Single-Enterprise Bargaining and Agreement Making Process

KEY

- OPTIONAL STEP
- REGULATED STEP (S300)
- POTENTIAL FOR REWORK
- EMPLOYER
- EMPLOYEE REP
- ALTERNATIVE PATHWAY
- EMPLOYER AND/OR EMPLOYEE REP
- TOUCH POINT
- SIMULTANEOUS STEPS/ OPTIONALITY IN ORDER

HIGH LEVEL STEPS

PRE-BARGAINING → BARGAINING → TRIAGE & ASSESSMENT → EA APPROVED

TIMINGS

USER EXPERIENCE

- Track and monitor Nominal Expiry Dates (NED) of EAs already in place in business or, for unions, in sector
- As NED approaches or where an EA is not already in place, speak with employees and gauge views on bargaining
- Conduct analysis as to costs and benefits of bargaining
- Engage with internal business stakeholders to align on decision to bargain, objectives and likely implications
- Engage with employees to align on decision to bargain, objectives and likely implications
- Contact FWO, FWC, law firm or industry body for help
- Develop a risk management and/or bargaining strategy
- Set out the parameters of bargaining
- Draft a preliminary EA/log of claims
- Employer initiates/agrees to bargain (or PSO, scope order or low-paid authorisation comes into operation), triggering notification time
- Employer issues a notice of employee representational rights (NERR)
- Employees/ representatives request bargaining rep/s at any time after notification
- Parties meet and negotiate in good faith
- Bargaining can cease if all bargaining reps agree to end bargaining. Parties can apply to the FWC for a bargaining order requiring a bargaining representative to engage in good faith bargaining
- Parties reach an in-principle agreement
- Employer explains the terms and effect of the EA including as compared to the award/ previous EA and the needs of employees
- Employer advises employees how, when and where the vote will occur
- Employer must make available a copy of the proposed EA (including incorporated docs) to employees
- Any financial disclosure documents are given to employees
- Employees vote on proposed EA
- Majority of employees who cast a vote approve EA and an agreement is "made"
- Majority of employees who cast a vote don't approve
- One of the parties (usually the employer) applies to FWC for EA approval using F6
- Employer completes F17 form
- Bargaining reps completes (including unions) give notice to FWC, whether they support approval and whether they want to be covered using form F18 or F18A
- Application is submitted to the FWC
- Notice email publishing FWC has received the application (distinguishes it from other issues which it sends)
- Non-parties can seek application forms from the FWC. Notice is released if an application.
- Non-parties to an agreement may request to be an application forms and request to be heard
- Application considered by FWC
- Parties are invited to a hearing
- Parties are invited to provide undertakings and/or submissions
- Applicant withdraws application
- Parties are notified that their application has been approved
- Parties are notified that their application has been refused
- Parties and/or non-parties appeal decision (FWC Full Bench or Fed Court)
- EA in operation
- EA remains in operation until terminated or replaced

