120 hours, and enhanced dispute resolution powers for the Fair Work Commission, which will enable it to settle disputes during bargaining, helping to avoid industrial action. In addition, employers will continue to have the ability to apply to the Fair Work Commission to suspend or terminate protected industrial action on a range of grounds, including threatening to endanger the life, personal safety, health or welfare of the population or part of it; causing significant damage to the Australian economy or an important part of it; or when the action is protracted and is causing, or is going to cause, significant economic harm to the employer or employees who will be covered by the agreement.

The Department considers the expanded options available to businesses are a net benefit.

Impact on employees

The multi-enterprise agreement proposals will increase bargaining power of employees and their representatives. Majority Support Determinations that are currently only available for single enterprise agreements will be extended to multi-enterprise agreements. Opening up the ability for Majority Support Determinations to be used in the multi-enterprise bargaining streams provides additional options for employees to make agreements with their employer. The reforms will have a significant positive impact on low paid employees through the enhanced Supported Bargaining Stream. These reforms are likely to improve outcomes for low paid workers in feminised industries such as aged care, childcare and health care.

There will be changes to content restrictions of enterprise agreements to allow for positive gender measures in enterprise agreements. This will mean that parties can now have the choice and flexibility to have such measures in their agreements which promote gender equity. As mentioned above, Research from the Bankwest Curtin Economics Centre and the WGEA shows that the combination of gender concentration and salary differences between men and women within industries contribute to the gender pay gap. Positive measures may encourage more women to work in high-paying industries, with the net effect to help decrease the gender pay gap.[72] Specifically, this report found that Australia's gender pay gap would fall by more than a third if a 40:40:20 gender concentration were to be achieved across all industries and occupations.[73] This will be enacted in tandem with Government support to increase female participation within the workforce as a whole and within male-dominated sectors.

Case Study
30 aged care centres are specified in a supported bargaining authorisation by the relevant registered organisation. The workforce is 70 per cent female and low pay is found by the Fair Work Commission to be prevalent in the aged care industry. Employees in the supported bargaining stream now have additional bargaining power and access to the additional benefits of the supported bargaining stream, including the power to direct a person, such as a funding entity, to attend a conference if the FWC is satisfied that their participation is necessary for the agreement to be made. The resulting enterprise agreement sees their pay increase significantly, as well as providing dependable wage increases for the life of the agreement.

Industrial action

Amendments to the protected industrial action provisions are proposed to reduce unnecessary administrative burden and de-escalate bargaining disputes.

To remove the current incentive to take industrial action within 30 days, the validity of a protected action ballot will be extended to three months from the date that it is approved by employees. It is extremely difficult to quantify the impact of individual instances of protected industrial action on an individual employer, however, by no longer requiring employees to

[72] Duncan AS, Mavisakalyan A and Salazar S (2022), Gender Equity Insights 2022: The State of Inequality in Australia, BCEC|WGEA Gender Equity Series, Issue #7, October 2022, page 31.
[73] Duncan AS, Mavisakalyan A and Salazar S (2022), Gender Equity Insights 2022: The State of Inequality in Australia, BCEC|WGEA Gender Equity Series, Issue #7, October 2022, page 63.

take all forms of protected industrial action in the ballot within 30 days for such forms of action to remain available, this proposal reduces the incentive to take all forms early in the process, which should reduce the impact on all parties.

The Fair Work Commission will be empowered to establish a publicly accessible panel of pre-approved ballot providers, in order to enhance the accessibility and reduce the time and cost of undertaking protected action ballots, relative to the current default option of postal or attendance ballots via the Australian Electoral Commission. In addition, new proposals will only allow for protected industrial action if bargaining representatives attend a conciliation conference held by the Fair Work Commission at the same time as the protected action ballot is being conducted. There will be a 14-day period in which the conference could take place. The Fair Work Commission will determine where, when and for how long the conciliation conference is to take within the maximum 14-day period. If the employee bargaining representative does not attend the conciliation, any industrial action they take will not be protected. Equally, the employer bargaining representative must participate in the conciliation in order for employer response action to be protected. Fair Work Commission conciliation at this stage is likely to contribute to some parties coming to agreement without protected industrial action being taken, reducing the impact of such action on all parties.

Option 3 - Ease some restrictions and remove some limitations to access single and multi-employer bargaining

This option retains the existing framework but makes minor changes to the single interest bargaining stream, low-paid bargaining stream, and multi-employer bargaining stream.

This option retains the existing bargaining streams and so the regulatory change is minimal. For the single interest stream, unnecessary criteria would be removed when the Fair Work Commission considers a section 247 application. However, Ministerial Declarations would continue to operate for employers other than franchisees, noting that the narrow scope of the existing single interest bargaining scheme is reflected in there having recently been around only five applications for Ministerial declarations and 10 applications for single interest employer authorisations per year. Under this option the $1,181 cost of the Ministerial declaration would remain as the cost to business.

In regard to the low-paid bargaining stream the Fair Work Commission would no longer be required to consider the history of bargaining in the industry in which the employees who will be covered by the agreement work. This will have minimal regulatory impact and would seek to encourage applicants to the low-paid stream. The new Cooperative Workplaces Stream would receive additional support from the Fair Work Commission, upon request. This will encourage parties to build cooperative relationships through the bargaining process.

Regarding industrial action and positive gender measures, this option would see no changes to those provisions.

