General Manager's report into developments in making enterprise agreements under the *Fair Work Act 2009* (Cth)

2015–2018

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The contents of this paper are the responsibility of the author and the research has been conducted without the involvement of members of the Fair Work Commission.

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List of abbreviations

AAWI	Average Annualised Wage Increase
ABS	Australian Bureau of Statistics
AGL Loy Yang	*Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd T/A AGL Loy Yang*
ALDI A	*ALDI Foods Pty Limited v Shop, Distributive and Allied Employees Association*
ALDI B	*Shop, Distributive and Allied Employees Association v ALDI Foods Pty Limited*
Beechworth Bakery	*Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery*
BOOT	Better Off Overall Test
CURF	confidentialised unit record file
EEH	Employee Earnings and Hours
Explanatory Memorandum	*Explanatory Memorandum to the Fair Work Bill 2008* (Cth)
Fair Work Act	*Fair Work Act 2009* (Cth)
Fair Work Commission	Commission
Federal Court	Federal Court of Australia
KCL	*KCL Industries Pty Ltd*
Maersk	*The Maritime Union of Australia v Maersk Crewing Australia Pty Ltd*
MMA Offshore Logistics	*The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics*
NERR	Notice of Employee Representational Rights
NES	National Employment Standards
NUW	National Union of Workers
Peabody	*Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union*
RACV	*RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union*
Re Cram	*Re Cram; Ex parte NSW Colliery Proprietors' Association Limited*
Regulations	*Fair Work Regulations 2009* (Cth)
WAD	Workplace Agreements Database

Executive summary

The General Manager of the Fair Work Commission (the Commission) is required every three years under s.653(1) of the *Fair Work Act 2009* (Cth) (Fair Work Act) to:

- review the developments in enterprise agreement making in Australia;
- conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

This report presents findings for the 26 May 2015–25 May 2018 period from the review into the developments in enterprise agreement making in Australia. Pursuant to s.653(3) this report is due to the Minister for Jobs and Industrial Relations within six months from the end of the reporting period, i.e. by 25 November 2018.

Key legislative developments in enterprise agreement making

During the reporting period three Acts amending the Fair Work Act were passed by the Commonwealth Parliament. These were the:

- *Fair Work Amendment Act 2015* (Cth);
- *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth); and
- *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth).

Key case law developments in enterprise agreement making

The Courts and the Commission made a number of significant decisions relating to enterprise agreements during the reporting period. Decisions related to issues such as:

- procedural steps associated with the approval of agreements by the Commission;
- the capacity of employers to make undertakings;
- the meaning of genuine agreement;
- the better off overall test (BOOT);
- the meaning of fairly chosen; and
- good faith bargaining.

Key decisions from the reporting period are summarised in this report.

Key findings from the quantitative data about enterprise agreement making

In the current reporting period, there were fewer enterprise agreements approved (13 448 compared with 18 657) and employees covered (2 121 701 compared with 2 536 760) than in the previous reporting period.

Key findings from the quantitative data about designated groups

Section 653(2) provides that the General Manager must consider the effect of enterprise bargaining on the following groups:

- women;
- part-time employees;
- persons from a non-English speaking background;
- mature age persons;
- young persons; and
- any other persons prescribed by the regulations.[1]

For the reporting period, the most common method of setting pay for the designated groups was by collective agreement except for those aged under 21 years, where awards were the most common.

In terms of wage increases in approved enterprise agreements, average annual wage increases (AAWIs):

- for females were mostly lower than for males;
- for part-time employees were mostly lower than for full-time employees;
- for employees with a non-English speaking background were mostly lower than those with an English speaking background; and
- for young and mature employees were mostly lower than employees aged between 21 and 44 years.

[1] Fair Work Act, s.653(2). The regulations do not prescribe any other persons.

1 Introduction

The Fair Work Commission (the Commission) is the national workplace relations tribunal. It is established by the *Fair Work Act 2009* (Cth) (Fair Work Act). The Commission carries out a range of functions including: maintaining a safety net of modern award minimum wages and conditions; facilitating enterprise bargaining and approving enterprise agreements; administering the taking of protected industrial action; settling industrial disputes; and granting remedies for unfair dismissal.

The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President.[2] The President is assisted by a General Manager,[3] also a statutory appointee, who oversees the administration of Commission staff.

Under s.653(1) of the Fair Work Act, the General Manager must:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

The review and research must also consider the effect that these matters have had on the employment (including wages and conditions of employment) of the following persons:

- women;
- part-time employees;
- persons from a non-English speaking background;
- mature age persons;
- young persons; and
- any other persons prescribed by the regulations.[4]

The Fair Work Act specifies that the research must be conducted for the initial three-year period following the commencement of s.653 and each subsequent three-year period,[5] and a written report of the review and research must be provided to the Minister within six months after the end of the relevant reporting period.[6]

This report presents developments in enterprise-agreement making in Australia for the three-year period from 26 May 2015 to 25 May 2018.[7]

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[2] Fair Work Act, ss.575 and 626.

[3] Fair Work Act, s.657.

[4] Fair Work Act, s.653(2). The regulations do not prescribe any other persons.

[5] Fair Work Act, s.653(1A).

[6] Fair Work Act, s.653(3).

[7] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012.

The report is divided into five sections dealing with developments in enterprise-agreement making. These are:

- resources used to inform the report;
- legislative changes;
- case law relating to enterprise agreements;
- quantitative data relating to enterprise agreements; and
- the numbers of enterprise agreements and the wage outcomes in enterprise agreements.

2 Resources used to inform the report

A range of data and resources have informed the report. These include:

- the Australian Bureau of Statistics' (ABS) Survey of Employee Earnings and Hours (EEH);
- administrative data collected by the Commission;
- data from the Workplace Agreements Database (WAD), compiled and maintained by the Department of Jobs and Small Business;
- other commissioned research; and
- case law.

2.1 Survey of Employee Earnings and Hours (EEH)

The ABS EEH is an employer-based survey conducted biennially that is designed to provide statistics on the composition and distribution of employee earnings, hours paid for and the methods used to set employees' pay. Information is collected from a sample of employers about characteristics of both the employers and their employees.

2.2 Fair Work Commission administrative data

The Commission's case management system (CMS plus) is used by Commission staff to record and maintain its business processes and records. Data on applications to the Commission are recorded in CMS plus by staff from the point of lodgment through the application's life cycle. The Commission uses CMS plus to meet its statutory and business reporting requirements. CMS plus contains data relevant to the approval of enterprise agreements such as:

- the name of the new enterprise agreement;
- the type of enterprise agreement;
- party names;
- industry;
- prior enterprise agreements;
- date and location of lodgment;
- enterprise agreement approval processing time;
- lodgment documents and other related documents, including approval documents, application for approval, employer and employee declarations of support;
- location of the hearing and the Member dealing with the matter;
- the decision; and
- any correspondence between the Commission and the parties.

2.3 Workplace Agreements Database (WAD)

The WAD is a database that contains information on all federal enterprise agreements that have been certified or approved since the introduction of enterprise bargaining in October 1991.

The WAD contains data on enterprise agreements such as industry (based on the Australian and New Zealand Standard Industrial Classification 2006 classification), sector, duration and the number of employees covered. Other characteristics that are collected include the title of the

enterprise agreement, the section of the Fair Work Act under which the enterprise agreement was approved and the parties involved in the bargaining process. Where available, the database includes information on wages (including quantum and timing of increases) which is used to calculate the average annual wage increase (AAWI) for the enterprise agreement.

2.4 Other commissioned research

The Commission engaged Professor David Peetz and Dr Serena Yu to conduct research on the trends in collective bargaining for the *Annual Wage Review 2016–17* and *Annual Wage Review 2017–18*. This report discusses relevant findings from this research.[8]

2.5 Case law

This report discusses decisions related to making enterprise agreements where the cases demonstrated legal developments.

2.6 Issues of comparability between the 2015 and 2018 reports

Some results for this report, such as those relying on data from CMS plus and the WAD, are directly comparable with those in the 2015 report, as the method of data collection and the definitions have not changed over time. Where appropriate, comparisons are drawn between the previous and current reporting periods.

Results in relation to other quantitative data, such as the EEH, are not directly comparable with data presented in previous reports. While there are some similarities in the way that data were derived, differences between the data sets and their method of collection ensure that caution should be exercised when comparing two different periods. In particular, cross-sectional surveys that are based on samples are not directly comparable with other time periods.

[8] Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February; Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

3 Legislative developments relating to enterprise agreements

The three-year period that this report relates to has seen a number of legislative changes which have impacted upon the making of enterprise agreements. The legislative changes were made by the:

- *Fair Work Amendment Act 2015* (Cth);
- *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth); and
- *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth).

These legislative changes are discussed below.

3.1 *Fair Work Amendment Act 2015* (Cth)

The *Fair Work Amendment Act 2015* (Cth) introduced two significant changes to the laws relating to enterprise agreement-making in respect of protected action ballot orders and greenfields agreements. The Bill was passed on 11 November 2015 and the relevant amendments came into effect on 27 November 2015.

3.1.1 Application for a protected action ballot order

The *Fair Work Amendment Act 2015* (Cth) introduced a new requirement that in order for bargaining representatives to be eligible to apply to the Commission for a protected action ballot, there has to have been a notification time in relation to the proposed enterprise agreement.[9]

The *Explanatory Memorandum to the Fair Work Bill 2008* (Cth) (Explanatory Memorandum) states that the new subsection was included to implement recommendation 31 of the Fair Work Review Panel to amend the Fair Work Act 'so that an application for a protected action ballot order may only be made when bargaining for a proposed agreement has commenced, either voluntarily or because a majority support determination has been obtained.'[10]

The amending Act also introduced a legislative note to s.437(2A), that states '[p]rotected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).' This note makes clear that 'disagreement over the scope of a proposed enterprise agreement does not, of itself, prevent the taking of protected industrial action.'[11]

3.1.2 Greenfields Agreements

The amending Act introduced provisions that set out the persons who are bargaining representatives for a proposed greenfields agreement,[12] and has the effect of extending the requirement to bargain in good faith to negotiations for greenfields agreements. The amendment also allows the employer to give written notice to each employee representative that is a bargaining

[9] Fair Work Act, s.437(2A).

[10] Explanatory Memorandum, Fair Work Amendment Bill 2014, 145.

[11] Explanatory Memorandum, Fair Work Amendment Bill 2014, 146.

[12] Fair Work Act, s.177.

representative for the agreement, of the commencement of a six-month notified negotiation period for the proposed agreement.[13]

The employer can apply to the Commission for approval of the agreement after the expiration of the notified negotiation period in the circumstances set out in s.182(4) of the Fair Work Act.[14] Section 187(6) provides additional requirements for approval of such agreements, in that the Commission must be satisfied that the proposed agreement, 'considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work'.[15] Section 255A, which was also introduced by the amending Act, sets out limitations to the application of certain sections of the Fair Work Act in relation to greenfields agreements where the notified negotiation period has ended.

3.2 *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth)

The *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth) introduced further changes to the agreement-making provisions in the Fair Work Act. The Bill was passed on 10 October 2016 and the amendments came into effect on 13 October 2016.

