

# Mapping and Analysis of Enterprise Agreement Making and Approval Processes

Diagnosis Report

11 DECEMBER 2019



**Australian Government**  
**Attorney-General's Department**

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- Faster, simpler EA-making process
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# Executive summary

**Enterprise bargaining** is the process of negotiation between an employer and their employees and their bargaining representatives with the goal of making an **Enterprise Agreement (EA)**. EAs contain the terms and conditions of employment between an employer(s) and their employees.

Enterprise bargaining is regulated under Part 2.4 of the *Fair Work Act 2009* which establishes a set of rules and obligations about the enterprise bargaining process. This includes rules about bargaining, the content of EAs, and how an EA is made and approved.

BCG was engaged by the Attorney-General's Department to undertake a 4-week process mapping and analysis of the EA-making process. Our objective was to identify unnecessary and duplicative steps in the process that could be modified or removed, while ensuring appropriate safeguards remain in the system. We did this by mapping the EA making and approval process, and testing and verifying steps against the intended purpose with employers, employee representatives, the Fair Work Commission, and subject matter experts.

Overall the single-enterprise agreement making and approval process is complex, cumbersome and demands a high level of technical requirements that do not always serve a purposeful outcome in line with the original policy intent. In identifying potential opportunities for process improvement, we found duplicative and redundant steps primarily come from users having to rework and repeat steps along the process (i.e., duplication from repetition driven by the complexity and high technicality of the process). We have focused on how to potentially reduce, change or remove steps to make a faster, simpler and improved process that meets all users' needs.

Improvements to the process can be looked at from two angles: re-engineer the process to remove complexity, technical requirements that lead to re-work and/or educate, upskill and raise awareness around the process to achieve higher levels of compliance across the process. Secondly, there could be greater opportunities to realise the benefits of the policy by re-designing an EA-making process that meets all users' needs. Ways to achieve this can be: introducing flexibility in the process for user needs, increasing consistency and confidence in outcomes and scaling progressive approaches to improve understanding and bargaining between parties.

This **Diagnosis Report** documents the outcomes of the project. We completed mapping of the single- enterprise agreement-making process and identified many pain points which have been grouped into six key themes:

- Lack of **transparency and navigational help** leading to confusion and frustration
- Lack of **technical requirement expertise & error detection** leading to rework due to process containing a high degree of technical requirements
- Lack of **cooperation** between the parties of an EA leading to frustration and stagnation
- Lack of **consistency in decision making** leading to variations in outcomes
- Lack of **flexibility** leading to opting out of bargaining in a "one size fits all" model
- Lack of **discussion and action on productivity** leading to both parties not focusing on mutual gains and benefits

We identified 35 discrete potential ideas to address those pain points, which should be evaluated and considered in more detail.

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# Scope of work: Diagnostic of the single EA-making and approval process

The project involved the mapping and analysis of the steps taken before, during and after the making of an agreement, through to the lodgement of application, triage assessment, and the assessment and approval of the agreement by the Fair Work Commission.

We identified pain points, complexities and duplicative efforts that could be explored further for improvements in the process.

The scope of the work considered the single-enterprise bargaining process only. Determining the effectiveness of the enterprise bargaining system was not in scope. Analysis of the efficacy of the BOOT was also explicitly excluded, however there are references to the BOOT where it relates to user experience and perceptions.

There are two main deliverables:

1. Visualised process map of the EA-making and approval process (the Process Map); and
2. Prepare a written analysis and evaluation of the EA-making and approval process (this Diagnostics Report).

The Process Map includes:

- steps in the enterprise agreement making and approval process (single-enterprise agreements) from the commencement of bargaining to approval of the agreement by the FWC
- the participants and stakeholders of this process
- the policies and rules that underpin the agreement and their implications
- legislated timeframes for certain steps
- the behavioural components of negotiation and bargaining that can have implications on time and productiveness of the process

The Diagnostics Report includes:

- how the steps are applied in practice and their implications,
- deep dives into pain points experienced by the users, and
- potential opportunities for process improvements including steps that could be changed or removed

# We undertook targeted engagement approach using ethnographic techniques

We engaged with participants, experts and stakeholders of the EA process through a targeted engagement research method using ethnographic researchers to deep dive into the process. We used this approach because ethnographic research surfaces latent unmet needs of users that is directional.

Over four weeks, we engaged a diverse group of external users based on factors such as: frequency of use (i.e., repeat or inactive users), size of entity (large or small-medium), industry, and level of sophistication with the industrial relations system. Further information on the number and types of stakeholders and users engaged and invited in our diagnostic research can be found on slide 9.

This research was conducted on a confidential basis to allow parties to freely express their views.

Thirty-six employers were invited to participate in the research and 11 accepted. We focused on two employer segments for our research:

- Users who have undertaken the EA-making and approval process multiple times and have internal capabilities to run it, with self-built tools and resources. Most likely to be **large sized enterprises**
- Users who have either not engaged extensively in the process, or have minimal exposure. Generally rely on external resources for assistance to execute the process (i.e., external legal counsel or consultants). Often likely to be **small-medium sized enterprises**

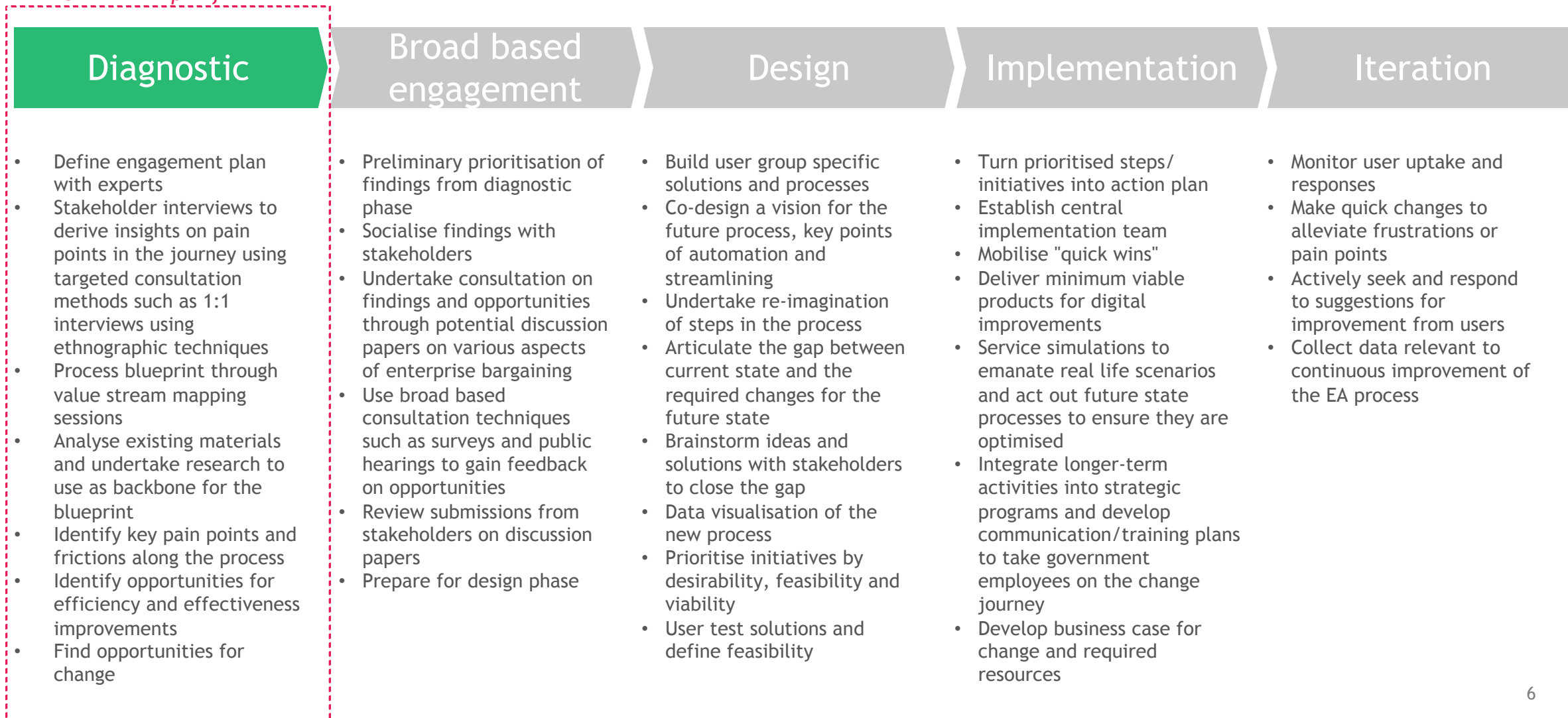
For **employee representatives/unions**, we invited 11 unions to participate in the research, 2 interviews were conducted with unions that accepted the invitation.

Potential opportunities for process improvements were identified and presented in two Immersion Sessions where we gained feedback and iterated with Government subject matter experts.

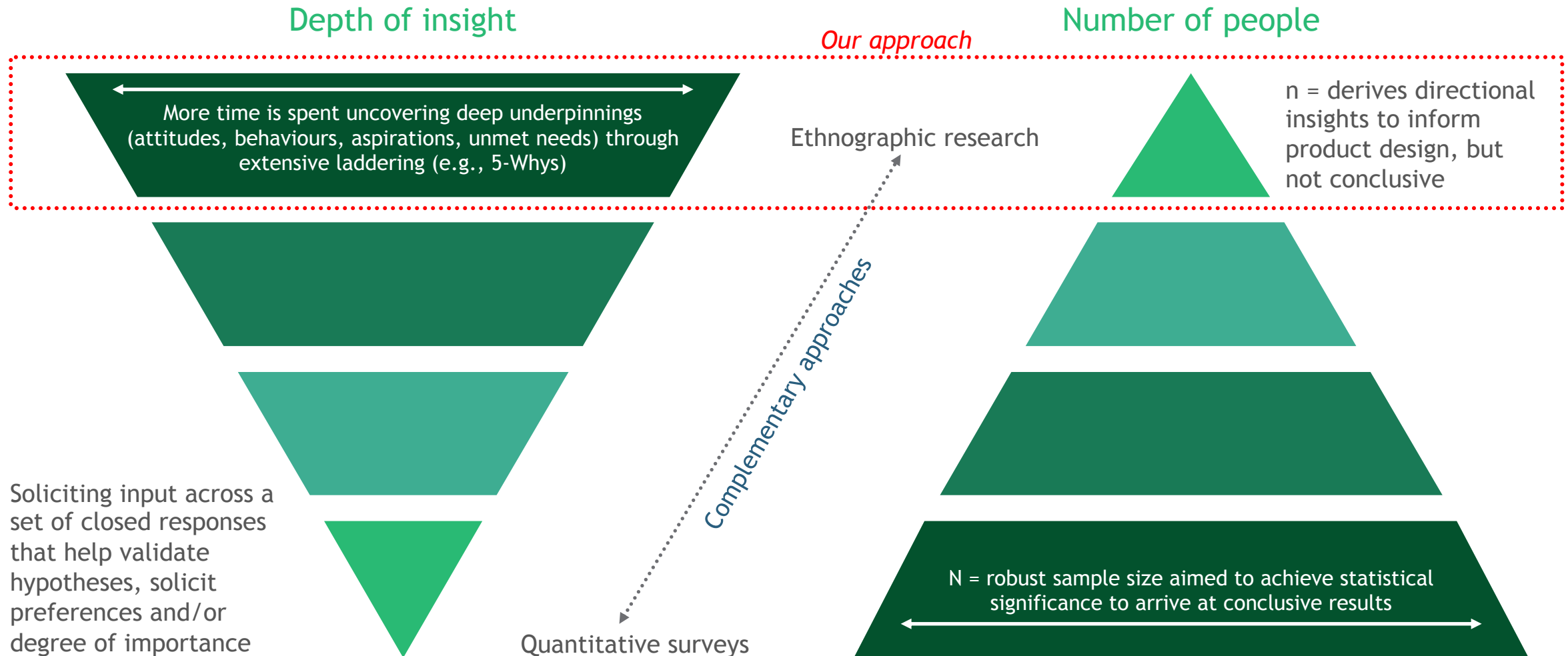
Further consultation and research on pain points and opportunities for improvement with a broader set of stakeholders could be beneficial in taking this work forward.