The Department does not prefer this option for several reasons. First, the impact of deregulating the single interest stream is likely to be modest compared to the preferred option and is unlikely to yield a significant increase in applications for a single interest declaration, therefore minimising the potential benefits to businesses and employees. Secondly, the minor amendments to the low-paid stream are also unlikely to yield a significantly increased number of low-paid bargaining authorisations, given the 'history of bargaining' precondition has not proven to be the major hurdle for previous unsuccessful applications.

4.4 Remove unnecessary complexity and make the Better Off Overall Test simple, flexible and fair

Problem: The Fair Work Act has a range of pre-approval requirements that must be considered by the Fair Work Commission in the approval process. Unnecessary complexity in the approval process contributes to delays in an agreement being approved.
Option 1 is the status quo. Employees and employers will continue to bargain in accordance with the framework established by the Fair Work Act and the Fair Work Commission will continue to assess applications for approval of enterprise agreements against current rules and the interpretation of those rules.
Option 2 (preferred) removes unnecessary complexity and makes the Better Off Overall Test simple, flexible and fair. This option includes amendments to simplify the enterprise agreement pre-approval process and simplify the Better-Off-Overall Test.
Option 3 (not preferred) simplifies the enterprise agreement approval steps and amends the Better Off Overall Test to apply to classes or groups of employees.

Option 1 - Status Quo

Consensus was reached at the Jobs and Skills Summit that the Better Off Overall Test and the existing genuine agreement requirements are onerous, complex and unnecessarily prescriptive. Without reform, significant impacts for employers and workers will continue where an agreement has been reached but cannot be approved because of a procedural error made during the course of the bargaining process.

The existing cost of bargaining per firm is calculated as:

Hours per day bargaining x labour cost x median bargaining time per employer (by size of business)[74]

Small business: 4.6 x $79.63 x 62 = $22,710

Medium Business: 4.6 x $79.63 x 150 = $54,944

Large Business: 4.6 x $79.63 x 225 = $82,417

An enterprise agreement currently passes the Better Off Overall Test if the Fair Work Commission is satisfied that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant Modern Award applied. The complexity of the Better Off Overall Test impacts the length of time the Fair Work Commission takes to consider applications for approval of enterprise agreements.

In the 2016 *Coles* Decision, a Full Bench of the Fair Work Commission found that although the Better Off Overall Test is a global test, if any individual employees or prospective employees are found to not be better off, the agreement cannot be approved without undertakings.[75] In the months after this decision, the number of agreements requiring undertakings increased. This suggested the Fair Work Commission was taking a highly forensic approach to analysing agreements against the Better Off Overall Test, increasing the complexity and uncertainty of the process.

The *Coles* Decision, and the subsequent increase in agreements being approved with undertakings, caused a substantial increase in the time taken to approve enterprise agreements, from a median of 18 days (from lodgement to approval) in 2015-16 to a high of 76 days in 2017-18. While the Fair Work Commission's 2021-22 report indicates it is now meeting its

[74] Department of Employment and Workplace Relations, Workplace Agreements Database, 2022, unpublished data. Median bargaining time for all agreements

[75] *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887

timeliness benchmarks (of 8 weeks to finalise approvals in 90 per cent of cases), the highly technical and inflexible approach to applying the Better Off Overall Test remains in place. Employer groups are strongly of the view that the broader decline in enterprise agreement coverage across the labour market is, in part, referrable to these changes in the application of the test. The status quo retains entrenched costs to businesses and employees related to the time taken to bargain and the time taken for the Fair Work Commission to assess agreements for approval. The longer parties spend in bargaining and waiting for approval from the Fair Work Commission, the greater the cost.

Option 2 - Remove unnecessary complexity and make the Better Off Overall Test simple, flexible and fair (preferred)

This option introduces a number of proposals that will have a regulatory benefit and one, the Better Off Overall Test reconsideration process, that has a minor regulatory cost.

Employers and employees will have access to a less onerous agreement making and approval process for enterprise agreements. The current genuine agreement requirements would be replaced with a broad requirement for the Fair Work Commission to be satisfied that the agreement has been genuinely agreed. This will address concerns about complex and prescriptive agreement approval requirements and encourage unions and employers to build productive, cooperative relationships in the workplace.

The net effect of the proposed suite of changes to the Better Off Overall Test will be that the test becomes simpler while still retaining key protections for employees. Additionally, the new reconsideration process will be introduced to allow employees or their representatives to seek a reassessment of the Better Off Overall Test where there has been a material change in working arrangements, or where their circumstances were not properly considered during the approval process.

Impact on employers

Changes to Genuine Agreement

During the 7 day access period for an enterprise agreement, the employer must give the employees a copy of the agreement and any other materials incorporated into the agreement, provide an explanation of the terms of the agreement and the effect of those terms to employees, and notify the employees of the time and method of voting for the agreement which starts after the access period.

There will be a net positive benefit to employers in a reduction of the costs associated in bargaining due to the simplification of the genuine agreement requirements such as the 7-day access period from the median bargaining time per firm by size of business.[76] Therefore, the cost saving from this proposal for all businesses who bargain is calculated at

7x 4.6 x $79.63 = **$2,564**

There would also likely be positive benefits from a shorter approval process.