The *Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016* (Cth) amended the definition of 'unlawful term' in the Fair Work Act, to include a term of an enterprise agreement that is 'an objectionable emergency management term'.[16] An objectionable emergency management term is defined in s.195A as a term of an enterprise agreement that covers an employer that is a designated emergency management body that (broadly speaking) has, or is likely to have, the effect of restricting or limiting certain interactions between the emergency management body and its volunteers.[17]

In addition, these amendments provided that the model consultation term is to be taken to be a term of an enterprise agreement if the consultation term proposed by the parties in the agreement is an objectionable emergency management term.[18] It also confers on volunteer bodies (as defined) a right to make submissions for consideration in relation to a matter before the Commission if it arises under Part 2-4 or Part 2-5 (Workplace Determinations) and affects, or could affect, the volunteers of a designated emergency management body.[19]

3.3 *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth)

The *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth) introduced new disclosure requirements for bargaining representatives for a proposed enterprise agreement that is not a greenfields agreement,[20] in response to recommendation 48 of the Final Report of the Royal

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[13] Fair Work Act, s.178B.

[14] Fair Work Act, s.182(4).

[15] Fair Work Act, s.187(6).

[16] Fair Work Act, s.194(baa).

[17] Fair Work Act, s.195(A)(1); see also exceptions in s.195A(2).

[18] Fair Work Act, s.205(2).

[19] Fair Work Act, ss.254A, 281AA.

[20] Fair Work Act, ss.179–179A.

Commission into Trade Union Governance and Corruption.[21] The Bill was passed on 10 August 2017 and the relevant amendments came into effect on 11 September 2017.

The new provisions 'require bargaining representatives (employers and organisations) for a proposed enterprise agreement to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement.'[22]

The amending Act also introduces an obligation on employers to provide employees with access to any disclosure documents given in relation to the proposed agreement during the relevant access period for the agreement.[23]

Failure to comply with the new requirements may give rise to a civil remedy; however, such non-compliance does not amount to reasonable grounds for believing the agreement has not been genuinely agreed to, nor is it otherwise relevant to the approval of the agreement by the Commission.[24]

3.4 Greenfields Agreements Review

On 3 October 2017, Mr Matthew O'Callaghan, a former Senior Deputy President of the Commission, was engaged to undertake a review of the greenfields agreement provisions of the Fair Work Act which were the subject of legislative amendments in 2015.

The review released a background paper (Greenfields Agreements Review Background Paper) and employee and employer organisations, as well as employers, were given the opportunity to make submissions in response to the paper and the provisions.

The review was completed by Mr O'Callaghan on 27 November 2017. The final report of the Greenfields Agreements Review was released in February 2018.

[21] Explanatory Memorandum, Fair Work Amendment (Corrupting Benefits) Bill 2017, 11 [64].

[22] Explanatory Memorandum, Fair Work Amendment (Corrupting Benefits) Bill 2017, 11 [64].

[23] Fair Work Act, s.180(4A)–(4C).

[24] Fair Work Act, s.188A.

4 Case law relating to enterprise agreements

This section discusses some of the key developments in case law relating to the making of enterprise agreements during the reporting period.

4.1 Genuine agreement

General requirements for when the Commission must approve an enterprise agreement are found in s.186 of the Fair Work Act.[25] One such requirement is that, if the agreement is not a greenfields agreement, the Commission must be satisfied that the agreement has been genuinely agreed to by the employees covered by it.[26]

Section 188 of the Fair Work Act elaborates on what is meant by 'genuinely agreed', and specifies a range of criteria that the Commission must be satisfied of in order for an enterprise agreement to have been genuinely agreed to by the employees covered by it. These include certain requirements contained in ss180–182 of the Fair Work Act, and an additional requirement for the Commission to be satisfied that 'there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees'.[27]

The criteria relevant to the below discussion include that the employer must take all reasonable steps to ensure that the employees (the *relevant employees*) employed at the time who will be covered by the agreement:

- are given access to the written text of the agreement and any other material incorporated by reference throughout the access period for the agreement (s.180(2));
- are notified of certain information relevant to voting for the agreement (s.180(3)); and
- have explained to them the terms of the agreement, and the effect of those terms, in an appropriate manner taking into account particular circumstances and needs of the relevant employees (s.180(5)).

In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union*[28] the Full Court of the Federal Court of Australia (Federal Court) upheld the decision of the primary judge quashing the Commission's approval of an enterprise agreement on the basis of jurisdictional error. The agreement in question was made with three employees, whose employment would otherwise be covered by two modern awards, while the agreement itself was intended to cover employees whose employment would otherwise be covered by 11 modern awards.

In making its decision to approve the agreement, the Commission had considered the appellant's declaration that it explained the agreement to employees but had not considered the steps that the appellant had actually taken to do so. The Federal Court found that the primary judge of the Federal Court was correct in finding that the Commission fell into jurisdictional error by way of failure to:

[25] The Fair Work Act also sets out additional requirements in s.187.

[26] Fair Work Act, s.186(2)(a); note that if the agreement is a multi-enterprise agreement, the Commission must be satisfied that the agreement has been genuinely agreed to by each employer covered by that agreement, and no person coerced, or threatened to coerce, any of the employers to make the agreement (s.186)(2)(b).

[27] Fair Work Act, s.188(c).

[28] [2018] FCAFC 77.

- have regard to the contents and terms of the explanation the appellant purportedly provided to employees before the vote;[29] and
- appreciate, in determining whether employees had genuinely agreed to the agreement, the need to consider whether the employees were likely to have understood its terms and effect. [30]

The Federal Court commented that without knowing the content of the explanation provided, it was not open to the Commission to be satisfied that all reasonable steps had been taken to ensure the terms and their effect were explained to the employees who voted on the agreement or that they had genuinely agreed to it.[31]

The Federal Court observed that the language used in ss.186(2)(a) and 188(c), particularly the word 'genuinely' in the phrase 'genuinely agreed', 'indicates that mere agreement will not suffice and that consent of a higher quality is required',[32] commenting that '[p]aragraph 188(c) is cast in very broad terms. It is intended to pick up anything that is not caught by paras (a) and (b). Thus, any circumstance which could logically bear on the question of whether the agreement of the relevant employees was genuine would be relevant'.[33] In order to be satisfied that the agreement was 'genuinely agreed to' having regard to s.188(a)(i), the content of the employer's explanation of the terms of agreement and their effect is not only relevant to the question raised by s.188(c), but was a mandatory consideration.[34]

The Federal Court concluded that 'the requisite state of satisfaction that the Agreement had been genuinely agreed to … was not reached and the basis for the exercise of power conferred on the Commission to approve the agreement was therefore absent'.[35]

4.2 Better off overall test

Another of the general requirements that the Commission is to consider when approving an enterprise agreement is that the enterprise agreement must pass the better off overall test (BOOT).[36] Section 193 of the Fair Work Act sets out the circumstances when both greenfields and non-greenfields agreements pass the BOOT. A non-greenfields agreement passes the BOOT:

> ' … if the [Commission] is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.'[37]

In *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo; The Australasian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty*

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[29] At [172].

[30] At [172].

[31] At [113].

[32] At [141].

[33] At [142].

[34] At [142].

[35] At [173].

[36] Fair Work Act, s.186(2)(d); note however that s,189 provides limited scope for the Commission to approve an enterprise agreement that does not pass the better off overall test in exceptional circumstances following the application of a public interest test.

[37] Fair Work Act, s.193(1).

Limited T/A Coles and Bi Lo,[38] a Full Bench of the Commission considered whether an agreement that provided a higher hourly rate than the relevant modern award, but lower penalty rates for evenings, weekends and public holidays, passed the BOOT requirements in s.193(1) of the Fair Work Act.

The Full Bench examined other benefits under the agreement which could make up for the potential loss suffered, particularly by part-time and casual employees whose potential loss was likely to be of significance. The Full Bench was not satisfied that 'a consideration of all benefits and detriments under the Agreement results in each employee and each prospective employee being better off overall under the Agreement compared to the Award.'[39] The respondent was given an opportunity to remedy the deficiencies by providing undertakings, but in the absence of an indication that such an undertaking was proposed, an order was issued quashing the first instance decision to approve the agreement.[40]

In *Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery*[41] (*Beechworth Bakery*), the Shop, Distributive and Allied Employees Association challenged the decision to approve an enterprise agreement on two broad bases: that the BOOT had been incorrectly applied; and that the Commission erred in accepting the undertaking provided by the employer. The Full Bench considered it unnecessary to decide whether the agreement passed the BOOT because, absent the undertaking proffered by respondent, there was no finding in the decision that the agreement passed the BOOT.[42] The Full Bench, therefore, turned its attention to the undertaking and determined that the power to approve an agreement with undertakings was only enlivened if the Commission had concern that the agreement did not meet the requirements set out in ss.186 and 187 of the Fair Work Act. The Full Bench did not consider it was necessary for the Commission to make findings as to the manner in which the agreement did not pass the BOOT, but that it was sufficient for the purposes of enlivening the jurisdiction concerning the provision of undertakings for the Commission to identify its concern with enough particularity so that the respondent could seek to address its concern by proffering an undertaking.[43]

The Full Bench held that the undertaking proffered by the respondent was not an undertaking capable of addressing the Commission's concern that the agreement did not pass the BOOT.[44] The Full Bench further held that acceptance of the undertaking and the reliance on it to approve the agreement was therefore erroneous. As the Commission did not conclude that the agreement passed the BOOT independently of the undertaking, nor did it make any finding under s.189 that the agreement should be approved even though it did not pass the BOOT, the Full Bench held that there was no proper basis to approve the agreement.[45] The findings of the Full Bench relating to the undertaking are considered in further detail below.

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[38] [2016] FWCFB 2887.

[39] At [33].

[40] PR581624.

[41] [2017] FWCFB 1664.

[42] At [20].

[43] At [35].

[44] At [46].

[45] At [46].

In *ALDI Foods Pty Limited v Shop, Distributive and Allied Employees Association* (*ALDI A*),[46] the High Court also considered whether the Federal Court had correctly determined the question of whether the Commission fell into jurisdictional error in being satisfied that the agreement passed the BOOT. The agreement in question included a 'comparison clause' under which an employee was able to request a comparison of the benefits received under the agreement and the relevant modern award. The clause provided that any shortfall in total remuneration which would otherwise be payable under the modern award would be paid to the employee in the pay period after the comparison was completed, and in the event that the parties could not agree on the remuneration, this could be pursued through the dispute resolution procedure in the agreement.

The High Court affirmed the decision of the majority of the Federal Court that the Commission had made jurisdictional errors in concluding that the agreement passed the BOOT because the comparison clause created 'an enforceable right to payments to employees equal to or higher than those contained in the award'.[47] The High Court held that the right to equalisation (at the initiation of the employee) did not of itself leave the employee better off under the agreement at test time.[48]

The High Court also found that '[o]n a fair reading of the reasons of the Full Bench [of the Commission], it did not engage in any comparison between the Agreement and the modern award. Rather, it summarised ALDI's submission … and accepted that submission as showing that the Agreement passed the BOOT.'[49]

The High Court quashed the decision of the Full Bench and ordered the Full Bench to determine according to law whether the agreement passed the BOOT.

In an appeal against a decision to approve an agreement in the black coal industry,[50] the CFMEU claimed that the agreement could not pass the BOOT as it permitted casual employment while the relevant award did not. The union's position was that the 25 per cent loading to be paid to casuals under the agreement (plus a guarantee of an additional 1 per cent) was not sufficient for the agreement to pass the BOOT. The Full Bench dismissed the appeal finding the agreement provided adequate remuneration for any employees who would be employed as casuals in the future, thereby meeting the requirements of s.186.

4.3 Undertakings

Where the Commission has concerns that an enterprise agreement that has been lodged for approval does not meet the requirements in ss.186 and 187 of the Fair Work Act, s.190 empowers the Commission to approve the agreement in circumstances where it has accepted a written undertaking, from one or more employers covered by the agreement, that meets those concerns.

In *Beechworth Bakery*,[51] the Full Bench considered whether an undertaking could satisfy concerns about whether the agreement passed the BOOT. The undertaking enabled an employee covered by the agreement to ask their employer to compare the amount paid to the amount they would

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[46] [2017] HCA 53.