# We have undertaken a diagnostic of the current EA-making and approval process as phase one

*Current scope of work*



In order to understand the underlying needs and pain points of users, one on one interviews with fewer users is a proven method that gives depth of insights





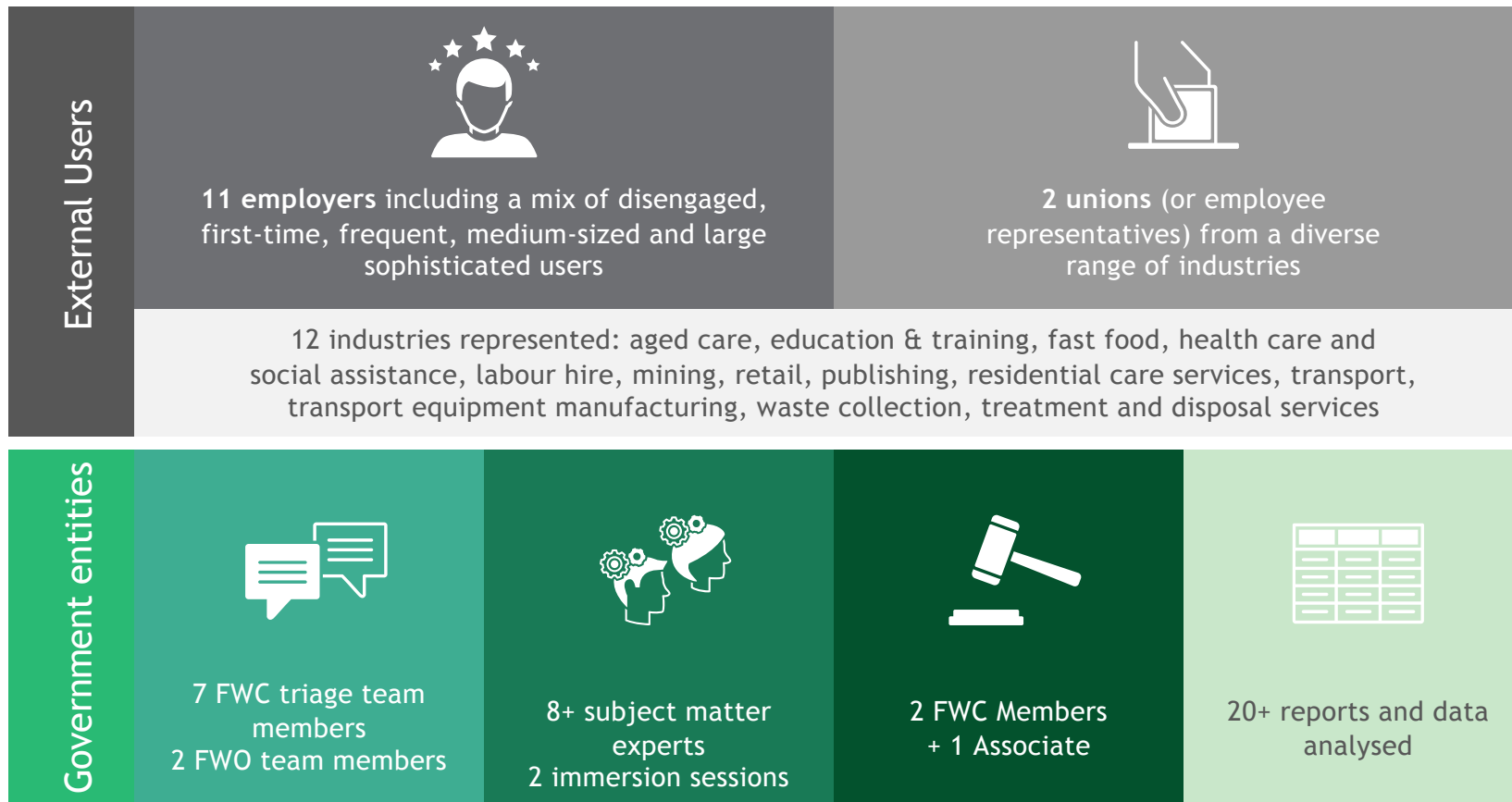
# Hence, for this diagnostic phase we have chosen a targeted engagement approach using ethnographic research techniques to engage with users



For Illustrative Purposes: List of consultation modes not exhaustive

# A range of users, stakeholders and subject matter experts were invited to engage in this diagnostic phase

We invited **36 employers and 11 unions** to participate in the ethnographic research

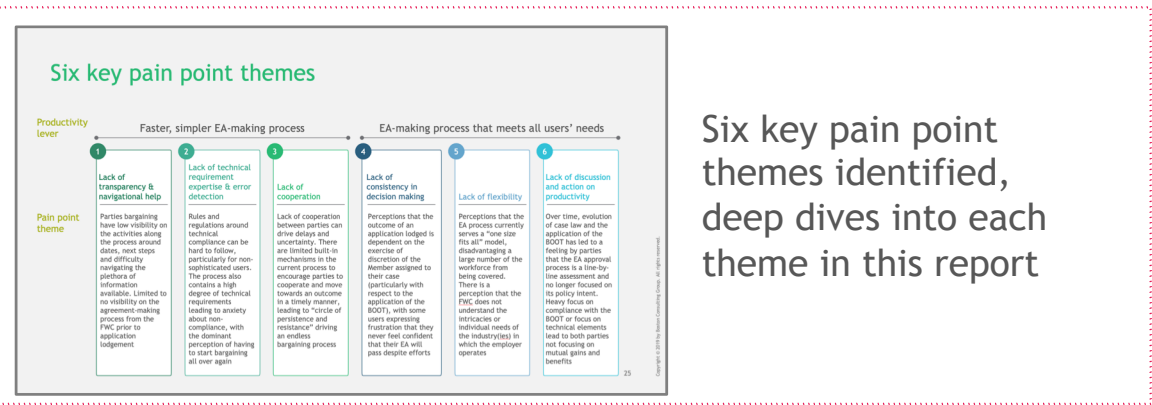
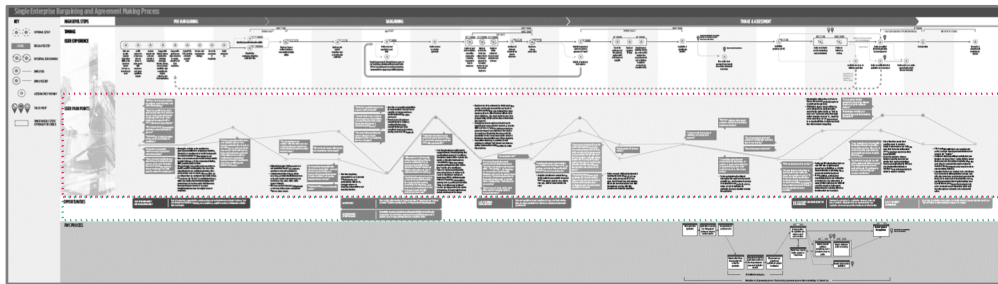


# The research findings are presented in the current user journey and process map and detailed further in this Diagnostics Report

## 1 Current-state user journey & process map

Refer to Single-Enterprise Bargaining and Agreement Making Process Map

## 2 Diagnostics Report



Six key pain point themes identified, deep dives into each theme in this report

Please read the process map in detail to get an understanding of steps in the process where high degree of technical requirements live, re-work, complexity and confusion is derived from

Opportunity	Users who would benefit	Description	Pain-point addressed	Next steps	
↑	Updating bargaining representatives	All users, in particular small-medium enterprise, technical bargaining representatives	Updating on technical and soft skills of bargaining representatives • Develop training for bargaining • EA process updates and online training • Encourage training of representative bargaining representatives • EA induction programs • Provide information about internal-union bargaining	First time bargaining reps can be unfamiliar with the EA process, lack understanding of their role, can lead to turnover of bargaining reps and impacting timelines	Do later
↑	Introduce touchpoint when bargaining commences	All users	The parties should notify FWC upon timing of the NCR so that FWC is aware bargaining is commencing. This could take the form of: • Small notification when the NCR generator tool is used • Pop-up when NCR generator tool is opened, prompting parties to notify and file the NCR • FWC communication on subsequent requests for information • FWC could encourage this through use of an automated tool and capture data to use between the continuous improvement	FWC does not know when bargaining begins or how long it takes and is not able to provide help/intervene where needed	Design further
↑	Proactive nudges and communications	All users	• Whenever data is collected on timing of NCR, the FWC should consider proactively communicating online messaging. See also, just the date along the process by building on date calculator • Build a standardized, scheduled communications post application to disclose the average time to hear back from the FWC on different parts of the process • Provide more clearly that applications without understanding and resolved within 20 days • Consider proactively contacting applicants if their application will not be processed • Consider proactively contacting the operational team on the date, this can be automated or submitted at a later time • A live report of median time from agreement approval at sign-off time to 11 single and 21 common agreements	Communication around timelines across the process, especially for approvals to unclear	Design further

Key opportunity areas to address each pain point theme, encompassing 35 discrete actionable components

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# The challenge

The stakeholder landscape for enterprise bargaining is complex and interlinked, with many parties involved. They include (1) government entities such as the Fair Work Ombudsman (FWO), the Fair Work Commission (FWC) and the Commonwealth Attorney-General's Department (AGD); and (2) employers, employees, and their representatives. Each stakeholder has different perceptions and interests.

Employees, employers and their representatives want an agreement that is simple and easy to navigate, a government service that can readily respond to their requests, and an EA that provides tangible benefits to them. Government entities have an overarching regulatory oversight to ensure that EAs registered with them are scrutinised to their level of satisfaction to ensure fairness, and the policy intent of increasing productivity on a macroeconomic level.

The Fair Work Act 2009 promotes productivity, fairness and cooperation through an emphasis on enterprise-level collective bargaining. Benefits for employers include simplified business operations, certainty around labour cost, and increased output. For employees these benefits include wages growth, more certainty, and improved working conditions.

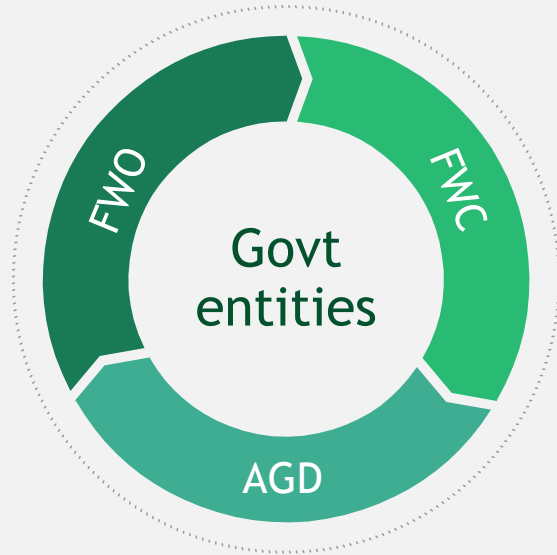
However, the intent of the Fair Work Act may be unrealised if EAs are not being used by the workforce. In recent years, there has been a decline in the coverage of the Australian workforce by active EAs. Many reasons have been put forward for this decline. One of them is the processes by which EAs are made by parties and approved by the FWC.