USER PAIN POINTS

- "FWC has a lot of resources available but not many people know they exist or find them engaging"
- "My wife is a part IR lawyer. She's a small business owner now. There's no way she would go down the EB path even though she'd love to. It's too lengthy and too expensive. It's a process that favours large enterprise"
- "We've learnt how to lodge compliant applications primarily through trial and error"
- "this flowchart is helpful from time to time, but it's clearly written for practitioners"
- "The best way to ensure that employees get a going rate is enterprise bargaining"
- "Given our level of sophistication we usually don't need representation. Generally don't have any issues and there we will point them to the FWC – we have very extensive forum with materials on the FWO website before"
- Users find the information available online generalised and difficult to navigate (not intuitive).
- Users have voiced frustration that online information is sometimes outdated (including and is not always updated to reflect changes in case law.
- When looking for help, users can bounce between the FWC and FWO for information
- The roles of the supporting bodies are restricted and unclear to users, more queries (tend to come to FWC than FWO, but as a tribunal FWC are restricted in their ability to help
- The EA process is seen to favour the "IR Club" or sophisticated players, with a one size fits all model disadvantaging small and medium sized business and/or first time users. More experienced or more well-resourced industries/employers are more likely to engage.
- "We have a spreadsheet which shows every significant employer in our industry and whether there is an EA or not. If there is one and it looks like it's close to expiry date we will send pro forma correspondence to get the ball rolling. If there is not, we will see whether there is an appetite for employees to bargain. Sometimes we need to have an NGO to get the employer to play ball"
- Some users have difficulty finding the NERR generator tool and completing the notice (i.e., first two questions are self-explanatory)
- Users are often confused about when to issue the NERR, who to issue to (e.g., whether the NERR needs to be re-issued to capture new employees) and how to issue (e.g., email, letter, notice board or intranet)
- FWC has limited to no visibility on when bargaining begins or how long it takes (unless parties reach out proactively for assistance) and so are unable to provide help/intervene when/if needed
- "When the proposed EA didn't pass we played it safe and re-issued the NERR. Even though we're maybe not technically required to we thought it wasn't worth the risk"
- "The consequences are so extreme—after two whole years you could be pretty much required to go back to the start because of one small technical breach"
- "It's very hard to bargain with someone who doesn't know how to bargain"
- "If the employer is only processing minimal changes to the existing EA, generally speaking they'll be pretty agreeable to bargaining with minimal disputation. Protracted disputes and litigation, strike actions etc, whose if employers wants to cut conditions"
- "As a bargaining representative the union has special privileges over someone who just appoints their mate or brother and that's a real problem because we know a lot more"
- "Preference of the boss is not deal with a union. They would generally rather not get involved in bargaining reps"
- "Low by (no negotiation means it's so low longer the BOOT, it's the BOT (Better Off Test)"
- "Currently the EA process is skewed towards employers. There is little to no discussion around productivity gains which is what the Act states the purpose of enterprise bargaining to be"
- "They came in (those meetings and made no attempt to bargain whatsoever. There is no negotiation, there is no discussion"
- Even though employers might want to engage in interest based bargaining they are afraid that commercial in confidence information/matters will be leaked to the market. On the other hand, employee bargaining reps might reject interest based bargaining because they believe they "need to give something up
- There is no obligation for parties to move to resolution or to make an EA (could be intentionally stalling); no means to get FWC unable to arbitrate a matter without all bargaining reps agreeing to do so, parties can get stuck in the "circle of persistence and resistance"
- Can low can change during bargaining—it requires effort to keep abreast of the market movements
- The perception from employees is that even time as one go through multiple EA processes, there is less and less to negotiate on because every new EA tends to build on the one before it
- It seems there is no real discussion on productivity of the workforce, overtime/life time scope, productivity through leaner operational processes for business, meeting operational KPI targets etc
- "If you're dealing with the scenario properly, where both sides want and say "here's the list of what we want to get out of this – let's negotiate" – technical compliance are not a problem. The problem with (mnemonic) arises where the employer turns up and says, "I want to bargain and hasn't got anything I want and we are going to vote in a length of time." That's where you get problems"
- Employers are often confused about how to notify employees about a vote and how to conduct it (e.g., which methods are acceptable to use and how to document); and who needs to be notified and has a right to vote (e.g., whether casual workers can vote)
- Particularly for larger employers it can be difficult for head office to know who is eligible to vote (e.g., here casual employees may have swapped shifts, but this only becomes evident weeks later in payroll)