[47] [2017] HCA 53, at [93] citing *Transport Workers' Union of Australia v ALDI Foods Pty Ltd* (2016) 255 IR 248 at 267 [58].

[48] [2017] HCA 53, at [93].

[49] [2017] HCA 53, at [96].

[50] *Construction, Forestry, Mining and Energy Union v SESLS Industrial Pty Ltd* [2017] FWCFB 3659.

[51] *Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery* [2017] FWCFB 1664.

have received under the relevant award over a certain period. It also provided that any shortfall in wages otherwise payable under the award plus an additional amount would be paid to the employee in the pay period following the review.

The Full Bench held that the undertaking was not capable of satisfying their concerns, because it did not create an enforceable right to any payment; rather, it operated to allow an employee to request that a comparison be made.[52] The Full Bench observed that the obligation to 'make good' any shortfall arises only if an employee makes a request for a review, and that if no such request was made, then an obligation to 'make good' would not arise.[53] Further, it was held that '[a]n undertaking that in its expression is uncertain, ambiguous, aspirational or perhaps conditional, with the result that it will not create an enforceable entitlement as a term of the agreement, will not likely meet the concern that an agreement does not pass the better off overall test'.[54]

The Full Bench also recognised that the wording of the undertaking would result in delay in payment to an employee and that in the circumstances, it was not clear that the increase provided in the undertaking would compensate for the potentially substantial difference in entitlements over an indeterminate period.[55] The agreement was remitted back to the Member at first instance to consider in light of the decision of the Full Bench.

Section 190(3)(b) of the Fair Work Act states that an undertaking must not 'result in substantial changes to the agreement'. In *Construction, Forestry, Maritime, Mining and Energy Union v Lightning Brick Pavers Pty Ltd*[56] a Full Bench of the Commission quashed a decision approving an agreement with extensive undertakings which, amongst other amendments, had the effect of reducing ordinary hourly rates of pay and changing redundancy payments. Further, a Full Bench in *Construction, Forestry, Mining and Energy Union v Concrete Constructions (WA) Pty Ltd*[57] rejected the employer's attempt to address BOOT deficiencies by way of undertakings, declaring that 'an undertaking accepted after an agreement has been approved is not given any legal effect by the [Fair Work] Act'.[58]

In a decision[59] dealing with a request to refer a matter to a Full Bench, the acting President confirmed the decision in *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* (*RACV*)[60] (which found that certain leave entitlements are provided in days rather than hours) and stated that an undertaking was not required to address an inconsistency with the NES as the agreement contained an NES precedence term.[61]

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[52] [2017] FWCFB 1664, at [42].

[53] At [43].

[54] At [44].

[55] At [45].

[56] [2018] FWCFB 3825.

[57] [2017] FWCFB 3912.

[58] At [9].

[59] *re Mondelez Australia Pty Ltd* [2018] FWC 2140.

[60] [2015] FWCFB 2881.

[61] At [19].

4.4 Notice of Employee Representational Rights (Notice or NERR)

The Fair Work Act requires an employer that will be covered by a proposed enterprise agreement, that is not a greenfields agreement, take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who will be covered by the agreement and is employed at the notification time for the agreement.[62] This notice is known as the Notice of Employee Representational Rights (NERR) and its prescribed form is at Schedule 2.1 to the *Fair Work Regulations 2009* (Cth) (the Regulations).

A Full Bench of the Commission considered the application of s.173(1) which requires the employer to give notice to employees employed at the notification time of their right to be represented in *Uniline Australia Limited*.[63] The NERR must be given as soon as practicable, and no later than 14 days after the notification time under s.173(3). The majority of the Full Bench affirmed a Commission decision that a NERR given outside the timeframe prescribed in s.173(3) was not a valid NERR.[64]

Despite the above, the majority of the Full Bench did not discount the possibility that for the purposes of ss.181(2) and 188(a)(ii) a NERR might be given to an employee more than 14 days after the notification time and the Commission might be satisfied that the employer had complied with ss.181(2) if, for example, the employer took all reasonable steps to give the NERR as required under s.173(1) but those steps were unsuccessful in relation to a particular employee.[65]

In *The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics*[66] (*MMA Offshore Logistics*), a Full Bench of the Commission considered a challenge to the validity of the Commission's approval of a particular enterprise agreement on a number of grounds, including that the NERR issued by the employer did not conform to the prescribed form of the NERR in Schedule 2.1 of the Regulations because it included the Fair Work Ombudsman's Infoline number rather than the number of the Commission.

The Full Bench noted that in *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd*[67] (*ALDI B*), no member of the Federal Court expressed the view that *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union*[68] (*Peabody*) was incorrect.[69] In light of *ALDI B*, the Full Bench in *MMA Offshore Logistics* considered that 'the proper course is to follow *Peabody* and approach the NERR issue on the basis that a purported NERR which does not strictly comply with the prescribed form in Schedule 2.1 is invalid, and that an enterprise agreement which proceeds on the basis of an invalid NERR is incapable of approval'.[70] The Full Bench also

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[62] Fair Work Act 2009 s.173. The 'notification time' for the agreement is the time when the employer agrees to bargain, or initiates bargaining for the agreement, or one of the following comes into operation in relation to the agreement: a low-paid authorisation that specifies the employer, a majority support determination or a scope order (s.173(2)).

[63] [2016] FWCFB 4969.

[64] Uniline at [102-103]. The earlier Commission decision was *Transport Workers Union of Australia v Hunter Operations Pty Ltd* [2014] FWC 7469.

[65] At [106].

[66] [2017] FWCFB 660.

[67] [2016] FCAFC 161.

[68] [2014] FWCFB 2042.

[69] [2017] FWCFB 660, at [98].

[70] Ibid.

considered *KCL Industries Pty Ltd*[71] (*KCL*) and found that '[e]ven if the requirement for strict compliance still allowed some capacity for errors of an entirely trivial nature to be overlooked (the possibility of which was adverted to by Jessup J in *Aldi* at [49] and by the Full Bench in *KCL* at [17])'[72] it did not consider that the particular defect in the NERRs in question could be characterised as trivial.

The Full Bench observed that:

> 's.174 does not require the prescribed content in the NERR to include the telephone number of the Commission's infoline, or indeed anything that is currently contained in the last paragraph of Schedule 2.1. It would be open to the Minister at any time to exercise the power in s.173(5) and s.796 to have a new form prescribed which omits the last paragraph which … employers frequently fail to correctly reproduce in the NERRs which they issue. However, until that occurs, [the Full Bench] consider that the Commission's duty is to not approve enterprise agreements where the NERR issued by the employer does not strictly comply with the currently prescribed form in respect of that last paragraph.'[73]

On 3 April 2017, after the above decision was handed down, an amendment to the Regulations commenced operation. The change to the Regulations affects the content of the NERR, and applies to NERRs issued from 3 April 2017 onwards. The changed content relates to the last paragraph, which now reads:

> 'If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.'

4.5 Employees fairly chosen

In *ALDI A*, [74] the High Court unanimously allowed, in part, an appeal by ALDI Foods Pty Limited from a decision of the Federal Court.

The High Court observed that the Fair Work Act provides that when an agreement is made, the employees that approved the agreement 'are accurately described as being covered by it, even though it does not yet apply to them … so as to create rights and liabilities in relation to work actually performed under it'.[75]

The High Court held the Federal Court erred in its determination of the issue of coverage,[76] finding the reasoning of the majority in the Federal Court could not accommodate the distinction expressly drawn between 'application' and 'coverage' in ss.52 and 53 of the Fair Work Act.[77] While s.186 assumes that there are employees *covered* by an agreement when the approval application is made, it does not follow that it must *apply* to them at that time.[78] The High Court observed that at the stage of considering whether an agreement should be apoproved pursuant to s.186(2)(a), 'it is a natural and ordinary use of language to speak of the employees, whose jobs are described by

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[71] [2016] FWCFB 3048.

[72] [2017] FWCFB 660, at [101].

[73] Ibid, at [104].

[74] [2017] HCA 53.

[75] At [42].

[76] At [4].

[77] At [73]–[75].

[78] At [76].

the terms of the agreement which has been made, as employees who 'are covered' by the agreement.'[79]

Further, the High Court held that the Federal Court's reasoning contradicted the plain and ordinary meaning of ss.172(2) and (4) of the Fair Work Act, which contemplate the making of non-greenfields agreements with persons already employed.[80] The High Court concluded that nothing in s.172 prevented the votes of a few employees from binding the wider group that grows within an already existing enterprise.[81]

In Aerocare Flight Support Pty Ltd t/a Aerocare Flight Support v Transport Workers' Union of Australia and Australian Municipal, Administrative, Clerical and Services Union,[82] the Full Bench examined whether the group of employees proposed to be covered by the enterprise agreement was fairly chosen pursuant to s.186(3) of the Fair Work Act, in circumstances where the agreement covered part-time but not casual employees. The evidence before the Commission showed that the part-time employees and casual employees performed the same work, for the same supervisor, and in the same location. The Full Bench found that Aerocare's decision to exclude casual employees from coverage where they were functionally indistinguishable from part-time employees meant that the group of employees covered was not fairly chosen.[83] The Full Bench further affirmed the principle that s.186(3) of the Fair Work Act refers to the whole class of employees to whom the agreement might in future apply and is not limited to the group of employees who actually voted to make the agreement.[84] Aerocare lodged an application for judicial review, however, the application was dismissed on the basis that no jurisdictional error was established.[85]

4.6 Approval of proposed enterprise agreement by employees

Section 181 of the Fair Work Act provides that employers that will be covered by an agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it. The question of who is 'employed' at the time was considered by the Federal Court in *National Tertiary Education Industry Union v Swinburne University of Technology*.[86] The Federal Court overturned a previous decision of the Full Bench of the Commission that 'employees employed at the time' in s.181(1) included casual or sessional academics who had been engaged at any time during the previous 12 months. The Federal Court found only those employed during the seven days prior to the commencement of voting on the proposed agreement were eligible to vote under s.181(1). The seven-day period refers to the access period immediately before the starting of voting for the agreement, during which employees employed at the time are given a copy of the agreement and other relevant materials.

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[79] At [77].

[80] At [76].

[81] At [86].

[82] [2017] FWCFB 5826.

[83] At [30].

[84] At [26].

[85] *Aerocare Flight Support Pty Ltd v Transport Workers' Union of Australia* [2018] FCAFC 74.

[86] [2015] FCAFC 98.

4.7 Good faith bargaining

Section 228 of the Fair Work Act sets out a range of requirements for bargaining in good faith that apply to bargaining representatives for proposed enterprise agreements. These requirements relate to the bargaining representatives' conduct during bargaining and include 'attending, and participating in, meetings at reasonable times'[87] and 'refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining'.[88]

In *LCR Mining Group Pty Ltd v Construction, Forestry, Mining and Energy Union*,[89] a Full Bench of the Commission considered whether a teleconference or videoconference could constitute a 'meeting' or qualify as 'attending' for the purposes of s.228(1)(a). The Full Bench followed the decision of Flick J in *J J Richards & Sons v Fair Work Australia*[90] that 'in the absence of a clear necessity, words of limitation should not be read into legislation where they do not appear'.[91] Accordingly:

> '[i]n the absence of express words of limitation, "meeting" and "attending" must be given a contemporary meaning in the context of the Act to encompass "meetings of the mind", not just meetings of the body.'[92]

The issue of capricious or unfair conduct under s.228(1)(e) of the Fair Work Act was considered in *Construction, Forestry, Mining and Energy Union v Anglo Coal (Capcoal Management) Pty Ltd T/A Capcoal*[93] where the Full Bench agreed with the finding at first instance, that:

> '[i]t is not unfair for an employer suffering loss and damage as a result of employees taking industrial action to decide, on legitimate business grounds, to restructure its business to manage or offset that loss and damage, and to decide to make employees redundant in the process.'[94]

The Full Bench observed that employees engaging in protected industrial action 'are "protected" in that their action is not unlawful under the Fair Work Act and that they are immune from certain civil and criminal liability for engaging in the action', but this does not mean that the employer is prevented from responding in a manner that addresses its legitimate business interests, provided the employer meets its obligations under the Fair Work Act.[95]

Section 228(1)(e) was also considered in *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd*,[96] where Deputy President Asbury noted '[t]he fact that the employees are taking protected industrial action or engaging in lawful Union activity does not give them immunity from disciplinary action for breaches of [company] policies and procedures where there is a sufficient connection between the conduct that allegedly breaches the relevant procedure and the workplace'.[97]

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[87] Fair Work Act s.228(1)(a).