The focus of this work therefore was to: **Identify potential opportunities to improve the EA-making and approval processes.**

# The ecosystem of enterprise bargaining involves many parties with differing perceptions and interests

- Individual disputes
- Provides general advice to the public
- Regulates enterprise bargaining process
- Approves EAs submitted to it
- Sets modern awards

- Negotiates with bargaining reps
- Puts EA forward for employee vote
- Wants business continuity and certainty
- Seeks better conditions for their employment
- Partakes in the EA process through vote



- Policy advisers and makers for enterprise bargaining
- Delivers Govt's policy agenda

→ The framework ensures the safety net is met by compliance with the Fair Work Act 2009

External users want a simple and easy to navigate EA and agreement making process and a government that meets their interests ←



- Negotiates with employer
- Provides information and resources to employees
- Represents employees' needs

# The Fair Work Commission plays a central role in approving enterprise agreements and resolving disputes, along with other entities

## Fair Work Commission

Functions and responsibilities set by the Fair Work Act 2009

Makes, reviews and varies modern awards which act as a safety net of minimum wages and conditions

Assists with the bargaining process for enterprise agreements; approves, varies and terminates enterprise agreements on application

Makes orders to stop/suspend or terminate protected industrial action

Deals with disputes and claims including unfair dismissal, anti-bullying, unlawful termination, etc

Cannot provide legal advice to applicants re enterprise bargaining

## Fair Work Ombudsman

Functions and responsibilities set by the Fair Work Act 2009

Provides free advice and information on the Australian workplace relations system to the public

Monitors compliance with and investigates breaches of workplace laws (including potential breaches of the Fair Work Act and EAs)

Takes enforcement action against breaches

Cannot provide legal advice to applicants re enterprise bargaining depending on circumstances of each case

## Attorney-General's Department

Provides advice to the Attorney-General, Ministers and Cabinet on policy matters pertaining to industrial relations (amongst other things)

Policy development of workplace relations matters (per global best practice, stakeholder feedback, etc.)

Interacts with central agencies (PM&C) and other government departments on issues that have general implications for industrial relations matters

Maintains and operates the Workplace Agreements Database which provides data on developments in coverage, wage increases and conditions of employment included in collective agreements

## Cabinet and Ministers

Sets the Government's high level policy agenda

Representational bodies elected by general election and appointed by Governor-General (on advice from the Prime Minister)

Responsible to Parliament and the people of Australia

Introduces Bills to Parliament for debate, negotiates with cross bench and opposition members on policy agenda

Enterprise bargaining can deliver benefits to both employers and employees

Employee benefits can include:

- Fair and certain wages
- Representation
- Improved conditions
- ... and more

Employee benefits

Employer benefits

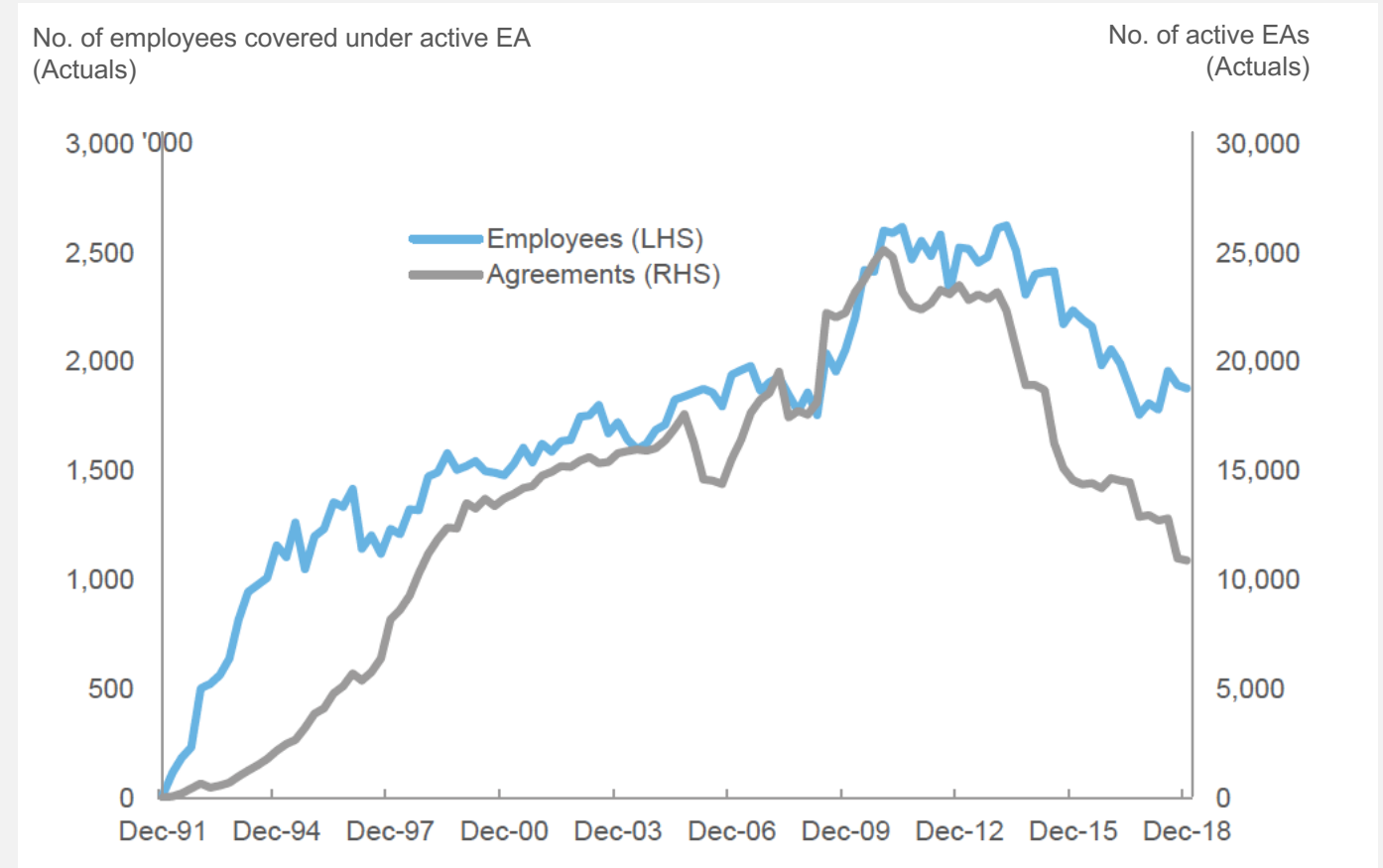
Employer benefits can include:

- Increased output
- Certainty on cost of labour
- Minimal disruption to work (i.e., no industrial action)
- ... and more



There has been a decline in active enterprise agreements in Australia in recent years

The number of federally registered, active EAs and the number of employees covered under those active EAs are falling<sup>1</sup>



1. It is important to note that agreements can continue to operate even though they have expired; the coverage of these agreements is measured under ABS EEH data. Source: Attorney-General's Department, Trends in Federal Enterprise Bargaining Report, March Quarter 2019; Australian Bureau of Statistics ABS cat. no. 6345.0; Business Council of Australia report "The State of Enterprise Bargaining in Australia" (August 2019)

One hypothesis is the process by which EAs are made and approved by the FWC has contributed to this decline



## EA-making and approval process

Lengthy, cumbersome and complex assessment and approval process<sup>1</sup>

“One size fits all” process that is not tailored to different user groups and their changing needs around EAs<sup>1</sup>

*Focus of this report*

Introduction of the Better Off Overall Test (BOOT) in 2010 for each current and each prospective employee, and evolving case law with the application of this test<sup>2</sup>

1. Ethnographic research conducted by BCG 2. Business Council of Australia, "The state of enterprise bargaining in Australia" (August 2019) accessed 5 November 2019

# This report identifies opportunities to activate new users and re-engage existing users of EAs

## 1 Activate new users of EAs

Large sized enterprises<sup>4</sup> represent around 20% of all current (not expired, or terminated) EAs, and cover around 90% of employees<sup>3</sup>

Small-medium enterprises are the smallest user group of EAs based on employee coverage: <20% of employees working for medium-sized enterprises<sup>4</sup> are covered by collective agreements<sup>3</sup>

In lieu of EAs, small-medium enterprises turn to individual contracts or rely on an award as their industrial instrument

## 2 Re-engage existing users of EAs

The number of employees covered by current EAs has fallen since 2014.<sup>1</sup> BCA reports that the proportion of people working under lapsed EAs has risen from 22% in 2014 to 40% in 2018<sup>2</sup>

Data suggests that many small-medium enterprises are not re-engaging or opting out of the EA process<sup>2</sup>

Large enterprises are the biggest user of EAs by coverage. There is a perception that some large enterprises are opting out or not renewing EAs



**What steps and aspects of the EA process could be changed to activate new users and re-engage existing users?**

1. Attorney-General's Department, Trends in Federal Enterprise Bargaining Report, March Quarter 2019; Australian Bureau of Statistics ABS cat. no. 6345.0; Business Council of Australia report "The State of Enterprise Bargaining in Australia" (August 2019); 2. Business Council of Australia report, "The state of enterprise bargaining in Australia" (August 2019), calculation based on ABS cat. no. 6306.0 and Attorney-General's Department, Trends in Federal Enterprise Bargaining Report, March Quarter 2019 3. Data received from Economics and Workplace Agreements Analysis Team, Industrial Relations Policy Division, Commonwealth Attorney-General's Department, on 5 November 2019 4. Medium sized enterprises are defined as employing between 20-99 employees; Large sized enterprises are defined as employing 100 or more employees

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- Faster, simpler EA-making process
- Better quality EAs

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# Findings and opportunities

We identified two categories of potential opportunities for improvement:

1. Faster, simpler EA-making process; and
2. EA-making process that meets all users' needs

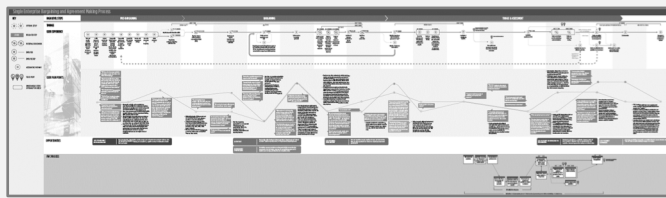
## 1. Faster, simpler EA-making process:

- We have identified **ten potential opportunities** to solve the **lack of transparency & navigational help**. This includes levers to add or change touchpoints and timely communications to give and gain more visibility across the EA process
- We have identified **six potential opportunities** to solve the **lack of technical requirement expertise & error detection** leading to rework due to process containing a high degree of technical requirements. This includes removing unnecessary technical requirements and/or improving the ability to detect mistakes or non-purposeful errors early on in the process, which could potentially be fatal to agreement approval
- We have identified **five potential opportunities** to solve the **lack of cooperation**. This includes ways to address the potential unwillingness to cooperate and distrust between parties through promotion and scaling of the “New Approach” interest based bargaining

## 2. EA-making process that meets all users' needs:

- We have identified **five potential opportunities** to solve the **lack of consistency in decision making**. This includes introducing new tools to increase parties' understanding of, confidence in and consistency in the application of awards and the BOOT, and tools such as modular agreement builders
- We have identified **five potential opportunities** to solve the **lack of flexibility**. This includes providing for the different needs of different EA users and different processes for variations
- We have identified **six potential opportunities** to solve the **lack of discussion and action on productivity**. This includes ways to improve understanding of parties' interests to find mutual gains

# Snapshot: Single-Enterprise Bargaining and Agreement Making Process Map



Re-work of technical requirements



High complexity requirements



Process steps



Confusion about the bargaining process including access to information



Issuing of NERR is technical & prone to error



Bargaining can drag out for an unknown amount of time



Voting requirements are technical & prone to error



F17 form is long and confusing for users to complete



Technical requirements under S180 can be confusing



The complexity of the process may deter parties from re-negotiating for an EA after the NED



- Users find the information available online generalised and difficult to navigate (not intuitive).
- Users have voiced frustration that online information is sometimes incorrect/misleading 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. 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.



