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Commission

General Manager’s report into developments in making enterprise agreements under the *Fair Work Act 2009*

2021–2024

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Fair Work Commission

The contents of this report 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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Fair Work
Commission

Table of contents

Executive summary 7

1. Introduction 9

2. Resources to inform this report 11

3. Legislative developments relating to enterprise agreements 13

4. Case law relating to enterprise agreements 37

5. Data relating to enterprise bargaining 69

6. Data relating to enterprise agreements and wage outcomes 75

Appendix A—Initiatives to support the Commission's bargaining and agreement-making functions and its users 96

Appendix B—Types of enterprise agreements 98

Appendix C—Section 185 agreements by industry 103

Fair Work Commission

List of tables and charts

Table 1: Selected bargaining applications, number of lodgments, 2021–24....69

Table 2: Selected bargaining matters, number of finalisations by application type, 2021–24....70

Table 3: Protected action ballot orders and related matters, lodgments, 2021–24....72

Table 4: Protected action ballot orders and related matters, finalisations, 2021–24....73

Table 5: Types of flexibility terms in enterprise agreements, 1 July 2018–30 June 2024, per cent of approved enterprise agreements....75

Table 6: Enterprise agreements, lodgments and approvals, 2021–22 to 2023–24....77

Table 7: Number of enterprise agreement approval applications....79

Chart 1: Number of enterprise agreement approval applications lodged with the Fair Work Commission, fortnight ending, 15 July 2022 to 28 June 2024....80

Chart 2: Number of enterprise agreements approved and employees covered, September quarter 2018 to June quarter 2024....81

Table 8: Number of enterprise agreements approved, by industry....82

Table 9: Number of employees covered, enterprise agreements approved, by industry....83

Table 10: Average number of employees covered, enterprise agreements approved, by industry....84

Chart 3: Median number of employees per agreement approval application lodged, fortnight to, 15 July 2022 to 28 June 2024....85

Chart 4: AAWI for enterprise agreements approved each quarter, September quarter 2018 to June quarter 2024....86

Chart 5: AAWI in enterprise agreements by selected industries, June quarter 2021 to June quarter 2024....87

Chart 6: AAWI in enterprise agreement approval applications lodged with the Commission, fortnight to, 15 July 2024 to 28 June 2024........ 88

Chart 7: Pay-setting arrangements, May 2018, May 2021 and May 2023........ 89

Table 11: Selected characteristics of employees by method of setting pay, May 2021 and May 2023........ 90

Table 12: AAWI in enterprise agreements approved by gender and proportion of women covered, 2018–19 to 2023–24........ 91

Table 13: AAWI in enterprise agreements approved by part-time employment, 2018–19 to 2023–24........ 92

Table 14: AAWI in enterprise agreements approved by employees from a non-English speaking background employment, 2018–19 to 2023–24........ 92

Table 15: AAWI in enterprise agreements approved by age group, 2018–19 to 2023–24........ 93

Table 16: Coverage of designated groups by core provisions, 2021–24........ 95

Table C1: Enterprise agreements lodged by industry, 1 July 2021 to 30 June 2024........ 103

Fair Work
Commission

List of abbreviations

AAWI	average annual wage increase
ABS	Australian Bureau of Statistics
AWA	Australian Workplace Agreements
AWU	Australian Workers' Union
BOOT	better off overall test
CFMMEU	Construction, Forestry, Maritime, Mining and Energy Union
Closing Loopholes Act	*Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)
Closing Loopholes No.2 Act	*Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2023*
Commission	Fair Work Commission
DEWR	Department of Employment and Workplace Relations
EEH	Employee Earnings and Hours
Fair Work Act	*Fair Work Act 2009*
FW Transitional Act	*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)*
ITEA	Individual Transitional Employment Agreements
MUA	Maritime Union of Australia
NES	National Employment Standards
RFFWU Inc	Retail and Fast Food Workers' Union Incorporated
SJBP Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
UWU	United Workers Union
WAD	Workplace Agreements Database

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Executive summary

Under section 653 of the *Fair Work Act 2009* (Fair Work Act), every 3 years the General Manager of the Fair Work Commission (Commission) is required to review the developments, in Australia, in making enterprise agreements.

This report presents findings for the reporting period 26 May 2021 to 25 May 2024. Under section 653(3) this report is due to the Minister within 6 months after the end of the reporting period (by 25 November 2024).

This report is the fifth report on developments in making enterprise agreements under the Fair Work Act since the reporting requirement commenced in 2009.

Key findings

Data on enterprise bargaining and agreement making

- The number of enterprise agreements approved during the reporting period (12 920) was higher than in the previous period (12 305 – revised from the previous report), as was the number of employees covered by enterprise agreements (2.65 million compared with 1.94 million).
- Average annual wage increases (AAWIs) in approved enterprise agreements were higher during the current reporting period than in the previous reporting period, reflecting higher wage outcomes in 2023 and the first half of 2024. The AAWI for the current reporting period was 3.6 per cent, compared with 2.7 per cent in the previous reporting period.
- Wage increases for women under enterprise bargaining were consistently lower than for non-women during the current and previous reporting periods.
- The majority of applications under the bargaining provisions in the Fair Work Act during the reporting period were to deal with a bargaining dispute. The number of bargaining applications lodged with the Commission increased over each year of the current reporting period.

Fair Work
Commission

Legislative developments relating to enterprise agreements

During the reporting period, key legislative developments in enterprise agreement making were introduced by the:

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
- *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and
- *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

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, some of which responded to the legislative developments during the period. Key decisions noted in this report relate to issues such as:

- genuine agreement
- voting on and making enterprise agreements
- the better off overall test (BOOT)
- undertakings
- greenfields agreements
- procedural issues
- protected industrial action
- termination and suspension of industrial action
- supported bargaining authorisations
- industrial action workplace determinations
- intractable bargaining declarations and intractable bargaining workplace determinations, and
- majority support determinations.

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Commission

1. Introduction

The Fair Work Commission (Commission) is the national workplace relations tribunal and is established by the *Fair Work Act 2009* (Fair Work Act). The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President. The President is assisted by a General Manager, also a statutory appointee, who oversees the administration of Commission staff. The General Manager also has regulatory powers and functions under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Under sections 653(1) of the Fair Work Act, every 3 years the General Manager of the Commission must:

- review the developments in making enterprise agreements in Australia;
- conduct research into the extent to which individual flexibility arrangements (IFAs) 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 requests for extensions of unpaid parental leave.

The General Manager must also conduct research into the circumstances in which employees make such requests, the outcome of such requests and the circumstances in which such requests are refused.

This report presents findings into developments in enterprise agreement making in Australia for the period 26 May 2021 to 25 May 2024.[1]

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[1] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the 3-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 and presented data up to 30 June 2012 as a result of data collection periods. This report includes data from 1 July 2021 to 30 June 2024 for the same reason.

Fair Work
Commission

In conducting this review the General Manager must consider the effect that the developments in making enterprise agreements 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.

No other persons are presently prescribed.

A written report of the review must be provided to the Minister within 6 months after the end of each reporting period. This report is due to the Minister by 25 November 2024.

1.1 Report outline

This report deals with the following topics:

- resources to inform this report
- legislative developments relating to enterprise agreements
- case law relating to enterprise agreements
- data relating to enterprise bargaining, and
- data relating to enterprise agreements and wage outcomes.

Fair Work
Commission

2. Resources to inform this report

Data presented in this report are obtained from the Australian Bureau of Statistics (ABS), the Department of Employment and Workplace Relations' (DEWR) Workplace Agreements Database (WAD), and the Commission's administrative database. This report also discusses legislative and case law developments relating to enterprise agreement making.

2.1 Survey of Employee Earnings and Hours (ABS)

The ABS Survey of Employee Earnings and Hours (EEH) is conducted biennially and collects data from a sample of employers about the characteristics of both the employers and their employees. It contains data on employee earnings, hours paid for, and the methods used to set pay.

2.2 Workplace Agreements Database (DEWR)

The Workplace Agreements Database (WAD) contains information on federal enterprise agreements that have been certified or approved since the introduction of enterprise bargaining under Commonwealth laws in October 1991.

The WAD includes information on wages in enterprise agreements (including the quantum and timing of wage increases, if available), which is used to calculate the average annualised wage increase (AAWI) for the agreements.

The WAD also captures additional information such as the title, industry, sector, duration, number of employees covered, section of the Fair Work Act under which the enterprise agreement was approved, and the parties involved in the bargaining process.

2.3 Fair Work Commission administrative database

The Commission's administrative database contains information relevant to the approval of enterprise agreements, such as party names, industry, date and location of lodgment, and Commission decisions. It also contains data on related matters, such as bargaining and industrial action applications. Data presented in this report are current as at 30 September 2024 and so may differ from that in the Commission's annual reports.

Fair Work Commission

In addition, using information collected from agreement applications lodged since 1 July 2022, the Commission has published fortnightly statistical reports on enterprise agreement approval applications. These reports provide information on the AAWI for enterprise agreements lodged with the Commission for approval and a monthly update on the number of applications made relating to other bargaining matters.

Fair Work
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3. Legislative developments relating to enterprise agreements

The Fair Work Act is the principal legislation governing agreement making in the national workplace relations system in Australia.

In the reporting period, key amendments to the Fair Work Act that related to making enterprise agreements in Australia were made by the:

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
- *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and
- *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

These legislative developments are discussed in more detail below.

A brief overview of other legislative developments during the reporting period that impacted employees covered by enterprise agreements (such as legislation which changed provisions of the National Employment Standards (NES)) is at section 3.4.

3.1 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (SJBP Act) received royal assent on 6 December 2022, with amendments commencing on various dates thereafter.

3.1.1 Commission's role in promoting bargaining and agreement making

The SJBP Act added to the functions of the Commission in section 576(2)(ab) of the Fair Work Act 'promoting good faith bargaining and the making of enterprise agreements.'

Since the commencement of the SJBP Act, the Commission has undertaken a range of user focussed activities and projects to support bargaining and agreement making. These are outlined in **Appendix A**.

Fair Work Commission

3.1.2 New types of enterprise agreements

The SJBP Act changed the types of enterprise agreements that can be made under the Fair Work Act. These changes came into effect for agreements with a 'notification time'[2] on or after 6 June 2023.

The SJBP Act changed the definition of a 'single-enterprise agreement' to confine such agreements to enterprise agreements covering a single employer, or 2 or more employers that either are engaged in a joint venture or common enterprise or are related bodies corporate. This means that single-enterprise agreements can no longer cover 2 or more employers subject to a 'single interest employer authorisation'.

The SJBP Act also introduced 3 types of 'multi-enterprise agreement':

- supported bargaining agreements
- single interest employer agreements, and
- cooperative workplace agreements.

The new supported bargaining agreements replace the scheme of agreements made under the previous low-paid bargaining arrangements. For a supported bargaining agreement to be made, the Commission must first make a 'supported bargaining authorisation'.

For a single interest employer agreement to be made, the Commission must first make a 'single interest employer authorisation'.

The new cooperative workplace agreements are multi-enterprise agreements made without any supported bargaining authorisation or single interest employer authorisation.

Multi-enterprise agreements, other than multi-enterprise greenfields agreements, must not cover employees in relation to 'general building and construction work'.[3]

An overview of the 5 types of enterprise agreement under the Fair Work Act following the SJBP Act changes, including their coverage and application, is in **Appendix B**. Further information on bargaining

[2] Defined in Fair Work Act section 173(2).

[3] Fair Work Act, section 186(2B). 'General building and construction work' is defined in section 23B(1).

for the 3 new types of multi-enterprise agreement introduced by the SJBP Act is in sections 3.1.6–3.1.8 below.

3.1.3 Initiating bargaining

Section 173(2A) of the Fair Work Act provides that a bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:

- the proposed agreement will replace an earlier single-enterprise agreement that has passed its nominal expiry date
- a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement
- no more than 5 years have passed since the nominal expiry date, and
- the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

Section 173(2)(aa) of the Fair Work Act extended the definition of ‘notification time’ for a proposed agreement to include the time when the employer receives a request to bargain for the proposed agreement from an employee bargaining representative under section 173(2A). The effect of these provisions is that an employee bargaining representative can initiate bargaining in certain circumstances, without the employer having agreed to bargain or the Commission having made a ‘majority support determination’, ‘scope order’, supported bargaining authorisation or single interest employer authorisation. These provisions came into effect on 7 December 2022.

3.1.4 Bargaining disputes

The SJBP Act replaced the provision in the Fair Work Act for ‘serious breach declarations’ and ‘bargaining related workplace determinations’, with provision for the Commission to make ‘intractable bargaining declarations’ and ‘intractable bargaining workplace determinations’.

Section 234(1) of the Fair Work Act allows a bargaining representative for a proposed enterprise agreement, other than a greenfields agreement, to apply for an intractable bargaining declaration

Fair Work
Commission

under section 235 in relation to the agreement. If an intractable bargaining declaration is made, the Commission may, in certain circumstances, make an intractable bargaining workplace determination under section 269.

An application for an intractable bargaining declaration cannot be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the proposed agreement.[4]

Under section 235, the Commission may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:

- an application for a declaration has been made by a bargaining representative for the proposed agreement
- the Commission has dealt with the bargaining dispute about the proposed agreement under section 240 and the applicant participated in Commission processes to deal with the dispute
- there is no reasonable prospect of agreement being reached if the Commission does not make the declaration
- it is reasonable in all the circumstances to make the declaration taking into account the views of all the bargaining representatives, and
- the 9 month 'minimum bargaining period' has ended[5].

If the Commission makes an intractable bargaining declaration, it may specify a 'post-declaration negotiating period' under section 235A, during which the Commission can continue to assist the parties to resolve the dispute (such as by conciliation) but cannot make an intractable bargaining workplace determination. The Commission can extend this period if it considers it appropriate to do so and taking into account any views of the bargaining representatives.[6]

[4] Fair Work Act, section 234(2).

[5] The 'end of the minimum bargaining period' is 9 months after expiry of any existing enterprise agreement or 9 months after bargaining starts. See further Fair Work Act sections 235(5) and 235(6).

[6] Fair Work Act, section 235A(2).

Fair Work
Commission

Under section 269, once the Commission makes an intractable bargaining workplace determination, a Full Bench of the Commission must make an intractable bargaining workplace determination as quickly as possible:

- if there was a post-declaration negotiating period—after the end of that period, or
- otherwise—after the Commission has made the determination.

Sections 270 to 274 of the Fair Work Act specify the terms that an intractable bargaining workplace determination must include. The Commission must take into account the factors specified in section 275 in deciding which terms to include in an intractable bargaining workplace determination.

3.1.5 Industrial action

The SJBP Act made several changes to the provisions of the Fair Work Act relating to industrial action.

Under amended sections 413 and 437(2), a 'protected action ballot order' can be obtained and protected industrial action can be taken in relation to a proposed enterprise agreement other than a greenfields agreement or a cooperative workplace agreement.

Under section 437A, the Commission is to treat a protected action ballot order application in relation to a proposed multi-enterprise agreement, as if it were multiple separate applications in relation to each employer (so that if the requirements for issuing an order are satisfied in relation to an employer, the Commission is to issue a separate protected action ballot order in relation to the employees of that employer).

Amended section 414 requires a bargaining representative of an employee who will be covered by a proposed multi-enterprise agreement, to give the employer written notice of industrial action at least 120 hours before commencement of the action (rather than the 3 working day minimum notice period that applies if the agreement is not a multi-enterprise agreement).

Section 448A requires the Commission, upon making a protected action ballot order, to order all bargaining representatives for the proposed agreement to attend a conference on or before the day that voting in the protected action ballot closes. The conference is conducted by a Member or

Fair Work
Commission

delegate of the Commission, who may mediate or conciliate, or make a recommendation or express an opinion.[7]

Section 409 (dealing with 'employee claim action') was initially amended to include an additional requirement for employee claim action to be protected industrial action, to the effect that if any bargaining representative of an employee contravened an order under section 448A that applied to them and related to a protected action ballot order, any subsequent industrial action by employees or their bargaining representatives would not be protected industrial action.[8]

Similarly, section 411 of the Fair Work Act (dealing with 'employer response action') was amended to the effect that if an employer or their bargaining representative contravene an order made under section 448A, then any subsequent industrial action taken by the employer will not be protected industrial action.[9]

As noted in section 3.2.3 below, sections 409 and 411 of the Fair Work Act were further amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act).