[88] Fair Work Act s.228(1)(e).

[89] [2016] FWCFB 400.

[90] [2012] FCAFC 53

[91] [2016] FWCFB 400 At [40].

[92] At [49].

[93] [2017] FWCFB 317.

[94] At [36].

[95] At [38].

[96] [2017] FWC 5380.

[97] At [258].

4.8 Protected action ballot order

A protected action ballot is a process by which employees may decide, by means of a secret ballot, whether or not to authorise protected industrial action for a proposed enterprise agreement.[98]

The *Fair Work Amendment Act 2015* (Cth) introduced a new requirement that for bargaining representatives to be able to apply to the Commission for a protected action ballot order, there must have been a notification time in relation to the proposed enterprise agreement.[99]

The amending Act also introduced a legislative note to s.437(2A), which states that '[p]rotected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute)'.

Section 437(2A) was considered in *The Maritime Union of Australia v Maersk Crewing Australia Pty Ltd*[100] (*Maersk*). Here, the Full Bench found that s.437(2A) does not require there to have been a notification time for the particular enterprise agreement proposed by the applicant, rather, it is sufficient for there to have been a notification time 'in relation to' the applicant's proposed agreement.[101] The Full Bench rejected the respondent's argument that because the notification time in s.173(2) of the Fair Work Act triggers a requirement for the employer to issue a NERR in respect of the proposed enterprise agreement, the Commission cannot make a protected action ballot order unless a valid NERR has been issued.[102]

In *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd T/A AGL Loy Yang)* (*AGL Loy Yang*),[103] the Full Bench adopted the analysis in *Maersk* but noted that the factual matrix in *Maersk* was significantly different to those before it.[104] Here, the Full Bench held:

> 'in the case of a proposed enterprise agreement with two or more employers who are single interest employers, that the trigger for a notification time … is the time when each employer has agreed to bargain or initiates bargaining.'[105]

In dismissing the application, the Full Bench found that, as one of the respondent employers had not agreed to or initiated bargaining at the time the applicant applied for a protected action ballot order, the application was invalid.[106]

Swinburne University of Technology v National Tertiary Education Industry Union[107] concerned an application by the union for a protected action ballot order in circumstances where Swinburne had given notice that it proposed to make a multi-enterprise agreement (while the union proposed a

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[98] See Division 8 of Part 3-3 of the Fair Work Act.

[99] Fair Work Act 2009 s.437(2A) and 173(2).

[100] [2016] FWCFB 1894.

[101] At [56].

[102] The Full Bench noted at [47] that this issue may be relevant to a factual enquiry as to whether the employer has agreed to bargain.

[103] [2016] FWCFB 2878.

[104] At [34].

[105] At [38].

[106] At [43].

[107] [2016] FWCFB 6838.

single-enterprise agreement). The Full Bench considered how the notification time definition contained in s.173(2)(a) operates in respect of a multi-enterrpise agreement, and said:

> '[b]ecause a multi-enterprise agreement necessarily involves a number of employers, it seems to us that a notification time in relation to a proposed multi-enterprise agreement could arise under s.173(2)(a) only if all the employers to be covered had agreed to bargain or had initiated bargaining for the proposed agreement.'[108]

The Full Bench concluded that 's.437(2A) is not to be interpreted on the basis that a notification time for a proposed multi-enterprise agreement could be treated as being "*in relation to*" a proposed single-enterprise agreement'.[109]

In *The Australian Meat Industry Employees Union v Coles Supermarkets Australia Pty Ltd*,[110] the Commission considered the issue of notification time in circumstances where the applicant sought to recommence bargaining after a Full Bench quashed a decision to approve an enterprise agreement. The Commission found that the notification time in relation to the agreement that was quashed ceased when the majority of employees who cast a valid vote approved that agreement, resulting in there being no notification time for the applicant to rely upon.[111]

During the reporting period, the Commission also approved an application for a protected action ballot order seeking to poll a single employee, in *Dale v Australian Taxation Office*.[112]

4.9 Majority support determinations

A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the Commission for a majority support determination.[113] The Commission must make the majority support determination where it is satisfied that:

- a majority of the employees who are employed by the employer or employers at a time determined by the Commission and who will be covered by the enterprise agreement want to bargain; and
- the employer, or employers, who will be covered by the enterprise agreement have not yet agreed to bargain, or initiated bargaining, for the enterprise agreement; and
- the group of employees who will be covered by the enterprise agreement was fairly chosen; and
- it is reasonable in all the circumstances to make the determination.[114]

In deciding whether the group of employees who will be covered by the proposed single-enterprise agreement was fairly chosen, the Commission must take into account whether the group is geographically, operationally or organisationally distinct if the agreement will not cover all employees of the employer or employers covered by the agreement.[115] *QGC Pty Ltd v The*

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[108] At [35].

[109] At [37].

[110] [2016] FWC 4870.

[111] At [38]–[43].

[112] [2015] FWC 5665.

[113] Fair Work Act, s.236.

[114] Fair Work Act, s.237.

[115] Fair Work Act s.237(3A).

Australian Workers' Union,[116] when considering whether a group of employees were organisationally or operationally distinct for the purposes of s.237(3A) of the Fair Work Act, a Full Bench of the Commission noted that performance by a group of employees of a different role, task, skill or function did not, of itself, form a sufficient basis for a finding of operational or organisational distinctiveness in the circumstances of that case.[117]

In *Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers' Union*,[118] the Full Bench examined the operation of s.237(2)(a)(i) of the Fair Work Act, and found that the test for 'the decision as to whether a majority of employees want to bargain is to be made on the basis of the most current material available at the time of the decision'[119] and not at another point in time.

ResMed Limited v Australian Manufacturing Workers' Union,[120] discussed in the previous General Manager's report,[121] was subsequently appealed to the Federal Court.[122] In the appeal, the appellant advanced an additional alternative argument that an employee organisation is competent to make an application for a majority support determination where the majority of employees that are the subject of the application are eligible to be members of that organisation.[123] The Federal Court held that the decision on judicial review was free of error,[124] and added that the appellant's alternative argument could not succeed, for the same reasons that its primary argument was rejected, finding that:

> '[o]nce it is established that the organisation of employees in question is validly a bargaining representative for at least one employee, such alignment as there may be between the employees the subject of the majority support determination – whether all of them, a majority of them, or some of them – and the eligibility rule of the organisation is neither here nor there.'[125]

4.10 Procedural issues in relation to the approval of enterprise agreements

During the current reporting period, a number of decisions have been issued which have dealt with procedural issues in relation to decisions concerning the approval of enterprise agreements, including in relation to circumstances when non-parties may inspect documents held by the Commission.

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[116] *QGC Pty Ltd v The Australian Workers' Union* [2017] FWCFB 1165.

[117] QGC at [44].

[118] *Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers' Union* [2016] FWCFB 8372.

[119] Kantfield, at [37].

[120] *ResMed Limited v Australian Manufacturing Workers' Union* [2015] FCA 360.

[121] O'Neill B (2015), *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth): 2012–2015*, p. 14. In [2014] FWCFB 2418, the Full Bench considered whether an employee organisation could apply for a majority support determination which would apply to all employees where the Commission had found at first instance that only one employee at the workplace was eligible to be a member of the organisation. The Full Bench found that an employee organisation does not need to be eligible to cover all classes of employees to whom the enterprise agreement would apply in order to apply for a majority support determination.

[122] *ResMed Limited v Australian Manufacturing Workers' Union* [2015] FCAFC 195.

[123] Ibid, at [8].

[124] Ibid, at [10].

[125] Ibid, at [18].

In *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd*,[126] a Full Bench considered whether or not to provide access to initiating documents to a non-party. The Full Bench held that the Commission erred at first instance by refusing to provide the appellant with the documents sought, stating that the principle of open justice applies equally to the Commission as it does to the Courts.[127] The Full Bench held that completed Forms F16 and F17, provide important information on which the Commission relies in determining whether or not to approve enterprise agreements, and should be provided to any member of the public who wishes to see them unless exceptional circumstances exist to justify an order of confidentiality.[128]

In *National Union of Workers v Sigma Company Limited T/A Sigma Healthcare*,[129] a Full Bench found that the respondent had failed to serve its application for approval of an enterprise agreement on the National Union of Workers (NUW) in accordance with the Commission's service rules. The Full Bench found that the NUW was denied natural justice because it was not given an opportunity to make submissions as to why it should be heard in relation to the application, in circumstances where the respondent was aware that the NUW was appointed as a bargaining representative for one employee who would be covered by the agreement, (and notwithstanding that the employee concerned later revoked the status of the NUW by appointing himself as a bargaining representative). The Full Bench considered that the right to be heard extended to the NUW as they were a bargaining representative at some stage in the process and as such, the application should have been served on the union.

4.11 Workplace determinations

The Commission issued one workplace determination during this reporting period. The *Essential Energy Workplace Determination*[130] is an industrial action related workplace determination made under s.266 of the Fair Work Act. In its decision, the Full Bench noted that four issues were outstanding at the end of the post-industrial action negotiating period which the parties could not reach agreement on. These issues were the consultation term, the dispute settlement procedure, the redundancy provision and the outsourcing provision. The Full Bench determined these provisions and issued the workplace determination.

Proceedings relating to an industrial action related workplace determination in respect of the Commonwealth Department of Home Affairs also commenced during the reporting period, however, these proceedings were still on foot at the conclusion of the reporting period.[131]

4.12 Developments in relation to content in enterprise agreements

During this reporting period, the issue of whether certain terms of an enterprise agreement concerned permitted matters was considered in the context of an alleged dispute arising under an approved enterprise agreement. In a decision refusing permission to appeal, the Full Bench in "*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Visy Board Pty Ltd T/A Visy Board* [132]

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[126] [2016] FWCFB 8413

[127] At [23].

[128] At [27]–[28].

[129] [2017] FWCFB 3892.

[130] *Essential Energy Workplace Determination* [2016] FWCFB 7641.

[131] *Commonwealth of Australia represented by the Department of Home Affairs* [2018] FWCFB 3415 (issued 8 June 2018, outside of reporting period).