- Some users have difficulty finding the NERR generator tool and completing the notice (i.e., first two questions are not 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.



- 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".
- Case law can change during bargaining—it requires effort to keep abreast of and respond to changes.



- 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).
- 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.



- 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.



- FWC, and often parties, both run their own BOOT in highly manual spreadsheets, with little to no visibility into how the other is calculating and no common/ standardised approach.
- Undertakings are confusing and time consuming



- 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 which leads to fewer applications).

User pain points

Themes

Lack of transparency & navigational help

Lack of technical requirement expertise & error detection

Lack of cooperation

Lack of discussion and action on productivity

Lack of consistency in decision making

Lack of flexibility

# An initial prioritisation of opportunities looked at value and feasibility



## Do now:

Easy wins, assembling a cross functional team to develop and deliver the opportunity

## Do later:

De-prioritise for now in terms of resource allocation and consider later on in delivery roadmap

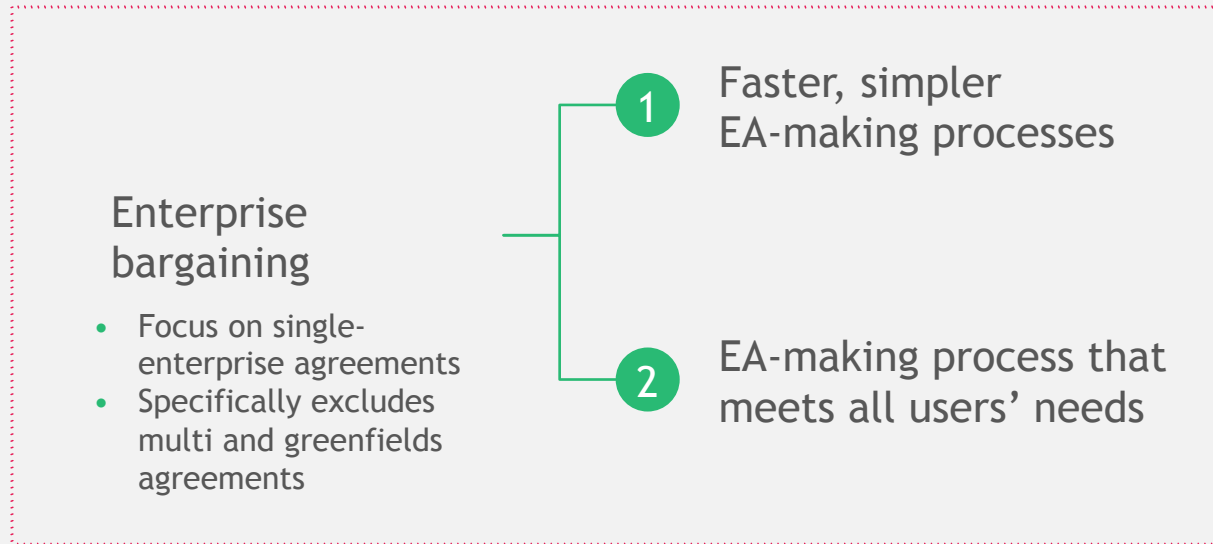
## Design further:

Strategic initiatives, begin a broad based engagement with stakeholders and users to design the opportunity further to break down the delivery components to make it feasible

## Don't do:

Low value, high complexity opportunities not worthwhile focusing on

# There are two categories of potential opportunities for improvement



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## Other mechanisms

- Modern awards
- Individual arrangements

Not considered  
(out of scope)



# Our research has found six key pain points to solve



In order to achieve faster and simpler EAs, we must tackle ...

- 1 Lack of **transparency & navigational help** leading to confusion and frustration
- 2 Lack of **technical requirement expertise & error detection** leading to rework due to process containing a high degree of technical requirements
- 3 Lack of **cooperation** leading to frustration and stagnation on reaching an outcome



In order to achieve EA-making process that meets all users' needs, we must tackle ...

- 1 Lack of **consistency in decision making** leading to variations in outcomes
- 2 Lack of **flexibility** leading to opting out of bargaining in a "one size fits all" model
- 3 Lack of **discussion and action on productivity** leading to parties not focusing on mutual gains and benefits

# Six key pain point themes

Productivity  
lever

Faster, simpler EA-making process

EA-making process that meets all users' needs

Pain point  
theme

1

**Lack of transparency & 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. Limited to no visibility on the agreement-making process from the FWC prior to application lodgement

2

**Lack of technical requirement expertise & 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

3

**Lack of cooperation**

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

4

**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

5

**Lack of flexibility**

Perceptions that the EA process currently serves a "one size fits all" model, disadvantaging a large number of the workforce from being covered. There is a perception that the FWC does not understand the intricacies or individual needs of the industry(ies) in which the employer operates

6

**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

# Faster, simpler EA-making process



# 1. Lack of transparency & navigational help

## ... Theme

Parties bargaining have low visibility on the activities along the process around dates, next steps and difficulty navigating the plethora of information available. Prior to application being submitted the FWC has limited to no visibility on the agreement-making process. This restricts their ability to help and intervene when needed.

... how might we add or change touchpoints and timely communications to give and gain more visibility across the process and make it easier to navigate the process?

“ We got some generic reply email saying we’d submitted the application then we heard nothing  
Medium enterprise

“ Employees want certainty around when they’re going to get their pay rise  
Union

“ FWC has a lot of resources available but not many people know they exist or find them engaging  
Large enterprise

“ We have absolutely no visibility as to when bargaining commences, we only see an application once it’s submitted, so there is nothing we can do to pro-actively help parties  
FWC

“ Once you’ve submitted your application, the whole process is a black hole  
Large enterprise

## Insights/Pain Points

1. Users find the information available online generalised and difficult to navigate (not intuitive)
2. The Enterprise Bargaining Benchbook is comprehensive and a useful resource for frequent users but is written in the language suitable for practitioners. Many users are unaware the tools that could be useful (e.g., 10 tips on Agreement Making, NERR generator, Date Calculator)
3. First-time bargaining reps can be unfamiliar with the EA process and lack understanding of their role, potentially leading to turnover of bargaining reps and impacting timelines
4. 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
5. 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
6. Employers do not know that undertakings exist to remedy deficiencies, and/or they do not know how to apply the undertaking (i.e., they provide undertakings for deficiencies in situation where it is not appropriate). Perceptions are that the communications from the FWC around the undertaking can be vague and unclear
7. Communication around timelines across the process, especially for approvals is unclear, some users expect to wait two months for a decision however approvals can be given in two weeks from lodgment leaving employers in a operational constraint situation as they are not ready to apply the agreement. Employees are also left in the dark about when they will receive their pay rise
8. The FWC has a very limited role in giving advice on undertakings even on the most basic things, which leaves the applicant frustrated
9. Users have voiced frustration that online information is sometimes incorrect/misleading and is not always updated to reflect changes in case law

## Opportunities to address Lack of transparency & navigational help

Levers to add or change touchpoints and timely communications to give and gain more visibility across the EA process, including making it easier to navigate the EA process for example through online tracking of applications

### Potential benefit to users

- Online resources are intuitive, user-friendly and relevant
- Guidance, advice and interaction with FWC occurs as and when needed
- Mistakes are quickly corrected or pre-emptively prevented
- Less uncertainty about outcome
- Increased visibility and certainty on status of application (allowing easier communications with employees) and preparation of business operations

### Potential benefit to Government

- Less rework, reduction in resources dealing with low value activities (such as resubmissions of documents, checking procedural errors)
- Reduce duplication of activities (consolidate two websites into one on enterprise bargaining)
- Higher rates of approvals
- Reduced length of time to approve applications
- Reduces confusion of users between govt agencies



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Tactical	Upskilling bargaining representatives	All users, in particular small-medium enterprises, individual bargaining representatives	Upskilling on technical and soft skills of bargaining representatives <ul style="list-style-type: none"> <li>• Disseminate education prior to bargaining</li> <li>• EA process webinars and online training</li> <li>• Encourage training of inexperienced bargaining representatives</li> <li>• EA induction programs</li> <li>• “Learn the process” videos and educational materials</li> <li>• Provide information about interest-based bargaining</li> </ul>	First-time bargaining reps can be unfamiliar with the EA process, lack understanding of their role, can lead to turnover of bargaining reps and impact timelines	Do later
Strategic	Introduce touchpoint when bargaining commences	All users	The parties should notify FWC upon issuing of the NERR so that FWC is aware bargaining is commencing, this could take the form of <ul style="list-style-type: none"> <li>• Smart detection of when the NERR generator tool is used</li> <li>• Pop-up when NERR generator tool is opened, prompting parties to notify and give data</li> <li>• Clear communication in educational materials promoting the ability to speak to the FWC during bargaining</li> </ul> FWC could encourage this through use of an automated tool and capture data re user behaviours for continuous improvement	FWC does not know when bargaining begins or how long it takes and so are unable to provide help/intervene when/if needed	Design further
	Proactive nudges and communications	All users	<ul style="list-style-type: none"> <li>• Whereby data is collected on issuing of NERR, the FWC should consider proactively communicating dates approaching, due date, past due date along the process by building on date calculator</li> <li>• Build a standardised, automated communications post application to disclose the average times to hear back from the FWC on different parts of the process</li> <li>• Promote more openly that applications without undertakings are finalised within 32 days</li> <li>• Consider proactively contacting applicants if their application will not be processed within published timelines—considering the operational burden on the team, this can be outsourced or automated at a later time</li> <li>• A live count of median times for agreement approval at lodgement time by 1) simple and 2) complex agreements</li> </ul>	Communication around timelines across the process, especially for approvals is unclear	Design further

## Opportunities to address Lack of transparency & navigational help

Levers to add or change touchpoints and timely communications to give and gain more visibility across the EA process, including making it easier to navigate the EA process for example through online tracking of applications

### Potential benefit to users

- Online resources are intuitive, user-friendly and relevant
- Guidance, advice and interaction with FWC occurs as and when needed
- Mistakes are quickly corrected or pre-emptively prevented
- Less uncertainty about outcome
- Increased visibility and certainty on status of application (allowing easier communications with employees) and preparation of business operations

### Potential benefit to Government

- Less rework, reduction in resources dealing with low value activities (such as resubmissions of documents, checking procedural errors)
- Reduce duplication of activities (consolidate two websites into one on enterprise bargaining)
- Higher rates of approvals
- Reduced length of time to approve applications
- Reduces confusion of users between govt agencies