Section 468A gave the Commission the new function of approving 'eligible protected action ballot agents'.

The Commission may approve a person as an eligible protected action ballot agent if satisfied that they are a fit and proper person to be an eligible protected action ballot agent and any further requirements in the regulations are met.[10] The Commission is required to reconsider whether an eligible protected action ballot agent continues to meet the requirements every 3 years.[11]

Further, the Australian Electoral Commission became an eligible protected action ballot agent, rather than being the 'default' ballot agent.

These changes came into effect on 6 June 2023.

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[7] See further section 448A(6).

[8] Section 409(6A) as introduced by the SJBP Act.

[9] Sections 411(1)(d), 411(2) and 411(3) as introduced by the SJBP Act.

[10] Fair Work Act, section 468A(2).

[11] Fair Work Act, section 468A(4).

Fair Work
Commission

3.1.6 Multi-enterprise agreements – supported bargaining agreements

The SJBP Act provided for new supported bargaining arrangements that replace the previous low-paid bargaining arrangements.

If the Commission makes a supported bargaining authorisation it has additional powers to facilitate bargaining for the proposed multi-enterprise agreement. On its own initiative, the Commission can provide to the bargaining representatives such assistance that it considers appropriate, including directing parties (and certain third parties) to attend a conference.[12] A supported bargaining authorisation can also provide access to applications for bargaining orders,[13] for the Commission to deal with a bargaining dispute[14] and for an intractable bargaining declaration[15].

A multi-enterprise agreement is a supported bargaining agreement if a supported bargaining authorisation was in operation in relation to the agreement immediately before it was made. An application for a supported bargaining authorisation in relation to a proposed multi-enterprise agreement (other than a greenfields agreement) can be made by either:

- a bargaining representative for the agreement, or
- an employee organisation entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.[16]

The application must specify the employers and employees to be covered by the agreement.[17]

Subject to the restrictions in section 243A, the Commission must make a supported bargaining authorisation if:

- an application has been made, and
- the Commission is satisfied that:

[12] Fair Work Act, section 246.
[13] Fair Work Act, section 230(2).
[14] Fair Work Act, section 240(2).
[15] Fair Work Act, section 235.
[16] Fair Work Act, section 242(1).
[17] Fair Work Act, section 242(2).

Fair Work Commission

  - it is appropriate for the employer and employees that will be covered by the agreement to bargain together having regard to the factors specified in sections 243(1)(b)(i)–243(1)(b)(iv), and
  - at least some of the employees who will be covered by the agreement are represented by an employee organisation[18], or
- the employees specified in the application are employees in an industry, occupation or sector declared by the Minister for Employment and Workplace Relations under section 243(2B).[19]

Under section 243A the Commission must not make a supported bargaining authorisation:

- that specifies an employee who is covered by an unexpired single-enterprise agreement,[20] or
- in relation to a proposed agreement if the agreement would cover employees in relation to general building and construction work.

A supported bargaining authorisation must specify the employers and employees that will be covered by the proposed multi-enterprise agreement and any other prescribed matters, and comes into operation on the day it is made.[21]

If an employer is specified in a supported bargaining authorisation, it can only make a supported bargaining agreement with the employees specified in the authorisation, and cannot bargain for any other kind of agreement with those employees.[22] However, employers can be added to or removed from a supported bargaining authorisation under section 244 of the Fair Work Act.

A supported bargaining agreement can be varied to cover additional employers and their employees, or to remove employers and their employees from coverage.[23]

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[18] Fair Work Act, sections 243(1)(b) and 243(1)(c).

[19] Fair Work Act, section 243(2A).

[20] Subject to Fair Work Act, section 243A(3).

[21] Fair Work Act, sections 243(3) and 243(4).

[22] Fair Work Act, section 172(7).

[23] Fair Work Act, Subdivisions AA, AB and AE of Division 7 of Part 2-4.

Fair Work
Commission

3.1.7 Multi-enterprise agreements – single interest employer agreements

The SJBP Act also introduced single interest employer agreements. A single interest employer agreement is a type of multi-enterprise agreement that can cover two or more employers that are certain franchisees or have certain common interests.

In consequence of these changes, the SJBP Act amendments also confined 'single-enterprise agreements' to single employers, or to 2 or more employers that are engaged in a joint venture or common enterprise or are related bodies corporate. However, as outlined in section 3.3.2 below, under subsequent amendments multiple franchisees are again able to make single-enterprise agreements, as an alternative to single interest employer agreements.

A multi-enterprise agreement is a single interest employer agreement if a single interest employer authorisation was in operation in relation to the agreement immediately before it was made. An application for a single interest employer authorisation in relation to a proposed agreement that will cover 2 or more employers can be made by either:

- the employers to be covered by the agreement, or
- a bargaining representative of an employee who will be covered by the agreement.[24]

The application must specify the employers and employees to be covered by the agreement.[25]

Subject to section 249A, the Commission must make a single interest employer authorisation if the requirements in section 249 of the Fair Work Act are satisfied. Amongst the other requirements in section 249, the Commission must be satisfied either that:

- the employers carry on similar business activities under the same franchise and are franchisees or related bodies corporate of the same franchisor,[26] or
- 'the employers have clearly identifiable common interests' and it is not contrary to the public interest to make the authorisation.[27]

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[24] Fair Work Act, section 248(1).

[25] Fair Work Act, sections 248(2).

[26] Fair Work Act, sections 249(1)(b)(v) and 249(2).

[27] Fair Work Act, sections 249(1)(b)(v) and 249(3).

Fair Work Commission

Under section 249A the Commission must not make a single interest employer authorisation in relation to a proposed agreement if the agreement would cover employees in relation to general building and construction work.

A single interest employer authorisation must specify the employers and employees that will be covered by the proposed multi-enterprise agreement (which may be only some of the employers and employees specified in the application) and any other prescribed matters.[28]

A single interest employer authorisation comes into operation the day it is made and ceases to operate at the earlier of:

- the time the agreement to which it relates is made, or
- 12 months after it was made (or a longer period, if extended by the Commission).[29]

A single interest employer authorisation can provide access to applications for the Commission to deal with a bargaining dispute,[30] for bargaining orders[31] and for intractable bargaining declarations[32].

If an employer is specified in a single interest employer authorisation, it can only make a single interest employer agreement with the employees specified in the authorisation, and cannot bargain for any other kind of agreement with those employees.[33] However, employers can be added to or removed from a single interest employer authorisation under section 251 of the Fair Work Act.

A single interest employer agreement can be varied to cover additional employers and their employees, or to remove employers and their employees from coverage.[34]

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[28] Fair Work Act, section 250.

[29] Fair Work Act, section 249(4).

[30] Fair Work Act, section 240(2).

[31] Fair Work Act, section 230(2).

[32] Fair Work Act, section 235.

[33] Fair Work Act, section 172(5).

[34] Fair Work Act, Subdivisions AD and AE of Division 7 of Part 2-4.

Fair Work
Commission

3.1.8 Multi-enterprise agreements – cooperative workplace agreements

A multi-enterprise agreement is a cooperative workplace agreement if there was no supported bargaining authorisation or single interest employer authorisation in operation in relation to the agreement immediately before it was made.

Amongst other approval requirements, before approving a cooperative workplace agreement that is not a greenfields agreement, the Commission must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement.[35]

Protected industrial action cannot be taken in pursuance of a cooperative workplace agreement.[36] A bargaining representative for such an agreement may apply for the Commission to deal with a bargaining dispute, provided all of the bargaining representatives agree.[37]

Cooperative workplace agreements can be varied to cover additional employers and their employees, or to remove employers and their employees from coverage.[38]

3.1.9 Anti-discrimination and special measures to achieve equality

The SJBP Act amended the definition of a 'discriminatory term' of an enterprise agreement under section 195(1) of the Fair Work Act to include three additional protected attributes. The effect is that enterprise agreements made on or after 7 December 2022 cannot contain terms that discriminate against an employee covered by the agreement because of, or for reasons including, breastfeeding, gender identity and intersex status.[39]

The SJBP Act also amended the Fair Work Act to allow 'special measures to achieve equality' as defined in section 195(4), to be included in enterprise agreements made on or after 7 December 2022.[40]

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[35] Fair Work Act, section 186(2A).

[36] Fair Work Act, section 413(2).

[37] Fair Work Act, section 240(3).

[38] Fair Work Act, Subdivisions AC and AE of Division 7 of Part 2-4.

[39] Fair Work Act, sections 186(4), 194 and 195(1).

[40] Fair Work Act, sections 172A and 195(2)(c).

Fair Work
Commission

3.1.10 Prohibiting pay secrecy

The SJBP Act inserted new workplace rights for an employee to disclose (or not disclose) the employee's remuneration and to ask other employees about their remuneration, with effect from 7 December 2022.[41] Under section 333C of the Fair Work Act, a term of an enterprise agreement that is inconsistent with these employee rights is of no effect.

3.1.11 Requirements for genuine agreement

One of the requirements that must be satisfied for the Commission to approve an enterprise agreement, is that if the agreement is not a greenfields agreement, the Commission must be satisfied the agreement has been 'genuinely agreed to' by the employees covered by the agreement.[42] Section 188 of the Fair Work Act sets out the requirements for genuine agreement. The SJBP Act amended these requirements for agreements with a notification time on or after 6 June 2023.

Amongst other changes, section 188 is amended to:

- require the Commission to take into account the 'statement of principles' made under section 188B[43]
- require the Commission to be satisfied that employees requested to approve the agreement by voting for it:
  - have a sufficient interest in the terms of the agreement, and
  - are sufficiently representative, having regard to the employees the agreement is expressed to cover[44], and
- in relation to a multi-enterprise agreement—require the Commission to be satisfied that before requesting employees vote on the agreement, either:
  - each bargaining representative for the agreement that is an employee organisation had provided the employer with written agreement to the making of the request, or

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[41] Fair Work Act, sections 333B–333D.

[42] Fair Work Act, section 186(2)(a).

[43] Fair Work Act, section 188(1).

[44] Fair Work Act, section 188(2).

Fair Work
Commission

– a 'voting request order' permitted the employer to make the request.[45]

Section 188B requires the Commission to make 'a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement'. The statement of principles must deal with the following matters:

- informing employees of bargaining for a proposed enterprise agreement
- informing employees of their right to be represented by a bargaining representative
- providing employees with a reasonable opportunity to consider a proposed enterprise agreement
- explaining to employees the terms of a proposed enterprise agreement and their effect
- providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote
- any matter prescribed by the regulations, and
- any other matters the Commission considers relevant.

Following a consultation process, a Full Bench of the Commission published the *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* on 12 May 2023.[46] The Statement of Principles on Genuine Agreement was registered on the Federal Register of Legislation on 17 May 2023.[47]

The SJBP Act made a number of changes to the enterprise agreement pre-approval requirements in section 180 of the Fair Work Act, in consequence of the provision for the statement of principles, such as:

- removing the definition of access period,

[45] Fair Work Act, section 188(2A) (see also section 180A). The SJBP Act amendments provide for the Commission to make voting request orders under section 240A.

[46] See Full Bench statement *Approval of enterprise agreements – genuine agreement – Statement of Principles on Genuine Agreement*, 12 May 2023.

[47] See Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023.

Fair Work
Commission

- removing the requirement that the employer take all reasonable steps to give employees a copy of the agreement and any incorporated materials during the access period, and
- removing the requirement that the employer take all reasonable steps to notify employees of the time, place and method of voting by the start of the access period.

The amendments also confined to non-greenfields single-enterprise agreements, the requirement to provide a notice of employee representational rights and wait until at least 21 days after the last such notice is given, before requesting employees vote on a proposed agreement.[48]

The genuine agreement amendments described above also apply to approval by the Commission of variations of enterprise agreements under section 210 of the Fair Work Act, with effect from 6 June 2023.

3.1.12 Better off overall test

The SJBP Act amended the 'better off overall test' (BOOT) under section 193 of the Fair Work Act, for enterprise agreements made on or after 6 June 2023. The amendments include:

- requiring the Commission to consider any views relating to whether an agreement passes the BOOT expressed by the employers covered by the agreement or 'award covered employees for the agreement', and to give primary consideration to any common view expressed by the bargaining representatives of the employers covered by the agreement and the bargaining representatives of award covered employees for the agreement that are employee organisations[49]
- expressly requiring the Commission to apply the BOOT as a 'global assessment',[50] and
- expressly requiring the Commission only to have regard to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the 'test time'.[51]

[48] Fair Work Act section 173(1) and see also sections 188(3) and 188(4).

[49] Fair Work Act, sections 193A(3) and 193A(4).

[50] Fair Work Act, section 193A(2).

[51] Fair Work Act, sections 193(1), 193A(6) and 193A(6A).

Fair Work
Commission

The SJBP Act also inserted s.191A to the Fair Work Act which enables the Commission to address concerns that an agreement lodged for approval does not pass the BOOT, by amending the agreement.[52]

Division 7A was inserted into Part 2-4 of the Fair Work Act which provides for an employer, employee or employee organisation covered by an enterprise agreement to apply to the Commission to reconsider whether the agreement passes the BOOT, if:

- in applying the BOOT the Commission had regard to certain patterns or kinds of work or types of employment, and
- at the test time or a later time, one or more employees who would be award covered employees for the agreement if the test time were the time of the application for reconsideration, engaged in other patterns or kinds of work or other types of employment, to which the Commission did not have regard.[53]

If on reconsideration the Commission has a concern the enterprise agreement does not pass the BOOT, it may accept an employer undertaking to address the concern or itself amend the agreement to address the concern.[54]

The BOOT amendments described above also apply to approval by the Commission of variations of enterprise agreements under section 210 of the Fair Work Act, with effect from 6 June 2023.

3.1.13 Dealing with errors in enterprise agreements

The SJBP Act inserted new provisions into the Fair Work Act to deal with errors in enterprise agreements.

Section 218A of the Fair Work Act empowers the Commission, on its own initiative, or on application, to vary an enterprise agreement to correct or amend an obvious error, defect or irregularity.

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[52] Fair Work Act, sections 191A and 191B.

[53] Fair Work Act, sections 227A and 227B.

[54] Fair Work Act, section 227B(3).

Fair Work
Commission

Sections 602A and 602B address the problem that arises if a party erroneously lodges the wrong version of an agreement or variation with the Commission for approval and it is approved. Under these provisions the Commission may validate the approval decision, as if the error had not occurred.

These provisions commenced on 7 December 2022 and apply to approval decisions made before, at or after commencement of the provisions.

3.1.14 Termination of enterprise agreements after nominal expiry date

The SJBP Act amended the provisions of the Fair Work Act for terminating an enterprise agreement after its nominal expiry date, with effect from 7 December 2022.

Subject to section 226(1A), on application, the Commission must terminate an enterprise agreement after its nominal expiry date under section 226(1) if it is satisfied that:

- the continued operation of the agreement would be unfair for the employees covered by the agreement
- the agreement does not, and is not likely to, cover any employees, or
- all of the following apply:
    - the continued operation of the agreement would pose a significant threat to the viability of a business carried on by the employer or employers covered by the agreement
    - termination of the agreement would be likely to reduce the potential of terminations of employment due to redundancy or the employer's bankruptcy or insolvency for employees covered by the agreement, and
    - if the agreement contains terms providing entitlements relating to the termination of employees' employment—each employer covered by the agreement has given the Commission a 'guarantee of termination entitlements' (as defined in section 226A) in relation to the termination of the agreement.

Section 226(1A) provides that the Commission must terminate the agreement only if the Commission is satisfied that it is appropriate in all the circumstances to do so.