Simplification of the Better Off Overall Test

There will be a positive benefit from a reduction in complexity regarding the Better Off Overall Test. Currently the Better Off Overall Test is applied after an agreement is submitted to the Fair Work Commission for approval. Members of the Fair Work Commission may request undertakings be given by employers to fix current issues with Better Off Overall Test compliance. This process can contribute to delays in approval of agreements.

The Fair Work Commission has advised that 41 per cent of agreements require undertakings for Better Off Overall Test non-compliance. This is approximately 940 agreements (out of 2,292 in 2021-22 financial year).[77] We have made a conservative assumption that 20 per cent of these agreements will not require undertakings due to changes in the Better Off Overall Test. That is approximately 188 agreements.

[76] Departmental Estimate. Extended to 7 days to account for access period
[77] Fair Work Commission, unpublished data.

The Fair Work Commission's benchmarks indicate those applications that are complex (usually involving undertakings) are approved (in 95 per cent of cases) within 45 working days and simple agreements (in 95 per cent of cases) within 20 days. The distinction between complex and simple agreements is an administrative one drawn by the Fair Work Commission. Data on the distributional split of complex and simple agreements is not available. Therefore, we have used the 25-day difference as the basis for the costing. We have also assumed that an employer will spend an average of 2 hours per day managing their agreement through the approval process.

Therefore, the benefit for business is:

2 x 25 x $79.63 = $3,981 x 188 = $748,522

Per agreement that is $3,981.

Better Off Overall Test Reconsideration Process

The Better Off Overall Test Reconsideration process proposed is new and does not have a suitable comparator in the current framework. We are unable to calculate how many agreements would be subject to the Better Off Overall Test Reconsideration Process. However, we can calculate the cost per firm of having to update their payroll as a result of undertakings or amendments as a result of the Better Off Overall Test reconsideration process.

Using costings available in section 4.2 outlined above the cost would be:

For an average size small business of 10 employees the cost would be $5x10 = $50

For an average size medium business of 100 employees the cost would be $5x100 = $500

For an average sized large business of 300 employees the cost would be $5x300 = $1,500

The Department estimates that it will take approximately 15 minutes for an employer to read a factsheet at the Fair Work Commission website on these provisions at a cost of approximately $20 (25% of $79.63).

Impact on employees

There will be a regulatory cost for employees who apply for the Better Off Overall Test reconsideration process. Depending on their circumstances they may be required to attend hearings and conferences at the Fair Work Commission. For employees that are members of a union, it's likely their union will apply for the Better Off Overall Test reconsideration process. The Department is unable to estimate how many employees may apply for the Better Off Overall Test reconsideration process.

There will be benefits for employees as part of this process as there is more certainty that their pay and conditions will remain better off overall than the relevant Modern Award, than would have previously been the case. It's likely these reforms will stop a new iteration of zombie agreements being created, which will provide additional benefits in the long term.

Improvements in the approval process will mean less delays for approval of agreements, which will enable employees to get access to the benefits of bargaining – such as higher wages – sooner.

Option 3 – Extend the time to meet genuine agreement requirements and amend the Better Off Overall Test to apply to classes or groups

This option proposes to remove most of the pre-approval steps and only retain the employee ballot to approve the agreement and change the existing application of the Better Off Overall Test to apply to classes or groups.

Removing most of the pre-approval steps apart from the requirement for employers to facilitate an employee vote for the agreement will have a regulatory benefit for employers as they would no longer be required to follow the onerous and

prescriptive pre-approval steps. Further, the removal of all time frames in the pre-approval process, such as the 7 day access period or the 21 days required to pass between giving the employees the notice of employee representational rights and the vote will significantly decrease the bargaining time.

The reduction of the 7-day access period has been costed above. For a reduction of 21 days in bargaining a business could save up to $7,692 (21x4.6x$79.63). Further, the agreement approval time before the Fair Work Commission will be reduced if employers are no longer required to prove that they followed the pre-approval steps. However, under this option there are no safeguards to ensure that employees genuinely agreed to the agreement. That is because there is no requirement to show that employees were given a copy of the agreement, to notify employees of the vote, or to explain the terms of the agreement and its effect on employees.

Under this option, the Better Off Overall Test would be amended to a specified class or groups of employees, removing the requirement that it be applied as against each award covered and prospective award covered employee. This may allow agreements to disadvantage certain employees where the group of employees is, as a whole, not disadvantaged.

This proposal would simplify the assessment of the Better Off Overall Test, 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 Better Off Overall Test resulted in a shorter approval process, with less undertakings sought by the Fair Work Commission, this would reduce the regulatory burden on parties. However, depending on how the Fair Work Commission applies the Better Off Overall Test 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, not disadvantaged.

4.5 Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements

Problem: Access to arbitration to overcome a bargaining dispute under the Fair Work Act is tightly restricted. Where parties cannot agree on a new enterprise agreement and bargaining becomes intractable, the ability to draw negotiations to a close is limited.
Option 1 is the status quo. Currently, under section 240 of the Fair Work Act a bargaining party may apply to the Fair Work Commission for assistance to deal with a bargaining dispute and the Fair Work Commission can arbitrate the dispute but only with the agreement of both bargaining parties.
Option 2 (preferred) Improve the capacity of the Fair Work Commission to help workers and businesses reach agreements. This option increases the capacity of the Fair Work Commission to deal with bargaining disputes and applies to the Supported Bargaining Stream, Single Interest Bargaining Stream and Single Enterprise Bargaining Stream but not the Co-Operative Workplaces Stream.
Option 3 (not preferred) increases the capacity of the Fair Work Commission to help workers and businesses reach agreements with defined limits on process and outcomes.