- There is confusion as to how employees hired during the bargaining and access period should be handled, (e.g., does the NERR need to be re-issued to capture new employees)
- Some of the terminology around dates is a bit confusing, in particular 7 full calendar days between making a proposed EA available and the vote often trips people up
- "Sometimes the employer tries to play a War of attrition on these things by getting employees to vote multiple times on the same proposed EA. One employer had their proposed EA voted down twice, but the third time got approved by a small margin"
- "Can my casuals vote?"
- "It's tried to pass a company trend during the vote to give employees the chance to vote? If so, how do I comply with s180? It seems unreasonable and not in the interest of productivity to stop hiring completely for a week"
- Parties find the F17 form long and confusing – it can be hard to know how much or how little information to provide, with little proactive error detection capabilities
- "Our experience is that the F6s and F18 don't create challenges at all. What does create challenges is the F17 forms which over time has become more and more complicated. We will offer to do the F6s and offer to assist with putting together the F17 as well. If it's a small employer then they will usually accept that offer. But with large employers they have their own resources to do the F17"
- Failure to comply with legislated technical requirements under s180(2),(3),(5) can lead to parties having to start bargaining all over again
- Sometimes parties only realise they've failed to comply with something as they fill out the F17 form, at which stage there are limited ways to remedy mistakes.
- "The majority of the time we would prepare the F17 on behalf of the employer but the bargaining reps don't know what to do. Sometimes they don't have any templates and they have no resources to do the F17"
- "Too never really have a sense of confidence you're going to be approved"
- "We got some generic reply email saying we'd submitted the application then we heard nothing"
- "Bear non-registered union came in and made a submission because they wanted new members"
- "Cumbersome the right to be heard doesn't exist in the first instance. It's easier for us to get our foot in the door on appeal which sees more of the FWC's resources. It's a bizzare process"
- Parties can sometimes withhold information that ought to be disclosed in good faith (e.g., may be aware of a process or technical error early on in the process, but do not raise it until after the application has been submitted to defeat the application)
- "It's embarrassing to not be able to tell your employees when they're going to get their pay rise. They keep asking and I just have to say, sorry mate I don't know, it's with the FWC"
- "Once you've submitted your application, the whole process is a black hole"
- "We chase the FWC by sending them emails. Previously they would ring up if it's been a long time. But now they don't have the capacity. Bargaining reps are busy bees and they tell me that it's being considered next week? Or that's 8 days since chase them then it can be expedited"
- "Employees want certainty around when they're going to get their pay rise"
- FWC, and often parties, both run their own ROI/I in bespoke manual spreadsheets, with little to no visibility into how the other is calculating and no commons/ standardised approach
- It can be difficult, particularly for unsophisticated players and in situations where the EA is close to the award to assess whether employees are better off overall in comparison to the award. Interpreting and evaluating differences from the award can be complex
- Compliance issues may arise in industries where rates of pay in EAs are more likely to be close to the award.
- There is a perception of inconsistency between Members regarding approvals and whether they require undertakings
- There is a perception that the FWC does not understand the intricacies or individual needs of the industry/ies in which the employer operates
- "How can just two identical agreements in front of two different members of the same bargaining rep/s get two different decisions?"
- "The way the FWC has interpreted the BOOT has changed drastically over the last 5 years. Previously it wasn't so different to the no disadvantage test, but now Commissioners look at all the scenarios, including the worst-case scenario line by line of the award"
- Parties perceive that interpretation of the Act has evolved over time so that some EAs previously approved may not be approved today
- Limited incentive to re-engage in the bargaining process can lead to lapsed agreements
- Making variations to the EA can be difficult and inflexible (and therefore may not be done leads to fewer applications). There is limited ability to amend the EA once in operation, including where the need arises to do so for a subset of the employees (the whole employee base needs to vote to amend anything in the EA)
- There are instances where parties may choose to have certain terms negotiated and agreed outside of the EA because of the complexity of making or varying an EA. In lieu of an EA, some parties are opting into using policy documents, despite their preference to have these matters contractually bound under an EA
- "Sometimes the day before the hearing the employer will pull the matter and/or will have to cancel all my flights because they know it won't get through. It's a detriment to everyone – a waste of time and resources on both sides"
- "Some Members who come with a knowledge of the sector come with a more practical approach. Others who do not know about the sector tend to be more pedantic and we have to explain things to them"