Fair Work
Commission

Sections 226(3), 226(4) and 226(5) provide that in deciding whether to terminate the agreement, the Commission must consider the views of the employees, employers and employee organisations (if any) covered by the agreement, and must have regard to whether:

- the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement
- bargaining for the proposed new enterprise agreement is occurring, and
- termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

If the termination is opposed by any employee, employer or employee organisation covered by the enterprise agreement, the application for termination must be transferred to a Full Bench of the Commission, unless the Commission is satisfied the agreement does not and is not likely to cover any employees.[55]

3.1.15 Sunsetting of pre-2010 agreements ('zombie agreements')

The SJBP Act amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (FW Transitional Act) to sunset all remaining transitional instruments preserved by that Act, being:

- agreement-based transitional instruments
- Division 2B State employment agreements, and
- enterprise agreements made during the 'bridging period' (from 1 July 2009 to 31 December 2009).

These transitional instruments were made prior to the commencement of the Fair Work Act on 1 January 2010 and are referred to as 'pre-2010 agreements' but are also commonly known as 'zombie agreements.'

[55] Fair Work Act, sections 615A(3) and (4).

Fair Work
Commission

Each pre-2010 agreement sunsetted on 7 December 2023 after a default period of 12 months, unless the Commission, on application, has extended the default period of the agreement.[56]

3.2 *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)

The Closing Loopholes Act received royal assent on 14 December 2023, with the amendments it made to the Fair Work Act commencing on different dates.

3.2.1 Regulated labour hire arrangement orders

The Closing Loopholes Act inserted new Part 2-7A into the Fair Work Act, which provides for the Commission, on application, to make a 'regulated labour hire arrangement order' in relation to employees supplied by their employer to perform work for a 'regulated host' employer (other than a small business employer), where the regulated host has a 'host employment instrument' that would apply to the employees if they were employed by the regulated host to perform the work.

If the Commission makes such an order, the employer will generally be required to pay employees being supplied to the host employer no less than the 'protected rate of pay'—which is generally the full rate of pay that would be payable to the employees under the host employment instrument if they were directly employed by the regulated host.[57]

While applications for regulated labour hire arrangement orders could be made from 15 December 2023, employer obligations under an order to pay employees at no less than the protected rate of pay did not commence until 1 November 2024.[58]

3.2.2 Workplace delegates' rights

The Closing Loopholes Act introduced into the Fair Work Act new workplace rights and protections for 'workplace delegates'—who are persons appointed or elected under the rules of their employee

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[56] FW Transitional Act, item 20A of Schedule 3, item 26A of Schedule 3A and item 30 of Schedule 7.

[57] See further Fair Work Act, sections 306F and 306G.

[58] Fair Work Act, clause 93 of Schedule 1.

Fair Work
Commission

organisation, to represent members of the employee organisation who work in a particular enterprise.[59]

Section 205A(1) requires an enterprise agreement to include a delegates' right term for workplace delegates to whom the agreement applies. This applies to enterprise agreements put to a vote by the employer on or after 1 July 2024.[60]

Section 205A(2) provides that if, when an enterprise agreement is approved, the delegates' rights term in the agreement is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates:

- the term of the enterprise agreement has no effect, and
- the most favourable term of those in the modern awards, as determined by the Commission, is taken to be a term of the enterprise agreement.

3.2.3 Industrial action

As noted in section 3.1.5 above, section 409 of the Fair Work Act as amended by the SJBP Act was to the effect that industrial action by employees who will be covered by a proposed enterprise agreement will not be 'employee claim action' (and so will not be 'protected industrial action') if any bargaining representative of such an employee had contravened a Commission order under section 448A directing the bargaining representatives for the agreement to attend a conference during the protected action ballot period. The result was that failure of any employee bargaining representative to attend a conference as required by an order under section 448A, would render any subsequent employee industrial action unprotected—even for those employees whose bargaining representatives did attend the conference.

Section 409(6A) as amended by the Closing Loopholes Act is to the effect that industrial action will not be protected industrial action unless each bargaining representative 'who applied for a protected action ballot order for the protected action ballot for the industrial action' has complied with any order

[59] The Closing Loopholes No 2 Act extended these workplace rights and protections to regulated workers effective from 26 August 2024.

[60] See further Fair Work Act, clause 96 of Schedule 1.

Fair Work Commission

under section 448A. It follows that if an employee representative other than one that applied for the protected action ballot order fails to attend the conference, this will not affect whether industrial action authorised by the ballot is protected industrial action.

3.2.4 Anti-discrimination measures

The Closing Loopholes Act inserted a new protected attribute of ‘subjection to family and domestic violence’ into the anti-discrimination provisions of the Fair Work Act.

Among other changes, the amendments are to the effect that an enterprise agreement made on or after 15 December 2023, must not contain a term that discriminates against employees covered by the agreement because they are subjected to family and domestic violence.[61]

3.3 *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth)

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No.2 Act) received royal assent on 26 February 2024, with its amendments to the Fair Work Act commencing on various dates between February 2024 and February 2025.

3.3.1 Model Terms

The Closing Loopholes No.2 Act amends the Fair Work Act to require the Commission to make certain model terms for enterprise agreements and ‘copied State instruments’. These amendments commence on 26 February 2025, or an earlier date as proclaimed.

Under sections 202, 205, 737 and 768BK of the Fair Work Act as amended, a Full Bench of the Commission[62] must by legislative instrument, determine the:

- ‘model flexibility term’ for enterprise agreements
- ‘model consultation term’ for enterprise agreements
- model term for dealing with disputes for enterprise agreements, and

[61] Fair Work Act, sections 186(4), 194 and 195(1).

[62] Fair Work Act, section 616(4A).

- model term for settling disputes about matters arising under a copied State instrument for a transferring employee.

Sections 202(6), 205(4), 737(2) and 768BK(3) respectively set out the matters the Full Bench must take into account in determining the model terms.

The Commission started the process to determine the model terms in September 2024.[63]

3.3.2 Enabling multiple franchisees to access the single-enterprise stream

As noted in section 3.1.7 above, the SJBP amendments to the Fair Work Act confined 'single-enterprise agreements' to single employers, or to 2 or more employers that are engaged in a joint venture or common enterprise or are related bodies corporate.

The Closing Loopholes No.2 Act amended section 172 of the Fair Work Act to allow multiple employers that carry on similar business activities under the same franchise and are franchisees or related bodies corporate of the same franchisor, to make single-enterprise agreements rather than multi-enterprise agreements. These amendments had effect from 27 February 2024.

3.3.3 Transitioning from multi-enterprise agreements

The Closing Loopholes No.2 Act amended the Fair Work Act to provide for circumstances in which a new single-enterprise agreement may replace an unexpired single interest employer agreement or supported bargaining agreement.[64]

An employer can only put such a new single-enterprise agreement to an employee vote with the agreement of each employee organisation to which the multi-employer agreement applies, or if the Commission has made a voting request order.[65]

Among other changes, the amendments also modify the BOOT in circumstances where application is made for approval of a single-enterprise agreement that covers employees to whom a single interest employer agreement or supported bargaining agreement applies. Section 193(1)(b) requires the BOOT

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[63] See President's statements [2024] FWC 2520 and [2024] FWC 2676.

[64] Fair Work Act, sections 58(4) and 58(5).

[65] Fair Work Act, sections 180B and 188(2A).

Fair Work
Commission

in respect of such employees to be assessed against the single interest employer agreement or supported bargaining agreement, rather than the relevant modern award.[66]

These amendments had effect from 27 February 2024.

3.3.4 Bargaining – Intractable bargaining workplace determinations

The SJBP Act introduced provision for the Commission to make intractable bargaining workplace determinations. The Closing Loopholes No.2 Act made 2 changes to these provisions.

First, section 274(3) of the Fair Work Act is amended to the effect that an 'agreed term' for an intractable bargaining workplace determination is a term agreed by the bargaining representatives: at the time the application for the declaration is made; at the time the declaration is made, or at the end of any post-declaration negotiating period (if there is one). This 'locks-in' as agreed terms that must be included in the subsequent intractable bargaining workplace determination, terms that have been agreed at any of these 3 stages (rather than just those agreed at the 2nd and 3rd of these stages, as previously).[67]

Second, section 270A requires that a term of an intractable bargaining workplace determination dealing with matters still at issue (other than a term providing for a wage increase), must be not be less favourable to employees and employee organisations to be covered by the determination, than a term dealing with the same matter in an enterprise agreement that applies to the employees or employee organisations immediately before the determination is made.[68]

These changes had effect from 27 February 2024.

3.3.5 Casual employment

The Closing Loopholes No.2 Act replaced the definition of 'casual employee' in section 15A of the Fair Work Act with a new definition. The new definition retains the concept that a casual has no 'firm advance commitment to continuing and indefinite work' and is entitled to a casual loading or casual

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[66] Fair Work Act, sections 193(1)(b) and 193(1A).

[67] Fair Work Act, section 274(3).

[68] Fair Work Act, section 270A.

Fair Work Commission

rate of pay, but requires the question as to whether or not there is such a commitment to be assessed on the basis of the 'real substance, practical reality and true nature of the employment relationship'.

The amendments also amended the NES to provide new 'employee choice about casual employment' arrangements under which casual employees can seek to change to full-time or part-time employment, and to establish a new framework for dealing with disputes about employment status.[69]

The changes to the definition of a casual employee and the NES had effect from 26 August 2024.

In addition, clause 101 of Schedule 1 to the Fair Work Act allows the Commission to make a determination varying an enterprise agreement made before 27 February 2024 to:

- resolve an uncertainty or difficulty relating to the interaction between the agreement and the definition of casual employee
- resolve an uncertainty or difficulty relating to the interaction between the agreement and the NES casual employment provisions, or
- make the agreement operate effectively with the definition or the NES provisions.

Clause 101 commenced on 27 February 2024.

3.4 Further changes to the NES

During the reporting period some further changes were made to the NES in the Fair Work Act, which changed or added to the entitlements of employees who may be covered by enterprise agreements. These included:

- *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) – which from 11 September 2021 extended access to compassionate leave to include circumstances where an employee or their spouse or de facto partner has a miscarriage.[70]
- *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Cth) – which from 1 February 2023 (1 August 2023 for small business employees), among other changes, introduced an entitlement of up to 10 days' paid family and domestic violence leave in a

[69] Fair Work Act, sections 66AAB–66MA.

[70] Fair Work Act, section 104(1)(c).

Fair Work Commission

12 month period (replacing the previous entitlement to 5 days' unpaid leave).[71] The definition of family and domestic violence in s.106B(2) of the Fair Work Act was extended to include conduct of a current or former intimate partner of an employee, or a member of the employee's household. Transitional provisions allow the Commission to make a determination varying an enterprise agreement to resolve problems with the interaction between the agreement and the new leave provisions.[72]

- SJBP Act – which from 6 June 2023 expanded the circumstances in which an employee may request flexible working arrangements under the NES,[73] and made further provision for employees to challenge refusal of a request for flexible working arrangements.[74]
- *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) and SJBP Act – which from 1 July 2023 and 6 June 2023 respectively added additional entitlements to unpaid parental leave to the NES and made further provision for employees to challenge refusal of a request for an extension of unpaid parental leave.[75]
- *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) – which from 1 January 2024, added an entitlement to superannuation contributions to the NES. This requires an employer to make superannuation contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay the superannuation guarantee charge under superannuation legislation.[76]

[71] Fair Work Act, section 106A.

[72] Fair Work Act, clause 53 of Schedule 1.

[73] Fair Work Act, sections 65(1A)(aa) and 65(1A)(e)-(f).

[74] Fair Work Act, sections 65B, 44 and 739.

[75] Fair Work Act, sections 76A–76C, 44 and 739.

[76] Fair Work Act, Division 10A of Part 2-2.

Fair Work
Commission

4. Case law relating to enterprise agreements

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

4.1 Genuine agreement

Section 186 of the Fair Work Act sets out general requirements that must be satisfied if the Commission is to approve an enterprise agreement.[77] 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.[78] Section 188 sets out matters the Commission must take into account in determining whether an enterprise agreement has been genuinely agreed to by employees.

The case law considers issues including:

- the effect of a misrepresentation to employees during bargaining
- the steps taken by an employer to explain the terms of a proposed enterprise agreement to its employees, and
- how the Statement of Principles on Genuine Agreement introduced by the SJBP Act is to be used.

4.1.1 Misrepresentation during bargaining

In *National Tertiary Education Industry Union v Southern Cross University, CPSU, the Community and Public Sector Union-SPSF Group*[79] the National Tertiary Education Union appealed approval of an enterprise agreement on multiple grounds, including that the agreement had not been genuinely agreed to. The

[77] Additional requirements are in section 187.
[78] Fair Work Act, section 186(2)(a).
[79] [2023] FWCFB 200.

Fair Work
Commission

employer had represented that a sign-on bonus of $750 would be paid to all employees, including all 'current' casual staff, upon a successful majority vote on the agreement. However, the bonus was instead paid upon approval of the agreement by the Commission.

The Full Bench of the Commission considered the representation misleading in 2 respects. First, a materially different event would in fact trigger the sign-on bonus. Second, because of the gap in time between voting and approval, the cohort of persons employed was likely to differ between the 2 events.

Whether a misrepresentation made in the course of an access or voting period for an agreement had the result that the agreement was not genuinely agreed to by employees, was to be determined, in the words of *Appeal by Australian Municipal, Administrative, Clerical and Services Union*[80], by whether:

> 'it could reasonably be expected to have the effect of deceiving those employees into voting for something which, if they had known the true position, they would not have voted for.'

The Full Bench held it was not open for the Commissioner at first instance, on the evidence taken as a whole and considered objectively, to find that the misrepresentation could not reasonably be expected to have this effect.[81] Because of the misrepresentation, the Commission could not be satisfied the agreement had been genuinely agreed to.[82]

4.1.2 Explanation of agreement

Section 180(5)(a) of the Fair Work Act requires that, before an employer requests that employees approve a proposed enterprise agreement by voting for it, the employer must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the employees employed at the time who will be covered by the agreement.

In *Construction, Forestry, Maritime, Mining and Energy Union v Karijini Rail Pty Limited* [83] a Full Bench of the Commission found that the employer had failed to explain the differences between the agreement

[80] [2013] FWCFB 7453, [28].
[81] [2023] FWCFB 200, [29]-[41].
[82] Ibid, [49].
[83] [2021] FWCFB 4522.

Fair Work Commission

and the award in respect of some important industrial terms, including in relation to employment types covered by the agreement and meal breaks. The Full Bench determined that the requirements in section 180(5) had not been met and that it was not open to the Member at first instance to find the failures constituted a minor procedural or technical error or one that was not likely to have disadvantaged employees. Consequently, the failures were not errors that could be disregarded by the Commission under section 188(5) of the Fair Work Act.[84]

4.1.3 Statement of Principles on Genuine Agreement

As noted previously, section 188 of the Fair Work Act as amended by the SJBP Act requires the Commission to take into account the *Statement of Principles on Genuine Agreement*[85] in determining whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

The Full Bench of the Commission in *Shop, Distributive and Allied Employees Association v Allen Family Pty Ltd*[86] considered how the *Statement of Principles on Genuine Agreement* should be used. The Full Bench observed that it doesn't operate as a checklist of mandatory rules that must be complied with, but rather where an employer follows pre-approval steps consistent with it, that would weigh more favourably towards a conclusion the agreement has been genuinely agreed. Conversely, the requirement to take into account the *Statement of Principles on Genuine Agreement* does not displace the requirement that the Commission consider each of the other matters set out in section 188 in determining whether an agreement has been genuinely agreed.[87]

4.2 Voting on and making enterprise agreements

Under section 182(1) of the Fair Work Act, a single-enterprise agreement that is not a greenfields agreement is 'made' when a majority of employees who will be covered by the proposed agreement cast a valid vote to approve the agreement.

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[84] Ibid, [62]–[77].

[85] Made pursuant to section 188B of the Fair Work Act.

[86] [2024] FWCFB 48.

[87] Ibid, [76].

