

AUSTRALIA'S COLLECTIVE BARGAINING REGIME: TOO COMPLEX, COSTLY AND INEFFICIENT FOR EMPLOYERS

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News

Leading global commercial law firm Herbert Smith Freehills has again published a comprehensive employers' guide to navigating Australia's complex enterprise bargaining regime.

"Bargaining under the Fair Work Act Legal Guide" is a consolidation and expansion of five previous guides published since the Fair Work Act was introduced in 2009. It includes a comprehensive commentary of legislation relevant to collective bargaining and industrial action, and analyses over 1700 decisions handed down between 1 July 2009 and 31 December 2017.

Herbert Smith Freehills has also revealed the results of the second Bargaining Survey, looking at the industrial relations landscape from the perspective of some of the firm's key clients. The results show that under the current legislation, enterprise bargaining remains extremely resource-intensive. Many employers are looking to unwind agreement conditions that have become unsustainable, yet achieving productivity improvements and other meaningful change is very difficult.

The Survey shows that:

50% of organisations had to put their last enterprise agreement to two or more votes before it was approved by employees, and 14% had to hold three or more votes;

55% of organisations hold, on average, more than 11 bargaining meetings to reach an agreement, with one-quarter (26%) holding 16 meetings or more.

Launching the Guide, [Rohan Doyle](#), a Partner in Herbert Smith Freehills' Employment, Industrial Relations and Safety team, said bargaining participants have grappled with the significant changes introduced under the Fair Work Act, and the decisions of the Courts, Fair Work Australia, and now the Fair Work Commission have all attracted enormous interest.

"Nine years on, the Fair Work Act bargaining framework is proving to be a costly burden for business, with employers increasingly struggling to find the leverage needed to secure productive bargaining outcomes. As a result, businesses are facing drawn-out and complex bargaining negotiations which tie up management resources and ultimately do not result in any productivity gains", Mr Doyle said.

"Businesses are increasingly asking the question, "What's in this for us? How do I justify the investment of resources into the bargaining process?"

Mr Doyle went on to say that unresolved questions about key aspects of the bargaining regime needed to be clarified to reduce the significant and unnecessary burden on private and public resources which was resulting in matters regularly progressing through the courts on appeal.

Herbert Smith Freehills' Bargaining Survey shows employers are seeking meaningful change to enterprise agreements that have become unsustainable. However, despite the desire for change, and the difficulty in achieving it, there remains an under-investment in pre-planning, employee communications, and stakeholder management.

"We are seeing an increasing number of employers facing protracted, labour intensive bargaining rounds. In fact, it is increasingly common to have two or even three employee votes before majority agreement is achieved. Given the level of resources invested by employers, it is essential that the bargaining process results in enterprise agreements that are sustainable over the longer term. The future of many enterprises, and even industries, depends on it. Flexibility, efficiency and productivity are key."

Mr Doyle reassured employers that 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. It is particularly important that the time is invested early to ensure that all stakeholders are on the same page and endorse the organisation's bargaining strategy," he said.

[Wendy Fauvel](#), a Senior Associate in Herbert Smith Freehills' Employment, Industrial Relations and Safety team who was a co-editor of the Guide, said:

“Developing a first-class enterprise bargaining strategy for an employer is not easy, particularly for those looking to achieve change. There is no ‘template’, but it can 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.”

Key findings from 2018 Herbert Smith Freehills' Bargaining Survey:

Enterprise bargaining is an extremely resource-intensive process for many organisations:

- 50% of organisations had to put their last enterprise agreement to two or more votes before it was approved (with 14% going to 3 or more)
- 55% hold, on average, 11 or more bargaining meetings to reach an agreement – 26% of which hold 16 meeting or more.
- 21% have, on average, 16 or more attendees at each bargaining meeting
- 54% find the procedural steps for approval of enterprise agreements difficult to follow
- More than one-third (37%) of organisations have 10 or more enterprise agreements

There is a desire to unwind ‘unsustainable’ enterprise agreements

- 93% are seeking to remove some unproductive or inflexible terms and conditions in their next round of bargaining, 20% of which are seeking significant change
- 60% are looking for wage freezes or only nominal wage increases

Most are trying to achieve change – but the framework makes it challenging:

- 71% don't believe their organisations' enterprise agreement flexibility term is an effective mechanism to increase productivity
- 54% don't believe their organisation has enough leverage in bargaining to achieve enhancements to productivity and efficiency
- 11% would prefer to use the Fair Work Commission to arbitrate their next agreement

- Only one-third (34%) feel the bargaining framework under the Fair Work Act strikes a fair balance between the rights of both employers and unions in enterprise bargaining
- Only one-quarter (26%) feel the bargaining framework under the Fair Work Act allows their organisation to secure productivity improvements

Despite the desire to secure meaningful change, and the difficulty in achieving it, there remains an under-investment in planning, employee communications and stakeholder management:

- 65% feel their organisation doesn't invest enough time and resources in planning its industrial action mitigation strategy
- One-in-five (19%) feel their organisation doesn't invest enough time and resources in planning its bargaining strategy generally

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