AMMA
AUSTRALIAN
RESOURCES &
ENERGY GROUP

INDUSTRIAL RELATIONS PAPER

- Project Life Agreements (Greenfields)
- Enterprise Agreement Making

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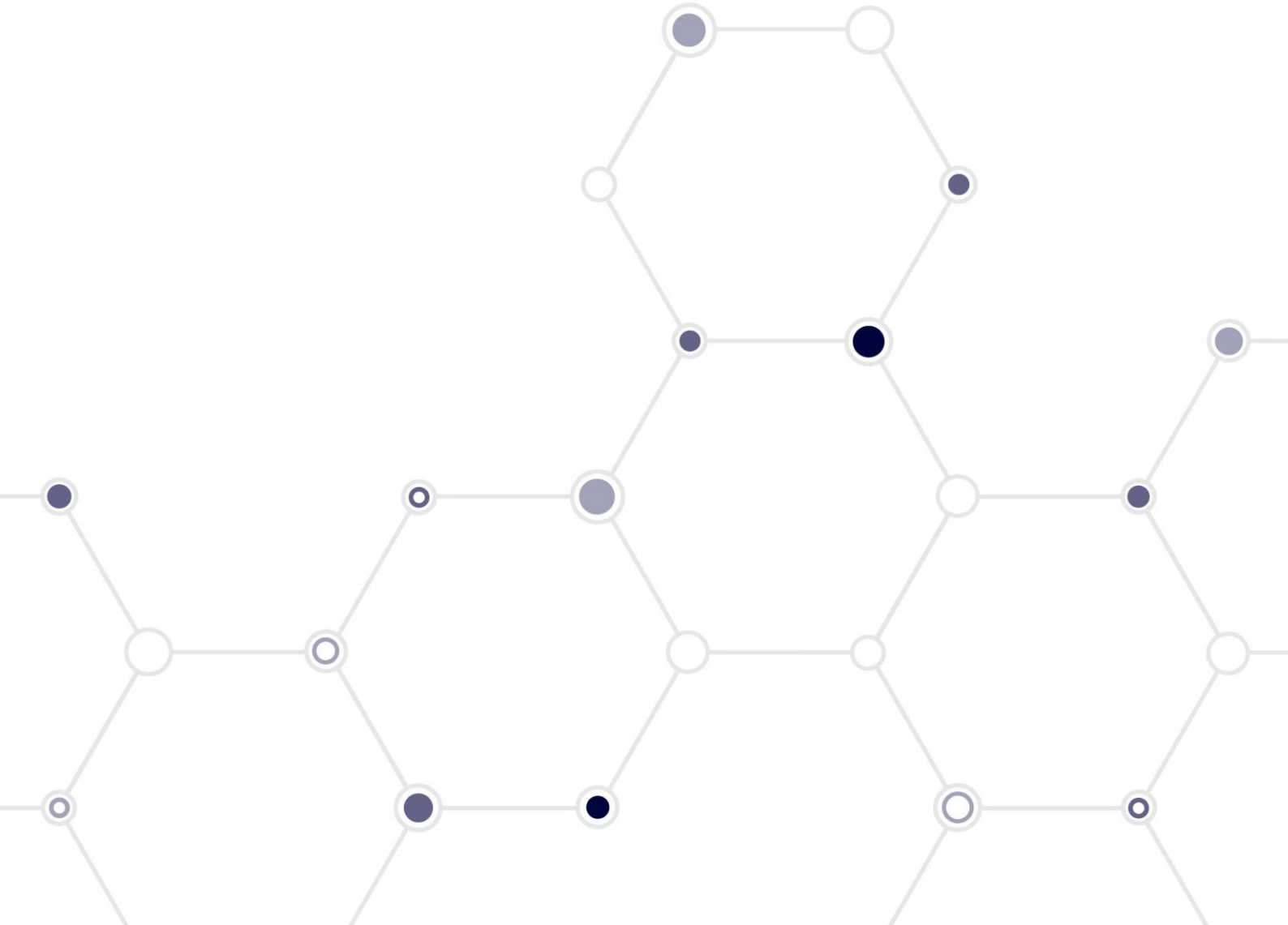


Introduction

The Australian Government has stated its top priority for the nation's post-COVID-19 economic recovery is to restore the jobs that have been lost as a result of the global health pandemic.

As we move into the recovery phase, the Prime Minister is looking to the industrial relations system "to get the workplace settings right, so the enterprise, the business can succeed, so everybody can fairly benefit from their efforts and their contributions."[1]

This global health crisis has demonstrated that Australia's industrial relations system has not kept pace with the needs of modern workforces and is not responsive to economic disruption. That the system required immediate temporary modifications to support businesses to keep people employed highlights how rigid and unfit for purpose the current system is.