Fair Work
Commission

4.2.1 Approval by a majority of employees

In *Commonwealth Bank of Australia*[88] a Full Bench of the Commission considered whether an agreement was approved by a majority of employees entitled to vote on the agreement in circumstances where the employer had considered that 33 427 employees were eligible to vote, including 2846 employees currently covered and employed under Australian Workplace Agreements (AWAs) and Individual Transitional Employment Agreements (ITEAs). If the proposed agreement was approved by the Commission, the employees covered by AWAs and ITEAs would not automatically be covered by it. Rather, these employees would only be covered by the proposed agreement if it was approved by the Commission and they elected to terminate their AWAs and ITEAs.

The Full Bench found that the employees covered by AWAs or ITEAs at the time of the vote were not eligible to vote on the agreement as they were not employees that 'will be' be covered by the agreement after it is made.[89] However, the Full Bench found that if the 2 846 ineligible employees were discounted from the 'Yes' vote, it could still be satisfied that a majority of employees entitled to vote on the agreement had approved it, given that 20 841 employees had cast a valid vote and 13 095 had voted to approve the agreement.[90]

4.2.2 Agreement validly made

In *Australian Manufacturing Workers' Union; Construction, Forestry, Maritime, Mining and Energy Union v Temmco Total Energy Mining Maintenance Company Pty Ltd*[91] a Full Bench of the Commission considered an appeal against the approval of a non-greenfields enterprise agreement covering future servicing work on the Loy Yang A power station located in Victoria. The employer was based in New South Wales and its practice was to establish an enterprise agreement for each new interstate power station servicing contract. The agreement was voted on and approved by 8 employees.

The Full Bench found that none of the 8 employees were covered by the agreement at the time of the vote, as no work at the Loy Yang A site was being performed at the time. Nor could it be said that

[88] [2021] FWCFB 3635.
[89] Ibid, [9].
[90] Ibid, [10]–[11].
[91] [2021] FWCFB 6048.

Fair Work Commission

these employees 'will be covered by the agreement' in the future, as the mere possibility that some or all of them might be allocated to perform work covered by the agreement at some time in the future was not sufficient.[92] Consequently, the agreement had not been validly made by these employees.

In *United Workers' Union v Hot Wok Food Makers Pty Ltd*[93] the United Workers' Union appealed the approval of an agreement on the basis that some or all of the 4 employees who voted to approve the agreement were not be entitled to do so, because they were not employed by the employer at the time the agreement was purportedly made or because their jobs were not covered by the agreement even if they were employed at the relevant time.[94]

The Full Bench of the Commission found that none of the employees who voted on the agreement were entitled to vote as they were not performing work covered by the agreement. Consequently, the agreement was not made in accordance with section 182(1) of the Fair Work Act.[95] The Full Bench further found that selection of 4 relatively high-paid managers to make the agreement, which was subsequently to apply to a host of employees who were not given an opportunity to bargain or vote, 'was entirely lacking in authenticity and moral authority' in the sense discussed in *One Key Workforce Pty Ltd v CFMMEU*.[96]

In *Appeal by The Australian Workers' Union*,[97] the Australian Workers' Union (AWU) appealed the approval of an enterprise agreement on the basis that the Commission could not be satisfied that the Agreement had been genuinely agreed to by the employees that will be covered by it because:

- the pre-approval steps required by section 180(5) of the Fair Work Act had not been complied with
- the agreement was voted on by a cohort of employees who were not performing work that was covered by the agreement, and

[92] Ibid, [42]–[43].
[93] [2023] FWCFB 4.
[94] Ibid, [2].
[95] Ibid, [17]–[53].
[96] Ibid, [56] citing *One Key Workforce Pty Ltd v CFMMEU* [2018] FCAFC 77 [131]–[165].
[97] [2023] FWCFB 157.

Fair Work Commission

- the employees would not in the future be covered by the agreement, due to the 4-week terms of their contracts.[98]

The AWU further submitted that the agreement was 'intended to subsequently cover a much larger workforce, including in a different industry … and that the agreement was a contrivance or sham intended to avoid the requirements of the Fair Work Act in relation to the making of enterprise agreements'.[99]

The Full Bench of the Commission found that the 6 employees who voted on the agreement were not eligible to vote as they were not covered by the agreement at the time of the vote, and were never going to be covered by the agreement once it had been made.[100] The Full Bench concluded that it was never intended that the employees were engaged to perform the work of the classifications in the agreement and, if necessary, would find the contracts of the voting employees were 'a sham—that is, a document which took the form of a legally effective transaction but which the parties did not intend to have its ostensible legal consequences'.[101] The Full Bench quashed the approval of the agreement at first instance and dismissed the application for approval, in part, because the agreement was not validly made.

4.2.3 Small voting cohorts

In *Australian Workers' Union v Altrad APTS Pty Ltd T/A Altrad*[102] a Full Bench of the Commission quashed the approval of an enterprise agreement despite the appeal being lodged more than 2 years after the approval decision was published.[103] The AWU had appealed the decision on several grounds, including that the agreement was not genuinely agreed.

The agreement had been voted on by 3 employees. The Full Bench noted that a small voter cohort is not automatically indicative of a lack of genuine agreement, but in some circumstances should trigger

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[98] Ibid, [29].

[99] Ibid, [29].

[100] Ibid, [81].

[101] Ibid, [81].

[102] [2024] FWCFB 21.

[103] The Full Bench applied section 188 as it was prior the SJBP amendments, as the enterprise agreement had been approved in 2021.

Fair Work
Commission

greater scrutiny. In this case such circumstances included the small number of employees who voted in a context where the agreement was to apply to a much larger cohort, a question as to whether the voting employees were aware of the appropriateness of the terms and conditions under the agreement for all of the classifications it covered, and that the evidence revealed the voting employees had no vested personal interest in the terms of the agreement.[104]

The Full Bench found that the 3 voting employees were not representative of the employee cohort which would be ultimately covered by the agreement, had no personal vested interest in the agreement as they were covered by separate contracts, and arguably were covered by another agreement so that the proposed agreement would not apply to them until the other agreement expired. While the Full Bench did not conclude the arrangement was a sham, it resulted in an agreement that was lacking in authenticity and moral authority in the sense discussed in *One Key Workforce Pty Ltd v CFMMEU*.[105]

4.3 Employees fairly chosen

Amongst other approval requirements, the Commission must be satisfied that the group of employees covered by an enterprise agreement was fairly chosen. If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the Commission must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group covered is geographically, operationally or organisationally distinct.[106]

In *Construction, Forestry, Maritime, Mining and Energy Union v Karijini Rail Pty Limited*[107] TRRC Pty Ltd (TRRC), a subsidiary of Railtrain Holdings Pty Ltd (Railtrain) had held a contract to provide rail crew labour to a mining company, under which it supplied the miner with around 50 employees covered by TRRC's enterprise agreement. Most of the TRRC employees were employed on a permanent basis and the TRRC agreement did not cover employees employed on a fixed-term or maximum-term basis. Railtrain established a new subsidiary, Karijini Rail Pty Ltd (Karijini), for the purpose of securing a new contract with the miner and putting in place an enterprise agreement aligned with the new contract.

[104] [2024] FWCFB 21, [77]–[90].

[105] Ibid, [84]–[101], citing *One Key Workforce Pty Ltd v CFMMEU* [2018] FCAFC 77, [131]–[165].

[106] Fair Work Act, sections 186(3) and 186(3A).

[107] [2021] FWCFB 4522.

Fair Work Commission

Karijini made an enterprise agreement with its 2 employees who had been employed on a maximum-term basis. The agreement provided for employment only on a fixed-term, maximum-term, project, or casual basis, and the agreement did not cover employees employed on a permanent basis. Karijini subsequently employed all of TRRC's permanent employees on a maximum-term basis, with the term aligned with the new contract with the miner.[108]

The Full Bench of the Commission found that the exclusion of permanent employees from coverage of the Karijini agreement engaged section 186(3A), as it excluded from coverage employees who might be employed by Karijini to perform work otherwise covered by the agreement. The excluded employees were not operationally or geographically distinct.[109] Further, the Full Bench found it would have been reasonably open to infer that the rationale for the coverage provision was to assist in achieving the result that the TRRC agreement would not continue to apply to TRRC employees who transferred to Karijini (pursuant to section 313 of the Fair Work Act) and that, as a result, the coverage of the agreement was not fairly chosen.[110]

4.4 Better off overall test

When dealing with an application for approval of an enterprise agreement, the Commission must consider whether the agreement passes the BOOT.[111] Section 193 of the Fair Work Act sets out when an enterprise agreement passes the BOOT.

As noted above, the SJBP Act amended the BOOT for agreements made on or after 6 June 2023.

4.4.1 Reconciliation clauses

In *Commonwealth Bank of Australia*[112] a Full Bench of the Commission considered the impact on the BOOT assessment of a reconciliation clause in an enterprise agreement. The Full Bench considered that several terms of the agreement may have the result that some employees would not be better off

[108] Ibid, [1]–[31].

[109] Ibid, [97]-[101]. See further the Full Bench's discussion about the proper application of sections 186(3) and 186(3A) at [86].

[110] Ibid, [96].

[111] Fair Work Act, section 186(2)(d).

[112] [2021] FWCFB 3635.

Fair Work Commission

overall if they were engaged in certain work patterns.[113] The reconciliation clause provided that at the end of each 6-month period, the employer would calculate whether employees were eligible for a 'top up' payment, which was to be made if the remuneration the employee would have received under the relevant modern award would have been greater than the remuneration the employee received under the agreement.

The Full Bench noted that in principle a reconciliation clause can assist the Commission to be satisfied that employees will be better off overall under an enterprise agreement than under the relevant award. However, the reconciliation clause provided for the top up payment only to equal any shortfall in payment in comparison to the award and so did not ensure that employees would be better off overall under the agreement as a result of the reconciliation.[114]

The employer offered an undertaking, by which the payment to affected employees would include the shortfall plus an additional 5%. The Full Bench stated:

> 'In our view, where an enterprise agreement contains a reconciliation process under which the employer undertakes to ensure that employees will be paid more than they would have earned under the award over a period, the Commission's consideration of whether the agreement passes the BOOT would take into account whether it is probable that employees will regularly work in ways that would attract the operation of the reconciliation provision and if so the margin by which the payment exceeds the award-based 'shortfall' and whether this is sufficient to outweigh the 'late payment detriment'. If an enterprise agreement does not have a reconciliation provision of course, there is no internal safety net. The existence of a realistic *possibility* of employees working in ways that would result in them receiving the same pay as, or less pay than, that prescribed by the award would lead the Commission to doubt whether it could be satisfied that the agreement passed the BOOT (depending on the other terms and conditions in the agreement and the award), and to seek appropriate undertakings. But the presence of an effective reconciliation provision means that an employee will always have more pay. The

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113 Ibid, [15].

114 Ibid, [21]–[23].

Fair Work
Commission

> concern is rather to weigh in the balance what we have broadly described as the 'late payment detriment'.'[115]

The Full Bench found that:

> 'if the shortfalls identified in various models were to materialise, even on a regular basis, the detriment would comfortably be outweighed by the operation of the employer-initiated reconciliation provision which confers an additional 5% payment on top of any shortfall'.[116]

The Full Bench found that employees would be better off overall under the agreement than they would have been under the award, taking into account its assessment of the various ways in which employees might undertake work under the terms of the agreement.[117]

4.4.2 Loaded rates

In *United Workers' Union v Hot Wok Food Makers Pty Ltd*[118] the UWU appealed approval of an enterprise agreement on several grounds, including that the Commission could not be satisfied that the agreement passed the BOOT. This was due to the effect of clauses which allowed employees to voluntarily elect not to receive penalty rates that they were entitled to under the relevant awards for weekend work, public holiday work, overtime work and weekday work between 7pm to 7am.[119] This arrangement could be characterised as a loaded rates agreement, whereby employees consented to certain working conditions in exchange for higher rates of pay.[120]

The Full Bench related a series of propositions from the *Loaded Rates Agreements* decision[121], noting that every existing and prospective award covered employee must be better off overall, and that analysis of a loaded rates agreement requires an examination of the practices and arrangements concerning the working of ordinary and overtime hours, taking into account common patterns of

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[115] Ibid, [80].
[116] Ibid, [87].
[117] Ibid, [87].
[118] [2022] FWCFB 191.
[119] Ibid, [60].
[120] Ibid, [117].
[121] *Loaded Rates Agreements* [2018] FWCFB 3610.

Fair Work Commission

working hours. The Full Bench considered that it was clear that employees of Hot Wok were very likely to undertake weekend and evening work, and would be engaged in shifts which attracted penalty rates.[122] The Commission's modelling demonstrated that employees working in this manner without receiving penalty rates would not be better off overall under the agreement, given the ordinary rates of pay in the agreement were only approximately 5% above the ordinary rates of pay in the award. The Full Bench found that the agreement did not pass the BOOT.[123]

4.4.3 Test time

In *Bunnings Group Limited*[124] the Retail and Fast Food Workers' Union Incorporated (RFFWU Inc) opposed an application for approval of an enterprise agreement on bases including that the agreement did not meet the BOOT requirement in section 186(2)(d) of the Fair Work Act.

For the purpose of the application of the BOOT, the 'test time' (the time at which the BOOT modern award comparison is to be made[125]) was the time at which the employer lodged its application for approval of the agreement, which was 19 June 2023. However, RFFWU Inc submitted that the Commission should assess the BOOT taking into account the increase to the rates of pay in the award of 5.75% effective from 1 July 2023 as a result of the *Annual Wage Review 2022-23 Decision* issued on 2 June 2023. RFFWU Inc noted that the agreement's commencement date was 13 November 2023 (assuming approval by 8 September) and submitted that the Commission should consider the value of award pay increases (including the 2023 increase which was known) with greater concern and weighting than it would ordinarily apply.[126]

The Full Bench stated that the Commission is required to apply the BOOT by comparing 2 scenarios:

> '*first*, if the relevant enterprise agreement applies to each award covered and prospective award covered employee at the test time, and *second*, if the relevant

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[122] [2022] FWCFB 191, [117]–[118].
[123] Ibid, [122]–[133].
[124] [2023] FWCFB 125.
[125] Fair Work Act, section 193(6).
[126] [2023] FWCFB 125, [8].

> modern award applies to these employees as at the test time. The BOOT is passed if the employees are better off overall under the first scenario than the second.'[127]

The Full Bench observed that the Commission has always proceeded on the basis that section 193(1) requires the BOOT comparison to be conducted by reference to the award terms as they are at the test time.[128] The approach suggested by RFFWU Inc would invite a speculative exercise with no support in the text of section 193.[129]

4.4.4 Non-inclusion of rates of pay

In *VIP Plastic Packaging Pty Ltd*[130] a Full Bench of the Commission considered an enterprise agreement lodged with the Commission for approval that did not include classifications or rates of pay. The classifications and rates of pay were in a separate document titled a 'wage schedule' lodged with the application. This wage schedule was referenced in the agreement but was not incorporated and so did not form part of the agreement. The Commission sought an undertaking from the employer that set out the specific rates of pay.

The employer initially declined to provide an undertaking that set out the classifications and rates of pay and opposed the wage rates and wage schedule being published with the agreement. The employer did offer an undertaking to pay employees covered by the agreement minimum wages and allowances as contained in the wage schedule.[131]

The Full Bench observed there was some doubt that such an undertaking would have the effect of incorporating the rates of pay as a term of the agreement, and that absent inclusion of rates of pay in the agreement it would not be open for the Commission to be satisfied that it passed the BOOT. Further, the Full Bench referred to the decision in *The Australian Workers' Union v Oji Foodservice Packaging Solutions (Aus) Pty Ltd*[132] (which found that wage rate could not be redacted from an approved agreement as published by the Commission) and noted that '[a]s with the effect of the

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[127] Ibid, [11].
[128] Ibid, [20].
[129] Ibid, [24]-[25].
[130] [2023] FWCFB 161.
[131] Ibid, [5].
[132] [2018] FWCFB 7501.

