

**INCA CONSULTING**

---

# **ENTERPRISE AGREEMENTS TRIAGE**

**A review of the pilot**

---

Prepared for: Fair Work Commission

Prepared by: Inca Consulting in association with Dr George Argyrous, Senior Lecturer  
in Evidence-Based Decision-Making, University of NSW

May 2015  
J09296

## TABLE OF CONTENTS

<b>1. INTRODUCTION AND OBJECTIVES .....</b>	<b>1</b>
1.1 THE ENTERPRISE AGREEMENTS TRIAGE PILOT .....	1
1.2 REVIEW OF THE PILOT .....	2
<b>2. METHODS .....</b>	<b>3</b>
<b>3. RESULTS.....</b>	<b>4</b>
3.1 TIMELINESS .....	4
3.2 CONSISTENCY OF OUTPUTS .....	7
3.3 ADMINISTRATIVE AND COST EFFICIENCY .....	9
<b>4. CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>13</b>

---

## 1. INTRODUCTION AND OBJECTIVES

### 1.1 The Enterprise Agreements Triage Pilot

The Fair Work Commission (FWC) has embarked on *Future Directions 2014-15* - a program of administrative reforms to provide for more efficient processes across its agreements, dispute resolution and other business areas. One of these initiatives (Initiative 15) is a review of the enterprise agreements application process, featuring the conduct of the Enterprise Agreements Triage Pilot (pilot). The pilot sought to demonstrate the effectiveness, timeliness and increased efficiency of a new process for assessing and approving new enterprise agreements applications.

The pilot commenced on 6 October 2014 and will run until 30 June 2015. The pilot - overseen by Deputy President Gostencnik - entailed the assigning of a portion of new enterprise agreement lodgements to the FWC Member Support Team. Initially, the Member Support Team assessed:

- Most Victorian agreements in the building, metal and civil construction industry
- A portion of all Western Australian agreements
- All Tasmanian agreements.

Beginning 1 December 2014, the pilot was expanded to include:

- All Western Australian agreements
- All ACT agreements.

The pilot provides a full assessment of the statutory requirements in relation to bargaining, voting and other approval requirements. The Member Support Team also performs the Better Off Overall Test (BOOT), which includes a thorough analysis of agreement provisions, and a comparison with relevant modern award/s conditions (hours, rates of pay, penalties, overtime, leave, unauthorised provisions, etc), on each agreement. A standard set of analysis templates has been developed for use by the Member Support Team.

It should be noted that the pilot process still requires a Member to approve (or not approve) enterprise agreements in accordance with the *Fair Work Act 2009* (the Act). Furthermore, all decisions in relation to applications, such as specifying any undertakings that need to be sought, are made by Commission Members. Deputy President Kovacic and Commissioner Lee assisted Deputy President Gostencnik in the determinative element of the approval process.

The processing of enterprise agreements under the pilot is considerably different to the Commission's established practice. Individual Commission Members may employ different processes when considering enterprise agreement applications. For instance, some Commission Members deal with enterprise agreement applications via a mixture of correspondence, e-hearings and/or formal attendance hearings. Other Commission Members rely on their knowledge of the parties and relevant industries and, where appropriate, approve agreements 'on the papers'.

The pilot seeks to improve the consistency of the enterprise agreement approval process as well as improve the timeliness of assessment. It also aims to relieve some of the administrative burden of Commission Members so that they can focus on more substantive matters.

In addition, the pilot features the development of a paperless process that relies on the electronic data in FWC's case management system for records and archiving purposes. This replaces the printing and physical storage of hard copy documents that have historically been created and maintained for each individual enterprise application in the existing system. According to National Archives, all hardcopy records associated with enterprise agreements are required to be retained.

Overall, between 6 October 2014 and 27 April 2015, 570 lodgements were considered by the Member Support Team under the arrangements of the pilot. This represented 18% of all 3,109 agreements considered by FWC during this period. From 1 January 2015 approximately 32% of all enterprise agreement applications received by the Commission have been processed under the pilot.

Initially, four existing members of the Member Support Team were given responsibility for assessing enterprise agreements under the pilot. Five new staff were added to the team and trained across a number of functions, including assessing enterprise agreements, resulting in a current team size of nine.