Option 1 - Status Quo

Currently, under section 240 of the Fair Work Act a bargaining party may apply to the Fair Work Commission for assistance to deal with a bargaining dispute and the Fair Work Commission can arbitrate the dispute but only with the agreement of both bargaining parties. For voluntary multi-employer bargaining under section 172 (3) of the Fair Work Act, all bargaining parties must agree to the Fair Work Commission conciliating and/or arbitrating a dispute (section 240).

Access to arbitration to overcome a bargaining dispute under the Fair Work Act is currently restricted. The Fair Work Commission can arbitrate a dispute under section 240 with the agreement of the bargaining parties; or in circumstances where industrial action has been terminated; where bargaining is intractable under the low-paid bargaining stream; and following the making of a 'serious breach declaration' for repeated breaches of the good faith bargaining requirements.

Maintaining the status quo will mean that bargaining, including protracted bargaining, will continue with its current regulatory cost to parties. Parties will continue to be able to take industrial action in accordance with the Fair Work Act and its associated costs.

Case Study - Protracted bargaining[78]
Recent negotiations for an Australian company extended between 2018 to 2020. Bargaining occurred over 728 days of bargaining, which included 167 days of direct meetings between employer and employee bargaining representatives. 12 separate disputes were lodged.

The employer assessed that during bargaining, productivity was impacted between 22-34% in any given 24-hour period, losing between 16 and 50 hours of productive work each day, and collectively losing over 60,000 individual working hours to protected and unprotected industrial action.

Option 2 - Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements (preferred)

This option increases the Fair Work Commission's capability to assist bargaining parties to progress bargaining to finality through independent third-party arbitration. The ability for parties to engage the Fair Work Commission to assist bargaining will be a significant benefit for both employers and employees.

Under this option, a new intractable bargaining declaration and intractable bargaining workplace determination will replace serious breach declarations and bargaining related workplace determinations in the Fair Work Act. These improved bargaining tools will be available in the single and multi-employer bargaining streams under the Fair Work Act (excluding the Co-operative Workplaces Stream and greenfields agreements).

This option permits a bargaining representative for a proposed agreement to apply to the Fair Work Commission for an intractable bargaining declaration. Whether or not to issue an intractable bargaining declaration is a discretionary decision for the Fair Work Commission. However, in order to issue an intractable bargaining declaration the Fair Work Commission must be satisfied that:

- It has already attempted to assist the parties deal with their dispute under section 240 of the Act (which deals with bargaining disputes);
- There is no reasonable prospect of agreement being reached if a declaration is not made; and
- It is reasonable in the circumstances to make the declaration (considering the views of all bargaining representatives).

If the Fair Work Commission issues a declaration, the Commission may order the parties to undergo a further period of negotiation. The period for these mandatory negotiations is to be determined by the Fair Work Commission and can subsequently be extended if the Fair Work Commission considers it appropriate to extend.

After the declaration is made, and after any post-declaration negotiation period has elapsed (if any), the Fair Work Commission must then make an intractable bargaining workplace determination. An intractable bargaining workplace

[78] While this is a hypothetical scenario, the figures are based on a real-life case

determination must be made by the Fair Work Commission as quickly as possible. An intractable bargaining workplace determination must include terms agreed between the parties, a coverage term, core terms (e.g. nominal expiry date), mandatory terms (e.g. dispute resolution term) and terms dealing with the matters that remain at issue between the parties.

Impact on employers

This measure will have positive and negative effects on employers.

Improved access to arbitration is anticipated to have positive effects for business in reducing the length of time it takes to bargain, either by having a viable option to bring protracted or deadlocked bargaining to a conclusion and/or influencing the behaviour of bargaining representatives to bargain in a reasonable and efficient manner.

Improved access to arbitration will have negative impacts in that third-party arbitration can be lengthy and costly with uncertainty and lack of control over outcomes.

Quantifying the impact of this measure, both positive and negative, is complex because:

- If and when arbitration occurs under the measure remains within the parties' power and will be affected by behaviour and preferences of individual bargaining representatives;
- The length of time and cost involved in third-party arbitration depends upon the process used by the individual Fair Work Commission Member as well as the behaviour of the parties in that arbitration;
- The effect on bargaining behaviour of bargaining representatives and the reduction in surface and unreasonable bargaining is difficult to predict and measure; and
- The outcome of arbitration is at the discretion of the Members of the Fair Work Commission.

To estimate the potential arbitrated wage outcomes, the Department has analysed the wage outcomes awarded by the Fair Work Commission in its workplace determination decisions since commencement of the Fair Work Act. The results of that analysis are contained in the following table.