OPPORTUNITIES

- LACK OF TRANSPARENCY AND NAVIGATIONAL HELP: Parties bargaining have low visibility on the activities along the process around dates, next steps and difficulty navigating the plethora of information available. Linked to no visibility on the agreement-making process from the FWC prior to application lodgement.
- LACK OF COOPERATION / LACK OF DISCUSSION AND ACTION ON PRODUCTIVITY: Lack of cooperation between parties can drive delays and uncertainty. There are limited built-in mechanisms in the current process to encourage parties to cooperate and move towards an outcome in a timely manner, leading to "circle of persistence and resistance" driving an endless bargaining process. Over time, evolution of case law and the application of the BOOT has led to a feeling by parties that the EA approval process is a line-by-line assessment and no longer focused on its policy intent. Heavy focus on compliance with the BOOT or focus on technical elements lead to both parties not focusing on mutual gains and benefits.
- LACK OF TECHNICAL REQUIREMENT EXPERTISE AND ERROR DETECTION: Multiple rules and regulations around technical compliance can be hard to follow, particularly for non-sophisticated users. The process also contains a high degree of technical requirements leading to anxiety about non-compliance, with the dominant perception of having to start bargaining all over again.
- LACK OF CONSISTENCY IN DECISION MAKING: Perceptions that the outcome of an application lodged is dependent on the exercise of discretion of the Member assigned to their case (particularly with respect to the application of the BOOT), with some users expressing frustration that they never feel confident that their EA will pass despite efforts.
- LACK OF DISCUSSION AND ACTION ON PRODUCTIVITY: Over time, evolution of case law and the application of the BOOT has led to a feeling by parties that the EA approval process is a line-by-line assessment and no longer focused on its policy intent. Heavy focus on compliance with the BOOT or focus on technical elements lead to both parties not focusing on mutual gains and benefits.

FWC EXPERIENCE AND PAIN POINTS

- "The whole process is quite difficult if you're new to it or unless you have professional help. We've had quite a number of small businesses come in asking questions, occasionally even directed to us from the FWO, but we are limited in how we can help them"
- "As a tribunal our role is limited. We can't give parties legal advice or hand their hand. When it comes to educating parties on the process there's a gap in the system"
- "It's really hard to find things on the FWC website. Even when I go to refer parties to online resources I struggle to find it. I know myself, I sometimes struggle to find them myself and usually result to google searching"
- "We have absolutely no visibility as to when bargaining commences, we only see an application for a EA is submitted, so there is nothing we can do to pro-actively help parties"
- "Parties: should really look at the F17 upfront, but many of them don't look at it until after"
- FWC receives the Application
- Application is saved in Case Management System and assigned a matter number
- "Our current case management system is highly manual, though there is talk of a new one"
- Email sent to parties acknowledging receipt of application and matter number (usually within 2 days)
- Some applications forms to be completed in Word, others in online
- The redacted EA is published online
- "We have to consider all scenarios, even if we know that in general in that industry people don't want Sundays we have to consider but what if they did? This might make us seem pedantic but we have to, it's our job to voice all possible scenarios with Members"
- "It can be very difficult to weigh up the deficiencies against the positives, especially when they are non-financial"
- "It's next possible to dictate how Members choose to handle a matter, though parties can appeal to the full bench"
- Member of the Triage team is assigned to review the application
- Triage team reviews the application and fill out the single-enterprise agreement legislation checklist
- Triage team logs an complaint and application is assigned to a Member
- Member reviews the application and decides on best course of action
- Member may request further analysis by Triage Team
- "When limited to provide undertakings parties will often get disheartened and think they're doing it wrong. Sometimes they'll even withdraw their application for something that could've been fixed by a simple undertaking. I wish I could do more to help them and make it clear to them that you get more than one chance"
- "There's a fine line between helping and giving legal advice. I might know exactly what the party needs to do, but I have to be careful what/how I advise them"
- Member requests additional undertakings and/or submissions from the parties
- Member invites the parties to a hearing
- Member dismisses the application
- Member approves the application
- Decision and agreement are published online and sent to the parties.
- 95% within 10 working days
- Median time for all agreements approved = 30 calendar days; Agreements approved without undertakings = 22 calendar days

Data sources: approval rates taken from FWC 2018-19 Annual Report, and average approval timings from data provided by FWC pertaining to all agreements approved between 1 July and 31 October 2019