## **1.2 Review of the pilot**

The Fair Work Commission engaged Inca Consulting Pty Ltd, in association with Dr George Argyrous, Senior Lecturer in Evidence-Based Decision-Making at the University of New South Wales to undertake the review. The consultants were asked to make use of data collected through the pilot in order to examine:

- The timeliness of the process
- The consistency of outcomes
- The distribution of administrative workload and cost effectiveness

- The ability to meet the needs of, and minimise risks for, parties and Commission Members.

## **2. METHODS**

The review commenced on 13 April 2015. The following was undertaken:

- In-depth interviews with two of the Member Support Team and two Commission Members, nominated by FWC
- A detailed briefing by the Manager of the Member Support Team
- A review of relevant parts of the Fair Work Act 2009, written procedures for the pilot, pilot progress reports and other background documents
- A review of two example FWC case files including agreement lodgements, FWC analysis and correspondence between FWC and applicants
- A review of administrative data relating to processing times for enterprise agreements considered by the Members Support Team (ie the pilot) and Commission Members (ie non-pilot).

### 3. RESULTS

#### 3.1 Timeliness

The FWC has established timeliness benchmarks or targets for the assessment and approval of enterprise agreements. Specifically, the following benchmarks have been set:

- 50% of all enterprise agreements to be finalised within 21 days (three weeks)
- 90% of all enterprise agreements to be finalised within 56 days (eight weeks)
- 100% of all enterprise agreements to be finalised within 12 weeks.

A key aim of the pilot was to meet the established benchmarks and ideally to reduce the time taken between the lodgement of a new enterprise agreement and its approval.

FWC provided data to allow comparison of the processing times for agreements considered by Members through the pilot and those considered in the usual way (ie directly by the Chambers of FWC Members). The data provided related to the time period 6 October 2014 to 30 April 2015.

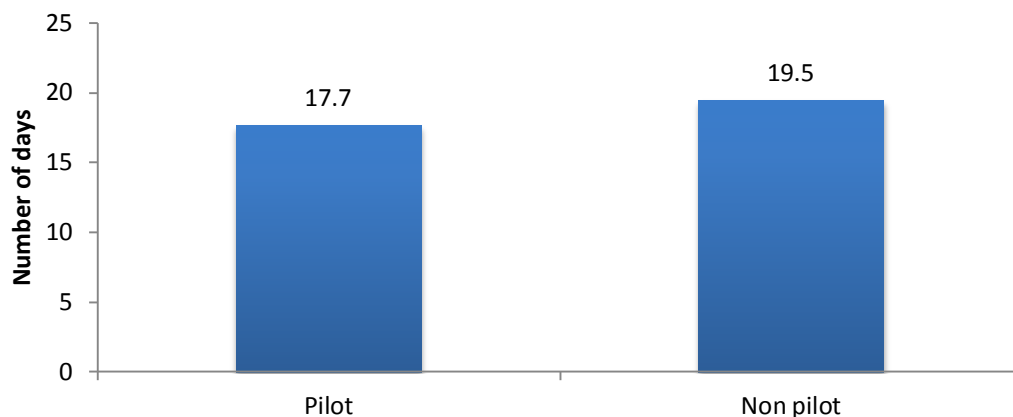
The following table sets out, by month, the number of lodgements and the median time for finalisation for the pilot and non-pilot enterprise agreements. There are a number of things to note. Firstly, the large volume of lodgements received by the Member Support Team in December 2014 resulted in a median processing time of 49 days, far exceeding the target and any other monthly result. As a small team, it was clearly ‘vulnerable’ to an unexpectedly high volume of lodgements, particularly when capacity was lowered due to public holidays and staff and Commission Members taking annual leave. A similarly large number of lodgements were received through the pilot in March 2015 (118 lodgements) but these were handled in a much more timely way – 50% were finalised within 14 days and 90% were finalised within 28 days.