Case	**Employee claim %**	**Employer claim %**	**FWC workplace determination %**	**Wage Price Index for the relevant year**	**Average bargained EA increases for the relevant year**
Case 1	3%	3%	3%	2.8%	3.3%
Case 2	On Commencement: 11-27% Progressing: 3.5%	On Commencement: Lower paid employees – 3% Higher paid – 12-13% Progressing 3% yearly	On Commencement: 4.5% 12 months after: 2.5%[79]	2.1%	2.6%
Case 3	On Commencement: 12% Progressing every 12 months: 4%	On commencement: 1.5% Progressing every 12 months: 1.5%	On commencement: 4% After 12 months: 2.5% Further 12 months: 2%	1.8%	2.8%
Case 4	On Commencement: 12.5%[80] Every 12 months: 2.5%	On Commencement: 2% Every 12 months for 2 years: 2%	On Commencement: 4% After 12 months 3%	2.3%	2.7%
Case 5	2.5%	2.5%	2.5%[81]	1.8%	2.8%

The limited data available supports the view that the FWC does not, and therefore is unlikely to, award significant wage increases over those reached through normal enterprise bargaining. Arbitrated increases over the life of these enterprise agreements largely mirror enterprise agreement average increases in the relevant year. What drives some averages higher than the average enterprise agreement is the initial increases awarded by the Fair Work Commission at the start date of the

[79] This decision included bringing employee wages up to the standard of a 25% increase on the 2004 agreement, which impacted all employees differently (e.g. – if an employee was receiving $27 an hour and a 25% increase on the 2004 agreement was 30$ an hour, their pay would rise to that $30).
[80] This was interpreted as 'back pay' increases that had been missed between 2014-2018.
[81] This number was reached during arbitration between the parties, after concessions were made on both sides.

determination. In cases where this occurred, the Fair Work Commission was generally acting to immediately increase wages where employees had not had a wage rise for a significant time while protracted bargaining was ongoing. Because of this, and the context in which the Fair Work Commission was arbitrating these disputes, these one-off increases are less significant. Year-on-year increases are much more reflective of the average anticipated arbitrated wages outcomes, and are below the percentage increases that businesses may be concerned about.

Acknowledging that the Fair Work Commission has awarded an above-average wage increase to balance lower levels of renumeration in the past, increased access to arbitration could raise concern about a possible inflationary effect on wages. There are two reasons why this is not anticipated to be the case.

Firstly, it is the Department's view that bringing business and unions together at the enterprise bargaining table, with productivity gains as a focal point, is the only way we can increase both profits and wages without inflationary pressure. Secondly, the Department understands that bargaining parties tend to mediate their own wage claims before and during arbitration proceedings. In *BP Refinery (Kwinana) Pty Ltd v AWU,*[82] both employee and employer wage claims were brought closer together before the FWC ordered a workplace determination. The AWU's initial claims were a 12 per cent increase on commencement and a 4 per cent increase progressing every 12 months. BP Refinery's initial claims were a 1.5 per cent increase on commencement and a 1.5 per cent increase progressing every twelve months. Eventually, the FWC ordered a 4 per cent increase on commencement, a 2.5 per cent increase after 12 months and a 2 per cent increase after a further 12 months.

Measuring the impact of mandatory arbitration on behaviour does not have an easy comparator from which to draw inferences. In the analysis above of existing workplace determinations, at least 2 instances of arbitration lead to the bargaining parties progressing their level of agreement, including on wages, during the arbitration process. This demonstrates that mandatory arbitration can, at the least, have a positive impact on bargaining behaviour and encourage parties to reach agreed outcomes.

Department analysis using the Workplace Agreements Database of 15,000 agreements made between 1 January 2017 and 30 June 2022 shows that the median bargaining times are:

> Small businesses: 62 days (approx. 2 months)
>
> Medium businesses: 150 days (approximately 4.5 months)
>
> Large businesses: 225 days (approximately 7 months)This measure is designed as a remedy to protracted bargaining. For current purposes, the Department will assume that bargaining for longer than the median for a large business is 'protracted' bargaining.

For the calculation of benefits to business, the Department estimates that without intervention, protracted bargaining will take an additional 6 months of bargaining time. If bargaining continued for this additional period instead of going to arbitration the cost to business would be:

> Number of days x hours per day x labour cost per hour
>
> 180 x 4.6 x $79.63 = $65,934 per business.

If the agreement is arbitrated instead of requiring additional bargaining time the Department assumes that the Fair Work Commission will finalise bargaining-related arbitration consistent with its publicly reported performance measures. According to those measures, the Commission aims to finalise 50% of cases within 8 weeks of filing. The Department assumes that business will spend 2 hours per day managing the arbitration process. Assuming an 8-week process, the cost of this to a business is:

> Number of days x hours per day x labour cost per hour
>
> 56 x 2 x $79.63 = $8,919

[82] [2020] FWCFB 2693.

The benefit per business in relation to the reduction in cost of bargaining time would be $57,015.

The potential negative impacts of this measure on business is outweighed by a high threshold to access arbitration. This high threshold will discourage a bargaining party from using arbitration excessively or vexatiously and ensures that the provisions are not gamed. Conversely, the ability of a bargaining representative to apply for arbitration is anticipated to focus the bargaining representatives' to reasonably and efficiently engaging in good faith bargaining to reach agreement on terms and conditions of employment.

The Department estimates that it will take approximately 15 minutes for an employer to read a factsheet at the Fair Work Commission website on these provisions at a cost of approximately $20 (25% of $79.63).