Fair Work Commission

redaction of rates in *Oji*, the non-inclusion of rates of pay in the Agreement before us would bear upon a 'central component' of the Agreement which would be of 'obvious importance to employees'.'[133] Omission of wage rates would also make it impossible for any interested party to form their own view as to whether an agreement passed the BOOT, and would not be consistent with the Commission's obligation under section 577(1)(c) to perform its functions in an open and transparent manner.[134]

The agreement was approved after the employer gave a revised undertaking setting out the classifications, rates of pay and allowances contained in the wage schedule.

4.5 Undertakings

If an application for approval of an enterprise agreement has been made and the Commission has a concern that the agreement does not meet the approval requirements in sections 186 and 187 of the Fair Work Act, the Commission may approve the agreement if it is satisfied that an undertaking from an employer meets the concern.[135] The Commission may only accept an undertaking if satisfied that the effect of doing so is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement.[136]

In *Construction, Forestry, Maritime, Mining, and Energy Union v Karijini Rail Pty Limited*[137] a Full Bench of the Commission upheld an appeal against the approval of an enterprise agreement 3 years previously, on the basis that the Commission at first instance erred in determining that the approval requirements in section 186(2)(a) and section 186(3) of the Fair Work Act were satisfied and by accepting 2 of the undertakings provided by the employer.[138] The Full Bench quashed the approval decision and redetermined the approval application. The Full Bench noted, based on the conclusions they reached in the appeal, that the agreement could not be approved without further undertakings that resolved their concerns in respect of section 186(2)(a) and section 186(3) of the Fair Work Act.[139]

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[133] [2023] FWCFB 161, [11].

[134] Ibid, [9]–[12].

[135] Fair Work Act, sections 190 and 191.

[136] Fair Work Act, section 190(3).

[137] [2021] FWCFB 4522.

[138] Ibid, [111].

[139] Ibid, [119].

Fair Work
Commission

The Full Bench did not allow the employer to provide new undertakings, noting that 'accepting new undertakings now to modify the terms of an agreement made so long ago would be a process lacking in legitimacy, particularly as the current … workforce … would appear to bear little resemblance to the workforce of two which made the Agreement'.[140]

4.6 Greenfields agreements

Greenfields agreements are enterprise agreements made by one or more employers and one or more employee organisations in relation to a genuine new enterprise (including a new business activity, project or undertaking) that the employers are establishing or propose to establish, where the employers have not yet employed any of the persons who will be necessary for the normal conduct of the enterprise and will be covered by the agreement.[141]

4.6.1 Genuine new enterprise

In *The Australian Workers' Union v Construction, Forestry, Maritime, Mining and Energy Union & Watpac Construction Pty Ltd*[142] a Full Bench of the Commission considered an appeal against approval of a greenfields agreement that covered marine and civil construction work and would grow the employer's service offering in this field. The AWU contended that the agreement was not a greenfields agreement, as it did not relate to a genuine new enterprise as Watpac already did some other civil construction work.[143]

The Full Bench considered the meaning of 'relates to a genuine new enterprise' in section 172(2)(b) of Fair Work Act. The Full Bench determined that there needs to be a 'direct, relevant, sufficient or material connection or relationship' [between the agreement and the genuine new enterprise], rather than one that is merely indirect or incidental.[144]

The Full Bench despite the demarcation of the new business venture in the view of the parties found:

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[140] Ibid, [120].

[141] Fair Work Act, sections 172(2)(b), 172(3)(b) and 172(4).

[142] [2022] FWCFB 85.

[143] Ibid, [3].

[144] Ibid, [42].

Fair Work
Commission

> ‘The Agreement does not relate to Watpac’s marine and civil construction enterprise that it is establishing because it does not have a sufficient material connection or relationship with the new enterprise. It is not concerned only with that business or activity but rather relates to the business or activity of civil construction, which includes the new enterprise, but that is merely a causal connection or relationship because that business or activity is civil construction. The Agreement relates to a much broader enterprise, that being civil construction which includes stadia construction and marine and civil construction. In our view, it is plainly contrary to the scheme in the Act for an agreement to be made as a greenfields agreement which will apply to employees in the establishing or proposed new enterprise and which extends to an existing part of the employer’s enterprise, or to other activities which are not part of the new enterprise.’[145]

The Full Bench held that the agreement was not a greenfields agreement within the meaning of section 172(b) of the Fair Work Act. The approval decision was quashed, and the approval application was dismissed.[146]

4.6.2 Section 182(4) greenfields agreements

In *Lofte Australia Pty Ltd*[147] the Commission dealt with an application for approval of a greenfields agreement covering port operations employees throughout Australia, that was said to have been made under section 182(4) of the Fair Work Act.

The Deputy President considered whether there had been ‘a notified negotiation period for the agreement’ for the purposes of section 182(4)(b). Under section 178B the employer must notify the relevant employee organisation that is a bargaining representative in writing of the notified negotiation period for the proposed agreement. In this matter, the employer had only given written notice to officials of the WA Branch of the Maritime Union of Australia (MUA), a division of the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU). The Commission considered the CFMMEU

[145] Ibid, [57].

[146] Ibid, [58]–[59].

[147] [2023] FWC 2178.

Fair Work Commission

rules and noted that officials of CFMMEU divisions only had authority to enter into agreements that affected members or potential members of the particular divisional branch, and that national officials had authority to enter into agreements that affected the members nationally.[148] As the agreement pertained to work that would be undertaken nationally, there had not been a notified negotiation period and the agreement had not been 'made' for the purposes of section 182(4).[149]

The Commission also considered whether on an overall basis, the agreement provided for pay and conditions that were consistent with the prevailing pay and conditions within the relevant industry for equivalent work, as required by section 187(6). The Commission concluded that the meaning of 'consistent with' should not be described as pay and conditions within a range or ballpark, but rather that the pay and conditions:

> 'should be relevantly consistent with the comparator in the sense that, on an overall basis, pay and conditions are congruent with, in keeping with, in accordance with, compatible with, or commensurate with, the prevailing (that is, the predominant and current) pay and conditions in the relevant industry for equivalent work. In short, the first should reflect the second.'[150]

The Commission considered the relevance of enterprise agreements that operate across a similar area and cover similar work, and determined that the pay and conditions of the proposed agreement were inferior to comparable instruments.[151] As sections 182(4)(b) and 187(6) of Fair Work Act were not met, the application was dismissed.

4.7 Procedural issues in relation to enterprise agreements

This section reports case law developments on the procedural aspects of approving and varying enterprise agreements.

[148] Ibid, [32].

[149] Ibid, [32]–[42].

[150] Ibid, [54].

[151] Ibid, [57]–[74].

Fair Work Commission

4.7.1 Incorrect version of an agreement lodged with the Commission

In *Yarra Valley Water Corporation v Australian Municipal, Administrative, Clerical and Services Union*[152] the applicant lodged with the Commission for approval a draft copy of an enterprise agreement which was different to the copy of the agreement that was voted on and approved by a majority of employees. In a decision at first instance, the Commission approved the draft version of the agreement.[153] The Commission was unable to vary or revoke the approval decision under the Fair Work Act as it was at the time, and consequently the applicant had to lodge an appeal against the approval decision on the basis that the agreement had not been made in accordance with section 182(1) of the Fair Work Act. The appeal was upheld[154] and the correct copy of the agreement was subsequently lodged with the Commission and approved.[155]

In *Victorian Hospitals' Industrial Association v Health Services Union*[156] the applicant lodged with the Commission for approval a version of the agreement that was affected by a 'computer glitch' which was not the agreement agreed upon by the parties. In a decision at first instance, the Commission approved this version of the agreement.[157] The approval decision was appealed on the basis that the agreement had not been made in accordance with section 182(1) of the Fair Work Act. On appeal the approval decision was quashed and the Full Bench also approved a subsequent application for approval of the correct document.[158]

As noted above, the SJBP Act introduced section 602A into the Fair Work Act with effect from 7 December 2022 to deal with circumstances in which an incorrect version of an agreement is lodged and approved by the Commission.

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[152] [2021] FWCFB 6006.

[153] *Yarra Valley Water Corporation* [2010] FWCA 5092.

[154] [2021] FWCFB 6006, [3].

[155] *Yarra Valley Water Corporation* [2021] FWCA 6226.

[156] [2022] FWCFB 239.

[157] *Victorian Hospitals' Industrial Association* [2022] FWCA 3966.

[158] [2022] FWCFB 239, [10]-[17].

Fair Work
Commission

4.7.2 Variations under section 218A

The SJBP Act inserted section 218A into the Fair Work Act with effect from 7 December 2022. Section 218A allows the Commission to vary an enterprise agreement to correct or amend an obvious error, defect or irregularity (whether in substance or form). Section 217 of the Fair Work Act allows the Commission to vary an enterprise agreement to remove an ambiguity or uncertainty.

In *Australian Federated Union of Locomotive Employees v Aurizon Operations Ltd; Application by Aurizon Operations Ltd*[159] a Full Bench of the Commission provided guidance on the distinction between sections 218A and 217, finding that:

> 'The enactment of s 218A in addition to the pre-existing power in s 217 to vary enterprise agreements indicates that it was intended to have a sphere of operation separate to, and distinct from s 217. Therefore, s 218A is not to be construed or applied on the basis that 'an obvious error, defect or irregularity' would encompass the type of ambiguity or uncertainty (as discussed in *Bianco Walling*) that is correctable under s 217. Rather, the text of s 218A(1), including its reflection of the language of s 602, the established construction of s 602 as an analogue of the slip rule and the [Secure Jobs, Better Pay Revised Explanatory Memorandum]'s identification of the statutory purpose of s 218A all indicate that the power in s 218A to vary an enterprise agreement to correct or amend an obvious error, defect or irregularity is confined to the remediation of clearly apparent and unintentional mistakes in circumstances not susceptible to controversy.'[160]

The Full Bench dismissed the employer's application under section 218A, as it sought to alter the meaning of a provision of the agreement. The employer's error was 'its own error in the bargaining process, in not anticipating the consequences of the provision it agreed to'.[161] The Full Bench also observed that the employer's application could readily have been made under section 217, and that unlike section 218A, section 217 does not allow the Commission to act on its own initiative.[162]

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[159] [2023] FWCFB 193.

[160] Ibid, [76].

[161] Ibid, [77].

[162] Ibid, [79].

Fair Work Commission

4.7.3 Application forms and associated declarations

Applications for approval of enterprise agreements must be made using certain forms, declarations and associated supporting documentation. The decisions in this section emphasise the importance of this material.

In *United Workers' Union v Hot Wok Food Makers Pty Ltd*[163] the Full Bench found that the form F17 declaration submitted by the employer in support of the approval application was false and misleading in a number of respects[164] and noted the importance of the F17 declaration in agreement approval applications:

> 'the Form F17 declaration and any documents accompanying it are, in most cases, the principal or even sole source of information upon which the Commission relies in determining whether an enterprise agreement meets the approval criteria in ss 186 and 187. The process for considering applications for the approval of enterprise agreements would break down entirely if, in every case, the Commission was required to "go behind" and investigate for itself the truth of the matters asserted in such declarations.'[165]

Accordingly, the Full Bench indicated that it would request that the General Manager of the Commission consider whether the declarant's conduct in respect of his F17 declaration should be referred to the Australian Federal Police.[166]

Similarly, in *Appeal by The Australian Workers' Union*[167] the Full Bench expressed concern about material provided in the agreement approval application, noting:

> 'although we have found appealable error in the Deputy President's decision, we have only done so on the basis of the new evidence adduced in the appeal, which disclosed the true picture concerning the circumstances in which the agreement was

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[163] [2023] FWCFB 4.
[164] Ibid, [61].
[165] Ibid, [61].
[166] Ibid, [61].
[167] [2023] FWCFB 157.

Fair Work
Commission

made. Not only did the Deputy President not have the benefit of this evidence but he was also, we consider, misled by the contents of the Form F17 declaration which accompanied the application for approval of the Agreement and the lack of candour on the part of Workforce Logistics in prosecuting its application.'[168]

The Full Bench considered the circumstances in which the agreement was made to merit further inquiry and referred various matters to the General Manager 'for further inquiry in order to ascertain whether there has been any wider-scale abuse of the enterprise agreement-making facility in the FW Act'.[169]

4.8 Protected industrial action

The Full Bench of the Commission in *National Tertiary Education Industry Union v Curtin University*[170] observed that the Commission's power to make a protected action ballot order is not discretionary. Section 443(1) imposes on the Commission a duty to make the order if the two conditions in the provision are met. At first instance the employer had contended that the first of these conditions was not met, because some of the questions proposed to be put to employees did not specify the nature of the proposed industrial action, as required by section 437(3)(b).

The Full Bench affirmed the approach to the construction of section 437(3)(b) taken in *John Holland* and rejected the approach taken in *NUW – NSW Branch v FreshExchange Pty Ltd*.[171] The Full Bench held that if the application specifies a question or questions that are capable of being answered 'yes' or 'no' by the balloted employees, which proposes action of an identified character, kind or sort capable of constituting industrial action within the meaning of section 19(1), it will comply with the requirement of section 437(3)(b).[172]

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[168] Ibid, [89].

[169] Ibid, [90].

[170] [2022] FWCFB 204.

[171] [2022] FWCFB 204, [53], citing *NUW - NSW Branch v FreshExchange Ltd* [2009] FWA 221 and *John Holland v AMWU* [2010] FWAFB 526, [19]. See further the Full Bench's discussion at [41]–[44] about *John Holland v AMWU* [2010] FWAFB 526.

[172] [2022] FWCFB 204, [53].

Fair Work
Commission

The Full Bench did not consider the Commission to have a general discretion to determine the questions to be included in the order or to exclude valid questions, independent of what has been applied for.[173] However, the Full Bench also clarified that the Commission is not compelled in making a protected action ballot order to reproduce the questions in precisely the same terms as applied for and adjustments can be made to more clearly express what the applicant proposes. In rare cases, a proposed question might be so lacking in meaning that it is incapable of being answered and might be excluded if the drafting could not be rectified.[174] The Full Bench also noted that if the ambiguity of a question were to be a test, it is to be assessed objectively.[175]

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Nilsen (NSW) Pty Ltd*[176] the Commission considered the impact of section 448A(2) on the Commission's power to make a protected action ballot order. Section 448A relevantly requires the Commission, if it has made a protected action ballot order, to order the bargaining representatives to attend a conference for the purposes of mediation or conciliation at a specified time or times during a specified period. Section 448A(2) requires that the specified period end on or before the day specified in the protected action ballot order as the day by which voting in the ballot closes.

The CEPU submitted that in specifying a date by which voting is to close that will enable the ballot to be conducted 'as expeditiously as practicable' as required by section 443(3A), the Commission was not permitted to take into account the time it may take to arrange a conference under section 448A.[177] The Full Bench held that in discharging its obligation under section 443(3A) the Commission may have regard to the broader statutory context. The desire for a bargaining representative to access protected industrial action in short time frames must be balanced against the legislative intent behind section 448A and the practical requirements of arranging and conducting a conference at which all bargaining representatives are able to fully participate and the Commission is able to deploy a range of dispute

[173] [2022] FWCFB 204, [54].
[174] Ibid, [55].
[175] Ibid, [58].
[176] [2023] FWCFB 134.
[177] Ibid, [55].

Fair Work
Commission

resolution techniques to assist in reaching agreement or narrowing issues in dispute consistent with sections 448A(5)–448A(6).[178]

In *Australian Manufacturing Workers' Union v McCain Foods (Aust) Pty Ltd*[179] a Full Bench of the Commission considered the meaning of 'industrial action' as defined in section 19(1) of the Fair Work Act, for the purposes of the definition of 'employer response action' in section 411. The majority of the Full Bench held that:

> '*First*, the definition of the expression *"industrial action"* in s 19(1) makes it clear that, for the purpose of the FW Act, it is constituted by the prescribed types of *action* taken by *employees or employers*. It does not include the organisation of such action, or the circumstance where such action is merely threatened, impending or probably [sic]. Further, it cannot within the scope of the definition be taken by a third party who is not, in relation to the relevant work or employment, the employer or an employee. Thus, the organisation of industrial action by a registered organisation acting in the capacity of bargaining representative does not fall within the s 19(1) definition and cannot itself constitute *"industrial action"* for the purpose of the FW Act, including for the purpose of s 411.'[180]

4.9 Scope orders

In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Ors v Utilities Management Pty Ltd*[181] a Full Bench of the Commission observed that judgement exercised by the Commission in making scope orders was discretionary in nature.[182] Under section 238(1) of the Fair Work Act a bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement) may apply to the Commission for a scope order. Under section 238(4) the Commission may make a scope order if it is satisfied:

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[178] Ibid, [79].

