

2018 GUIDE TO ENTERPRISE BARGAINING UNDER THE FAIR WORK ACT

16 April 2018 | Australia

Legal Briefings - By **Rohan Doyle** and **Wendy Fauvel**

Herbert Smith Freehills has published the second volume of the unprecedented Guide to Enterprise Bargaining under the *Fair Work Act*.

THE CURRENT STATE OF PLAY

The *Fair Work Act* brought significant change to Australia's collective bargaining regime, introducing new concepts (e.g. scope orders) and re-introducing the obligation to bargain in good faith.

Nine years on, it is apparent that:

- there remain many unresolved questions about the operation of the bargaining regime. It has become (and remains) very complex, and is resulting in many cases progressing to the Federal Court and the High Court;
- the bargaining regime has proven to be particularly challenging for employers. For example, agreements are taking longer to reach than they have in the past, and employers often have little leverage. It is relatively easy for unions to organise protected industrial action, yet relatively hard for employers to suspend or terminate it;
- unions are also calling for an overhaul of the bargaining framework. Many unions have the view that it has become too easy for employers to terminate existing agreements in bargaining, and too easy to lock out employees;
- accordingly, there has been, and will continue to be, legislative change; and

- nevertheless, more time and resources are being invested in pre-bargaining planning (but there is room for improvement). Employers recognise the significant recurring cost of bargaining outcomes, and value the exponential impact of even small gains. This is resulting in a greater degree of sophistication from employers, who are looking to achieve change and avoid the all too common “*rollover agreement with a 4% annual wage increase*”.

DEVELOPING AN INNOVATIVE BARGAINING STRATEGY

Whilst the current bargaining regime makes achieving change (or ‘unwinding’ unsustainable terms and conditions) difficult, it is certainly not impossible.

Those that prepare early, and have a detailed knowledge of the bargaining framework and its underpinning case law, will have a significant advantage, and will achieve better outcomes.

But developing a successful enterprise bargaining strategy for an employer is not easy, particularly for those looking to achieve change. There is no ‘template’. It can only be done with careful and meticulous planning, having regard to operational objectives, the business’ appetite for risk, the paths to obtaining and reducing bargaining leverage, the legal boundaries, listening and understanding what employees want, and, most importantly, experience. These are the building blocks of an enterprise bargaining strategy.

BARGAINING UNDER THE FAIR WORK ACT LEGAL GUIDE 2018

To assist our clients in building and implementing their bargaining strategies, Herbert Smith Freehills has recently published the 2018 edition of its legal guide “*Bargaining under the Fair Work Act*”. The Guide provides a comprehensive and practical overview of the Australian collective bargaining regime.