[132] [2018] FWCFB 8.

confirmed the Commission's decision at first instance. The Full Bench agreed with the conclusion that a clause which compelled the respondent to employ a person who was an employee of a labour hire employer in particular circumstances, and the attendant consequences for the respondent's capacity to use independent contractors, was not a permitted matter under s.172 of the Fair Work Act.[133] The Full Bench agreed with the respondent's contention that the clause in question was not sufficiently related to employees' job security, and therefore was not a matter pertaining to the relationship between the respondent and its employees who are covered by the agreement,[134] and referred to established jurisprudence concerning matters pertaining in the context of contractor provisions.[135]

The case of *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board*[136] is an earlier instance in which the Commission considered the issue of permitted matters in the context of a dispute under s.739 of the Fair Work Act. The Full Bench cited the relevance of *Re Cram; Ex parte NSW Colliery Proprietors' Association Limited* (*Re Cram*)[137] to the law on 'matters pertaining' under s.172 of Act, and confirmed that a matter pertains to the relationship between employers and employees if it directly affects the conditions of employees.[138] This includes a consideration of 'necessary requisites, attributes, qualifications, environment or other circumstances affecting the employment'.[139] The Full Bench also cited *Re Cram* as authority for the proposition that the 'mode of recruitment' has the 'necessary direct effect, because the competence and reliability of the workforce has a direct impact on the conditions of work, notably as they relate to occupational health and observance of safety standards'.[140]

Permitted matters considerations have also arisen in relation to applications for protected action ballot orders; see for example: *The Australian Workers' Union v Telum (QLD) Pty Ltd T/A Telum; Construction, Forestry, Mining and Energy Union v Telum (QLD) Pty Ltd T/A Telum*[141] and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Perigon Qld Pty Ltd; Nilsen Qld Pty Ltd; Fredon Qld Pty Ltd*.[142]

One case that considered whether a clause in an agreement was an unlawful term within the meaning of s.194 of the Fair Work Act was *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Nine Brisbane Sites Case) (No 3)*.[143] This matter concerned whether a union meeting clause was inconsistent with a provision of Part 3-3 of the Fair Work Act, and was therefore 'unlawful' under s.194(e). The relevant clause set out the employer's agreement, in certain circumstances, to employees attending union meetings or participating in union activities during work hours, and an entitlement for the employees to receive

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[133] [2018] FWCFB 8, at [23].

[134] At [15]–[16].

[135] At [17].

[136] [2016] FWCFB 2894.

[137] (1987) 163 CLR 117.

[138] [2016] FWCFB 2894, at [26].

[139] At [26].

[140] [2016] FWCFB 2894.

[141] [2016] FWC 8496.

[142] [2016] FWC 1695.

[143] [2018] FCA 564.

payment for such attendance or participation. Justice Collier held that the clause did not undermine the policy and scheme of the Fair Work Act, and is not inconsistent with Part 3-3, and also noted that it would be 'unwarranted' to construe the clause by reading in a purpose or an objective not specifically contemplated.[144]

4.12.1 Use of model terms in enterprise agreements

Data from the WAD show that 13.5 per cent of enterprise agreements approved in the reporting period used the model dispute resolution term.[145] The following table shows the incidence of use of the model consultation and flexibility terms in enterprise agreements over the reporting period.

Table 4.1: Model consultation clause in enterprise agreements 2015–18, per cent of approved enterprise agreements

Type of flexibility term	(%)
Model flexibility term: the flexibility term is the model term	31.0
Model flexibility term incorporated: the Fair Work Commission Member's decision incorporates the model flexibility term into the enterprise agreement	9.3
No flexibility clause: model flexibility term taken to be a term of the enterprise agreement	0.8
Flexibility – specific: the flexibility term differs from the model flexibility term, and specifies which term can be varied	55.6
Flexibility – general: the flexibility term allows any term of the enterprise agreement to be varied	3.3

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

[144] At [40].

[145] Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

5 Quantitative data relating to enterprise agreements

5.1 Quantitative summary of bargaining applications

The Commission retains data on the number of applications made by parties under the bargaining provisions in the Fair Work Act. Table 5.1 reports the total number of bargaining applications and types of applications lodged with the Commission during the reporting period. Table 5.2 reports the total number of bargaining applications and types of applications finalised by the Commission during the reporting period.

Over the reporting period, a total of 1147 bargaining applications were made. This represents an average of around 32 applications per month.

Table 5.1 shows that the numbers of applications made for bargaining orders and applications for the Commission to deal with bargaining disputes per year have declined since the beginning of the current reporting period, while there was a small increase in the number of applications for majority support determinations. The data show broadly similar trends between those matters which are lodgments and those which have been finalised.

Table 5.1: Bargaining applications – lodgments, 2015–18

Type of application	2015–16	2016–17	2017–18
s.229 – Application for a bargaining order	111	74	61
s.236 – Application for a majority support determination	71	93	91
s.238 – Application for a scope order	28	21	14
s.240 – Application to deal with a bargaining dispute	184	194	171
s.242 – Application for a low-paid authorisation	0	0	0
s.248 – Application for a single interest employer authorisation	10	13	11
Total	**404**	**395**	**348**

Note: Applications lodged reflect the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the two figures. Finalised applications may include other ancillary procedural applications linked to the substantive matter, such as applications for costs or other orders. This is reflected in the disparity between applications lodged and applications finalised.

Source: Fair Work Commission, *Annual Report 2015–16;* Fair Work Commission. *Annual Report 2016–17;* Fair Work Commission, *Annual Report 2017–18*.

Table 5.2: Bargaining applications – finalisations, 2015–18

Type of application	2015–16	2016–17	2017–18
s.229 – Application for a bargaining order	87	77	58
s.236 – Application for a majority support determination	63	93	76
s.238 – Application for a scope order	18	26	14
s.240 – Application to deal with a bargaining dispute	357	165	169
s.242 – Application for a low-paid authorisation	0	0	0
s.248 – Application for a single interest employer authorisation	11	11	13
Total	**536**	**372**	**330**

Note: Applications lodged reflect the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the two figures. Finalised applications may include other ancillary procedural applications linked to the substantive matter, such as applications for costs or other orders. This is reflected in the disparity between applications lodged and applications finalised

Source: Fair Work Commission, *CMS plus*.

5.2 Single-interest employer authorisations

A single-interest employer authorisation allows two or more employers to bargain for a single-enterprise agreement.[146] The employers must have genuinely agreed to bargain together and must carry on similar business activities under a franchise. During the reporting period there were a total of 34 applications lodged for a single-interest employer authorisation, ranging from a minimum of 10 applications in 2015–16 to 13 applications in 2016–17 (Table 5.1).

5.3 Scope orders

A scope order enables the Commission to resolve disputes arising during bargaining concerning the group of employees that a proposed enterprise agreement is intended to cover.[147]

Table 5.1 shows that the number of applications lodged for scope orders ranged from 14 applications in 2017–18 to a high of 28 applications in 2015–16. In total, 63 applications for scope orders were lodged in the reporting period.

5.4 Bargaining disputes

A bargaining representative may apply to the Commission to deal with a bargaining dispute.[148] The Commission may deal with a bargaining dispute in a number of ways, including by mediation or conciliation, or by making a recommendation or expressing an opinion. Further, the Commission may arbitrate with the agreement of the parties.[149]

Applications for the Commission to deal with a bargaining dispute remained the predominant form of bargaining application made to the Commission over this reporting period.

Almost half of all bargaining related applications lodged in the reporting period were applications for the Commission to deal with a bargaining dispute (Table 5.1). Relatively few decisions followed these applications, as such matters are generally dealt with by way of conference or mediation.

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[146] Fair Work Act, s.248, or the employers must be specified in a Ministerial declaration made under s.247.

[147] Fair Work Act, s.238.

[148] Fair Work Act, s.240(1).

[149] Fair Work Act, s.240(4).

5.5 Protected action ballot orders

Table 5.3 shows the applications made for protected action ballot orders, and related orders, over the reporting period. In addition to an application for a protected action ballot order, parties may apply to vary or revoke the protected action ballot order, or the employees may apply to extend the period within which the authorised protected industrial action may be taken by a further 30 days.[150]

Table 5.3: Protected action – lodgments, 2015–18

Type of application	2015–16	2016–17	2017–18
s.437 – Application for a protected action ballot order	960	537	602
s.447 – Application for variation of a protected action ballot order	21	7	27
s.448 – Application for revocation of a protected action ballot order	48	37	54
s.459 – Application to extend the 30-day period in which industrial action is authorised by protected action ballot	154	150	135
Total	**1183**	**731**	**818**

Source: Fair Work Commission, *Annual Report 2015–16;* Fair Work Commission, *Annual Report 2016–17;* Fair Work Commission, *Annual Report 2017–18*.

Table 5.4 shows the applications finalised for protected action ballot orders, and related orders, over the reporting period.[151]

[150] Applications lodged reflect the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the two figures.

[151] Finalised applications may include other ancillary procedural applications linked to the substantive matter such as applications for costs or other orders. This is also reflected in the disparity between applications lodged and applications finalised.

Table 5.4: Protected action – finalisations, 2015–18

Type of application and method of finalisation	2015–16	2016–17	2017–18	Total
s.437 – Application for a protected action ballot order				
Application dismissed (s.587)	2	0	1	3
Application withdrawn	38	58	59	155
Application granted: decision or order corrected	0	0	11	11
Ballot order issued (s.443)	915	470	505	1890
Ballot order not issued (s.443)	5	5	5	15
Ballot order not required (matter concluded)	2	4	1	7
Total	**962**	**537**	**582**	**2081**
s.447 – Application for variation of protected action ballot order				
Application withdrawn	0	1	0	1
Ballot order varied	21	6	26	53
Ballot order varied (s.447)	0	0	1	1
Total	**21**	**7**	**27**	**55**
s.448 – Application for revocation of protected action ballot order				
Application withdrawn	0	2	2	4
Application granted: decision or order corrected (s.602)	1	0	0	1
Ballot order revoked (s.448)	47	36	51	134
Total	**48**	**38**	**53**	**139**
s.459 – Application to extend the 30 day period in which industrial action is authorised by protected action ballot				
Application granted: decision or order corrected (s.602)	0	1	0	1
Application withdrawn	1	3	5	9
Extension granted (s.459)	151	142	130	423
Extension not required: Matter concluded	0	1	0	1
Referred to another matter	0	1	0	1
Total	**152**	**148**	**135**	**435**

Source: Fair Work Commission, *CMS plus.*

6 The numbers of enterprise agreements and wage outcomes

6.1 The numbers of enterprise agreements

Tables 6.1, 6.2 and 6.3 show the number of enterprise agreements that were lodged and finalised between 1 July 2015 and 30 June 2018. In total, 16 514 applications were lodged and 13 461 were approved in the three-year period.[152]

The tables show that 5529 enterprise agreements were lodged in the period 1 July 2015 to 30 June 2016, with 5698 lodged from 1 July 2016 to 30 June 2017 and 5287 lodged from 1 July 2017 to 30 June 2018.

Table 6.1: Enterprise agreement – lodgment and approval, 2015–16

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	5238	258	33	5529
Finalised				
Approved (s.186)	2890	221	15	3126
Approved (with undertakings – s.190)	1633	31	11	1675
Approved (exceptional circumstances – s.189)	0	0	0	0
Not approved	48	1	4	53
Application withdrawn	582	9	4	595
Total finalised	**5153**	**262**	**34**	**5449**

Source: Fair Work Commission, *Annual Report 2015–16*, Table 4*; CMS plus.*

[152] Applications lodged refer to the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the two figures.