Pre-bargaining

Bargaining

Triage and Assessment

EA in operation

Tactical

Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Simple online information	All users (particularly small-medium enterprises, individual bargaining representatives)	Consolidate online information to one site between FWC and FWO and create a centralised guide, document with tiered information aligned to user needs (i.e., sophisticated agents/employers and first time users). Improve the search functionality on the agreements webpage by asking “type of user” questions and presenting information relevant to user type. Access point to start learning about the process and collect user data points so that better service can be provided from the issuing of the NERR	The materials online are too convoluted and hard to understand	Design further
Undertakings explained	All users (particularly employers)	<ul style="list-style-type: none"> <li>• Standardised explanations of undertakings and applicability by providing users with a list of commonly sought undertakings in their industry or business type and better promotion of the material</li> <li>• Refine the existing undertakings guide to make it more user friendly for example: A repository of frequently occurring scenario-based undertakings accessible to applicants, potential consequence could be that it could normalise undertakings rather than encourage compliant agreements. The repository could be provided to users that require undertakings and providing a hyperlink to the repository when requesting undertakings</li> <li>• Create an education outreach program for infrequent users</li> <li>• Consider possibility of Commissioners providing a list of options for undertakings that would satisfy the Commissioner to remedy a deficiency</li> </ul>	Some employers do not know that undertakings exist to remedy deficiencies, and/or they do not know how to apply for an undertaking	Design further
FWC and FWO roles	Small-medium enterprises, individual bargaining representatives	Better communication/clarification on the role between the roles of the FWO and the FWC. Coordinated access to FWC/FWO education materials, including digital guides and checklists. Consider the most optimal roles and responsibilities to improve transparency and navigational help	The roles of the supporting bodies are restricted and unclear, driving frustration for users	Do now
Operationalising the date of agreement	All users	Change the “date of which the agreement should operate” from seven days to a longer period or actively promote putting in a operational date in the agreement that suits the business needs without compromising employee benefits	Employers may not be operationally ready for the change as they did not know when it would take effect	Do now

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- Reduced length of time to approve applications
- Reduces confusion of users between govt agencies



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Strategic	Case management operating model	All users	Introduce a case management model in FWC for complex cases and extend the service for help and navigation as a single point of contact vs. a capacity based triage model. Introduce the ability for FWC triage teams to provide navigational support during the process, understand the applicants' needs and help them overcome barriers	Who is the point of contact at the FWC, who is making decisions and who is managing communications and addressing questions	Design further
	EA journey tracker that tracks progress on application	All users	<ul style="list-style-type: none"> <li>• The ability to build a profile from time of “considering bargaining” for all parties and access tiered information during the process</li> <li>• Introduce a status bar that displays an application's progress and processing queue, which could provide visibility on undertaking applied and implications</li> <li>• Central point of communications and inquiries</li> </ul>	Unclear and confusing communications throughout the approval process including what will happen next to help users better prepare	Design further
	General inquiry help line or chat tool	Small-medium enterprises, individual bargaining representatives	Consider a help line or online chat tools that could provide users with information they require, and more efficiently help triage team resolve issues for users. This could prevent issues/missteps in the pre-application process and lead to less pain downstream rather than re-directing to the enquiries email	The FWC triage team email queries line does not suffice with answering questions	Design further



## 2. Lack of technical requirement expertise & error detection

### ... Theme

Multiple rules and regulations around technical compliance can be hard to follow, particularly for non-sophisticated users. In particular employers have voiced confusion about how to treat casuals and new employees; when, to whom and how they should issue the NERR; and who should vote and how. The process requires a high level of technicality that is not always necessary or meets the intended purpose of the step. There is a real anxiety about non-compliance, with the dominant perception being that one small mistake can lead to having to start bargaining all over again. While the introduction of the provision enabling the Fair Work Commission to overlook minor and technical errors might help address this in time, users would prefer to get it right than rely on the discretion of the Member. There is opportunity to remove unnecessary technical requirements and/or detect non-compliance earlier and provide more timely guidance if touchpoints can be introduced pre-application.

... how might we proactively detect non-complaint behaviours earlier in the process and educate parties so as to avoid technical errors?

“ Overly complicated NERR, when the point of the NERR is to say that the bargaining commenced and let employees know about it  
Large enterprise

“ We've learnt how to lodge compliant applications primarily through trial and error  
Large enterprise

“ 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  
Medium enterprise

### Insights/Pain Points

1. Employers are often confused about how to notify employees about a vote and how to conduct it (i.e., which methods are acceptable to use and how to document); and who needs to be notified and has a right to vote (i.e., whether casual workers can vote)
2. Particularly for larger employers it can be difficult for head office to know who is eligible (i.e., two casual employees may have swapped shifts, but this only becomes evident weeks later in payroll)
3. 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)
4. 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)
5. Some users have difficulty finding the NERR generator tool and completing the notice (i.e., first two questions are not self-explanatory)
6. There is some confusion around how to conduct the vote (which methods are acceptable to use and how to document) and who has a right to vote (e.g., whether casual workers can vote)
7. 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
8. Failure to comply with legislated technical requirements under s180(2),(3),(5) can lead to parties having to start bargaining all over again
9. Case law can change during bargaining. Parties perceive that interpretation of the Act has evolved over time so that some EAs previously approved may not get approved today
10. 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
11. The need to provide undertakings to state that the National Employment Standards (NES) apply feels unnecessary to parties
12. 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



## Opportunities to address Lack of technical requirement expertise & error detection

Levers to make rules and regulations around enterprise bargaining and agreement making easier to follow include removing unnecessary technical requirements and/or detecting non-compliance and promoting good behaviour earlier for example smart forms to complete F17 as you go that flag potential errors

### Potential benefit to users

- Time and cost saved in ensuring technical compliance (e.g., I no longer need to hire someone to help with technical compliance because I can easily understand exactly what I need to do to be technically compliant)
- By the time I get to submission it's easy because I've been filling out the F17 as I go and provided with early detection warnings of where I might be at risk of non-compliance and ways to remedy
- I have greater confidence that I will not be pulled up on minor technical errors and sent right back to the start, thereby reducing risk

### Potential benefit to Government

- FWC time and cost saved in seeking clarity on and correcting for non-compliance (i.e., would expect reduction in number of submissions required)
- Better quality answers and documentation submitted in forms to FWC will allow for faster and better decision making
- Greater willingness of users to engage in the process because it is perceived to be easy to comply with technical requirements



Tactical

Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Rethink the need for NES undertakings to be provided	Employers	<ul style="list-style-type: none"> <li>• Remove the need to provide undertakings pertaining to the NES by automatically including a NES precedence term in enterprise agreements (i.e., like a model term)</li> </ul>	The need to provide undertakings to state that the National Employment Standards (NES) apply feels unnecessary to parties	Do now
Simplify F17 language and make more explicit what is required	Employers	<ul style="list-style-type: none"> <li>• Review language in F17 to make it easier for users to understand what is required, iteratively testing improvements with users</li> <li>• Provide more guidance to users on the level of detail the FWC requires in responses, when it is acceptable to leave a question blank and what attachments should be included</li> <li>• This guidance could take the form of: Examples of compliant and non-compliant answers and/or supporting documentation to demonstrate inadequacies and submission mistakes; a list of frequently occurring application mistakes/issues (and how they are resolved); and/or in-form guiding/explanatory notes and templates</li> </ul>	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	Do now
Common mistakes forum	All users	<ul style="list-style-type: none"> <li>• Collect data around and provide users with examples of common mistakes specific to their industry and ways to avoid</li> <li>• FWC should collect user feedback on, and consider expanding its periodic workshops/seminars/twilight sessions to provide updates on changes and guidance on what's required to submit compliant applications</li> </ul>	Failure to comply with legislated technical requirements under s180(2),(3),(5) can lead to parties having to start all over again	Do now
Complete F17 as you go	Employers	<ul style="list-style-type: none"> <li>• Include cautionary statements in information materials to complete the application forms during the agreement making process (i.e., don't leave to the end)</li> <li>• Note: Next evolution of this would be smart forms that flag potential errors as you go, with potential to combine with EA journey tracker to fill in as you go</li> </ul>	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	Design further

## Opportunities to address Lack of technical requirement expertise & error detection

Levers to make rules and regulations around enterprise bargaining and agreement making easier to follow include removing unnecessary technical requirements and/or detecting non-compliance and promoting good behaviour earlier for example smart forms to complete F17 as you go that flag potential errors

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- Greater willingness of users to engage in the process because it is perceived to be easy to comply with technical requirements



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Tactical	Provide updates on evolving case law beyond current FWC bulletin service	All users (in particular frequent users)	<ul style="list-style-type: none"> <li>• If a change in case law means applications are going to be assessed more rigorously or additional documentation is required consider options for timely communication of this information to users (i.e., during pre-bargaining and bargaining phases)</li> <li>• Updates might take the form of: a refined FWC subscription service providing agreement-specific information; a banner on the FWC and/or FWO webpage; guides/educational materials linked to the F16 and F17 that can provide accurate, up-to-date information on requirements; or a push notification, call or email (e.g., through case management system or EA journey tracker)</li> </ul>	Case law can change while in the middle of bargaining. Parties perception is that interpretation of the Act has evolved over time so that some EAs previously approved would not get through today	Design further
Strategic	EA journey tracker that provides pre-application guidance	All users	<ul style="list-style-type: none"> <li>• EA journey tracker that provides pre-application guidance to users. Features could include:                             <ul style="list-style-type: none"> <li>- Calendar reminders that provide clarity around timing of activities (e.g., reminder to lodge application within 14 days of EA agreement being "made")</li> <li>- Proactive nudges and communication to document activities and timely guidance as to what and how to record (e.g., save the email you sent advising employees how, when and where the vote will occur)</li> <li>- Documentation to automatically feed into application and flag potential non-compliance as you go (e.g., a copy of the NERR, materials provided to employees to notify them of the time and place at which the vote was to occur and the voting method to be used, materials used to ensure the explanation was provided in an appropriate manner)</li> <li>- Built-in templates, forms and tools (e.g., pre-populated NERR)</li> </ul> </li> <li>• Note: This opportunity would be enhanced by introducing a touchpoint with the FWC when bargaining commences at which they can be made aware of and encouraged to download the EA journey tracker</li> <li>• Could start with limited features and evolve over time</li> </ul>	<p>Confusion around treatment of casuals, new employees, issuing the NERR, and voting</p> <p>Failure to comply with legislated technical requirements under s180(2),(3),(5) can lead to parties having to start all over again</p> <p>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</p>	Design further



# 3. Lack of cooperation

## ... Theme

Lack of cooperation between parties can drive delays and uncertainty in the process. There are limited built-in mechanisms in the current process to encourage parties to cooperate and move towards an outcome in a timely manner. Good faith bargaining requirements do not prohibit hard bargaining or that there will necessarily be an outcome, and parties can easily find themselves in a “circle of persistence and resistance.” Information asymmetry can be used as a negotiation tactic, with parties intentionally withholding information from each other, contributing to frustration with and stagnation in the bargaining process.

... how might we encourage open and frank conversations between parties and allow for differences of opinions to be resolved in a fair and timely manner?