**Table 1. Lodgements and time to finalisation (pilot vs non-pilot)**

Month	Oct 14	Nov 14	Dec 14	Jan 15	Feb 15	Mar 15	Apr 15
<b><i>Pilot</i></b>							
Lodgments	50	53	129	64	83	118	73
No. finalised	50	53	125	62	79	100	40
Median lodgment to finalisation (days)	25	21	49	25	22	14	10
90% lodgment to finalisation (days)	49	42	90	68	47	28	17
<b><i>Non-pilot</i></b>							
Lodgments	464	468	553	171	284	372	227
No. finalised	464	467	548	167	271	319	70
Median lodgment to finalisation (days)	28	20	29	21	20	15	11
90% lodgment to finalisation (days)	51	48	70	54	43	29	19

Over the entire time period, the median time for finalisation was 21.6 days for the pilot and 20.7 days for non-pilot enterprise agreements. Given the anomalous December result, it is of interest to look at the median time for finalising agreements, without including December. The figure below shows what is perhaps a more realistic indicator of the timeliness of assessing new enterprise agreements and one that is more reflective of the potential of the pilot process to lead to enterprise agreements being approved in a more timely fashion.

**Figure 1. Median time for finalising enterprise agreements: pilot vs non-pilot (Excluding December)**

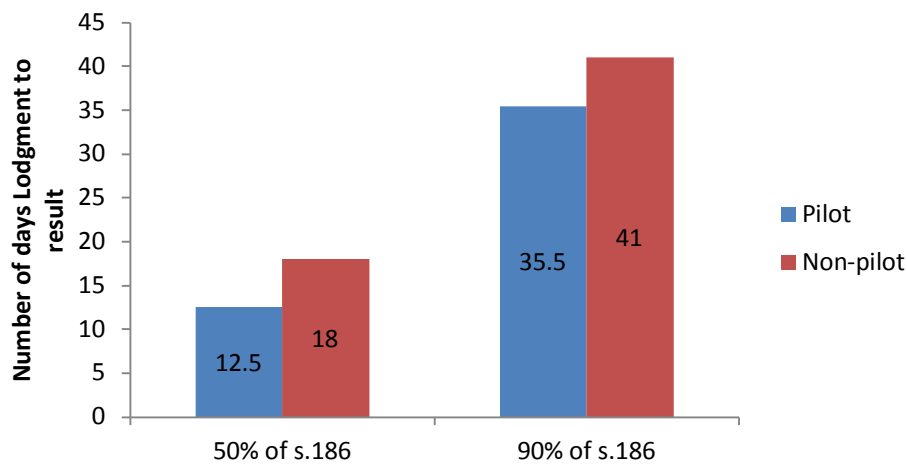


It is important to note that the ability to assess and approve enterprise agreements in a timely way is dependent not only on an efficient administrative process but also on lodgements that are complete, compliant and satisfy the Better Off Overall Test. If

there is a need to obtain further information from applicants, for undertakings to be sought from the applicant or if there is a need for a hearing, the process will obviously be slowed down.

For s.186 agreements, the following figure indicates that the median time between lodgement and approval was significantly shorter for those agreements processed in the pilot than for non-pilot enterprise agreements.

**Figure 2 - Timeframes for s.186 enterprise agreement approvals from 6 October 2014 to 5 May 2015**



The data provided by FWC shows that, between 6 October 2014 and 27 April 2015, 46% of all lodgements made under the pilot were given s.186 approval<sup>1</sup>. A much higher 62% of agreements assessed by Members were given s.186 approval. Clearly, this must have an impact on the time taken to finalise agreements. The fact that agreements are finalised within a comparable time frame is more notable in light of this.

There are a number of possible explanations for the difference in the proportion of s.186 approvals. It may be a function of the industries and jurisdictions where the triage pilot operated (for example smaller employers with less experience in developing and lodging agreements). It might also be a result of the work being performed by staff with less discretion than Commission Members and who may tend to err on the side of caution when presenting their analysis to a Member. Under the direction of Members involved in the pilot, staff members have been required to closely and

<sup>1</sup> Under s.186 of the Fair Work Act, the FWC must approve new enterprise agreements providing that the application meets the criteria specified in the Act. A s.186 approval is usually an approval granted to a compliant or 'uncontested' enterprise agreement without the need for undertakings or further information.



systemically scrutinise the requirements of the Act for each enterprise agreement application.

These results are set out in Table 2 below.