Table 6.2: Enterprise agreement – lodgment and approval, 2016–17

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	5474	177	47	5698
Finalised				
Approved (s.186)	2701	128	20	2849
Approved (with undertakings – s.190)	1962	33	13	2008
Approved (exceptional circumstances – s.189)	0	0	0	0
Not approved	39	0	0	39
Application withdrawn	689	11	9	709
Total finalised	**5391**	**172**	**42**	**5605**

Source: Fair Work Commission, *Annual Report 2016–17*, Table 21*; CMS plus.*

Table 6.3: Enterprise agreement – lodgment and approval, 2017–18

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	5102	149	36	5287
Finalised				
Approved (s.186)	1159	71	5	1235
Approved (with undertakings – s.190)	2499	47	22	2568
Approved (exceptional circumstances – s.189)	0	0	0	0
Not approved	42	0	0	42
Application withdrawn	776	10	8	794
Total finalised	**4476**	**128**	**35**	**4639**

Source: Fair Work Commission, *Annual Report 2017–18,* Table 25*; CMS plus.*

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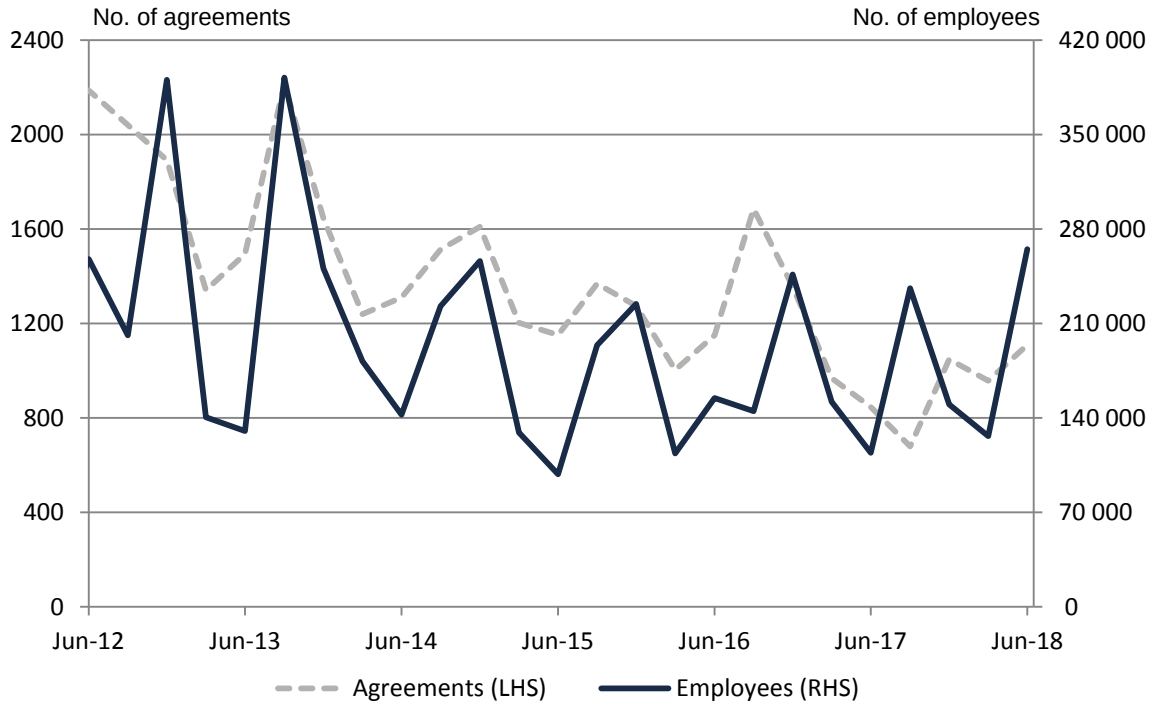
6.1.1 Employee coverage by enterprise agreements

Data from the WAD show that a total of 13 448 federal enterprise agreements were approved over the reporting period (1 July 2015 to 30 June 2018).[153] While volatile, the number of enterprise agreements approved per quarter increased in the first half of the reporting period to a peak of 1686 in the September quarter 2016 before falling to a low of 679 in the September quarter 2017. It has since increased slightly to be at 1109 in the June quarter 2018. The number of employees covered by enterprise agreements was also volatile and peaked in the June quarter 2018.[154]

In the current reporting period, there were fewer enterprise agreements approved (13 448 compared with 18 657) and employees covered (2 121 701 compared with 2 536 760) than in the previous reporting period (Chart 6.1).

Chart 6.1: Number of enterprise agreements approved and number of employees covered per quarter, June quarter 2012 to June quarter 2018



Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

The largest numbers of enterprise agreements approved over the reporting period were in Construction and Manufacturing, which accounted for almost half of all enterprise agreements approved. There were fewer agreements approved in this reporting period across every industry than in the previous reporting period (Table 6.5).

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[153] There is a small discrepancy between the number of agreements approved by the Commission (see 6.1 above) and the number of agreements which have been entered into the WAD.

[154] Not all enterprise agreements in the WAD contain employee data provided by the employer. For these enterprise agreements, a modified mean method is used to estimate the number of employees that the enterprise agreement covers (refer to Appendix 7 for additional details). Further, data about the number of employees covered by each enterprise agreement is obtained from the statutory declaration that an employer must lodge with the enterprise agreement. These are required to be accurate at the time the enterprise agreement is approved but do not necessarily accurately reflect the employee coverage of the enterprise agreement at any point in time after lodgment.

Table 6.4: Number of enterprise agreements approved per reporting period, by industry

	2012–15	2015–18
Agriculture, forestry and fishing	151	144
Mining	467	320
Manufacturing	3206	2206
Electricity, gas, water and waste services	416	373
Construction	5833	4362
Wholesale trade	602	515
Retail trade	309	170
Accommodation and food services	440	236
Transport, postal and warehousing	1431	1061
Information media and telecommunications	153	84
Financial and insurance services	154	118
Rental, hiring and real estate services	330	195
Professional, scientific and technical services	497	340
Administrative and support services	663	417
Public administration and safety	602	586
Education and training	682	653
Health care and social assistance	2065	1157
Arts and recreation services	189	142
Other services	467	369
Total	**18 657**	**13 448**

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

Despite not having the largest number of agreements approved, Education and training, Health care and social assistance, and Public administration and safety had the highest number of employees covered by enterprise agreements approved in the latest reporting period. These industries accounted for around half of all employees covered by enterprise agreements approved in the reporting period (Table 6.6).

Table 6.5: Number of employees covered by enterprise agreements approved per reporting period, by industry

	2012–15	2015–18
Agriculture, forestry and fishing	7680	12918
Mining	54 841	34 837
Manufacturing	208 187	136 597
Electricity, gas, water and waste services	63 725	44 582
Construction	117 719	101 201
Wholesale trade	38 936	29 641
Retail trade	287 229	115 228
Accommodation and food services	161 114	20 546
Transport, postal and warehousing	181 578	167 687
Information media and telecommunications	49 537	46 168
Financial and insurance services	187 298	156 404
Rental, hiring and real estate services	9570	7656
Professional, scientific and technical services	41 560	27 113
Administrative and support services	56 307	35 556
Public administration and safety	160 569	325 952
Education and training	411 680	357 327
Health care and social assistance	408 649	418 331
Arts and recreation services	45 898	41 380
Other services	44 683	42 577
Total	**2 536 760**	**2 121 701**

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

The average number of employees covered by enterprise agreements over the reporting period was 157, higher than in the previous reporting period. The largest average number of employees covered by approved enterprise agreements was in Financial and insurance services, while enterprise agreements in Construction covered the fewest average number of employees.

Around half the industries experienced an increase in the average number of employees covered by approved enterprise agreements compared with the previous reporting period (Table 6.7).

Table 6.6: Average numbers of employees covered by an enterprise agreement by industry

	2012–15	2015–18
Agriculture, forestry and fishing	50	89
Mining	117	108
Manufacturing	64	61
Electricity, gas, water and waste services	153	119
Construction	20	23
Wholesale trade	64	57
Retail trade	929	677
Accommodation and food services	366	87
Transport, postal and warehousing	126	158
Information media and telecommunications	323	549
Financial and insurance services	1216	1325
Rental, hiring and real estate services	29	39
Professional, scientific and technical services	83	79
Administrative and support services	84	85
Public administration and safety	266	556
Education and training	603	547
Health care and social assistance	197	361
Arts and recreation services	242	291
Other services	95	115
All industries	**135**	**157**

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.2 Research on trends in collective bargaining

Over the reporting period, the Expert Panel for annual wage reviews commissioned two research reports that analysed the recent trends in collective bargaining.

In the first report, Peetz and Yu (2017) examined factors that influenced recent changes in the collective agreement coverage of employees using data from the WAD and EEH.[155] While other factors had an influence on collective agreement coverage, Peetz and Yu found that the decline in public sector employment between 2000 and 2014 had a large negative effect on collective agreement coverage. Between 2014 and 2016, the decrease in the incidence of collective agreement coverage was found to be due to falls in Retail trade, Public administration and safety and Health care and social assistance. The decline in union density was also an important explanatory factor for collective agreement coverage.

Peetz and Yu (2018) used data from the confidentialised unit record file (CURF) from the 2016 EEH to model the probability of an employee being covered by a collective agreement relative to award rates of pay and individual agreements.[156] The report found that the main determinants of collective agreement coverage were sector, employer size, and union density, with public sector employees, employees who worked in medium/large firms, and union members having a higher

[155] Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February.

[156] Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

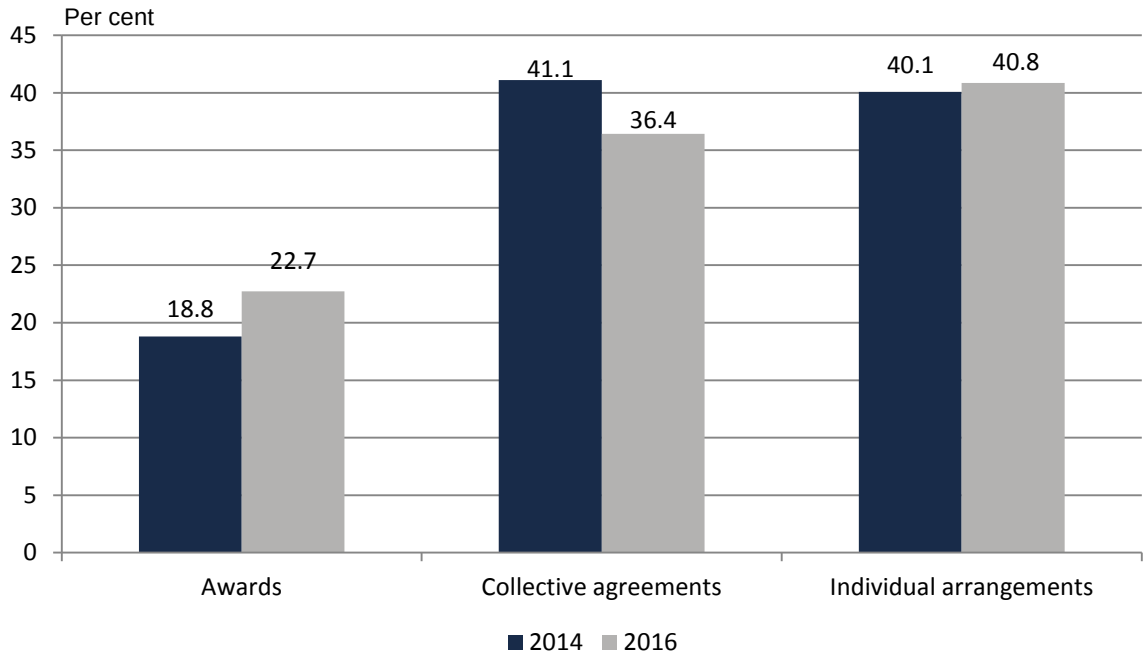
probability of being covered by a collective agreement. Peetz and Yu concluded that the analysis did not 'substantially change' the findings of their 2017 report.[157]

6.3 Enterprise agreement outcomes

6.3.1 Coverage by method of setting pay

Chart 6.2 presents data on the methods used to set pay for employees in 2014 and 2016 from the EEH. Over this period, the proportion of employees covered by collective agreements declined from 41.1 per cent to 36.4 per cent. This was offset by increases in the proportion of employees covered by awards (from 18.8 per cent to 22.7 per cent) and individual arrangements (40.1 per cent to 40.8 per cent).