“Preference of the boss (employer) is not deal with a union. They would generally rather not get [the union] involved as bargaining reps  
Union

“Where there is genuine agreement, it’s fine. When there is no genuine agreement and they try to cut [the union] out—it becomes an issue  
Union

“They came to those meetings and made no attempt to bargain whatsoever. There is no negotiation, there is no discussion  
Large enterprise

## Insights/Pain Points

1. Parties can sometimes withhold information that ought to be disclosed in goodwill (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)
2. Conduct of parties can be technically compliant with good faith bargaining but do not reflect goodwill or willingness to make compromises or reach an agreement
3. There is no obligation for parties to move to resolution or to make an EA (could be intentionally stalling); 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”
4. Reviewing and modifying concept of genuine agreement for smaller cohorts
5. 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”
6. Instances where disproportionate amount of weight placed on views of minority groups of employees; “the loudest voice in the room” (i.e., irrespective of how many employees an employee representative represents, each must be engaged with equally in the process)
7. The views held by bargaining representatives are not always reflective of the views of the workforce
8. Non-parties to an application or EA can make submissions contesting the EA terms or the process; FWC members can exercise discretion to determine whether to accept those submissions with the overarching objective being to “satisfy” themselves that the EA has been genuinely agreed. The pursuit of transparency can come at the cost of delays and instances where non-parties were (perceived to be) motivated by self-interest (i.e., to gain new members)

## Opportunities to address Lack of cooperation

Levers to address the potential unwillingness to cooperate and distrust between parties at the bargaining table for example scaling of “New Approaches” interest based bargaining methods

### Potential benefit to users

- Quicker, faster bargaining process
- Open and transparent communications and disclosure of interests without fear of commercial-in-confidence matters being disclosed or objections being raised post-application lodgement to defeat the application
- Clarity around goals and objectives (i.e., moving towards an output being an EA)
- Perception of being heard rather than being talked at

### Potential benefit to Government

- Less rework, reduction in resources dealing with low value activities (such as resubmission of documents, etc)
- Higher rates of approvals
- Early intervention from the FWC through mediator and interest based bargaining conduit
- Increased rigour on legislative framework to ensure policy objectives are not defeated

Pre-bargaining

Bargaining

Triage and Assessment

EA in operation

	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Strategic	Active encouragement of “New Approaches” interest based bargaining	All users	FWC could actively launch a campaign on the benefits of “New Approaches” such as interest based bargaining and scale up the program that has been underway. FWC should collect data on satisfaction levels, outcomes (productivity included in EAs) and other metrics (such as timeframes, etc.) in order to quantify the benefits of the New Approaches, “Chatham house rule” application to prevent leaking of commercial matters	Instances where disproportionate amount of weight placed on views of minority groups of employees; conduct of parties does reflect goodwill or willingness to make compromises or reach agreement	Design further
	Arrangement on how to bargain between parties before bargaining	All users	This arrangement would cover topics such as: norms, the type of bargaining that will be undertaken (i.e., interest based bargaining, what that means and why), identify participants, benefits to employee representatives, open discussion of topics/claims that could be weaponised, role of the bargaining rep and their methodologies to gauge workforce sentiments	Conduct of parties does reflect goodwill or willingness to make compromises or reach an agreement; views of bargaining representatives do not always reflect that of employees	Design further
	Greater marketing of FWC’s mediator function (under s240) to resolve disputes	All users	Encourage parties to call on FWC to act as a mediator where bargaining stalls or there is a perception that one party is being unreasonable; this would allow the process to move forward. FWC could build and run a credible mediation program supported by industry personnel (i.e., lawyers through a Continuing Legal Education program)	There is no obligation for parties to move to resolution or to deliver an EA (could be intentionally stalling)	Design further
Tactical	Bargaining representatives to disclose their concerns about non-compliance with the bargaining and agreement-making rules	Employers	The good faith bargaining rules could be modified to require bargaining representatives to disclose what they consider to be non-compliance with the bargaining and agreement-making rules to the other bargaining representatives. This positive obligation could potentially minimise challenges to agreements at the approval stage	Parties can sometimes withhold information that ought to be disclosed in goodwill	Do later
	Reviewing and modifying concept of genuine agreement for voting cohorts of employees	Employees and employee representatives	There have been examples of employers making EAs with small cohorts of employees in a new enterprise (including where the agreement is expressed to cover a wide range of classifications). Whether this arrangement satisfies the ‘genuine agreement’ requirement in the Fair Work Act depends on the circumstances of the case. In some instances this practice has been shown to be inconsistent with the ‘genuine agreement’ requirement or as a deliberate strategy to avoid the need to bargain with a union for a greenfields agreement or for an enterprise agreement with a larger group of employees	Unions concerned that some current practices exist that have been shown to be inconsistent with genuine agreement requirements	Design further

EA-making process that meets all users' needs

# 4. Lack of consistency in decision making

## ... Theme

Some users perceive that the outcome of an application once lodged is dependent on the discretion of the Member that happens to be assigned to their case (particularly with respect to the application of the BOOT). Some parties have expressed frustration that they do not understand what they need to do in order to pass the BOOT. They run their own test internally, but never really feel confident that they will pass.

... how might we equip parties to craft EAs they can be more confident will pass the BOOT and be approved?

“ You never really have a sense of confidence you’re going to be approved  
Large enterprise

“ You can put two identical agreements in front of two different members and get two different decisions  
Large enterprise

“ 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  
Medium enterprise

## Insights/Pain Points

1. FWC, and often parties, both run their own BOOT in highly manual spreadsheets, with little to no visibility into how the other is calculating and no common/standardised approach
2. 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
3. Compliance issues may arise in industries where rates of pay in EAs are more likely to be close to the award
4. Parties perceive that interpretation of the Act has evolved over time so that some EAs previously approved may not be approved today
5. Case law can change while in the middle of bargaining – it requires effort to keep abreast of and respond to changes
6. There is a perception of inconsistency between Members regarding approvals and whether they require undertakings

## Opportunities to address Lack of consistency in decision making

Levers to increase parties' understanding of, confidence in and consistency in the application of awards and the BOOT, including measures to help parties submit compliant EAs for example modular agreement builder linked to awards database

### Potential benefit to users

- Time and cost saved in ensuring compliance (e.g., I no longer need to hire an IR lawyer because I understand how to assess myself)
- It is easier for me to assess and communicate the impact of the new EA on my employees
- I understand exactly what the FWC wants from me and the reasoning behind their requests for additional undertakings/decisions
- I have greater confidence that my application will pass the BOOT, thereby reducing risk and increasing my willingness to engage in the process

### Potential benefit to Government

- FWC time and cost saved in seeking undertakings for non-compliance (i.e., would expect reduction in number of undertakings required)
- Better quality EAs submitted to FWC will allow for faster and better decision making
- Greater consistency in decisions will build trust in FWC process and government more generally
- Greater willingness of users to engage in the process because it is perceived to be easy to comply with BOOT



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Tactical	Provide greater explanation for decisions (including need for undertakings)	All users	<ul style="list-style-type: none"> <li>• When an undertaking is required provide greater explanation of why, focused particularly on defining what the problem to address is including evolving case law (e.g., sharing the legislative checklist, sharing the modelling used, a clear statement about the particular clause that's causing an issues or a description that clause x is inconsistent with requirement y)</li> <li>• Where an agreement cannot be approved based on the materials provided at lodgment, the Member should share the checklist with the parties and offer to hold a conference</li> <li>• Encourage best practice for Members to provide parties with reasoning for their decisions, even when agreement is approved (e.g., share the legislative checklist, hold a briefing session/conference)</li> </ul>	There is a perception of inconsistency between Members regarding approvals and whether they require undertakings	Design further
	Provide updates on evolving case law beyond current FWC bulletin service	All users (particularly repeat users)	<ul style="list-style-type: none"> <li>• If a change in case law means applications are going to be assessed more rigorously or additional documentation is required consider options for timely and more effective communication of this information to users (i.e., during pre-bargaining and bargaining phases)</li> <li>• Updates might take the form of: a refined FWC subscription service providing agreement-specific information; a banner on appropriate webpage (e.g., FWC and/or FWO); guides/educational materials linked to the F16 and F17 that can provide accurate, up-to-date information on requirements (e.g., practical steps needed to be taken to prove/evidence based on changes in the case law); or a push notification, call or email (e.g., through case management system or EA journey tracker)</li> </ul>	Case law can change while in the middle of bargaining—it requires effort to keep abreast of and respond to changes	Design further
	One consistent Member	All users	If a Member was involved in mediation, promote that parties may request the same Member determine the application	There is a perception of inconsistency between Members regarding approvals and whether they require undertakings	Do now

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- I have greater confidence that my application will pass the BOOT, thereby reducing risk and increasing my willingness to engage in the process

### Potential benefit to Government

- FWC time and cost saved in seeking undertakings for non-compliance (i.e., would expect reduction in number of undertakings required)
- Better quality EAs submitted to FWC will allow for faster and better decision making
- Greater consistency in decisions will build trust in FWC process and government more generally
- Greater willingness of users to engage in the process because it is perceived to be easy to comply with BOOT

Pre-bargaining

Bargaining

Triage and Assessment

EA in operation

	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Tactical	Modular agreement builder	All users	<ul style="list-style-type: none"> <li>• A modular agreement builder to help users build compliant EAs. Features could include:               <ul style="list-style-type: none"> <li>- Linked to award database to clear up confusion around which awards apply, help with matching roles against those in the award (note: FWO is responsible for providing guidance on award coverage to the public)</li> <li>- Feed into your pre-voting BOOT tool and F17</li> </ul> </li> <li>• Note: could evolve and add features over time (e.g., initially could start with feature of pointing applicants towards awards most likely to apply to them)</li> </ul>	Compliance issues may arise in industries where rates of pay in EAs are more likely to be close to the award	Design further
Strategic	Pre-voting digital BOOT tool	All users (in particular employers)	<ul style="list-style-type: none"> <li>• Digital tool for running preliminary assessments made available to all users, including FWC. This tool will help inform negotiations, communicate changes under proposed EA to employees and be submitted alongside the application. It should be noted that the tool is indicative only and does not constitute a final decision. Features could include:               <ul style="list-style-type: none"> <li>- ability to allow for easy comparison between the draft EA and the award/previous EA and help more easily match job titles against those in the award</li> <li>- automatically feeds into F17 form as an attachment</li> <li>- suggestions for model terms, best practice terms or industry standards</li> </ul> </li> <li>• Note: tool could evolve and add features over time (e.g., initially could be as simple as providing greater guidance or detail on what formula are used by FWC)</li> </ul>	Parties and FWC often both run their own BOOT in highly manual spreadsheets, with little to no visibility into how the other is calculating and no common/ standardised approach	Design further





# 5. Lack of flexibility

## ... Theme

Perceptions that the EA process currently serves a “one size fits all” model, disadvantaging a large number of the workforce from being covered. There is a perception that the FWC does not understand the intricacies or individual needs of the industry(ies) in which the employer operates. This can lead to behaviours of “giving up” and/or continuing to operate under lapsed EAs.

... how might we be more flexible around the way EAs are executed to deliver a tailored service to those who have different needs?