To support the creation of jobs, security of employment and better wages and conditions, Australia's industrial relations system must offer employers flexibility to engage with their employees. The regulatory environment must offer the efficiency and choice required to cater for widespread changes in skills, work methods and patterns, motivation and attitudes amongst both employers and employees.

The five key areas of industrial relations reform being considered by the Government's Industrial Relations (IR) Working Groups are a good first step.

AMMA's role

Australian Resources and Energy Group AMMA has been appointed to represent the views and interests of resources and energy employers on two critical areas of the industrial relations system: '***project life' greenfields agreements;*** and the ***enterprise agreement making*** framework.

Both have been key areas of advocacy for AMMA and its members over the past decade, with key challenges with the current legislative framework, the *Fair Work Act 2009* ('FW Act') repeatedly investigated and reported on.

This policy position paper focuses on the two areas in which AMMA has been directly appointed.

In addition, AMMA will have significant input into the other three working groups (Casuals; Award Simplification; Compliance and Enforcement) through its membership and Board Director position of the Australian Chamber of Commerce and Industry (ACCI).

The policy positions put forward in this paper, and which will be taken into the Government's IR Discussion Groups, build upon a number a recent AMMA policy campaigns and research projects:

- *AMMA's Post-Pandemic IR Reforms* – 2020 (link)
- *Fostering cooperative work through a modern IR system* – 2020 (link)
- *Securing the next wave of major project investment* – 2019 (link)
- *Pathway to Productivity, priorities for the 46th Australian Parliament* – 2019 (link)
- *A New Horizon*: *Guiding Principles for the Future of Work* – 2018 (link)

AMMA's unparalleled body of research and longstanding reputation as the recognised specialist on industrial relations and other employment matters, puts the Group in a highly informed position to advocate for reforms in the key areas to help get Australians back into employment.

[1] Prime Minister address, National Press Club, 26 May 2020.

Project Life Agreements (Greenfields)

Overview

AMMA strongly supports proposed reform to the national industrial relations system to facilitate enterprise agreements that operate for the life of new major project construction ("**Project Life Agreements**"), most typically used on "greenfields" projects in the resources and energy sector.

Facilitating Project Life Agreements is a critical and urgent reform that would significantly improve Australia's ability to attract global investment into new major resources and energy projects. Front of mind must be the overwhelmingly positive benefits major resources and energy projects deliver for the nation:

- The recent Australian resources and energy investment boom saw almost $400 billion of major project capital injected into the nation between 2003 and 2012.
- This directly created 161,000 new resources jobs, saw the sector support 1.1 million jobs throughout the economy, increased real wages by 6 per cent and raised household disposable income by 13 per cent[2].

The contribution of the resources and energy industry is now at record levels due to the projects approved and completed during the previous investment phase. In 2019 the sector accounted for one-third of all growth in Australia's GDP, $282 billion in export earnings and $35 billion in company taxes and resources royalties.

Australia has a significant opportunity to secure the next wave of major resources and energy project investment. At the end of 2019, the Australian Government Department of Industry recorded approximately **$250 billion** of new project capital in the national investment pipeline. Workforce modelling by AMMA forecast that if all was to be committed, this would directly create an estimated **101,000 new jobs** by 2026.

Benefits of 'Project Life Agreements'

The merit of facilitating Project Life Agreements has been identified through multiple reviews into the competitiveness and operation of the FW Act.

Support for 'Project Life Agreements':

- In 2015, the Productivity Commission found that "(existing) bargaining arrangements for greenfields agreements pose risks for large capital-intensive projects with urgent timelines", and recommended amending the FW Act to allow for enterprise agreements to match the duration of a greenfields project.
- In 2012, the former Labor Government found in its review of the FW Act that "there is a significant risk that some bargaining practices and outcomes associated with greenfields agreements potentially threaten future investment in major projects in Australia".

Project Life Agreements again became a policy focus in the lead-up to the 2019 Federal Election, with then-Opposition Leader Bill Shorten committing to the reform should the ALP win the election:

- *We would look at companies undertaking these mega projects and the multiple billions of dollars… we will be competing with the rest of the world for that*

[2] Raynor, V. and Bishop, J. 2013 *Industry Dimensions of the Resource Boom: An Input-Output Analysis*, RBA Research

investment. We want to look at the ability for companies to negotiate with unions for extended greenfields agreements, project life, (so they) can go to the global investors who will back it." [3]

Given the significant opportunity at Australia's fingertips, it is prudent and appropriate for the Morrison Government to pursue Project Life Agreements as a necessary improvement to the FW Act. This reform should also have bipartisan support if the Federal Opposition is genuine about attracting new job-creating capital to Australia.