Chart 6.2: Pay-setting arrangements, May 2014 and May 2016



Note: Individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses.

Source: ABS, *Employee Earnings and Hours, Australia*, various, Catalogue No. 6306.0.

6.3.2 Wage developments in enterprise agreements

Between the June quarter 2012 and the June quarter 2018, the Average Annualised Wage Increases (AAWIs) for approved enterprise agreements declined, with the current reporting period exhibiting mostly lower AAWIs relative to the previous reporting period. This is consistent with the decline shown in other wage measures.[158]

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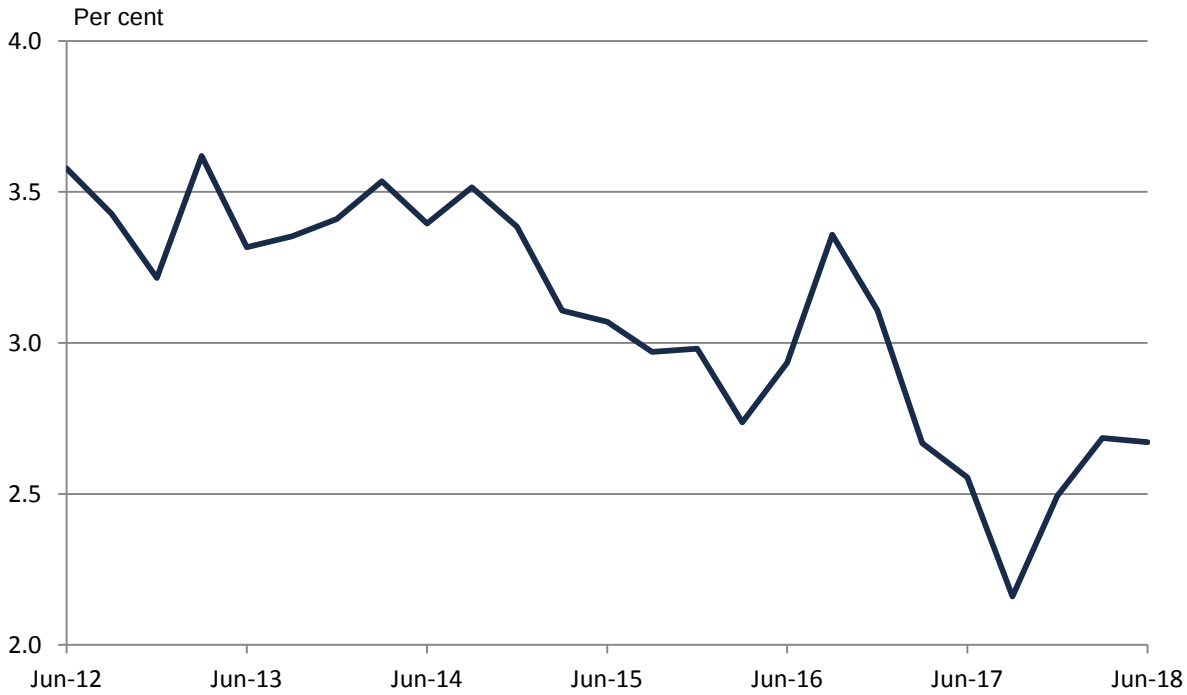
[157] Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February, p. 11.

[158] For example, see Table 5.1 from the Fair Work Commission, *Statistical report—Annual Wage Review 2017–18*.

Chart 6.3: AAWI for agreements approved in each quarter, June 2012 to June 2018



Source: Department of Employment, *Trends in Federal Enterprise Bargaining Report*, June quarter 2018.

6.4 Effect on designated groups

Section 653(2) of the Fair Work Act requires that the General Manager give consideration to the effect of enterprise agreement-making on the employment (including wages and conditions of employment) of the following persons:

- women;
- part-time employees;
- persons from a non-English speaking background;
- mature age persons; and
- young persons.

The Fair Work Act does not define young persons and mature age persons. As ABS data on age groups are often presented in categories, the Commission has also adopted this method of categorising young and mature aged employees. As such, data for young persons are presented for those aged under 21 years, and mature age persons are 45 years and over.

Table 6.8 shows the method of setting pay for these groups. The most common method of setting pay for the designated groups was by collective agreement, except for those aged under 21 years, where awards were the most common.

Table 6.7: Selected characteristics of employees by method of setting pay, per cent

	Collective agreement	Award	Individual arrangement	Total
	(%)	(%)	(%)	(%)
Female	38.3	29.3	32.4	100.0
Part-time	41.0	33.8	25.2	100.0
Aged under 21 years	40.7	42.9	16.4	100.0
Aged 45 years or over	40.8	21.7	37.5	100.0

Note: All data are weighted. Individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses.

Source: ABS, *Microdata: Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.55.001.

6.5 Developments in wages and conditions for designated groups

This section includes a discussion of wage developments in enterprise agreements, developments in conditions in enterprise agreements, and their effects on the groups designated in s.653(2) of the Fair Work Act.

Analysis of enterprise-agreement coverage for employees in the designated groups listed under s.653(2) of the Fair Work Act was undertaken using data from the WAD.

6.5.1 Wage developments for approved enterprise agreements in designated groups

This section focuses on the wage outcomes for employees by designated group that were covered by enterprise agreements approved during the reporting period. Where the WAD is used, wage outcomes can only be calculated for enterprise agreements where a percentage wage increase could be quantified.[159]

6.5.1.1 Women

The AAWI for both females and males declined over the current reporting period, while AAWIs were relatively stable in the previous reporting period. The AAWIs for females were mostly lower than for males in the current reporting period (Table 6.9).[160]

[159] For more information on AAWIs, refer to Appendix B – Technical notes.

[160] Note that these two measures presented in the table are different. The AAWI for males and females represents the average AAWI paid to male and female employees, respectively. In comparison, the AAWI for agreements with different proportions of women are presenting the AAWIs for agreements that have lower/higher proportions of women. Both measures are presented as they provide different ways of analysing the designated groups.

Table 6.8: AAWI in enterprise agreements by gender and by proportion of women, 2012–18

Overall	2012–13 (%)	2013–14 (%)	2014–15 (%)	2015–16 (%)	2016–17 (%)	2017–18 (%)
Male	3.7	3.6	3.4	3.0	3.2	2.6
Female	3.3	3.5	3.4	3.0	2.7	2.4
Share of women employees in agreements						
<40 per cent women	3.5	3.4	2.9	3.1	2.8	2.4
40-60 per cent women	3.3	3.5	3.7	3.0	2.5	2.2
>60 per cent women	3.2	3.5	3.5	2.9	2.7	2.5

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.5.1.2 Part-time employees

The AAWIs for part-time employees were mostly lower than for full-time employees in the current reporting period and lower compared with part-time employees in the previous reporting period (Table 6.10).

The AAWIs for workplaces with 20 per cent or more of their employees working part time were similar or higher than workplaces with lower part-time employment in the reporting period, whereas they were mostly lower in the previous reporting period.

Table 6.9: AAWI in enterprise agreements by type of employment and by proportion of part-time, 2012–18

Overall	2012–13 (%)	2013–14 (%)	2014–15 (%)	2015–16 (%)	2016–17 (%)	2017–18 (%)
Full-time	3.7	3.5	3.4	3.0	3.1	2.5
Part-time	3.2	3.5	3.4	3.0	2.8	2.4
Share of part-time employees in enterprise agreements						
<20 per cent part-time	3.4	3.7	3.4	3.0	2.6	2.4
≥20 per cent part-time	3.2	3.4	3.4	3.0	2.8	2.4

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.5.1.3 Non-English speaking background employees

AAWIs for employees with a non-English speaking background were mostly lower than for those with an English speaking background (Table 6.11).

Workplaces with 20 per cent or more of their employees with a non-English speaking background had broadly similar AAWIs relative to workplaces with less than 20 per cent of employees with a non-English speaking background over the reporting period.

Table 6.10: AAWI in enterprise agreements by non-English speaking background status and by proportion of non-English speaking background employees, 2012–18

Overall	2012–13 (%)	2013–14 (%)	2014–15 (%)	2015–16 (%)	2016–17 (%)	2017–18 (%)
Non-English speaking background	3.6	3.4	3.4	3.0	2.6	2.4
English speaking background	3.6	3.6	3.3	3.0	2.9	2.5
Share of non-English speaking background employees in enterprise agreements						
<20 per cent	3.4	3.6	3.3	3.0	2.5	2.5
≥20 per cent	3.8	3.4	3.5	3.0	2.7	2.4

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.5.1.4 Young and mature age persons

Both young employees (under 21 years) and mature age employees (45 years and over) had lower AAWIs compared with employees aged between 21 and 44 years over the reporting period, consistent with trends exhibited in the previous reporting period. The AAWIs for mature age employees fell the most from the previous reporting period.

AAWIs for workplaces with 20 per cent or more of their employees aged under 21 years were broadly similar to workplaces with fewer young employees in the reporting period, while they were mostly lower in the previous reporting period.

AAWIs for workplaces with 20 per cent or more of their employees aged 45 years and over were mostly similar to workplaces with lower proportions of mature age employees, except in 2017–18 where AAWIs were significantly lower for workplaces with a higher proportion of mature age employees (Table 6.12).

Table 6.11: AAWI in enterprise agreements for young and mature age workers and by proportion of employees, 2012–18

Overall	2012–13 (%)	2013–14 (%)	2014–15 (%)	2015–16 (%)	2016–17 (%)	2017–18 (%)
Young (under 21 years)	3.2	3.4	3.3	2.9	2.8	2.6
≥21 and ≤44 years	3.5	3.6	3.4	3.0	3.1	2.6
Mature (45 years and over)	3.5	3.5	3.4	3.0	2.8	2.4
Share of young employees in enterprise agreements						
<20 per cent	3.6	3.5	3.4	2.9	2.9	2.6
≥20 per cent	3.1	3.2	3.3	3.0	2.6	2.6
Share of mature employees in enterprise agreements						
<20 per cent	3.2	3.4	2.8	2.9	2.9	3.2
≥20 per cent	3.5	3.5	3.4	3.0	2.8	2.4

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.5.2 Developments in conditions for approved enterprise agreements in designated groups

This section focuses on the developments in the range of conditions of employment by designated groups in enterprise agreements approved over the reporting period. An analysis of the coverage of the core provisions by designated groups over the reporting period is shown in Table 6.13, which focuses on the coverage of core provisions by designated groups over the reporting period.

Table 6.12: Coverage of designated group employees by core provisions in enterprise agreements, 2015–18

	Female	Part-time	Non-English speaking background	Under 21 years	Over 45 years	All
	(%)	(%)	(%)	(%)	(%)	(%)
Annual leave	99.0	99.5	99.5	98.1	98.9	98.6
General training arrangements	97.3	97.8	95.6	95.9	96.7	96.6
Hours of work	99.1	99.5	98.4	99.1	98.5	98.7
Long service leave	98.6	98.3	98.1	98.1	97.3	97.8
Occupational health and safety	84.4	80.1	80.6	55.5	86.4	85.2
Parental leave	98.7	99.2	96.6	96.1	96.5	96.7
Personal carer's leave	99.4	99.7	99.6	98.4	99.2	99.1
Public holidays	98.1	98.5	97.7	98.6	97.2	97.4
Shift work/rostering provisions	81.9	84.2	90.4	91.9	83.2	83.9
Superannuation	99.1	99.4	97.0	99.0	97.9	98.3
Termination change and redundancy	88.6	90.9	90.9	96.4	88.8	90.4
Type of employment	99.7	99.7	98.4	98.9	98.2	98.6

Note: 'Type of employment' is any reference to casual employment, part-time employment, fixed-term employment, home-based work/telework, or temporary employment.