[179] [2021] FWCFB 4808.

[180] Ibid, [37].

[181] [2022] FWCFB 42.

[182] Ibid, [61], citing *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47, [19]-[20].

Fair Work Commission

- that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements
- that making the order will promote the fair and efficient conduct of bargaining
- that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen, and
- it is reasonable in all the circumstances to make the order.

The Full Bench observed that, aside from section 238(4A), section 238 does not prescribe the relevant matters to be taken into account in the discretionary decision making process, so such matters may be gleaned from the text of the relevant provisions and the relevant objects of the legislation.[183] The Full Bench observed that an application for a scope order may be made if the bargaining representative has concerns that bargaining is not proceeding 'efficiently or fairly' and not necessarily both.[184]

The Full Bench found that the Commission's role in making a scope order is:

> 'to determine whether the remedy of a scope order should be granted in accordance with requirements of the section in response to the concerns of a bargaining representative that bargaining for a proposed agreement is not proceeding efficiently *or* fairly. The consideration as to whether these concerns are objectively justified is necessarily central to the Commission's consideration … There is no requirement for a finding of "general unfairness" in order for a scope order to be made.'[185]

In a further application involving the same parties,[186] the Commission considered the effect of a scope order on the conduct of bargaining. It found that bargaining by the employer inside the singular process required by the scope order, for separate scopes and separate agreements was not of itself inconsistent with the scope order or a breach of good faith bargaining requirements (although it would

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[183] [2022] FWCFB 42, [62].

[184] Ibid, [64].

[185] Ibid, [101].

[186] *Application by Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Application by the Australian Municipal, Administrative, Clerical and Services Union v Utilities Management Pty Ltd* [2022] FWC 1981.

Fair Work Commission

have been if the employer had done so to the exclusion of bargaining for an agreement with the scope the subject of the scope order).[187]

The Commission observed that 'the scope of an agreement is a term of the agreement' that must be determined by those who make the agreement. A scope order 'compels the bargaining process to be conducted by reference to that order' but does not make the terms of an agreement, and good faith bargaining requirements do not preclude the employer from advocating its preferred position.[188] However, while in the circumstances it was not capricious for the employer (without the agreement of any other bargaining representative) to put to an employee vote a replacement agreement on terms different to the scope order, it was unfair and a breach of good faith bargaining obligations in that it undermined collective bargaining rights.[189]

4.10 Termination and suspension of industrial action

Section 424(1) of the Fair Work Act requires the Commission to make an order suspending or terminating protected industrial action that is being engaged in or is threatened, impending or probable, if the Commission is satisfied the industrial action threatens to:

- endanger the life, personal safety or health, or the welfare, of the population or part of it, or
- to cause significant damage to the Australian economy or an important part of it.

A Full Bench of the Commission in *Application on Commission's own initiative RE Svitzer Australia Pty Ltd*[190] observed that the terms 'endanger' and 'welfare' in section 424(1) bear their ordinary meaning and it is a matter for the Commission in each case to determine whether or not is satisfied that industrial action is threatening to endanger the welfare of the population or a part of it.[191] Being satisfied that the employer's protected industrial action met both limbs of section 424(1), the Full Bench was required to make an order suspending or terminating the industrial action. The Full Bench noted that while 'it has been recognised that employer response action may be used in an opportunistic way to attract the operation of section 424(1) and thereby bring industrial action to an

[187] Ibid, [134]–[136].
[188] Ibid, [130]–[132].
[189] Ibid, [190].
[190] [2022] FWCFB 213.
[191] Ibid, [29].

Fair Work
Commission

end,' it did not accept that section 424(1) is to be construed and applied as a legitimate avenue for any bargaining representative to bring about the end of the bargaining process.[192] Considering that the parties should not be deprived of their collective bargaining rights in circumstances where there was still some basis to think they could reach agreement or engage in consent arbitration of outstanding matters under section 240, the Full Bench suspended the employer's protected industrial action for 6 months.[193]

4.11 Supported bargaining authorisations

In *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia*[194] a Full Bench of the Commission set out some general propositions about the supported bargaining scheme in Division 9 of Part 2-4 of the Fair Work Act.

The Full Bench observed that the supported bargaining scheme is a modification of the previous low paid bargaining scheme, which is intended to be more accessible and widely used.[195]

The Full Bench considered in detail section 243 which sets out the circumstances in which the Commission is required to make a supported bargaining authorisation.

The Full Bench observed that 'prevailing' in section 243(1)(b)(i) is given its ordinary meaning—that is 'predominant' or 'generally current'—and this assessment would extend beyond the pay and conditions of the employees to whom the authorisation would apply.[196] The Full Bench distinguished 'low rates of pay' in this section from 'low paid' in the previous scheme, and observed that 'low rates of pay' refers to the amount an employee is paid for each defined period of working time, whereas 'low paid' refers to the earnings of employees generally. The Full Bench considered that 'low rates of pay' will prevail in an industry or sector if employees are 'predominantly paid at or close to the award rates of pay for their classification, since this is the lowest rate legally available to pay'.[197]

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[192] Ibid, [43].
[193] Ibid, [44]–[45].
[194] [2023] FWCFB 176.
[195] Ibid, [20].
[196] Ibid, [30].
[197] Ibid, [31]–[32].

Fair Work Commission

In section 243(1)(b)(ii) the expression ‘common interests’ is of wide import and extends to any ‘joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers’.[198] Such ‘common interests must be ‘clearly identifiable’, that is, plainly discernible or recognisable, but need not be self-evident’.[199]

The Full Bench observed that section 243(1)(b)(iii) requires a somewhat speculative or predictive assessment, as the parties’ choice of bargaining representatives may not be known at the time the Commission considers an application for an authorisation and because of the scope of the parties’ capacity to choose and change their bargaining representatives under section 176 of the Fair Work Act. The assessment might be informed by any past history of bargaining, representation at the hearing of the authorisation application, and any sameness or diversity of views amongst employees and employers concerning the prospect of multi-employer bargaining. However, the Full Bench did not consider the prospect of an agreement being reached if an authorisation is made to be a significantly relevant consideration, as section 243(1)(b)(iii) is concerned with the bargaining process, not the outcome.[200]

Section 243(1)(b)(iv)—which allows the Commission to have regard to any other matters it considers appropriate—gives the Commission a broad discretion as to the relevance and weight of other matters to be taken into account. The applicable objects of the Fair Work Act in sections 3, 171 and 241, and the circumstances of the particular case, will guide the Commission in identifying those matters.[201]

4.12 Single interest employer authorisations

In *Independent Education Union of Australia v Catholic Education Western Australia Limited and others*[202] a Full Bench of the Commission considered an application for a single interest employer authorisation made after the commencement of the SJBP Act amendments.

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[198] Ibid, [34].
[199] Ibid, [34].
[200] Ibid, [36].
[201] Ibid, [37].
[202] [2023] FWCFB 177.

The Full Bench noted that in this case the pathway to making an authorisation was relatively straightforward as the employers consented to the application and each had 50 or more employees. Consequently, it was unnecessary to consider the proper construction and application of many of the new provisions of section 249.[203] This application was notable as being the first of its kind by a bargaining representative of employees, as is now permitted by section 248(1)(b). The Full Bench held that the approach to 'common interests' used in *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia*[204] applied to single interest authorisations under the new provisions.[205]

4.13 Industrial action related workplace determinations

In *Australian Rail, Tram and Bus Industry Union, Australian Municipal, Administrative, Clerical and Services Union v Australian Rail Track Corporation Limited*[206] a Full Bench of the Commission considered an application for an industrial action related workplace determination under section 266(1) of the Fair Work Act, in circumstances where an enterprise agreement covering the applicant unions had been made and approved during a post-negotiation period following the termination of protected industrial action. The applicants argued that the Commission must make a workplace determination because the bargaining representatives had not settled all the matters at issue during bargaining for the agreement.

The majority of the Full Bench considered differences in the wording between section 182(1) of the Fair Work Act (which defines when an agreement is 'made') and section 266(1)(c) (which specifies as a condition for the Commission to make a determination that the 'bargaining representatives for the agreement have not settled all of the matters that were at issue'). The majority considered that use of the term 'bargaining representative' in section 266(1) was significant as 'it was open to the legislature to use different language if the intention was that a determination could not be made by the Commission where employees have made an agreement'.[207] The majority also considered that the term 'settled' in section 266(1)(c) was 'deliberately used to signify how agreement is reached inter

[203] Ibid, [23].

[204] *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176, [34].

[205] [2023] FWCFB 177, [31]–[32].

[206] [2024] FWCFB 152.

[207] Ibid, [77].

partes, whereas a reference to an agreement being "made", which is language used in section 182 to define when an agreement is reached between an employer and the relevant employees, has not been included'.[208] The majority of the Full Bench did not consider, on the evidence, that the 'making' of the agreement had the effect of 'settling all of the matters that were at issue between the bargaining representatives during bargaining' for the purposes of section 266(1)(c). Consequently, the Commission was required to make a workplace determination.[209]

The presiding Member of the Full Bench dissented, observing that section 266 cannot be divorced from the bargaining process, and when an agreement was made, bargaining for that agreement necessarily ceased, even though some of the bargaining representatives were not satisfied with the agreement made.[210] At the time of writing, the matter was before the Federal Court of Australia for judicial review.[211]

4.14 Intractable bargaining declarations and intractable bargaining workplace determinations

In *United Firefighters' Union of Australia v Fire Rescue Victoria*[212] a Full Bench of the Commission considered the intractable bargaining provisions introduced by the SJBP Act. Section 235 of the Fair Work Act sets out the circumstances in which the Commission may make an intractable bargaining declaration.

The matters in sections 235(1)(a) and 235(1)(c) are essentially issues of fact, whereas the matters in section 235(2) require 'an evaluative judgement of a discretionary nature', with a wider discretion in respect of the matters in sections 235(2)(b) and 235(2)(c) as they are matters of 'opinion or policy or taste'.[213] The Full Bench observed that the requirement in section 235(2)(b) (that the Commission must be satisfied there is no reasonable prospect of agreement being reached if it does not make the

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[208] Ibid, [77].
[209] Ibid, [78].
[210] Ibid, [4].
[211] *Australian Rail Track Corporation Limited v Australian Rail, Tram and Bus Industry Union & Ors* NSD384/2024.
[212] [2023] FWCFB 180.
[213] Ibid, [27], citing *Buck v Bavone* [1976] HCA 24 [118]–[119].

declaration) requires an 'evaluative judgement that it is rationally improbable that an agreement will be reached'.[214]

The requirement in section 235(2)(c) (that it is reasonable in all the circumstances to make the declaration, taking into account the views of all of the bargaining representatives) also requires an evaluative judgement, involving an assessment of what is 'agreeable to reason or sound judgement' in the context of the relevant matters and conditions accompanying the case.[215] The Explanatory Memorandum gives examples of potentially relevant matters. The Full Bench observed that the views of bargaining representatives 'must be treated as a matter of significance, but not necessarily a determinative consideration, in the assessment of whether it is reasonable in all the circumstances to make the determination sought'.[216]

The Full Bench also observed that if the Commission is satisfied as to each of the matters in sections 235(1)(a)–235(1)(c), it retains a residual discretion as to whether to make a declaration, although it is difficult to identify what discretionary matters might remain for consideration if the Commission is satisfied as to the criteria in section 235(2).[217] The Full Bench was satisfied that it was reasonable in all the circumstances to make the declaration, and specified a post-declaration negotiating period of 2 weeks because of its concern as to the 'radical difference' between the parties as to what constituted the agreed terms and the matters still in issue between them.[218]

In *United Firefighters' Union of Australia v Fire Rescue Victoria T/A FRV*[219] a differently constituted Full Bench held a hearing to decide which terms of the proposed agreement constituted 'agreed terms' as defined in section 274(3) of the Fair Work Act, for the purpose of section 270(2). The Full Bench observed that the elements to section 274(3) included that: what must be 'agreed' is that there be a 'term' which 'should be included in the agreement'; that agreement must be between the bargaining

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[214] Ibid, [29].
[215] Ibid, [30], citing *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105, [17].
[216] Ibid, [30]–[31].
[217] Ibid, [32].
[218] Ibid, [42]–[48].
[219] [2024] FWCFB 43.

Fair Work Commission

representatives, and that agreement must exist at a defined point in time—the end of the post-declaration negotiating period if there is one, or if there is not, the time the declaration was made.[220]

With no legislative definition of the term 'agreed', the Full Bench considered the ordinary meaning should apply. To have 'agreed' for the purpose of section 274 does not require formal agreement necessary for contract law, and accords with judicial consideration of the looser forms of agreement 'arrangement' or understanding' as used in the *Competition and Consumer Act 2010* (Cth).[221]

The Full Bench stated that where a party has genuinely reserved its position on a term or the entire agreement 'to the effect that matters are only agreed 'in principle' or are 'subject to' a satisfactory overall package being determined', that is 'strongly indicative' that those matters are not 'agreed' for the purpose of section 274(3). However, 'ritual incantation' of words of qualification such as 'in principle' may not of itself preclude a term being 'agreed' per section 274(3), as the search is for agreement 'in substance not form' as determined on the evidence.[222] The wording 'should be included in the agreement' in section 274(3) directs attention to the potential final form of any agreement.[223] A party that conditionally states that certain terms should be included in an agreement has not necessarily agreed, as factual reality, that those terms should be included in the agreement. A genuine conditional reservation is inconsistent with a term being agreed for the purposes of section 274(3).[224] In circumstances where, on the evidence, the union was aware that the employer was bound by the Victorian Government's wages policy and the employer had made clear statements to that effect, the Full Bench found that there were no 'agreed terms' for the proposed enterprise agreement.[225]

The union has sought judicial review of the Full Bench's decision. At the time of writing, the case has been heard by the Federal Court and the Court's decision is reserved.

In *Ventia Australia Pty Ltd v United Firefighters' Union of Australia*[226] a union contested an employer's application for an intractable bargaining declaration. The Commission considered whether there was

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[220] Ibid, [108].
[221] Ibid, [140]–[142].
[222] Ibid, [147]–[149].
[223] Ibid, [155].
[224] Ibid, [157].
[225] Ibid, [168]–[175].
[226] [2023] FWC 3041.

Fair Work
Commission

'no reasonable prospects of agreement being reached' if the declaration was not made, as required by section 235(2)(b) of the Fair Work Act. The Commission applied the approach in *United Firefighters' Union of Australia v Fire Rescue Victoria*[227], adding that each case must be considered in 'its own circumstances'.[228]

When all of the circumstances were taken into account, the Commission was not satisfied there was no reasonable prospect of agreement being reached if the Commission did not make the declaration sought, and so the Commission was obliged to dismiss the application. The parties were instead encouraged to return to the Commission for further assisted bargaining by way of a section 240 application.[229]

4.15 Majority support determinations

Section 237 of the Fair Work Act sets out the circumstances in which the Commission must make a majority support declaration in relation a proposed single-enterprise agreement. In *Retail and Fast Food Workers Union Incorporated*[230] the Commission considered the requirement in section 237(2)(a) (that the Commission be satisfied that a majority of employees employed by the employer at a time determined by the Commission and who will be covered by the proposed agreement, want to bargain). The enterprise agreement proposed by the applicant in this case would cover most store-based employees of Coles Supermarkets Australia Pty Ltd (around 103 600 employees).