In effect, Project Life Agreements would deliver increased confidence to major project investors and significantly increase the prospects of new projects receiving final approval by:

1. Providing certainty over total expected labour costs which comprise a significant portion of the total project development budget;
2. Providing protection for investments, often of multi-billions of dollars, from the threat of disruption and delays arising from the potential for mid-project industrial action;
3. Providing commodity customers with greater certainty on first cargo of resources delivery, thus facilitating the early reaching of supply contracts necessary for final investment approvals;
4. Providing greater flexibility for employers to negotiate greenfields agreements early in the feasibility and approvals stages, delivering certainty and stability to investors as early as possible without unnecessary time pressures to commence construction works; and
5. Encouraging greater cooperation between employers, employees and employee representatives on long-term, high-paid major project employment arrangements.

Project Life Agreements would also be of huge benefit to Australian workers through the creation of thousands of new highly-paid jobs. Major resources and energy projects involve by far the most highly-paid construction jobs in the country, and among the highest paid of any industry in Australia.

Wages on major resources projects:

- A labourer on a major resources project will typically earn around $114,000 to $120,000 per annum, or over $2200 per week. This is 260% above the on-site building award rate[4] ($821 per week or $42,700 annually) and 280% greater than the average labourer wage across all industries ($782 per week or $40,700 annually)[5].
- A tradesperson (i.e. electrician) will typically earn $120,000-$160,000 per annum, or over $2300 per week, on a major resources project. This is 230% above the award ($1,009 per week or $52,500 annually) [6] and 180% greater than the average wage for technicians and trades workers across all industries ($1,266 per week or $65,800)[7].

Clearly there is no risk to Australian workers that facilitating Project Life Agreements would result in people being paid below the FW Act's safety net. The risk is Australia failing to secure the potential new major resources and energy projects in its investment pipeline, foregoing the opportunity to provide construction employees with the highest paid job opportunities in the country.

[3] Shorten, B (15 May 2019), *Address To The Western Australian Leadership Matters Breakfast*, Perth
[4] Pay Guide - Building and Construction General On-site Award 2010 (Level 1 (CW/ECW 1 (level d))) fwo.gov.au
[5] Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 abs.gov.au
[6] Pay Guide - Building and Construction General On-site Award 2010, (Level 9 (ECW 9)) fwo.go.au
[7] Australian Bureau of Statistics, Characteristics of Employment, Australia, Table 4, August 2018 abs.gov.au

Failings of the current system

The most damaging aspect of the current agreement making framework is that it exposes major greenfields projects to mid-project industrial action. Major resources projects are of such vast scale that they take an average of seven years to build and commission, however the maximum duration of all enterprise agreements under the FW Act, including 'greenfields agreements' for new projects, is four years.

The absence of a mechanism enabling enterprise agreements to match the duration of project construction exposes major resources and energy developments to the threat of protected industrial action midway through, and often at critical points, in the project's construction schedule.

Mid-project industrial action:

- In 2015, with work 87% completed, employees on the $55 billion Gorgon LNG Project gave notice of their intent to take protected industrial action unless their roster demands were met.
- In 2017, with less than 12 months remaining, the $34 billion Ichthys LNG Project was threatened with industrial action by unions campaigning to reduce the construction roster.
- In 2014, the three LNG processing plants being built on Queensland's Curtis Island were simultaneously threatened with industrial action until the contractor agreed to a 13% pay increase for construction employees already earning in excess of $160,000 per annum.
- In 2010, the $15 billion Pluto LNG project was subject to protected industrial action being taken by subcontractor employees that cost the operator $3.5 million in damages per day.

Note: These examples are provided in greater detail in AMMA's submission on Project Life Agreements, available in full online.

That multibillion-dollar capital investment projects can effectively be held to ransom midway through construction, and be subject to significant industrial disruption, cost blow-outs and delays, is a failure for Australia's current approach to industrial relations.

While not the only factor, these damaging impacts of Australia's industrial relations framework is widely considered to have contributed to the sudden decline in the nation's attractiveness as a place to invest and build major resources and energy projects.

In the 12 months to April 2013, Australia lost around $150 billion worth of resources and energy investment when projects slated for development were suddenly cancelled or deferred indefinitely. By April 2018, committed project investment had dropped from $268 billion to just $30 billion[8].

[8] Historic data available via the Office of the Chief Economist's *Resources and Energy Quarterly* series

Getting the design right

Project Life Agreements align to various national goals supported by all stakeholders - attracting global investment into primary Australian industries, creation of high-paid and technology-driven jobs, opening up new resources and energy basins to development, and reducing the level of red-tape and regulatory burden to doing business in Australia.

There are however a number of important technical considerations involved in getting the design of Project Life Agreements right.

1. **Scope** - what type of agreements should 'Project Life' status be available to?