Source: Department of Jobs and Small Business, *Workplace Agreements Database*, June quarter 2018.

6.5.2.1 Women

Women were more likely to be covered by enterprise agreements with parental leave provisions and less likely to be covered by enterprise agreements with shift work and termination change and redundancy provisions.

6.5.2.2 Part-time employees

Part-time employees were more likely to be covered by enterprise agreements with parental leave provisions and less likely to be covered by enterprise agreements with occupational health and safety provisions.

6.5.2.3 Persons from a non-English speaking background

Employees with a non-English speaking background were more likely to be covered by enterprise agreements with shift work/rostering provisions and less likely to be covered by enterprise agreements with occupational health and safety provisions.

6.5.2.4 Young persons

Employees aged under 21 years were more likely to be covered by enterprise agreements with shift work/rostering and termination change and redundancy provisions and significantly less likely to be covered by enterprise agreements with occupational health and safety provisions.

6.5.2.5 Mature age persons

Employees aged 45 years and over were more likely to be covered by enterprise agreements with occupational health and safety provisions and less likely to be covered by enterprise agreements with termination change and redundancy provisions.

References

Data references

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Fair Work Commission, *Case Management System Plus*.

Fair Work Commission, *Statistical report—Annual Wage Review 2017–18.*

Legislation/Legislative instruments

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Fair Work Amendment Act 2015 (Cth).

Fair Work Amendment (Respect for Emergency Services Volunteers) Act 2016 (Cth).

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Cases/Decisions/Determinations

[2017] FWCFB 3659.

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"*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v Visy Board Pty Ltd T/A Visy Board*

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Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd T/A AGL Loy Yang.

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Essential Energy Workplace Determination.

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J J Richards & Sons v Fair Work Australia.

Kantfield Pty Ltd T/A Martogg & Company v The Australian Workers' Union.

KCL Industries Pty Ltd.

LCR Mining Group Pty Ltd v Construction, Forestry, Mining and Energy Union.

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National Union of Workers v Sigma Company Limited T/A Sigma Healthcare.

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Shop, Distributive and Allied Employees Association v Beechworth Bakery Employee Co Pty Ltd t/a Beechworth Bakery.

Swinburne University of Technology v National Tertiary Education Industry Union.

The Australian Workers' Union v Telum (QLD) Pty Ltd T/A Telum; Construction, Forestry, Mining and Energy Union v Telum (QLD) Pty Ltd T/A Telum.

The Maritime Union of Australia v MMA Offshore Logistics Pty Ltd t/a MMA Offshore Logistics.

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Other Sources

Greenfields Agreements Review Background Paper.

Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February.

Peetz D & Yu S (2018), Emplo*yee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

Appendix A – Enterprise agreements – lodgment by industry, 1 July 2015 to 30 June 2018

Table A.1: Enterprise agreements – lodgment by industry, 1 July 2015 to 30 June 2018

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Aged care industry	405	2	3	410
Agricultural industry	116			116
Airline operations	158	1	2	161
Airport operations	15	1		16
Aluminium industry	14			14
Ambulance and patient transport	5			5
Amusement, events and recreation industry	60	2		62
Animal care and veterinary services	14			14
Aquaculture	5			5
Asphalt industry	65	1		66
Australian Capital Territory	270	7	8	285
Banking, finance and insurance industry	122			122
Broadcasting and recorded entertainment industry	20		2	22
Building services	32	1	3	36
Building, metal and civil construction industries	3733	12	357	4102
Business equipment industry	15			15
Cement and concrete products	138	2	3	143
Cemetery operations	12			12
Children's services	168	1		169
Christmas Island	1			1
Cleaning services	47	1	1	49
Clerical industry	174	1		175
Clothing industry	17			17
Coal export terminals	5			5
Coal industry	158		9	167
Commercial sales	9			9
Commonwealth employment	51			51
Contract call centre industry	13			13
Corrections and detentions	18		1	19
Diving services	7		2	9
Dredging industry	9		10	19
Dry cleaning and laundry services	11			11
Educational services	702	23	3	728
Electrical contracting industry	683	3	22	708
Electrical power industry	100	2	2	104
Fast food industry	68		2	70
Fire fighting services	13		1	14
Food, beverages and tobacco manufacturing industry	363	2	3	368
Funeral directing	12			12
Gardening services	45			45
Grain handling industry	18			18
Graphic Arts	99		1	100
Hair and Beauty	1			1

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Health and welfare services	649	7	3	659
Hospitality industry	101		9	110
Indigenous organisations and services	7			7
Industries not otherwise assigned	3			3
Journalism	28	2		30
Licensed and registered clubs	47			47
Live performance industry	40		16	56
Local government administration	212			212
Manufacturing and associated industries	2092	7	25	2124
Marine tourism and charter vessels	11	1		12
Maritime industry	108	1	13	122
Market and business consultancy services	1	1		2
Meat Industry	85		1	86
Mining industry	188	1	3	192
Miscellaneous	20		1	21
Northern Territory	150	6	7	163
Nursery industry	2			2
Oil and gas industry	112		4	116
Passenger vehicle transport (non rail) industry	116	1	2	119
Pharmaceutical industry	66			66
Pharmacy operations	3			3
Plumbing industry	674			674
Port authorities	82			82
Postal services	1			1
Poultry processing	36			36
Publishing industry	15			15
Quarrying industry	64	1		65
Racing industry	33			33
Rail industry	78		12	90
Real estate industry	9			9
Restaurants	113	5		118
Retail industry	74	3	3	80
Road transport industry	552	6	7	565
Rubber, plastic and cable making industry	5			5
Salt industry	2			2
Scientific services	14			14
Seafood processing	4			4
Security services	183	1	6	190
Social, community, home care and disability services	221	4		225
Sporting organisations	7			7
State and Territory government administration	58		1	59
Stevedoring industry	83	1	4	88
Storage services	525	2	19	546
Sugar industry	19			19
Tasmania	399	1	1	401
Technical services	10			10
Telecommunications services	11			11

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Textile industry	24			24
Timber and paper products industry	163	1		164
Tourism industry	8	1		9
Vehicle industry	175	1		176
Waste management industry	147		13	160
Water, sewerage and drainage services	59			59
Wine industry	55			55
Wool storage, sampling and testing industry	6			6
Total lodged	**15942**	**116**	**585**	**16643**

Note: Industries are classified by Commission industry schedule. The total lodged does not equal the aggregate number of s.185 agreements lodged over the reporting period because agreements may span multiple industries.

Source: *CMS plus.*

Appendix B – Technical notes

The data sources used in this report include:

- Department of Jobs and Small Business, Workplace Agreements Database (WAD);
- Fair Work Commission, Case Management System Plus (CMS plus);
- Australian Bureau of Statistics (ABS), *Microdata: Employee Earnings and Hours, Australia, May 2016,* Catalogue No. 6306.0.55.001.

This section provides more detail on the accuracy and coverage of these data sources.

Workplace Agreements Database

Accuracy

The WAD is a census database that contains all federal enterprise agreements and issues of sampling error are not relevant.

The Commission understands that efforts have been made to reduce non-sampling error by careful quality control of data.

Employee coverage

The number of employees covered by an enterprise agreement is generally specified in the employer's declaration form (Form 17) that supports the initial application for the approval of that agreement lodged with the Commission. In addition, the Department of Jobs and Small Business may refer to Commission decisions and transcripts, as well as establish contact with employer and/or employee organisations.

Employee numbers are known for the vast majority of agreements approved over the reporting period. Where an agreement's employee coverage is unknown, and the agreement replaces an earlier agreement where employee coverage is known, then the number of employees from the earlier agreement is used. In cases where the agreement is still lacking data on employee coverage, the number of employees is estimated by using a type of trimmed mean. The method employed by the Department of Jobs and Small Business is to exclude the largest and smallest 5 per cent of agreements for each industry group in the preceding year, and then to calculate the average number of employees from the remaining agreements by industry.

Employment numbers are not specified under greenfields agreements. All employee coverage numbers for greenfields agreements used in the report have been estimated by the Department of Jobs and Small Business using the trimmed mean method described above.

Average Annualised Wage Increases

Estimates of AAWIs are calculated for federal enterprise agreements that provide a quantifiable wage increase over the life of the agreement. AAWI data examine increases to the base rate of pay only and do not take into account payments such as allowances and bonuses.

There are two stages to calculating the AAWI for agreements with quantifiable wage increases.

- Combining each wage increases to calculate a total percentage wage increase for each agreement. For agreements where the percentage wage increase is compounded, then the effective rate of interest is taken into account.

- For example, for an agreement that contains three 5 per cent increases compounded over three years, then the total percentage wage increase would be the sum of 5 per cent, 5.25 per cent and 5.51 per cent. Flat dollar increases are converted to a percentage using average weekly ordinary time earnings drawn from ABS, *Average Weekly Earnings, Australia*, Catalogue No. 6302.0.

- Annualising the total percentage wage increase by dividing it by the effective duration (in years).

AAWI per agreement provides an unweighted average and tends to overstate the average wage increases received by employees. AAWI per agreement weighted by the number of employees covered by that agreement calculates the employee weighted AAWI, which is a more reliable estimate.

Wage increases for which an average percentage increase could not be quantified, or are inconsistently applied for each employee covered by the agreement, are excluded from estimates of AAWI. This generally excludes increases linked to productivity or which are paid in the form of one-off bonuses, profit-sharing or share acquisition. This will tend to underestimate the average wage increase. Wage increases also cannot be quantified for agreements where base rates of pay have not been provided, and where wages are adjusted automatically by the Consumer Price Index or by annual wage review decisions.

Survey of Employee Earnings and Hours

Employee coverage

The EEH survey sample is weighted to account for most employing organisations in Australia, including both public and private sectors, with a few exceptions. Enterprises that are primarily engaged in the Agriculture, forestry and fishing industry are outside the scope of the survey, as are foreign embassies, and private households employing staff. The employees of employers covered in the survey are in scope if they received pay for the reference period, with the exception of members of the Australian Defence Force, employees based outside Australia and employees on workers' compensation who are not paid through the payroll.[161]

The EEH Confidentialised Unit Record File (CURF) provides additional detail on collective agreements, including whether they were registered or unregistered and the jurisdiction (federal or state) of registered agreements.

Accuracy of data

The EEH survey collects information from a sample of employers about their employees. The advantage of an employer survey is that employers may be able to refer directly to their employees' payroll and other records to coordinate a response to the survey questionnaire.

Imperfections in reporting by respondents still result in non-sampling errors. Non-sampling errors are pertinent to all types of surveys, however they are minimised by the careful design of the questionnaire, detailed checking of returns and the quality control of processing.

Because the results of the EEH survey are based on a sample of the population, this survey is also subject to sampling error. This means that the estimates in this sample may differ from the figures that would have been produced had the data been obtained from a full examination of all employers and employees. To minimise the risk of inaccuracy, the ABS employs a two-stage

[161] ABS (2016), *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0.

selection approach for the EEH survey. A random sample of around 8200 businesses is selected in order to adequately represent employers across different industries, states/territories, sectors and employee sizes. The employer sample culminates in data for around 53 000 employees who are randomly selected from the selected employers' payrolls.[162]

The EEH survey is not specifically designed to produce estimates of the number of employees in the workforce. The *Labour Force, Australia* publication is referred to by the ABS as the primary source for official estimates of employment.[163]

[162] ABS (2016), *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0.

[163] ABS (2016), *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0.