“  
My wife is a past IR lawyer. She’s a small business owner now. No way she would go down the EA path even though she’d love to  
Medium enterprise

“  
The whole process is quite difficult if you're new to it or unless you have professional help. We often get calls from small and medium business asking questions  
FWC

“  
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  
Union

## Insights/Pain Points

1. Limited incentive to re-engage in the bargaining process can lead to lapsed agreements
2. Making variations to the EA can be difficult and inflexible (and therefore may not be done which 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)
3. With limited ways to remedy deficiencies, errors detected in the application often mean that the parties need to go “back to square one” and repeat actions that might not be relevant or necessary (i.e., employers whose applications are not approved need to re-issue the NERR to all employees should they wish to return to bargaining)
4. 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 preferences to have these matters contractually bound under an EA
5. 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
6. There is a perception that the FWC does not understand the intricacies or individual needs of the industry/ies in which the employer operates

## Opportunities to address Lack of flexibility

Levers to increase flexibility to cater for the different needs of different EA users (e.g., different industries, level of sophistication) and allow for different processes for variations to existing EAs

### Potential benefit to users

- Reduced rework or activities that are irrelevant or unnecessary
- Increased value and relevance of the EA to business operations
- Faster, simpler process for small-medium enterprises (whose applications are generally less complex)
- Simpler and easier variations to existing EAs

### Potential benefit to Government

- Increased user satisfaction, the service provided meets user needs
- Higher rates of approvals

Pre-bargaining

Bargaining

Triage and Assessment

EA in operation

	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Strategic	Different process for variations that doesn't require all employees to vote	All employers and employees	Separate "variation" process and potential amendment to the Fair Work Act to allow the subset of employees impacted by a potential variation to vote on amendment to an already registered EA (at the moment, the Fair Work Act specifies that the employees covered by the agreement must vote, not just those subset of employees directly impacted)	Making variations to the EA can be difficult and inflexible (and therefore may not be done which leads to fewer applications)	Design further
	"Simple track" EA processes for small and medium sized businesses	Small-medium enterprises	Tailor and amend the process so that non-complex applications submitted by SMEs can be quickly and readily processed, which may include reducing or reversing the burden of proof with respect to procedural or technical matters such as timeframes or notifications to employees, etc.	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	Design further
	Nudges to parties when EAs nominal expiry date is approaching	Employers and employee representatives	FWC could provide nudges to parties to renew EAs when the expiry date is approaching (i.e., 6 months in advance)	Limited incentive to re-engage in the bargaining process can lead to lapsed agreements	Do now
Tactical	Consider different or separate processes for parties who would benefit from reactivation of existing EAs	All users	For EAs that are approaching or past their nominal expiry date, create a separate process which allows for faster and simpler reactivation of the EA. This would allow parties who are currently happy with their existing arrangements to benefit from revisiting parts or all of their EA	Limited incentive and complex processes to re-engage in the bargaining process can lead to lapsed agreements	Design further
	Should an application be rejected for a deficiency (that is greater than a minor procedural or technical error), allow parties to take actions to rectify that deficiency only	All users	Where an application has been rejected because of a deficiency or error (that is not a minor procedural or technical error that could be remedied under s188(2)), allow greater discretion from the FWC to allow parties to rectify those activities/steps only (where it makes sense to do so). For example, should parties wish to return to bargaining upon rejection of an application, there is little reason why the employer must re-issue the NERR if it is unnecessary	With limited ways to remedy deficiencies, errors detected in the application often mean that the parties need to go "back to square one" and repeat actions that might not be relevant or necessary	Design further



# 6. Lack of discussion and action on productivity

## ... Theme

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 is no longer focused on its original policy intent – to deliver productivity. Stakeholders perceive that this "line by line assessment" allows little latitude to make trade-offs. The heavy focus on compliance with the BOOT (based on parties' perceptions around how to comply) or focus on technical elements lead to both parties not focusing on mutual gains and benefits.

... how might we allow for more balanced conversations that are centered on mutual gains?

“ I don't think the employer is open to or does discuss productivity matters. My experience is that regarding productivity a lot of managers don't know what you're talking about. A lot of managers equate that with reducing your labour costs  
Union

“ Currently the EA process is skewed towards employees. There is little to no discussion around productivity gains which is what the Act states the purpose of enterprise bargaining to be  
Large enterprise

“ I'll ask - "what about productivity?" and it is laughable. There is sometimes some superficial clause included. But if we try to link wage increases with KPIs we are never successful”  
Large enterprise

“ Line by line negotiation means it's no longer the BOOT, it's the BOT [Better Off Test]  
Large enterprise

## Insights/Pain Points

1. Perceptions are that there is no discussion of productivity at all. Perception is that discussions about productivity would be beneficial to both employees (i.e., increased flexibility over rostering) and employers (i.e., output)
2. Stakeholders perceive that an apparent "line by line assessment" applied by the FWC means that negotiations lead to a "line by line assessment." Result is that it's no longer better off overall, but better off on everything leaving little room for negotiations
3. It seems there is little apparent discussion on productivity of the workforce (productivity can be associated with changes to awards, flexibility to meet employees' and/or business needs, KPI setting, leaner processing, reduced idle and overtime usage)
4. Representation becomes less necessary as bargaining discussions no longer require a sophisticated negotiation and weighing up of trade-offs overtime and non-attractive incentives for employers to engage in the process
5. The perception from employers is that over time as you 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 (despite the EA being tested against the award for BOOT purposes)
6. Some employers may be apprehensive about engaging in interest based bargaining due to the potential that the information shared can be disclosed to the market, on the other hand employee representatives reject interest based bargaining because they believe they "need to give something up"
7. Perceptions are that process overall favours the employee gains and employer has little incentive to engage

## Opportunities to address Lack of discussion and action on productivity

Levers to focus more on productivity and wages in bargaining conversations, for example incorporating “context setting briefings” between employer and employee representatives as a step in the process to understand each other’s interest and find mutual gains

### Potential benefit to users

- Mutual gains for all parties
- Understanding of each others needs and wants
- Clearer expectations from EAs
- Opening avenues to bargain on more than just wages

### Potential benefit to Government

- More incentives and benefits to engage in the EA process for all parties
- The ability for parties to negotiate on facts vs. beliefs which will deliver better quality EAs overall



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Strategic	Scale interest based bargaining training through online sources & interactive gaming	All users	Online and interactive learning modules on interest based bargaining that is promoted to parties engaging or re-activating EAs through the FWC. The modules should encourage more conversations on productivity gains for both parties, balancing the gains. Gamification tactics could be used to engage users on the learning modules such as a ranking system that anonymously ranks organisations into small to medium sized enterprise and large enterprises in terms of their sophistication	Representation becomes less necessary as bargaining discussions no longer require a sophisticated negotiation and weighing up of trade-offs over time and non-attractive incentives for employers to engage in the process	Do now
	Encourage "without prejudice context setting briefings" as a step in the process	All users	Encourage "without prejudice context setting briefings" (i.e., no obligation to bargain) where meetings could be held between employers and employee representatives to understand each other’s “context” (i.e., employers share information from the employer around sales, performance, competition and anything relevant impacting top and bottom-line of business with employee representatives and vice versa pain points, reasons for wage increases and circumstances of the work environment). Encouraging negotiation based on data points and facts over perceived beliefs and assumptions	Perceptions are that process overall favors the employee gains and employer has little incentive to engage	Do now
	Track the impact of EAs to ensure mutual gains in productivity for both parties	All users, particularly employers	Over time, to ensure mutual gains, FWC can encourage parties at the end of the EA process to track the impact of the EA and find ways to continuously strive for mutual gains (including making variations to the existing EA if need be)	Stakeholders perceive that an apparent "line by line assessment" applied by the FWC means that negotiations should be conducted line by line. Result is that it’s no longer better off overall, but better off on everything leaving little room for negotiations	Design further
Tactical	Productivity KPI’s	All users, particularly employers	What does productivity look like in my industry and “businesses like me” fact sheets or guidelines to help employers bring measures and KPI’s into the conversation when bargaining (consideration needs to be given to who would or could provide this information or training)	Perceptions are that there is no discussion of productivity at all	Design further

## Opportunities to address Lack of discussion and action on productivity

Levers to focus more on productivity and wages in bargaining conversations, for example incorporating “context setting briefings” between employer and employee representatives as a step in the process to understand each other’s interest and find mutual gains

### Potential benefit to users

- Mutual gains for all parties
- Understanding of each others needs and wants
- Clearer expectations from EAs
- Opening avenues to bargain on more than just wages

### Potential benefit to Government

- More incentives and benefits to engage in the EA process for all parties
- The ability for parties to negotiate on facts vs. beliefs which will deliver better quality EAs overall



	Opportunity	Users who would benefit	Description	Pain point addressed	Next steps
Tactical	Secure information shared in interest based bargaining	All users	Introduce and promote interest based bargaining as a option for all with a security of non-disclosure agreements to promote usage and uptake to overcome fears on being exposed	The potential that the information disclosed is leaked to the market	Do now
Strategic	Educate parties that the BOOT is a comparison of the new EA against the award (not the previous/existing EA)	Employers	The FWC applies the BOOT by comparing the new EA against the relevant award, however the perception is that in practice every new EA tends to build on the one before it. Employers may encounter difficulties trying to have an EA "voted up" by employees should the pay and conditions be perceived to be "less" than under an existing EA (even if those wages and conditions are better than the applicable award)	The perception from employers is that over time as you go through multiple EA processes, there is less and less to negotiate on	Design further

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- Faster, simpler EA-making process
- Better quality EAs

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# Conclusions on findings and opportunities

Overall the single-enterprise agreement making and approval process is complex, cumbersome and demands a high level of technical requirements that do not always serve a purposeful outcome in line with the original policy intent. The EA-making process can take a unknown amount of time (highest cases up to 2 years) making users feel stagnated and frustrated.

Improvements to the process can be looked at from two angles: re-engineer the process to remove complexity, technical requirements that lead to re-work and/or educate, upskill and raise awareness around the process to achieve higher levels of compliance across the process. Once the current process has been re-engineered to be faster and simpler for all users, there could be greater opportunities to realise the benefits of the policy by re-designing an EA-making process that meets all users' needs. Ways to achieve this can be: introducing flexibility in the process for user needs, increasing consistency and confidence in outcomes and scaling progressive approaches to improve understanding and bargaining between parties.

There are currently **10 opportunities** under “do now” which have been assessed as highly valuable and feasible to start improving the EA-making process.

# Summary: Opportunities on faster, simpler EA-making process

Opportunity	Next Step	Pg no.
<b>Lack of transparency leading to confusion and frustration</b>		
Clarification of FWC and FWO roles	Do Now	29
Operationalising the date of agreement	Do Now	29
Introduce touchpoint when Bargaining commences	Design Further	28
Proactive nudges and communications	Design Further	28
Simple online information	Design Further	29
Undertakings explained	Design Further	29
Case management operating model	Design Further	30
EA journey tracker that tracks progress on application	Design Further	30
General inquiry help line or chat tool	Design Further	30
Upskilling bargaining representatives	Do later	28
<b>Lack of technical requirement expertise and error detection leading to rework due to process containing a high degree of technical requirements</b>		
Rethink the need for NES undertakings to be provided	Do Now	32
Simplify F17 language and make more explicit what is required	Do Now	32
Common mistakes forum	Do Now	32
Complete F17 as you go	Design Further	32
Provide updates on evolving case law beyond current FWC bulletin service	Design Further	33
EA journey tracker that provides pre-application guidance	Design Further	33
<b>Lack of cooperation between parties of an EA leading to frustration and stagnation</b>		
Active encouragement of “New Approaches” interest based bargaining	Design further	35
Arrangement on how to bargain between parties before bargaining	Design further	35
Greater marketing of FWC’s mediator function (under s240) to resolve disputes	Design further	35
Reviewing and modifying concept of genuine agreement for voting cohorts of employees	Design further	35
Bargaining representatives to disclose their concerns about noncompliance with the bargaining and agreement-making rules	Do later	35