   Given the FW Act's greenfields agreement making stream is far from the only option utilised by employers on major resources and energy projects, AMMA is of the view that for Project Life Agreements to deliver the intended certainty and stability for major projects, this concept must be extended to all types of enterprise agreements used solely in eligible projects' construction phase.

   It would be a significant mistake to restrict the well-reasoned and evidence-backed Project Life Agreement reform to only one type of enterprise agreement used in the construction of major resources and energy projects. Doing so could effectively freeze-out contractors using non-union and/or non-greenfields agreements from working on new major resources and energy projects.

   - *Recommendation*: Project Life Agreements should extend to all types of enterprise agreements used in eligible major resources and energy project construction phase (greenfields and non-greenfields agreements).

2. **Eligibility** – what 'major projects' should have access to 'Project Life Agreements'?

   To determine which major projects can have enterprise agreements operate for the length of project construction, consideration must be had to the length of project construction, the estimated investment value of the project and the economic benefits provided. The criteria for extending the nominal life of project agreements must be clear and objective to avoid further disputation about which agreement making option is available for new projects.

   - *Recommendation:* Any new project with a value exceeding $50 million (value aligned to Australian Government's existing 'major project status'), and expected to take four years or longer to construct.

3. **Duration** – what should 'Project Life' mean in terms of length and expiry?

   Extending the maximum nominal term for Project Life Agreements is not the appropriate approach to designing and implementing this important reform. The term of Project Life Agreements should be just that – for the life of the project's construction phase.

   The preferred mechanism to trigger expiry of a Project Life Agreement should be a particular contract or commercial milestone, such as the commissioning of the project, completion of contract or once the operational workforce has been engaged. The term must be clear and objective, free from ambiguity and interference by any third parties' interpretation.

   In the interests of providing as much flexibility to parties negotiating a Project Life Agreement, AMMA believes that the option of setting a nominal expiry date should remain available if parties choose to go down that path. However, where parties agree for a Project Life Agreement to specify a maximum term, employers must have certainty that employees or their representatives cannot organise or take protected industrial action until the project construction is deemed complete.

- *Recommendation:* A Project Life Agreement should set out in its own terms as to when the agreement will cease to operate. The FW Act could require that Project Life Agreements include a clause which specifies when the agreement is no longer legally binding on the parties to the agreement, and thus the agreement is required to be terminated, should joint applications from all parties to the agreement not have applied for its extension or modification of those terms.

4. **Wage rates and increases** – how are they set or determined for 'Project Life'?

   AMMA's position is there is no identified need or justification for any additional wage setting provisions or processes outside of that in the current FW Act.

   Simply, it should be a matter for the parties to review the commercials of the project or enterprise, look to forecast future conditions and agree to a schedule of wage increases across the duration of the agreement. Economic indicators like CPI, wage price index or increases in minimum wage may or may not play a factor, depending on the views of the parties.

   The Productivity Commission has found there is little risk that longer agreement periods could lead to a gulf between award and agreement conditions as enterprise agreements that are close to award conditions are not the norm[9]. This is particularly the case for resources and energy industry employees who receive pay and conditions well above and typically multiple times the relevant awards.

   Further, the wage rates set by enterprise agreements are not the ceiling. Employers are not restricted by the rates and conditions set in an agreement and can always pay more than the minimum set if circumstances in the labour market require it (e.g. periods of heightened labour shortages / competition).

   - *Recommendation:* Project Life Agreements should allow for parties to negotiate and agree upon annual increases to pay rates as per the existing FW Act agreement making process. Project Life Agreements should not be subject to any new or additional statutory requirements in relation to wage increases.

5. **Amendments** – should additional amending provisions exist for Project Life Agreements?

   The existing provisions of the FW Act provide some ability for parties to seek amendments to enterprise agreements. AMMA's position is no additional or unique amending mechanism is required for Project Life Agreements.

   - *Recommendation:* Parties to a Project Life Agreement should be able to agree upon and apply for extensions or slight variations to the agreement terms as per the existing process under the FW Act.

6. **Permitted content** – what claims should be permitted in bargaining for 'Project Life'?

   With Project Life Agreements being set to operate for extended periods, it is even more critical that employees and their representatives are only allowed to bargain on matters directly pertaining to the employment relationship, namely wages and conditions.

   Under the FW Act there are already very few limitations on permitted agreement content with unions often pushing for content that produces no measurable benefit or enhanced productivity for the business. By helping secure job-creating projects, allowing Project Life Agreements to run for the life of major project construction is a mutually beneficial reform.

[9] Productivity Commission (2015) Review of the Workplace Relations Framework, Final Report

Allowing enterprise agreements to operate for the full length of project construction should not be a concession to broaden permitted agreement content in enterprise agreements.