While there will be some regulatory cost to implement this proposal, the policy has a net benefit given increased access to arbitration is intended to reduce the level of disputation, industrial action, and the time taken to bargain. The measure will also provide an incentive for the parties to bargain reasonably. Many employers are opposed to third party arbitration of enterprise agreement negotiations. However, the Fair Work Commission is an expert, independent Tribunal that has appropriate safeguards in place in relation to arbitration proceedings, such as administrative law principles of natural justice (i.e. the requirement to provide a fair hearing and allow parties an opportunity to argue their position) and relevant appeal mechanisms.

Impact on employees

As the Department's analysis of Fair Work Commission workplace determination decisions shows that protracted bargaining delays wage increases and other benefits to employees. It can also do great damage to relationships at the firm level. Arbitration allows impasses to be resolved, while considering the views of all parties to achieve a fair outcome sooner.

Case Study - Protracted bargaining cont.…

Rather than bargaining for 728 days, bargaining proceeded for 225 days (being the median time spent in bargaining for a large employer). At this time, the employer sought and was granted an intractable bargaining declaration by the Fair Work Commission, which took 56 days. The Fair Work Commission ordered the parties to engage in further facilitated discussions before the Fair Work Commission for another 21 days. An agreement was not able to be reached in this time. The Fair Work Commission arbitrated and issued an intractable bargaining workplace determination – which took a further 56 days.

On the hypothetical, the time between bargaining commencing and finalising was:

225 + 56 + 21 + 56 = 358 days

Compared with 728 bargaining days in the status quo scenario, this is a saving of 370 bargaining days. The savings to the employer in dollar terms is:

370 days x 4.6 hours/day x $79.63 = $135,530

Assuming that industrial action would otherwise have occurred in these 370 bargaining days, the employer has gained additional productivity of between 5920 and 18,500 hours of productive work.

Impact on Fair Work Commission

This measure will have an impact on the workload of the Fair Work Commission. It is not possible to assess the precise impact on the Fair Work Commission's workload for the reasons mentioned above.

It is reasonable to assume that the measure will increase the number of applications made to the Fair Work Commission each year. Because it is a pre-requisite for making an intractable bargaining declaration, referring to the number of applications for

the Fair Work Commission to deal with a bargaining dispute under section 240 of the Fair Work Act is a reasonable comparator to estimate the impact on workload.

In its 2020-2021 Annual Report, the Fair Work Commission received 121 applications under section 240 of the Fair Work Act. If each of these applications led to an application for an intractable bargaining declaration that would mean an additional 121 applications to the Fair work Commission. In the same period, the Fair Work Commission received a total of 28,957 applications to deal with matters under the Fair Work Act. Using these assumptions, this measure would lead to an increased workload of less than 0.5% of the Fair Work Commission's usual total workload.

Option 3 - Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements, applying to all streams

This option still uses mandatory arbitration like option 1 but stipulates the method of arbitration and sets boundaries to the outcomes that the Fair Work Commission can order.

The impact in terms of additional costs on employers under this option are substantially the same as those associated with option 2. The variable cost in this option would be the length of time stipulated for the Fair Work Commission to complete arbitration. Assuming the Fair Work Commission were required to complete arbitration of intractable bargaining workplace determinations within 4 weeks of commencing arbitration, the benefit to employers would be calculated, using the same assumptions as above, as follows:

28 x 2 x $79.63 = $4,459

The benefits per business in relation to the reduction in the cost of bargaining time would be $65,934-$4,459 = $61,475.

In the Department's view, the minimal increased cost to employers would be outweighed by the negative impacts of procedural limitations on the Fair Work Commission's ability to determine the most efficient manner and appropriate time required to arbitrate the individual dispute before it. The Fair Work Commission's performance measures are modest (50 per cent of cases finalised within 8 weeks) and the Fair Work Commission's history of meeting its performance targets should provide comfort to users.

Similarly, as the Department's analysis above shows, the risk of the Fair Work Commission awarding significant wage increases out of step with prevailing economic conditions is low. Additional regulation in this respect is unnecessary and is more likely to lead to gaming of the system and have a negative, unquantifiable effect on the behaviour of bargaining representatives.

5. Who will you consult and how will you consult them?

Overview

The Minister for Workplace Relations, the Hon Tony Burke MP, chaired a Meeting of Ministers on 5 July 2022 to discuss his intention to amend the *Fair Work Act 2009* to reflect the Government's election commitments. The Minister also chaired a meeting with key union and business representatives, the National Workplace Relations Consultative Committee (NWRCC) on 19 July 2022, where the same topic was discussed.

In August, September and October 2022, the Department consulted widely on reforms to the enterprising bargaining provisions of the *Fair Work Act 2009*, in the context of the Government's election commitments to get wages moving, improve job security, and support gender equity, and in the lead up and response to the Jobs and Skills Summit.

Possible reform options were canvassed with key stakeholders in bilateral and group forums led by the Department over this time and, as views were shared, the reforms were developed and enhanced. Where agreement was present between stakeholders, this strongly influenced final proposals for reform. Where agreement was not possible, views of the stakeholders were taken into account in the final design of the options to achieve balanced and effective outcomes. An example of this was in relation to the transition time for sunsetting Zombie Agreements, which was reconsidered following consultations with stakeholders.

The majority of stakeholders were consulted on more than one occasion, through informal and formal consultation methods, including confidential written submission, bilateral meetings and small group forums. In all, more than 50 consultation meetings were conducted over this period. Consultations were conducted with union, business and industry representatives, state and territory officials, individual businesses, academics, the National Women's Alliances, and the Women's Economic Equality Taskforce.