**Table 2. Median time from lodgement to finalisation for s.186 and other results (pilot vs non-pilot)**

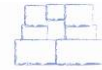
Month	Oct 14	Nov 14	Dec 14	Jan 15	Feb 15	Mar 15	Apr 15
<i><b>Pilot</b></i>							
s.186 Median lodgment to finalisation (days)	18	13	26	12	12	10	10
Other results. Median lodgment to finalisation (days)	34	30	55	55	30	20	11
<i><b>Non-pilot</b></i>							
s.186 Median lodgment to finalisation (days)	27	17	24	15	16	14	11
Other results. Median lodgment to finalisation (days <sup>2</sup> )	31	23	34	27	27	21	10

In summary, the data collected by FWC shows that the pilot has resulted in consistently improved timeliness for s.186 approvals. The data also suggests, particularly if the apparent ‘bottle neck’ in December can be considered an outlier and if the smaller proportion of s.186 enterprise agreements is taken into account, the triage approach is more time-efficient than the existing approach. The data also suggests that, as the Member Support Team grows and becomes more experienced, there is potential to assess enterprise agreements in an even more timely fashion. This contention is supported by the experience of the pilot in recent months where it has resulted in improved timeliness across all result types.

### 3.2 Consistency of outputs

It was noted that the success of the pilot was highly contingent on the Member Support Team being able to prepare solid and consistent analysis that provided Commission Members with the confidence to make good decisions on new agreements. It was also noted that it was extremely important for parties to be

<sup>2</sup> Other result types include: s.190 (approved with undertakings), s.587 (application dismissed), application withdrawn and application not approved



confident in the validity and consistency of approvals provided by the Commission. It was clear from the interviews that there was a high level of satisfaction on the part of Members and a high degree of trust in the work performed by the Member Support Team. The following quotes illustrate these Member views:

*“We [Members] don’t have to act uniformly but the advice has to be uniform – and it is.”*

*“I have a high level of confidence...very consistent, high level of work. They stick to the procedure, don’t free-wheel.”*

*“I’ve got confidence that the information flow is there to help make the right judgement.”*

*“A fairly straightforward task – it’s clear what we are to do. The obligations are clear – you just need a procedure and I think we’ve bedded that down.”*

It was noted that the centralised triage approach provided for *“a simpler, more consistent process for assessing agreements.”* In particular, it was noted that greater consistency could be achieved through using a small and dedicated team rather than the work being performed in a more dispersed way through Members’ chambers.

Importantly, the pilot approach has allowed for the detection of some trends in the lodgement of new enterprise agreements. For example, common errors made by applicants have been detected that delay the approval of agreements (or result in them being withdrawn). Observing these trends and identifying the types of employers or industries where ‘mistakes’ commonly occur has allowed FWC to embark on some ‘early intervention’ or ‘outreach’ work. For example, the ‘Notice of Employee Representational Right Guide’ has been developed to hopefully see fewer agreements withdrawn on a technicality. An enterprise agreement making ‘Step by Step’ guide for small business is also under development. Commission Members have begun delivering some industry briefings to assist employers and industry groups to prepare better agreements and to avoid common pitfalls.

These initiatives should be considered particularly good outcomes of the pilot that, in time, should result in even more efficient assessment and timely approval of enterprise agreements. It is likely that the education materials will lead to an overall long term improvement in the proportion of s.186 enterprise agreement approvals.

### 3.3 Administrative and cost efficiency

#### Administrative efficiency

At the outset of the pilot, the Member Support Team provided their analysis of each lodgement to the relevant Member's chambers where, typically, it was reviewed by the Member with the assistance of their Associate. Where correspondence was required with the applicant, for example to seek undertakings, the correspondence was drafted and sent by the Member's Associate. This part of the process was similar to the existing (non-pilot) arrangement and resulted in some inefficiencies and delays, particularly where an Associate was busy with other work.