- *Recommendation:* Project Life Agreements should not contain agreement content outside of the FW Act's current permitted matters

  (Note: See the section on Permitted Content in the next part of this paper for more background.)

7. **Approval process** – is the existing process suitable for Project Life Agreements?

AMMA members have held concerns about the amount of time taken to secure industrial arrangements for new major projects. This is due to the resources taken to engage in bargaining and the intensified pressure to reach an agreement, engage a workforce and commence work on new major projects in a timely process.

The significant problems with the existing Fair Work Commission (FWC) approvals processes (see relevant section of next part of this paper), creates unacceptable risk to multi-billion dollar capital projects.

- *Recommendation:* Project Life Agreements should have access to a priority approval system through the appropriate regulator / tribunal's agreement approval process, with a benchmark of approving all Project Life Agreements within 21 days of lodgment if all statutory tests are met.

8. **Circuit breakers** – what is the process if the parties cannot agree on terms and conditions?

In 2015, the Coalition Government attempted to address the significant issues associated with protracted greenfields negotiations by legislating for a six-month notification period for employers and unions to negotiate terms, after which the employer could apply to the FWC for a determination on its proposed agreement.

AMMA is supportive of the retention of a 'circuit breaker' type provision, but is of the view that the option should be available after three months rather than six months, consistent with the Productivity Commission's 2015 recommendation[10] and the government's original proposed amendment prior to being watered down through negotiations with the Senate Crossbench.

The Productivity Commission's recommendation 21.1, which recommends providing a suite of options where parties are not able to reach agreement after three months of negotiating, such as the option to request the FWC undertake a "last offer" arbitration by choosing between the last offers made by the employer and the union is also supported.

- If parties to Project Life Agreements have not reached a negotiated outcome after three months, an employer can request that the FWC undertake 'last offer' arbitration by choosing between the last offers made by the employer and the union.

[10] Productivity Commission (2015) Review of the Workplace Relations Framework, Final Report, recommendation 21.1

Enterprise Agreement Making

The decline in enterprise bargaining

If Australia is to retain enterprise bargaining as one of the cornerstones of its industrial relations system, employers and employees must have more flexibility and less red-tape when bargaining over wages, conditions and productivity-enhancing practices.

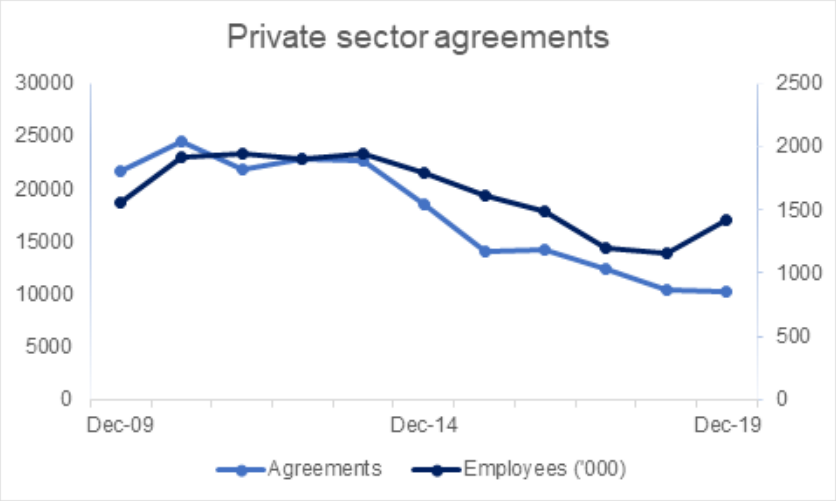
In its current form, enterprise bargaining has become far too complex for employers and employees to navigate. It provides fewer productivity gains, promotes third party involvement in business management and operational matters, and requires complicated and costly procedures.

Employers are consistently faced with roadblocks at almost every stage of the agreement making process and the Fair Work Commission's overly stringent and technical approach to approving agreements further exacerbates employers' concerns and frustrations. The unnecessary complexity and inefficiencies of this type erode the competitive advantage of businesses and delay pay rises for employees.

The experiences and views repeatedly detailed by employers reflects the increasingly low take up of enterprise agreement making. Data collated by the Attorney General's department shows the use of enterprise agreements has more than halved over the past six years:

Private sector	**Dec-13**	**Dec-14**	**Dec-15**	**Dec-16**	**Dec-17**	**Dec-18**	**Dec-19**
Agreements	22624	18455	14087	14156	12480	10394	10169
Employees ('000)	1948.2	1786.6	1608.7	1486.4	1196.2	1154.2	1415.9

All sectors	**Dec-13**	**Dec-14**	**Dec-15**	**Dec-16**	**Dec-17**	**Dec-18**	**Dec-19**
Agreements	23216	18944	14579	14665	12984	10904	10735.0
Employees ('000)	2612.5	2403.4	2236.7	2062.0	1813.5	1883.6	2234.9



To restore enterprise agreement making, Australia needs a better, simpler and faster system, one that will deliver productivity gains, real wage increases, create jobs and investment opportunities.