## Summary: Opportunities on EA-making process that meets all users' needs

Opportunity	Next Step	Pg no.
<b>Lack of consistency in decision-making leading to variations in outcomes</b>		
One consistent FWC Member	Do Now	38
Provide greater explanation for decisions (including need for undertakings)	Design further	38
Provide updates on evolving case law beyond current FWC bulletin service	Design further	38
Modular agreement builder	Design further	39
Pre-voting digital BOOT tool	Design further	39
<b>Lack of flexibility leading to opting out of bargaining in a "one size fits all" model</b>		
Nudges to parties when EAs' nominal expiry date is approaching	Do Now	41
Different process for variations that doesn't require all employees to vote	Design further	41
"Simple track" EA processes for small and medium sized businesses	Design further	41
Consider different or separate processes for parties who would benefit from reactivation of existing EAs	Design further	41
Should an application be rejected for a deficiency (that is greater than a minor procedural or technical error), allow parties to take actions to rectify that deficiency only	Design further	41
<b>Lack of discussion and action on productivity leading to both parties not focusing on mutual gains and benefits</b>		
Scale interest based bargaining training through online sources & interactive gaming	Do Now	43
Encourage "without prejudice context setting briefings" as a step in the process	Do Now	43
Secure information shared in interest based bargaining	Do Now	44
Track the impact of EAs to ensure mutual gains in productivity for both parties	Design further	43
Productivity KPI's	Design further	43
Educate parties that the BOOT is a comparison of the new EA against the award (not the previous/existing EA)	Design further	44

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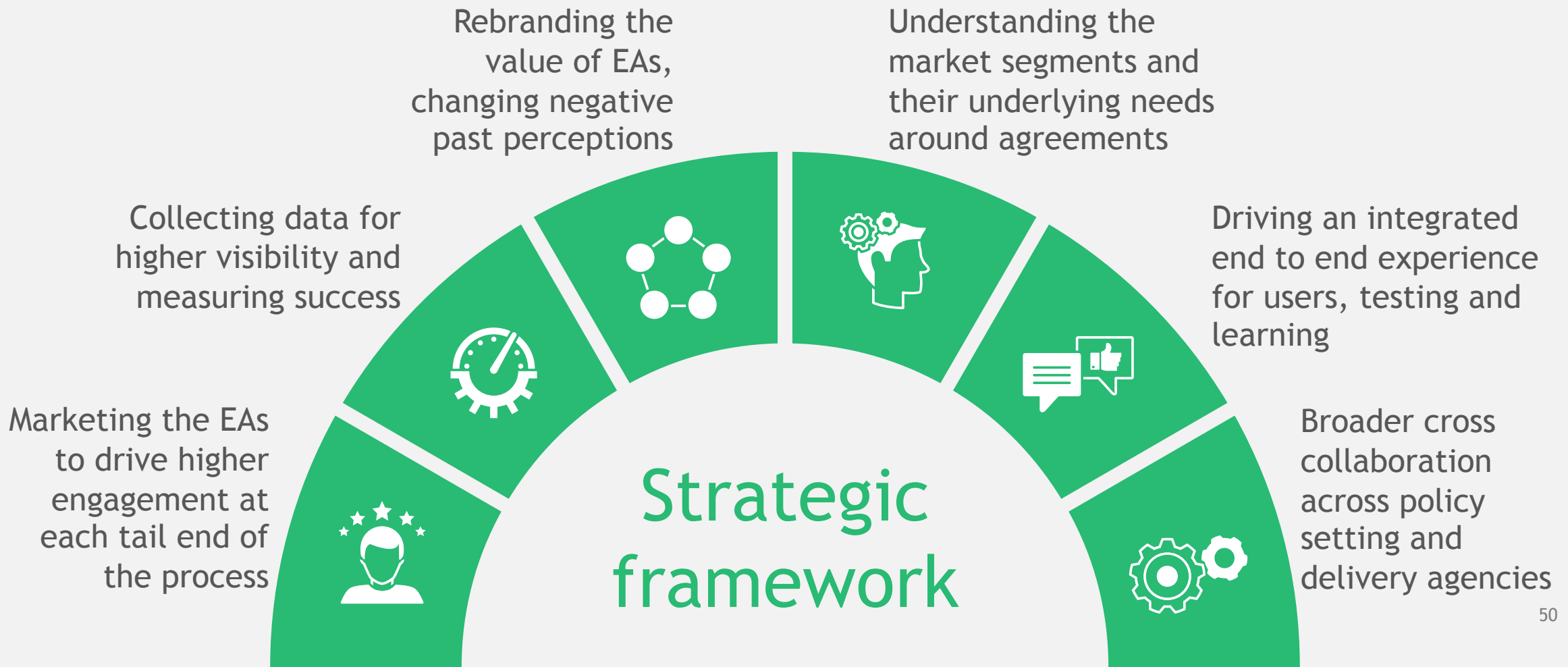
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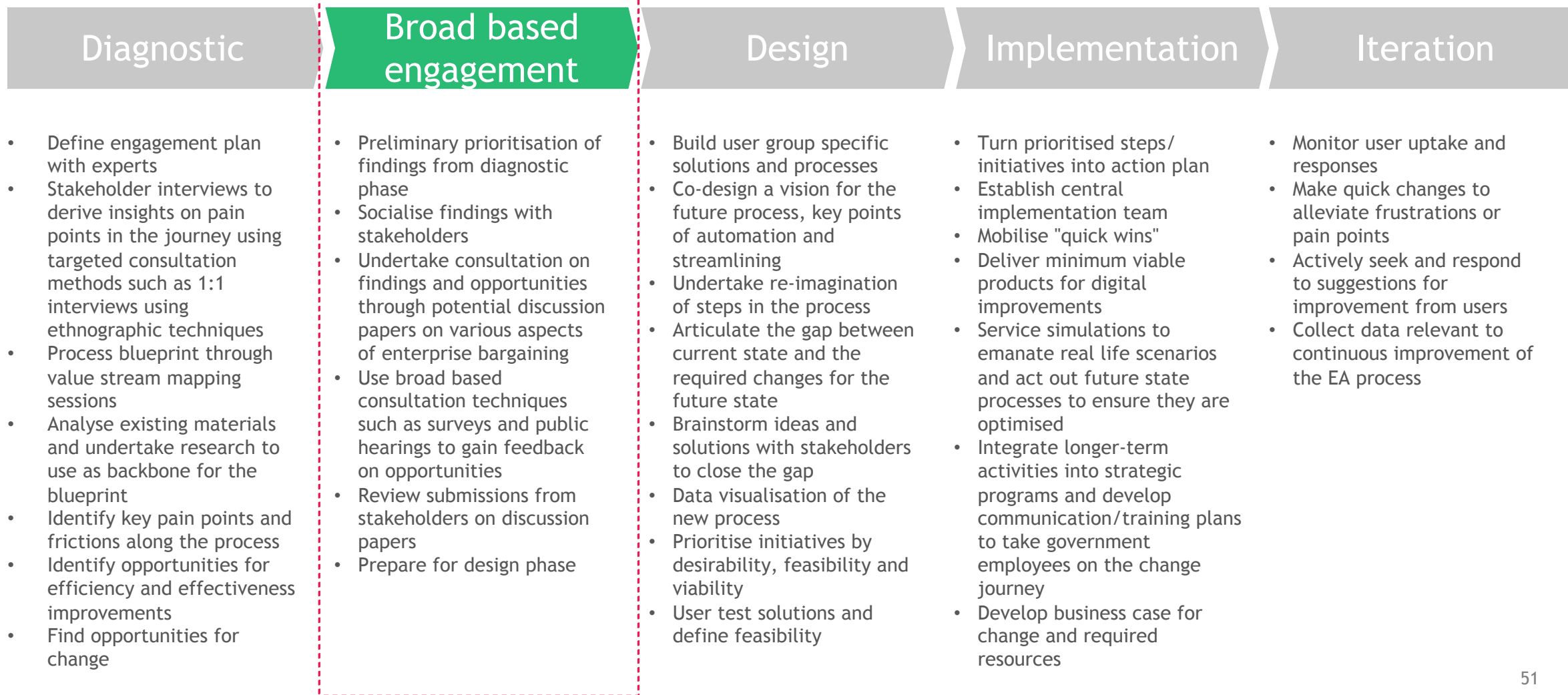


# The potential opportunities identified must be considered as part of a broader strategic framework

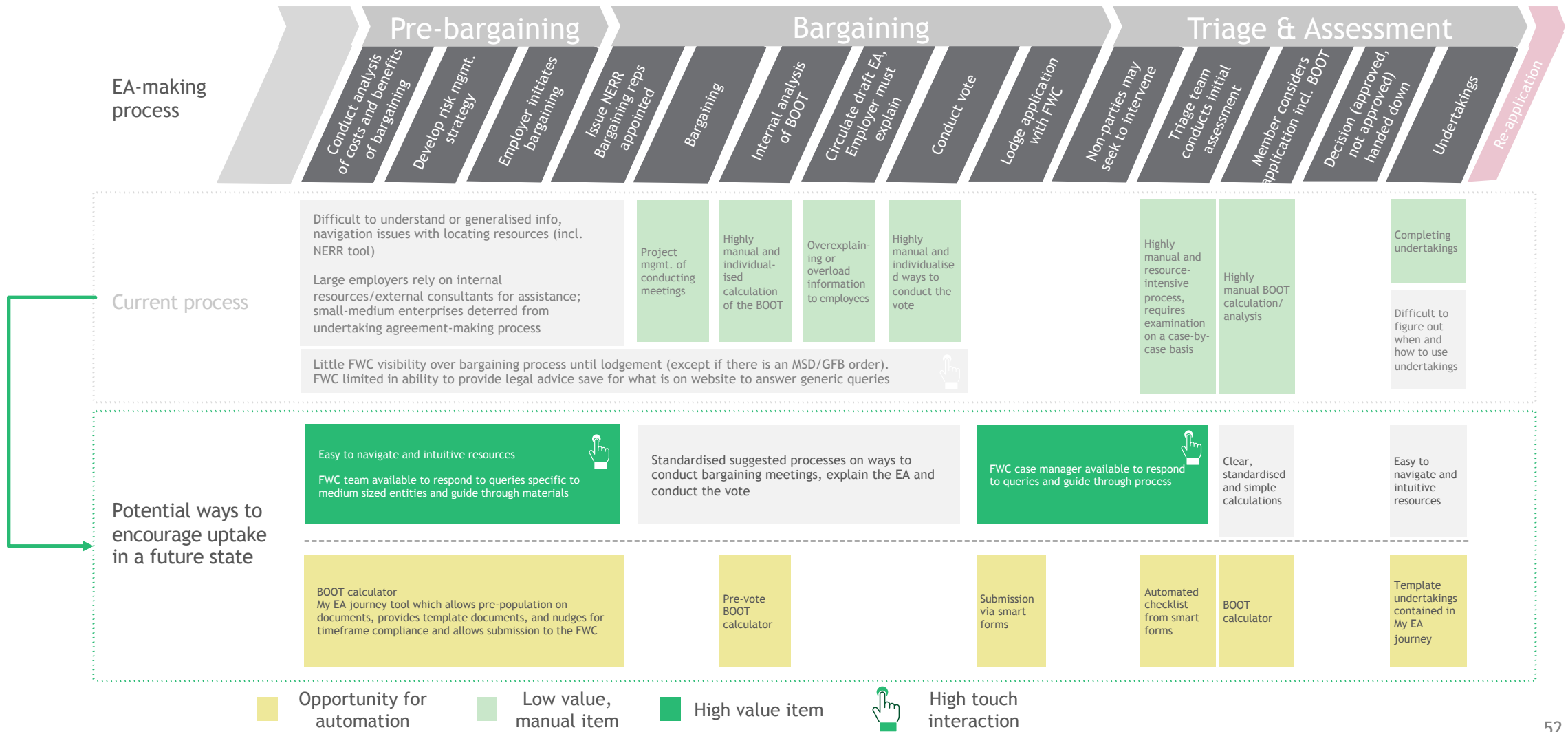


# Potential next steps involve engagement and prioritisation of initiatives with a broader stakeholder group

*Potential next phase of work*



# Example future state vision: Automating parts of the process could allow us to redirect resources from low value work to high touch interaction with different user groups



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