Since March 2015, the Member Support Team has established regular face-to-face meetings with the relevant Members in order to efficiently go through each enterprise agreement and to seek the Member's direction, based on the analysis that had been prepared by the team. Where an agreement is approved by the Member, this is indicated at the meeting. Where undertakings are required, the Member Support Team is instructed as to what needs to be sought and the correspondence is prepared by a team member. In some cases the application may require a Member's deeper analysis or discretion and/or a hearing. Reportedly, this process has greatly improved efficiency and lessened 'bottle-necks' that can arise in Members' chambers. Typically, a brief meeting allows for the day's lodgements to be considered and for the process to be 'moved along' for each agreement. As one informant said *"The direct interaction with staff was the game changer."*

In addition to the efficiency gains that the above process has brought about, it was also noted that the face-to-face meetings serve an important training function for the Member Support Team. As one informant said *"It's really accelerated the learning process."*

It was noted that it would be highly beneficial to be able to better forecast the volume of new enterprise agreement lodgements with the FWC. The 'December experience' highlighted this for those involved with the pilot. It was suggested that closer consultation with industry groups and unions would help to better predict the flow of work resulting from imminent bargaining rounds and for FWC to arrange its resources accordingly. If the pilot approach is to be applied more widely, it was noted that it would obviously be necessary to bolster the Member Support Team. In addition, it was also thought to be desirable to train a wider pool of FWC staff that could act as 'reserves' to be called upon during times of heavy traffic workload.

### **Cost efficiency**

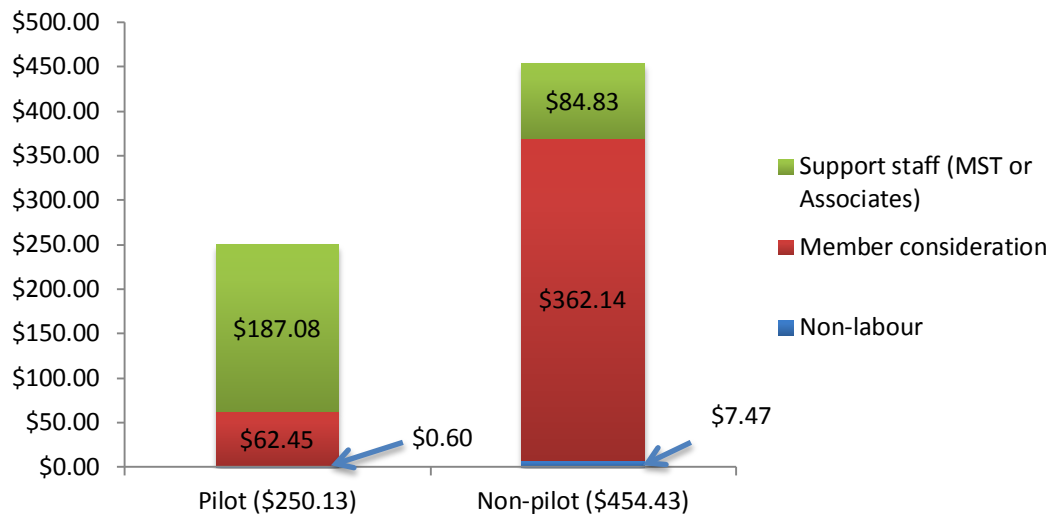
The FWC provided a list of material and labour costs associated with both the triage pilot approach and the existing approach. The following was taken into account:

- The material, freight and archiving costs associated with the maintenance of hard copy files (non-pilot)
- The labour costs associated with assessing agreements, consulting a Member, corresponding with parties, filing and other administration (undertaken either by Members' Associates or the Member Support Team)
- Member consideration of analysis provided by either an Associate or the Member Support Team.

The analysis, as set out in the following Figure, shows that the pilot is a more cost effective process to approve enterprise agreements. Specifically, the FWC analysis shows that the triage approach costs the Commission an estimated \$250.13 per agreement whereas the established approach is estimated to cost \$454.43 per enterprise agreement. Based on an anticipated workload of 6,000 applications, the potential reduction in costs could be between \$1 - \$1.25 million per annum ( $\$454.43 - \$250.13 \times 6000$ ). This model assumes that the costs of Members' involvement in the process is replaced by administrative staff, whereas the fixed costs of Members will continue to be incurred, however, they will be able to perform other determinative and more complex work that makes better use of their specialised skills and statutory responsibilities.

If the pilot model is implemented as the general practice and up to 80% of enterprise agreement applications are processed in this way, a cost benefit of up to \$1,000,000 could still be realised. The remaining 20% of enterprise agreements would have a pre-approval check completed before being allocated directly to a Member due to the nature of the industry/complexity of the agreement.