Issues with agreement making

Permitted content

One of the significant challenges with the bargaining process is the overly broad range of permitted matters that can be included in enterprise agreements. There are very few limitations on agreement content which has left employers bargaining over matters of direct management prerogative while unions push for content that infringes on operational decision-making.

Examples of "union business" in agreement content

- Restrictions on the use of casuals, contractors or labour hire workers and the pay rates and conditions that apply;
- Requirements that an employer must reach agreement (as opposed to consult) with unions over changes to working hours or rosters;
- Paid union leave for meetings, training and other union-specific matters.

To achieve mutually beneficial outcomes, agreement content must relate to the direct employment relationship and focus on the unique circumstances of the enterprise and its workforce.

The FW Act should clarify the content that is permitted in enterprise agreements to confine protected industrial action to matters that directly affect the employment relationship, allow proper consideration for productivity gains to be achieved, and eliminate confusion.

Recommendations:

- Limit content of agreements to matters that pertain to the employer-employee relationship;
- Reinstate the prohibition of certain content ("prohibited content") in enterprise bargaining that existed under the *Workplace Relations Act 1996*; and
- Tighten the bargaining rules to ensure industrial action is not taken over prohibited content.

Individual agreements

The current prohibition on individual agreement making contained in the FW Act gravely limits the freedom for both employers and employees to decide how they wish to engage with one another.

The system has attempted to provide for individual choice through Individual Flexibility Arrangements (IFAs), however the use and application of these arrangements is extremely limited.

How useful are Individual Flexibility Arrangements?

The utility of IFAs was specifically examined in the AMMA/RMIT research project of 2010-2012, with resources employers particularly concerned with their effectiveness as an option for individual employment arrangements.

Data following the fourth survey found that no respondents found "significant value" in IFAs under the FW Act and, importantly, 44.2% categorically stated they were of "no value at all". By the end of the survey series, only 4.3% of the resources and energy employers surveyed were using IFAs, reflecting their failure to provide flexibility and support individual employee choices as an alternative to statutory individual arrangements, and demonstrative of their extremely low usefulness to the industry generally.[11]

[11] Dr Stephen Kates (2013) The AMMA Workplace Relations Research Project, RMIT University.

While reforming IFAs to make them more useful and practical would be welcome, AMMA's position is the industrial relations system must include a form of statutory individual agreement making option.

A system of agreement making focused on the collective only, fails to recognise that the majority of workplaces do not operate in a collectivist structure. Indeed, many employers in the resources and energy industry are today choosing to ignore the limited options for statutory agreement making under the FW Act and instead are utilising common law employment contracts, underpinned by the Modern Awards safety net and supplemented by operating policies and procedures.

Under the prior industrial relations system, the resources and energy industry was among the strongest user of statutory individual agreements. In an industry that has consistently paid around 2.5 times the award rates, it cannot be argued that the use of Australian Workplace Agreements (AWAs) in the resources and energy sector was ever designed to underpay people.

Rather, individual statutory agreements provided employers with greater certainty and stability in their employment arrangements, including protection against strike action, in return for the highest wages in the country and capacity to cater for the individual needs and choices of their employees.

Recommendations:

- Remove the prohibition on individual agreement making in s 3(c) from the Objects of the FW Act;
- Allow high income earners to enter into individual agreements; and
- Provide a new form of individual statutory agreements with similar characteristics, approval processes and enforceability as collective agreements, including no industrial action during the life of the agreement.

A high-income threshold for individual statutory agreements:

AMMA's Post-Pandemic IR Reform Framework proposes a new form of individual statutory agreement available only to employees earning a minimum of $132,000 per annum. This would apply to only the highest employment arrangements in the country and primarily benefit the resources and energy industry – where underpayments are virtually unheard of:

a) AMMA's proposed benchmark equates to $2538 per week. This is:
   - 150% the average Australian weekly wage ($1659);
   - 230% the Mining Industry Award rate ($1102); and
   - 226% the Hydrocarbons (Upstream) Industry Award rate ($1121).

b) The $132,000pa ($2538 per week) benchmark means AMMA's proposed "High Income Employment Contracts" would only be available to:
   - 8.3% of all employed people in Australia (883,800 employees);
   - 8.2% of the private sector (708,300 employees);
   - 3.5% of the blue-collar workforce (260,900 employees - i.e. removing managers and professionals from the equation)
   - However, 55.9% of the mining industry earns above $132,000pa.

   (Note –data taken from ABS income distribution data).