The Department considers that confidential consultation is a highly useful means of eliciting frank and honest feedback on policy proposals. Workplace relations policy is highly contested, and media commentary is often salacious and counterproductive, resulting in further conflict and polarisation. Out of respect for the Department's commitment to stakeholders of confidentiality, and so as not to jeopardise future confidential discussions, stakeholder views and proposals provided in confidence cannot be disclosed as part of this analysis.

Following the consultation process, the Minister for Workplace Relations held a further Meeting of Ministers on 20 October 2022 to discuss the detail of the reforms covered by the Bill, including the reforms relating to enterprise bargaining. The Department also led a briefing on the draft Bill for state and territory officials on 21 October 2022, and a similar meeting on 20 October 2022 with the Council on Industrial Legislation, which is a sub-committee of the NWRCC.

Final amendments were made to the Bill in response to these consultations on 20 and 21 October 2022, prior to the Bill being finalised for introduction to the Parliament.

Prior consultation

Notwithstanding the comprehensive consultation the Department undertook on these specific measures, several measures addressed in this RIS were subject to consultation in 2020 (see the Enterprise Bargaining Reform Regulation Impact Statement (OBPR ID 20 42818)). Specifically, the Department consulted on reforms to the agreement approval process, unilateral termination of agreements and sunsetting zombie agreements. Stakeholder views were thoroughly ventilated during consultation for these reforms, and these were taken into account to inform Departmental policy work for this reform process.

6. What is the best option from those you have considered?

The Government has worked closely with key workplace relations stakeholders to develop sensible and reasonable reforms to improve access to and uptake of enterprise bargaining. In bilateral consultations and during the Jobs and Skills Summit, there was a commitment to implementing reasonable solutions to address the current issues identified in agreement making and reversing its trending decline. Consensus was reached on some key issues to progress reforms that would make the bargaining system simple, flexible and fair and increase access for groups and sectors that have not had strong bargaining coverage or outcomes.

This regulatory impact statement considers a number of options to improve enterprise bargaining. The options, at a high-level, seek to amend legislation to simplify bargaining, close loopholes in the bargaining framework and provide additional resources and capability to the Fair Work Commission to facilitate greater access to bargaining (especially for the low paid and women) and increased capacity to arbitrate intractable disputes.

Unilateral termination of agreements

Option 2 clarifies the circumstances in which the Fair Work Commission may agree to unilateral applications to terminate an agreement and also prohibits the agreement termination process from being used as an unfair bargaining tactic, while ensuring that legitimate applications can continue to be made. Employers and employees would continue to be able to terminate enterprise agreements by consent at any time.

The Department considers this the best option available, since it provides the Fair Work Commission with clear criteria with which to consider s.225 applications, allowing them to determine outcomes based on the facts of the matter. The Department considers there is a clear case for Government to intervene in order to close the loophole created by *Aurizon,* and to prevent unfair impacts on employees. The overall impact for this is option is minor, but it will create meaningful benefits for the bargaining system overall, as employers will no longer be able to threaten to apply to terminate their enterprise agreement to negatively impact the bargaining position of employees.

Zombie Agreements

Option 2 proposes to automatically sunset agreement-related transitional instruments made prior to the commencement of the Fair Work Act and during the 'bridging period' (1 July-31 December 2009). This issue has been subject to significant public debate, since it has ongoing, deleterious impacts on employees and business competition. After considering feedback from stakeholders, the Department considers there is a strong case for government action and that the proposed measures are reasonable.

A variation of option 3 was contained in the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021, which ultimately did not pass Parliament. **Option 2** improves upon this previous proposal by ensuring any party to an agreement can apply to preserve a sunsetting agreement for up to four years in specified circumstances. The Department considers this to be an appropriate safeguard which will minimise the impacts of the measure on businesses and employees.

Improving access to single and multi-employer agreements

Option 2 provides a suite of proposals to improve access to single and multi-employer agreement-making via the single-enterprise bargaining stream, single-interest bargaining stream, supported bargaining stream and cooperative workplaces bargaining stream. This option also ensures the process for taking industrial action is fair and robust and proposes to amend the Fair Work Act to ensure that positive measures to address gender and other forms of discrimination are permitted content in enterprise agreements.

It is clear the bargaining framework (status quo) is not delivering outcomes for businesses and employees, especially low-paid employees. The suite of amendments in **Option 2** is designed to address the decline in bargaining, low wage growth, and lack of access to bargaining. The Department considers **Option 2** preferrable to Option 3 because it specifically targets these issues.

Remove unnecessary complexity and make the Better Off Overall Test simple, flexible and fair

Option 2 simplifies the enterprise agreement approval process and makes amendments to the Fair Work Act to simplify the operation of the Better-Off-Overall-Test.

Consensus was reached at the Jobs and Skills Summit that the existing genuine agreement and better off overall requirements are onerous, complex and unnecessarily prescriptive, and that government action is needed. The improvements in **Option 2** remove the prescriptive elements of both the genuine agreement and better off overall requirements while maintaining appropriate discretion in the independent Tribunal to ensure fairness in agreements. The Department considers **Option 2** is preferrable to Option 3 because Option 3 does not adequately address the complexity and prescription that is at the core of the problem being addressed.