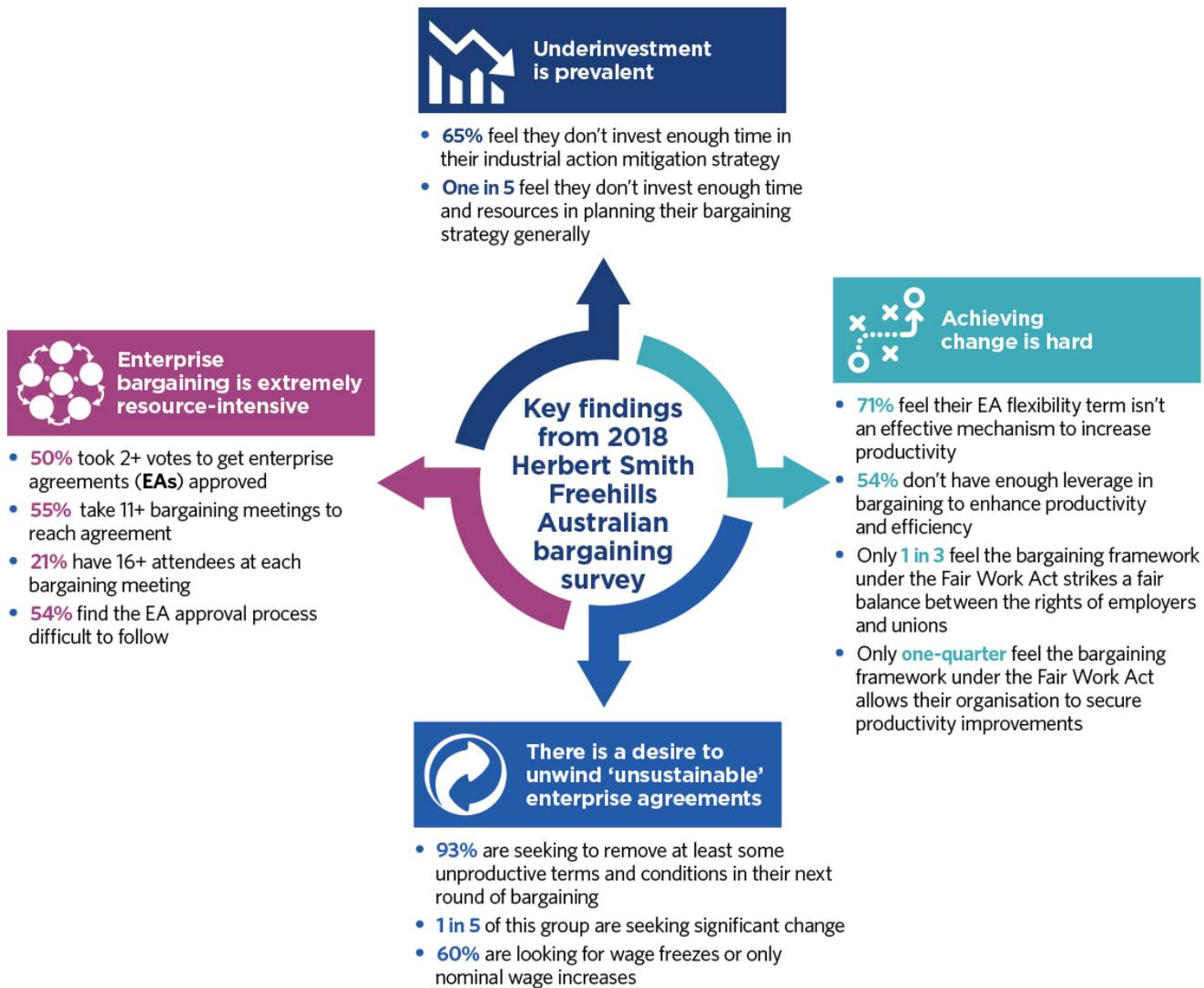
It includes a comprehensive commentary of relevant legislation , and analyses over 1700 decisions of the Fair Work Commission and the Courts handed down between 1 July 2009 and 31 December 2017.

Whilst the resources invested in the production of the Guide were significant, the Guide demonstrates the significant expertise that Herbert Smith Freehills is fortunate enough to have access to through its talented team of lawyers.

Click on the **Download** button above to discover an overview of the *Bargaining under the Fair Work Act Legal Guide 2018*.

BARGAINING SURVEY 2018

In launching the Guide, we have also released the results of the second HSF Bargaining Survey, looking at the industrial relations landscape from the perspective of some of the firm's key clients. The results show that enterprise bargaining remains extremely resource-intensive, many employers are looking to unwind agreement conditions that have become unsustainable, yet achieving such productivity improvements and other meaningful change is difficult.



We are helping many of our clients in working through these challenges and welcome a discussion with you should you require any assistance.

OBTAINING A COPY OF THE GUIDE AND SURVEY RESULTS

This Guide and survey results are subject to a limited release to clients of Herbert Smith Freehills who engage the Employment, Industrial Relations and Safety team to assist with their bargaining rounds.

If you have any questions, or would like to discuss your bargaining round with us, please contact [Rohan Doyle](#) or [Wendy Fauvel](#) or your usual Herbert Smith Freehills' contact.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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