Issues with agreement approvals

Genuinely agreed

The inconsistent and overly-technical approach taken by the FWC to enterprise agreement approvals has contributed to the rapid decline in enterprise bargaining.

This includes the FWC's unnecessarily stringent approach to assessing whether an employer took all reasonable steps to ensure the terms of the agreement and their effects were explained to employees is causing unjustifiable delays and serious inefficiencies for businesses and their workforces.

The FWC's approach to proving an agreement was "genuinely agreed"

- One employer's 10-page summary of each individual EA clause and its effect was rejected by the FWC, finding the employer was required to explain exactly which provisions of the EA were better than the award and which were not.
- Reports of FWC members going on "fishing exercises" to find out what hasn't been explained to employees and requiring every single item that is less beneficial to be explained, despite not be required by legislation.

AMMA's position is the requirements for agreement approval should take into account the vote, the views of all parties and the need to provide timely certainty to the business and employees.

Instead of leaving the FWC to determine that the agreement was explained and understood by relevant employees, the test should focus on whether a majority vote was achieved and whether any issues might have invalidated the voting process.

A simplified, common sense approach to the approval requirements is needed to address the delays and encourage employers and employees to utilise enterprise agreements.

Recommendations:

- Amend or clarify ss 180-181 of the FW Act regarding the pre-approval requirements to simplify the process for employers, employees and the FWC in approving agreements.
- Allow additional discretion for agreement approval taking into account the vote, views of all parties and the need to provide timely certainty to the business and its employees.

Better off overall test

The application of the better off overall test in its current form is creating uncertainty and a great degree of variability in agreement approval processes. Members at the FWC take differing and inconsistent approaches as to whether an agreement meets statutory criteria and increasingly requires employers to make undertakings, adding to the administrative burden of enterprise bargaining.

The application of the BOOT (AMMA member experiences)

- One employer, which does not employ casuals, was required by the FWC to include a part-time clause in its EA in case an employee requested flexibility under s 65 of the FW Act; and then was later required to provide undertakings about casual employment.
- The FWC has required some resources and energy employers to make undertakings about hypothetical, highly unlikely scenarios, and about matters that employers are already to comply with under the law (such as an undertaking that employers will comply with the NES).

The position of AMMA and its members is that the statutory criteria for agreement approval should be a truly global assessment of the workforce as a whole against the award, rather than a line-by-line exercise in hypotheticals by the FWC, which causes serious delays and inconsistencies.

Significant improvement is required to the statutory criteria to enhance consistency in its application and increase confidence of employers in making an agreement.

Recommendations:

- Simplifying the BOOT to allow enterprise agreements to be approved if employees covered by the agreement "as a whole" are better off under the agreement compared to the award (i.e. similar to the previous "no disadvantage test").
- Increasing FWC discretion to approve agreements without undertakings and remove the need for an undertaking on complying with the NES.

Third party interference and objection

Resources and energy employers regularly report unnecessary delays and interference in the approval process where unions, often not a party to bargaining, appeal a decision of the FWC to approve an agreement.

This type of interference by a non-bargaining third-party undermines the direct employment relationship between employers and employees where a majority of the workforce has voted to approve an agreement.

AMMA member examples of third-party interference:

- An engineering and construction employer faced rejection of its EA, on appeal by a union that was not a party to the agreement, because it did not have an employee that fell within each classification under several awards its new agreement was seeking to cover.
- Another employer had an agreement rejected by the FWC, despite being endorsed by over 70% of the workforce, after the union raised during the approval process a very technical issue it had discovered more than 12 months prior, but had failed to ever raise with the employer during long-running bargaining.

AMMA's position is where the majority of a workforce has approved an agreement there should be no opportunity for a union or third party to appeal and the decision should be left with an independent statutory body to assess. Under the current framework, there is ample opportunity for employees to nominate bargaining representatives and raise issues well before voting on an agreement.

The current framework for agreement making provides too many opportunities for objection and appeal which has led to a serious loss of employer confidence in the utility and practicality of enterprise agreements. This must be addressed.

Recommendations:

- Prevent third party intervention of approval / appeal unless it represents employees covered.
- Prohibit objections to an agreement at the approval stage if not raised before employees' vote.
- Limit the ability for unions to apply as an "aggrieved person" to inform the FWC on the approval process of already approved enterprise agreements.

Simplifying the process – AMMA's model for agreement making

Once the foundation of productive and mutually rewarding workplace relations, the bargaining framework is now far too complex for all but the most legal resource-heavy employers. It involves a myriad of complicated and costly steps with ideas to improve productivity or efficiency through workplace changes being forced off the table.

- Refer *Figure 1 – Agreement making under the FW Act*

AMMA's analysis of the existing bargaining framework demonstrates the number of steps employers are required to take, and the numerous associated risks, throughout the bargaining process.