Increase the capacity of the Fair Work Commission to help workers and businesses reach agreements

Option 2 would amend the Fair Work Act to increase the capacity of the Fair Work Commission to deal with surface bargaining and intractable bargaining disputes. Currently, the Fair Work Commission can only arbitrate a bargaining dispute with the agreement of all bargaining parties or in certain very limited circumstances. Under this option, the proposed changes would apply to the Supported Bargaining Stream, Single Interest Bargaining Stream and Single Enterprise Bargaining Stream but not the Co-Operative Workplaces Stream (use of which is entirely voluntary).

The Department considers this option is preferable. Where bargaining breaks down and the parties reach an impasse, the options to break through the impasse and progress to agreement are limited. While the Fair Work Commission can assist parties with alternative dispute resolution options, there will always be cases where alternative dispute resolution does not reach an outcome. Industrial action is another option open to parties but more often than not inflames disputes and can lead to a breakdown in ongoing relationships between workers and their employer. **Option 2** provides parties with an additional option to approach the expert, independent Tribunal to assist progress bargaining and, in some cases, arbitrate bargaining outcomes to bring bargaining to a conclusion. Any incentive to 'game' the system and excessively refer disputes to the Fair

Work Commission for arbitration, or concoct scenarios where arbitration becomes likely, are minimised by establishing a high threshold before the Fair Work Commission can authorise arbitration. Additionally, the Fair Work Commission's powers to assist voluntary resolution are further engrained in the framework giving the Fair Work Commission the maximum discretion to assist parties make agreements.

7. How will you implement and evaluate your chosen option?

Implementation

All measures will be implemented through legislation and each measure will come into effect as scheduled in the Bill. The 'zombie' agreements measure will provide a sunset period to allow businesses and workers to make appropriate arrangements. To effectively implement the preferred option, registered organisations, employers, and employees will require sufficient time to comprehend amendments to the bargaining system. As part of this implementation process, employees and employers can seek information from the Fair Work Commission, the Fair Work Ombudsman, and the Department.

All workplace relations reforms are vulnerable to extraneous macroeconomic factors affecting the usage or take-up of new provisions. The Department highlighted how a changing labour market and business structures affected the way businesses used the Fair Work Act, and the deleterious effects this had on collective bargaining. The Department mitigates this risk by engaging in continual monitoring of the workplace relations framework and providing regular advice to Government.

A major risk to the implementation of these measures is parties not engaging with the enterprise bargaining forms, especially the new bargaining streams. This risk will be mitigated by the Fair Work Commission operationalising the reforms and providing regular advice. This will include:

- The Fair Work Commission's existing hotline that provides information to employers and employees
- Updated explanatory information on their website
- Updated online benchbooks for practitioners

In recent times, the Fair Work Commission has developed an informal practice of convening a full five-person Full Bench to consider major legal issues or provide guidance on how new laws operate.[83] In convening these expanded Full Benches, the Fair Work Commission will often call for submissions from major stakeholders (e.g. the ACTU, ACCI and Ai Group).

In addition to business-as-usual activity which accompanies the introduction of any new workplace laws, the Department has planned a communication strategy to aid in implementing these measures. The Department will:

- Develop fact sheets and 'questions and answers' material for the Departmental website to explain the key law changes and address common misconceptions.
- Link Departmental web communications to Fair Work Ombudsman information and education materials.
- Hold bilateral consultations and forums with key stakeholders.
- Develop illustrative case studies.

The Department recognises the risk that despite its comprehensive consultation and communication, some of these measures may not align with the views of some stakeholders. This will be mitigated by ensuring the Department clearly articulating the substance of the changes, and why the Government was required to legislate to resolve known issues with the bargaining framework.

[83] *Application by Sharon Bowker* [2014] FWCFB 9227.

Monitoring and evaluation

The Department engages in continual monitoring of the workplace relations system, which involves a range of qualitative and quantitative data sources, including from data it develops or from the Fair Work Commission. The Workplace Agreements Database managed by the Department contains wages information relating to all public and private federal enterprise agreements, such as wage increases included in agreements. The quarterly and yearly reports produced by the Fair Work Commission will indicate the impact of the policy once it has been implemented.

Data that is available and will be monitored by the Department includes the:

- number of new agreements made in the amended multi-employer streams
- number of agreements in any stream made by small businesses
- time taken to approve an enterprise agreement
- number of Better-Off-Overall-Test reconsideration applications
- number of applications for unilateral termination of an agreement
- number of applications to extend the sunset date of a 'zombie' agreement
- number of intractable bargaining declarations and workplace determinations made by the Fair Work Commission
- average wage increases awarded for agreements in workplace determinations.

The Fair Work Commission provides its reasons for approval and dismissal of agreements, which will provide insight on how the amended provisions are understood by parties and interpreted by the Fair Work Commission. The use of technological solutions will also provide more data to assess performance and allow the Fair Work Commission to assist parties as appropriate.

The Department will also continue to engage in stakeholder consultation with employer and employee groups to gauge the impact of the reform. In particular, consultation will be undertaken through the regular meetings of the National Workplace Relations Consultative Council (NWRCC), which is a forum for employer and employee representatives to consult on workplace relations and labour market matters of national concern that is chaired by the Minister for Employment and Workplace Relations. Given the close ongoing monitoring and evaluation of the implementation of workplace relations legislation and policies, no formal evaluation of these measures is planned.

Appendix A: Current bargaining streams