The applicant submitted that the Commission should order an electronic ballot of the relevant employees to establish whether a majority want to bargain, and the Commission should be persuaded to do this because 19 written petitions and an online petition of over 2 100 employees produced by the applicant underscored a 'reasonable hypothesis' that a majority of employees sought to bargain.[231]

The Commission observed that although the applicant for a majority support determination is not *required* to provide evidence of majority support, that is the orthodox approach. As stated by a Full

[227] [2023] FWCFB 180.
[228] [2023] FWC 3041, [84].
[229] Ibid, [106]–[109].
[230] [2021] FWC 3068.
[231] Ibid, [11].

Fair Work Commission

Bench there is 'force in the proposition that an application under s 236 is for a determination that majority support exists, not a speculative investigation into whether it exists.'[232] The petitions did not establish majority support for bargaining, as at best, they indicated that a small sample of a significantly larger group of employees that would be covered by the proposed agreement wanted to bargain. Further, the employer was a large company with an employee turnover of around 15% per year, so that the composition of relevant employees and those petitioned would have changed during the period in which the petitions were gathered and since then.[233] The Commission found that the applicant had not established even a prima facie case that a majority of relevant employees wanted to bargain for the proposed agreement, and that the particular circumstances of the case did not justify the Commission ordering of a ballot to establish whether or not the applicant could meet the requirement in section 237(2)(a).[234]

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[232] Ibid, [13], citing *INPEX Australia Pty Ltd v The Australian Workers' Union* [2020] FWCFB 5321 [11].

[233] Ibid, [14].

[234] Ibid, [16]–[18].

Fair Work
Commission

5. Data relating to enterprise bargaining

5.1 Bargaining applications

The Commission retains data on the number of applications made by parties under the bargaining provisions in the Fair Work Act. Table 1 reports on the number of bargaining applications for selected matter types lodged with the Commission during the reporting period.

There were 1019 bargaining applications made during the current reporting period, representing an average of around 28 applications per month. The number of applications increased over the reporting period, reaching a high of 381 in 2023–24 (Table 1).

The majority of these applications over the period were to deal with a bargaining dispute. Most of the remaining applications were for a majority support determination or a bargaining order.

Table 1: Selected bargaining applications, number of lodgments, 2021–24

Type of application	2021–22	2022–23	2023–24	Total
s.229 - Application for a bargaining order	70	60	70	**200**
s.234 - Application for an intractable bargaining declaration*	–	1	11	**12**
s.236 - Application for a majority support determination	97	98	72	**267**
s.238 - Application for a scope order	9	5	7	**21**
s.240 - Application to deal with a bargaining dispute	117	160	203	**480**
s.240A(1) - Application for a voting request order for a proposed multi-enterprise agreement*	–	0	0	**0**
s.242 - Application for the FWC's approval of a supported bargaining authorisation*	–	1	2	**3**

Type of application	2021–22	2022–23	2023–24	Total
s.248 - Application for a single interest employer authorisation	7	8	13	**28**
s.269 - Bargaining related workplace determination	0	0	0	**0**
s.468A - Application for an eligible protected ballot agent	0	5	3	**8**
Total	**300**	**338**	**381**	**1019**

Note: *Types of applications available under *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. 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 totals in Tables 2 and 3.

Source: Fair Work Commission.

There were 995 bargaining applications for these selected matter types finalised over the period. The trend in finalisations during the period followed a similar pattern to lodgments, growing from 279 to 368 or around 32 per cent (Table 2).

Table 2: Selected bargaining matters, number of finalisations by application type, 2021–24

Type of application	2021–22	2022–23	2023–24	Total
s.229 - Application for a bargaining order	63	71	67	**201**
s.234 - Application for an intractable bargaining declaration*	–	0	7	**7**
s.236 - Application for a majority support determination	91	109	73	**273**
s.238 - Application for a scope order	12	7	5	**24**
s.240 - Application to deal with a bargaining dispute	106	150	200	**456**
s.240A(1) - Application for a voting request order for a proposed multi-enterprise agreement*	–	0	0	**0**
s.242 - Application for the FWC's approval of a supported bargaining authorisation*	–	0	1	**1**

Fair Work
Commission

Type of application	2021–22	2022–23	2023–24	Total
s.248 - Application for a single interest employer authorisation	7	8	11	**26**
s.269 - Bargaining related workplace determination	0	0	0	**0**
s.468A - Application for an eligible protected ballot agent	0	3	4	**7**
Total	**279**	**348**	**368**	**995**

Note: *Types of applications available under *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. Applications finalised reflect the number of applications finalised within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the totals in Tables 2 and 3. 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

5.2 Single-interest employer authorisation

A single-interest employer authorisation allows two or more employers to bargain for a single-enterprise agreement.[235] The employers must have genuinely agreed to bargain together and must carry on similar business activities under a franchise. Table 1 shows that 28 single interest employer authorisation application lodgments were made over the reporting period, while 26 finalisations were made (Table 2).

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.[236] Tables 1 and 2 show that during the reporting period, 21 lodgments and 24 finalisations for scope orders were made, respectively.

[235] Fair Work Act, s.248, or the employers must be specified in a Ministerial declaration made under 2.247.

[236] Fair Work Act, s.238.

Fair Work Commission

5.4 Bargaining disputes

A bargaining representative may apply to the Commission to deal with a bargaining dispute.[237] 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, or by arbitrating with the agreement of the parties.[238]

The majority of bargaining applications lodged over the period were to deal with a bargaining dispute, growing each year to be 73.5 per cent higher in 2023–24 than in 2021–22 (Table 1).

5.5 Protected action ballot orders

Table 3 shows the number of applications made for protected action ballot orders and related orders. There were 3233 applications for these orders over the reporting period. The number of lodgments grew by 17 per cent between 2021–22 and 2023–24. This growth was driven by an expansion in the more common application types (s.437 and s.459).[239]

Table 3: Protected action ballot orders and related matters, lodgments, 2021–24

Type of application	2021–22	2022–23	2023–24	Total
s.437 – Application for a protected action ballot order	653	771	742	2166
s.447 – Application for variation of a protected action ballot order	31	28	20	79
s.448 – Application for revocation of a protected action ballot order	45	59	29	133
s.459 – Application to extend the 30-day period in which industrial action is authorised by protected action ballot	246	259	350	855
Total	**975**	**1117**	**1141**	**3233**

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

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

[239] 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.

Fair Work Commission

Note: Data presented here may differ from the Commission's 2021–22 and 2022–23 annual reports reflecting revisions to matters in the case management system.

Source: Fair Work Commission.

The results in Table 4 highlight the change in the method of finalisation due to legislative changes introduced by the SJBP Act which took effect on 6 June 2023 and altered how protected action ballot orders are dealt with.

Prior to 6 June 2023, applications for protected action ballot orders were finalised[240] once the Commission issued the ballot order (under s.443). From 6 June 2023, the Commission is required to conduct a mandatory conference involving all parties to the application, after issuing the ballot order. Therefore, the issuing of the ballot order is now only an interim step in the application and the finalisation occurs after the mandatory conference has been conducted (s.448).

Table 4: Protected action ballot orders and related matters, finalisations, 2021–24

Type of application and method of finalisation	2021–22	2022–23	2023–24	Total
s.437 – Application for a protected action ballot order				
Application dismissed (s.587)	1	0	1	2
Application withdrawn	26	37	51	114
Ballot order issued (s.443)	627	676	0	1303
Ballot order not issued (s.443)	3	4	2	9
Ballot order not required: matter concluded	1	0	2	3
Conference conducted (s.448) - matter closed	0	15	668	683
Ballot order revoked before conference (s.448)	0	0	15	15
Extension granted (s.459)	0	0	1	1
Total	**658**	**732**	**740**	**2130**

[240] 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.

Fair Work
Commission

Type of application and method of finalisation	2021–22	2022–23	2023–24	Total
s.447 – Application for variation of protected action ballot order				
Application withdrawn	3	3	2	8
Ballot order issued (s.443)	2	0	0	2
Ballot order varied (s.447)	30	25	18	73
Total	**35**	**28**	**20**	**83**
s.448 – Application for revocation of protected action ballot order				
Application withdrawn	0	1	2	3
Ballot order revoked (s.448)	41	57	27	125
Ballot order issued (s.443)	3	1	0	4
Application dismissed (s.587)	1	0	0	1
Total	**45**	**59**	**29**	**133**
s.459 – Application to extend the 30-day period in which industrial action is authorised by protected action ballot				
Application withdrawn	7	7	3	17
Extension granted (s.459)	225	245	343	813
Conference conducted (s.448) - matter closed	0	0	2	2
Extension not required: matter concluded	0	1	1	2
PABO determined	11	8	0	19
Total	**243**	**261**	**349**	**853**

Source: Fair Work Commission

Fair Work
Commission

6. Data relating to enterprise agreements and wage outcomes

6.1 Use of model terms in enterprise agreements

Table 5 shows the incidence of the use of flexibility terms in enterprise agreements over the last two reporting periods. Between 2018–21 and 2021–24, the share of enterprise agreements using a different flexibility term to the model flexibility term declined, though was still remaining at around half of all enterprise agreements. In contrast, there was a higher share of enterprise agreements using the model flexibility term or a term from a Commission member's decision that incorporates the model flexibility term.

Table 5: Types of flexibility terms in enterprise agreements, 1 July 2018–30 June 2024, per cent of approved enterprise agreements

Type of flexibility term	2018–21 (%)	2021–24 (%)
Model flexibility term: the flexibility term is the model term	32.7	34.1
Model flexibility term incorporated: the Commission Member's decision incorporates the model flexibility term into the enterprise agreement	10.4	13.0
No flexibility clause: model flexibility term taken to be a term of the enterprise agreement	3.6	2.7
Flexibility – specific: the flexibility term differs from the model flexibility term, and specifies which term can be varied	51.5	48.4
Flexibility – general: the flexibility term allows any term of the enterprise agreement to be varied	2.3	2.3

Note: Proportions sum to more than 100 as a small number of agreements have multiple flexibility terms.

Source: Department of Employment and Workplace Relations, Workplace Agreements Database, June quarter 2024; Furlong M (2021), General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth): 2018–2021, November 2021, Table 4.1.

Fair Work
Commission

6.2 Agreement approval applications

Data on lodgments and finalisations of agreement approval applications from the Commission's administrative database and data from DEWR's WAD on enterprise agreements approved are presented in this section. Differences may arise between the data sources due to revisions made over time.

6.2.1 Lodgments and finalisations

Table 6 shows the number of enterprise agreements that were lodged for approval and subsequently finalised by the Commission for each year between 1 July 2021 and 30 June 2024 based on data from the Commission's case management system. In total, 13 476 enterprise agreements were lodged for approval and 13 384 were finalised. The number of lodgments for approval declined from 2021–22 to 2022–23 before rising to 2023–24 at 4790. The number of finalisations also fell between 2021–22 and 2022–23 before increasing to 4723 in 2023–24. The number of lodgments for approval for both greenfields and multi-enterprise agreements declined between 2021–22 and 2023–24.

Appendix C lists the number of enterprise agreements lodged by industry during the current reporting period.

Fair Work Commission

Table 6: Enterprise agreements, lodgments and approvals, 2021–22 to 2023–24

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
2021–22				
Lodged	**4082**	**392**	**41**	**4515**
Finalised				
Approved (s.186)	1964	312	16	2292
Approved (with undertakings – s.190)	2001	72	17	2090
Approved (exceptional circumstances – s.189)	0	0	0	0
Not approved	18	1	0	19
Application withdrawn	91	11	3	105
Application dismissed (s.587)	1	1	0	2
Application discontinued	18	0	0	18
Total finalised	**4093**	**397**	**36**	**4526**
2022–23				
Lodged	**3857**	**280**	**34**	**4171**
Finalised				
Approved (s.186)	1647	210	7	1864
Approved (with undertakings – s.190)	2070	45	20	2135
Approved (exceptional circumstances – s.189)	1	0	0	1
Agreement approved with undertakings and amendments (s.190 & s.191A)	1	0	0	1
Agreement approved with amendments (s.191A)	1	0	0	1
Referred to another matter	1	0	0	1
Not approved	15	1	0	16
Application withdrawn	116	17	6	139

Fair Work Commission

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Application dismissed (s.587)	3	0	0	3
Total finalised	**3855**	**273**	**33**	**4161**
2023–24				
Lodged	**4464**	**296**	**30**	**4790**
Finalised				
Approved (s.186)	2249	223	9	2481
Approved (with undertakings – s.190)	1965	63	22	2050
Approved (exceptional circumstances – s.189)	0	0	0	0
Agreement approved with undertakings and amendments (s.190 & s.191A)	15	1	0	16
Agreement approved with amendments (s.191A)	18	2	0	20
Referred to another matter	3	0	0	3
Not approved	30	1	1	32
Application withdrawn	145	12	3	160
Application dismissed (s.587)	11	0	0	11
Total finalised	**4436**	**302**	**35**	**4773**

Note: Data presented here may differ from the Commission's 2021–22 and 2022–23 annual reports reflecting revisions to matters in the case management system. Data in totals do not include two s.182(4) (Application for approval of a greenfields agreement) matters which occurred during the 2021–24 reporting period.

Source: Fair Work Commission.

Table 7 presents the number of enterprise agreement approval applications received by the Commission on a quarterly basis across the three years of the current reporting period. The table shows that in most quarters there was a higher number of applications in the final year of the reporting period, except for the September quarter.

Fair Work Commission

Table 7: Number of enterprise agreement approval applications

Quarter	2021–22	2022–23	2023–24	5-year average (2018–19 to 2022–23)
September	1286	1138	1132	1155
December	1466	1265	1543	1325
March	734	696	913	737
June	1029	1072	1202	1016
Total	**4515**	**4171**	**4790**	**4234**

Note: Data presented here may differ from the Commission's 2021–22 and 2022–23 annual reports reflecting revisions to matters in the case management system. Data in totals do not include two s.182(4) (Application for approval of a greenfields agreement) matters which occurred during the 2021–24 reporting period.