Even at a glance, the bargaining process involves too many unnecessary steps, almost all of which invite third party involvement to draw out the process even longer. While it is hard to distinguish the exact number of steps required to get an agreement over the line, employers often have to repeat parts of the process several times before the agreement can be approved and in-effect.

- Refer *Figure 2 – AMMA's model for simplified agreement making*

This is in stark contrast with AMMA's proposed simplified framework.

Reducing the number of steps employers are required to take to get an agreement in place will not only make the process of bargaining more productive and efficient, it will facilitate greater productivity and efficiency measures to be incorporated into agreements and ultimately be practiced in Australian workplaces.

Figure 1 – Agreement making under the FW Act

	RISKS	THIRD PARTY	TIMING
INITIATING BARGAINING			Min. 14 days
Employer initiates or agrees to bargain for a proposed Agreement	♦	♦	
Employer issues notice of employee representational rights	♦	♦	
Employees may appoint bargaining representatives / unions are default representatives for employee members	♦	♦	
BARGAINING STAGE			Variable
Representatives bargain satisfying the good faith bargaining requirements	♦	♦	
Draft / negotiate Agreement ensuring each employee is better off overall	♦	♦	
Adhere to content requirements: mandatory terms / no unlawful terms	♦	♦	
PRE-APPROVAL STAGE			Min. 7 days
Employees must be given copy of the agreement and relevant materials	♦	♦	
Employers must notify employees of the vote	♦	♦	
Employer must explain the terms and effects of the Agreement	♦	♦	
AGREEMENT STAGE			Nil
Employer asks employees to approve the proposed Agreement by voting	♦		
APPLICATION STAGE			14 days
Employer lodges the Agreement with the FWC along with all relevant application forms	♦	♦	
APPROVAL STAGE			Variable (anywhere from 14 days to 1 year)
FWC assesses the Agreement against the statutory requirements:	♦	♦	
- The agreement has been genuinely agreed	♦		
- The terms do not contravene the NES	♦		
- The Agreement passes the better off overall test (BOOT)	♦		
- The group of employees covered were fairly chosen	♦		
- The Agreement satisfies content requirements	♦		
- Approval is not inconsistent with good faith bargaining	♦		
FWC may approve the Agreement	♦	♦	
POST APPROVAL STAGE			21 days
Approval subject to third party appeal and potential re-determination	♦	♦	
Agreement is certified once appeal period has passed	♦	♦	

NO

NO

(Agreement takes effect 7 days after FWC approval)

Possible timeframe from 'Initiating Bargaining to 'Agreement Certified'
= Two months (statutory requirements) + bargaining period (variable) + approval stage (variable) + post approval stage (i.e. appeals / highly variable)

Can easily become 12 months +

Legend:

RISKS – include any event or action that invalidates or delays the bargaining process such as bargaining disputes, bargaining orders, protected industrial action, rejection of agreement, failure to meet statutory requirements, procedural or technical errors.

THIRD PARTY – includes bargaining representatives / unions, statutory bodies, or other parties not directly employed at the enterprise.

Figure 2 – AMMA's model for simplified Agreement Making

	RISKS	THIRD PARTY	TIMING
INITIATING BARGAINING			1-2 days
Employer initiates or agrees to bargain for a proposed Agreement		♦	
BARGAINING STAGE			Variable
Parties bargain satisfying the good faith bargaining requirements	♦	♦	
Draft / negotiate Agreement ensuring the terms do not disadvantage the overall workforce compared against awards and minimum standards	♦	♦	
AGREEMENT STAGE			48 hours
Employer asks employees to approve the proposed Agreement trusting that employees will ask questions / understand the terms and effects of the Agreement	♦		
APPLICATION STAGE			1 day
Employer lodges the Agreement with the Fair Work Ombudsman (FWO) with a statutory declaration that all legislative requirements are met			
APPROVAL STAGE			1 month
Third parties have a ***one-week window*** from date of lodgement to lodge objections or submissions to Agreement	♦	♦	
FWO audits and approves Agreement within one month of lodgement	♦		

(Agreement is effectively in-term from date of lodgement)

Possible timeframe from 'Initiating Bargaining' to 'Audited and In-term Agreement' = 1 month, 5 days + bargaining period (variable)

Feasibly could have an agreement within two months

Legend:

RISKS – include any event or action that invalidates or delays the bargaining process such as bargaining disputes, bargaining orders, protected industrial action, rejection of agreement, failure to meet statutory requirements, procedural or technical errors.

THIRD PARTY – includes bargaining representatives / unions, statutory bodies, or other parties not directly employed at the enterprise.

About AMMA

AMMA is the Australian Resources and Energy Group and has provided a unified voice for employers on workforce and other industry matters for more than 100 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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