**Figure 3. Cost per file of pilot vs non-pilot approach to assessing and finalising enterprise agreements**



The above figures are based on a cost per enterprise agreement. The data shows that Members' chambers (non-pilot) can finalise an average of 5 enterprise agreements per day and each staff member in the pilot can assess an average of 2 enterprise agreements per day, including consultation time with a Member to consider approval. Due to the assessment checks being performed by administrative staff, the labour costs under the pilot are substantially lower resulting in the reduced cost per agreement.

#### **Basis of costings**

The costings are based on a combination of data collected within the pilot and through consultation with chambers. The labour costs are based on total labour costs sourced from the Commission's Chief Financial Officer. The costing is indicative only and would be dependent on the agreement's complexity, compliance with legislation and the level of support from parties. Where an attendance hearing is required, additional costs would be the same under both models.

#### **Total non - pilot cost per file \$454.43**

Inclusive of:

- Material costs - file cover, label, pin, paper and printing
- Freight - interstate files average cost (costing assumes that 1 in 2 files require freight)
- Archiving - for a period of 10 years per file and up to 20 files per box

- Labour costs:
  - Registry staff making up the file (APS4 10min per agreement)
  - Associate completing a checklist and any correspondence. Once member has made a decision, listing the agreement for hearing and drafting/dispatching a decision to parties (APS5 x 5 agreements per day)
  - Member of the Commission - to consider the application including pre approval requirements, BOOT and the views of parties (5 agreements per day). Half of applications to be dealt with by Commissioners and half by Presidential members (based on 2013/14 financial year agreement allocations).

**Total Pilot cost per file \$250.13**

Inclusive of:

- Material costs - printing working documents
- Labour costs:
  - Member Support Team - triage agreement, consult Member, draft correspondence, list for hearing, draft decision as directed by Member and dispatch decision to parties (pilot team member 2 files per day) (costing based on current team breakdown of 56% APS4, 33% APS5 & 11% APS6)
  - Member of the Commission in consultation with staff - to consider the application including pre approval requirements, BOOT and the views of parties (15min per file). Assumes half of applications will be dealt with by Commissioners and half by Presidential members (based on 2013/14 financial year agreement allocations).

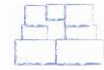
## 4. CONCLUSIONS AND RECOMMENDATIONS

The Enterprise Agreements Triage Pilot has demonstrated in very clear terms that the Member Support Team can effectively and efficiently assess enterprise agreements in accordance with the Fair Work Act and to the satisfaction of Commission Members. Using the triage approach yields a situation where agreements are assessed and finalised in a comparable if not faster manner, with further potential for improvement. The approach is certainly more cost efficient, with a potential cost benefit to the FWC of upwards of \$1million per year and freeing up Commission Members to concentrate on more substantive work.

The centralised approach also yields more consistent analysis to allow Members to make their decisions. Trends are more easily observable allowing the FWC to more actively assist parties to prepare enterprise agreements and avoid common pitfalls. The pilot strongly suggests that FWC should work towards adopting the model more widely.

Assuming that FWC decides to formalise the approach and implement it on a national basis, the following should be considered:

1. Add resources to the Member Support Team. While the existing nine staff perform a range of tasks in addition to their triage duties and further efficiencies are likely be found, the Member Support team should be built incrementally and the work of assessing agreements transferred to the team in an incremental manner. Careful decisions should be made about which industries and jurisdictions to ‘transfer’ to the triage model and at what time, taking into account the need generated by the changing profile of Members and the capacity of the Member Support Team.
2. Establish and train a small team of ‘reserve’ staff who can be called upon in times of heavy workload.
3. Continue to consult with industry groups and unions in order to better forecast the volume of lodgements, focusing on parties in those industries where bargaining rounds are under way.
4. Continue to develop and provide advice and information to employers and industry groups, to raise the incidence of compliant agreements lodged with FWC and to allow for more efficient and ‘problem-free’ approvals.



5. Establish separate timeliness benchmarks for s.186 approvals and 'other results'. Consideration should also be given to reviewing the benchmarks after the pilot model has been in place for 12 months.