Source: Fair Work Commission

In the Annual Wage Review 2023–24 decision, announced on 3 June 2024, the Commission's Expert Panel for annual wage reviews discussed the reasons for the changes in the number of applications lodged with the Commission during the reporting period and over previous reporting periods. This included presenting data noted in the table above (not including 2021–22). Commenting on the increase in approval applications since the Annual Wage Review 2022–23 decision, Expert Panel for annual wage reviews noted the following:[241]

> *"In the AWR 2023 decision, the Expert Panel said that the major amendments to the enterprise bargaining and enterprise agreement approval provisions of the FW Act effected by the Secure Jobs, Better Pay Act constituted '[t]he factor most likely to influence the extent of enterprise bargaining over the next 12 months'. We consider that this factor is a plausible explanation for the data … but we emphasise that it is too early to tell whether the trend exhibited in that data will be sustained."*

Analysis of the Commission's fortnightly statistical report on enterprise agreement approval applications finds that an average of around 170 approval applications were lodged with the Commission each fortnight between 2 July 2022 and 28 June 2024.[242]

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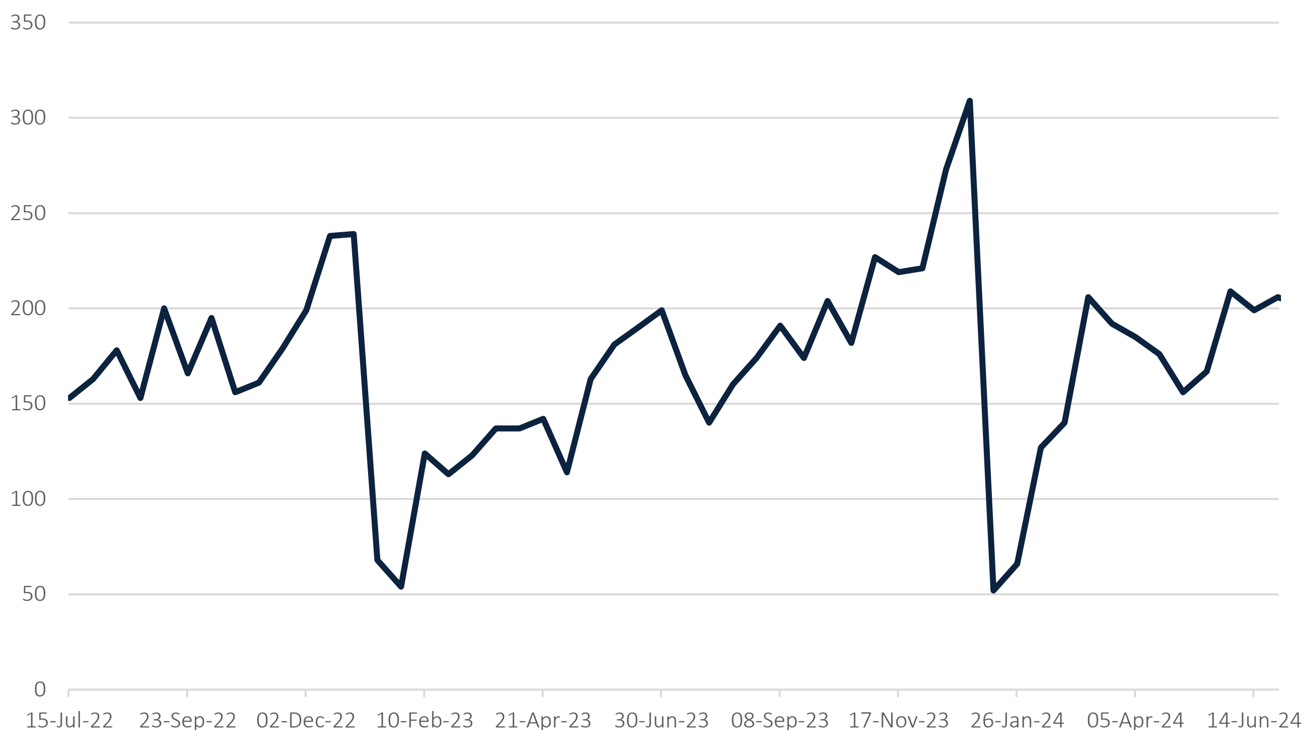
[241] [2024] FWCFB 3500 at [139].

[242] The Commission's database does not include some lodgments that have been subsequently changed to another matter type or withdrawn shortly after lodgment.

Fair Work Commission

Chart 1: Number of enterprise agreement approval applications lodged with the Fair Work Commission, fortnight ending, 15 July 2022 to 28 June 2024



Note: Excludes some lodgments that are withdrawn or changed to another matter type shortly after lodgment.

Source: Fair Work Commission.

6.2.2. Employee coverage

Data presented in the following section are sourced from the WAD, compiled by DEWR, on a quarterly basis.

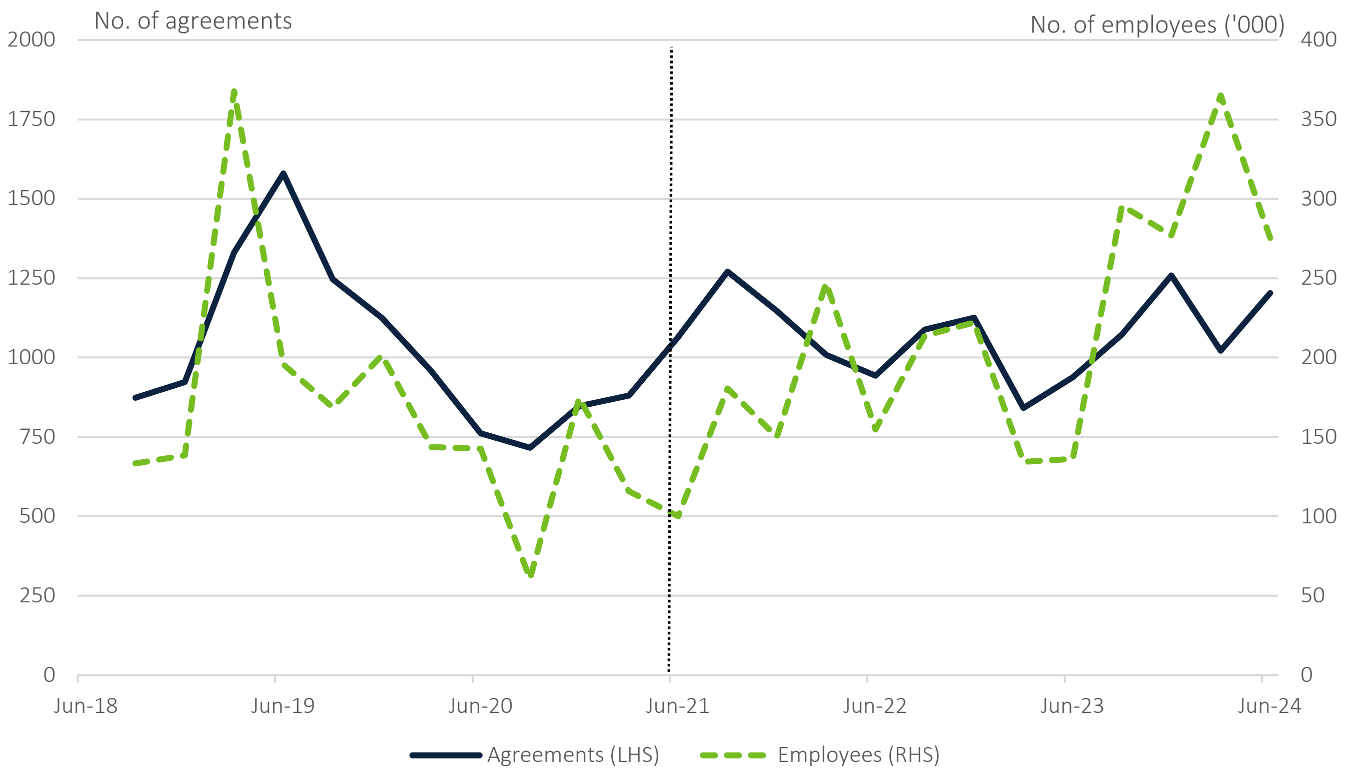
Chart 2 compares the trends in enterprise agreements approved and employees covered between the current and the previous reporting period. There were almost 13 000 enterprise agreements approved during the reporting period, an increase of 5.0 per cent on the previous period (1 July 2018 and 30 June 2021). The number of enterprise agreements approved declined during the previous reporting period, which coincided with the initial impact of the COVID-19 pandemic.

More than 2.6 million employees were covered by approved enterprise agreements in the reporting period. This is an increase of 36.5 per cent on the previous period. The number of employees covered by enterprise agreements approved was higher during the last four quarters of the current reporting

Fair Work
Commission

period than at the beginning of the period. Around 360 000 employees were covered by enterprise agreements approved in the March quarter 2024, the highest number during the reporting period.

Chart 2: Number of enterprise agreements approved and employees covered, September quarter 2018 to June quarter 2024



Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

The three industries with the largest number of enterprise agreements approved across both the 2018–21 and 2021–24 reporting periods were Construction; Manufacturing; and Transport, postal and warehousing (Table 8). These industries represent 66.8 per cent of all enterprise agreements approved in the reporting period, a slight increase from 64.2 per cent in the previous reporting period.

The number of enterprise agreements approved increased from the previous reporting period in 9 out of 19 industries. Growth in the number of enterprise agreements approved was over 10 per cent in six industries, while there were declines of over 20 per cent in a further six industries. Industries where there was a relatively large decline in the number of enterprise agreements approved tended to be those with relatively few enterprise agreements.

Fair Work Commission

The three industries with the largest growth were Arts and recreation services (27.4 per cent), Accommodation and food services (23.9 per cent), and Mining (18.7 per cent), while the three industries with the largest declines were Rental, hiring and real estate services (–32.5 per cent), Agriculture, forestry and fishing (–26.8 per cent), and Wholesale trade (–25.8 per cent).

Table 8: Number of enterprise agreements approved, by industry

Industry	2018–21 (No.)	2021–24 (No.)	Change (%)
Agriculture, forestry and fishing	157	115	–26.8
Mining	364	432	18.7
Manufacturing	2099	2207	5.1
Electricity, gas, water and waste services	406	414	2.0
Construction	4618	5019	8.7
Wholesale trade	299	222	–25.8
Retail trade	159	127	–20.1
Accommodation and food services	92	114	23.9
Transport, postal and warehousing	1188	1404	18.2
Information media and telecommunications	73	65	–11.0
Financial and insurance services	75	88	17.3
Rental, hiring and real estate services	80	54	–32.5
Professional, scientific and technical services	149	114	–23.5
Administrative and support services	243	191	–21.4
Public administration and safety	431	495	14.8
Education and training	573	554	–3.3
Health care and social assistance	926	896	–3.2
Arts and recreation services	135	172	27.4
Other services	238	237	–0.4
Total	**12 305**	**12 920**	**5.0**

Note: Revisions have been made to the data for 2018–21 from the previous report.

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

The industries with the highest number of employees covered by enterprise agreements approved during 2021–24 were Health care and social assistance; Education and training; and Public

Fair Work Commission

administration and safety (Table 9). There was also an above-average increase in the number of employees covered across each of these industries from the previous reporting period.

There was an increase in the number of employees covered by enterprise agreements approved in the reporting period across most industries, with growth of over 50 per cent in six industries. The largest increase was in Financial and insurance services (185.1 per cent). There was a decline in five of the 19 industries, with the largest decline in Accommodation and food services (–49.1 per cent).

Table 9: Number of employees covered, enterprise agreements approved, by industry

Industry	2018–21	2021–24	Change
	(No.)	(No.)	(%)
Agriculture, forestry and fishing	11 864	10 773	–9.2
Mining	48 504	55 259	13.9
Manufacturing	153 737	175 398	14.1
Electricity, gas, water and waste services	49 281	65 717	33.4
Construction	116 813	117 284	0.4
Wholesale trade	20 014	20 119	0.5
Retail trade	270 722	219 783	–18.8
Accommodation and food services	52 013	26 467	–49.1
Transport, postal and warehousing	130 905	215 377	64.5
Information media and telecommunications	36 753	39 020	6.2
Financial and insurance services	65 582	186 991	185.1
Rental, hiring and real estate services	2069	3757	81.6
Professional, scientific and technical services	22 503	23 615	4.9
Administrative and support services	25 962	14 562	–43.9
Public administration and safety	239 148	363 723	52.1
Education and training	348 544	509 737	46.2
Health care and social assistance	289 391	530 860	83.4
Arts and recreation services	31 597	48 014	52.0
Other services	27 159	25 362	–6.6
Total	**1 942 561**	**2 651 818**	**36.5**

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Fair Work Commission

The average number of employees covered per agreement approved increased to 205, a rise of around 30 per cent from the previous period (Table 10). There was an increase across most industries, with a fall in only five of the 19 industries. The largest increases were in Rental, hiring and real estate services (176.0 per cent), Financial and insurance services (143.0 per cent), and Health care and social assistance (89.7 per cent). The industries with the largest number of employees per approved agreement were Financial and insurance services (2124), Retail trade (1730), and Education and training (920), while the smallest number of employees per approved agreement were in Construction (23), Rental, hiring and real estate services (69), and Administrative and support services (76).

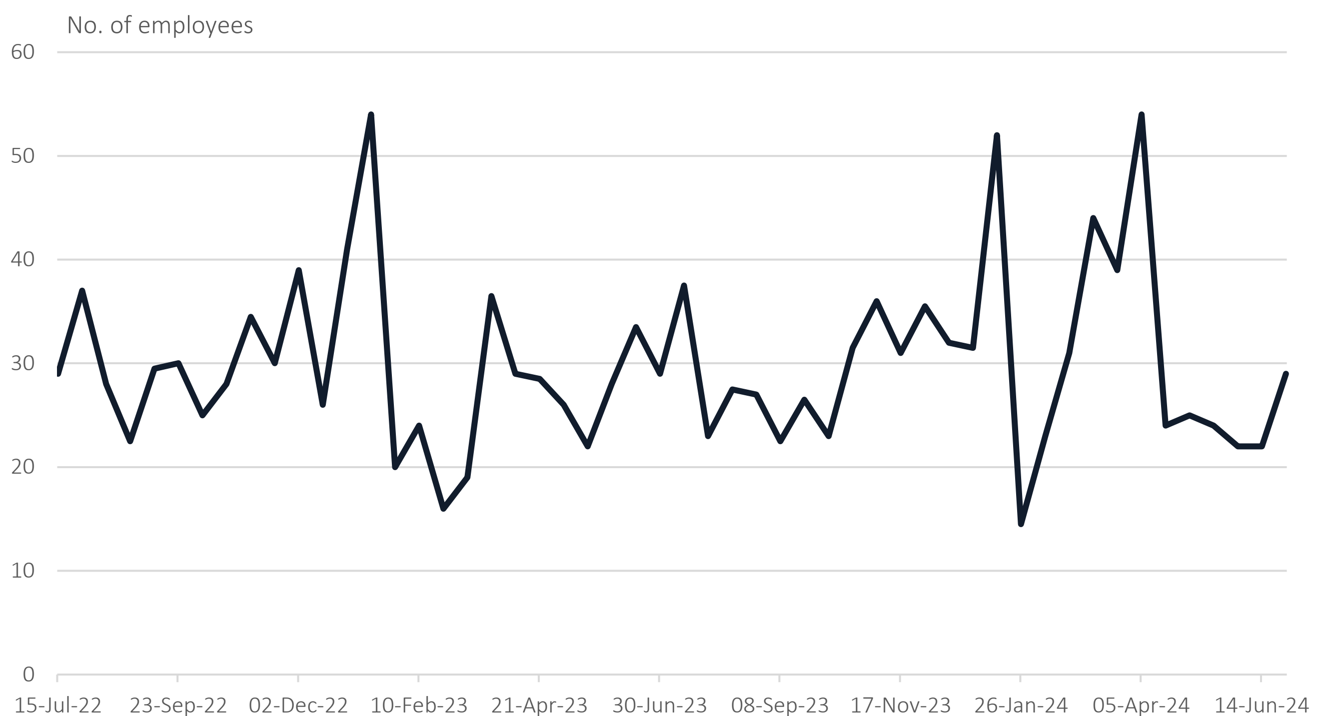
Table 10: Average number of employees covered, enterprise agreements approved, by industry

Industry	2018–21 (No.)	2021–24 (No.)	Change (%)
Agriculture, forestry and fishing	75	93	24.0
Mining	133	127	–4.5
Manufacturing	73	79	8.2
Electricity, gas, water and waste services	121	158	30.6
Construction	25	23	–8.0
Wholesale trade	66	90	36.4
Retail trade	1702	1730	1.6
Accommodation and food services	565	232	–58.9
Transport, postal and warehousing	110	153	39.1
Information media and telecommunications	503	600	19.3
Financial and insurance services	874	2124	143.0
Rental, hiring and real estate services	25	69	176.0
Professional, scientific and technical services	151	207	37.1
Administrative and support services	106	76	–28.3
Public administration and safety	554	734	32.5
Education and training	608	920	51.3
Health care and social assistance	312	592	89.7
Arts and recreation services	234	279	19.2
Other services	114	107	–6.1
Total	**157**	**205**	**30.6**

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

The Commission's fortnightly statistical report on enterprise agreement approval applications present data on the median number of employees per agreement approval application lodged. Over the period from 1 July 2022 to 30 June 2024, the median number of employees per agreement was 29 (Chart 3).

Chart 3: Median number of employees per agreement approval application lodged, fortnight to, 15 July 2022 to 28 June 2024



Note: Department of Employment and Workplace Relations, Workplace Agreements Database, June quarter 2024.

Source: Fair Work Commission

6.3 Outcomes

6.3.1 Wage developments

Wage outcomes from the WAD can only be calculated for enterprise agreements that provide quantifiable wage increases across all employees over the life of the enterprise agreement.[243]

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[243] Department of Employment, Non-quantifiable wage increases in federal enterprise agreements, October 2016.

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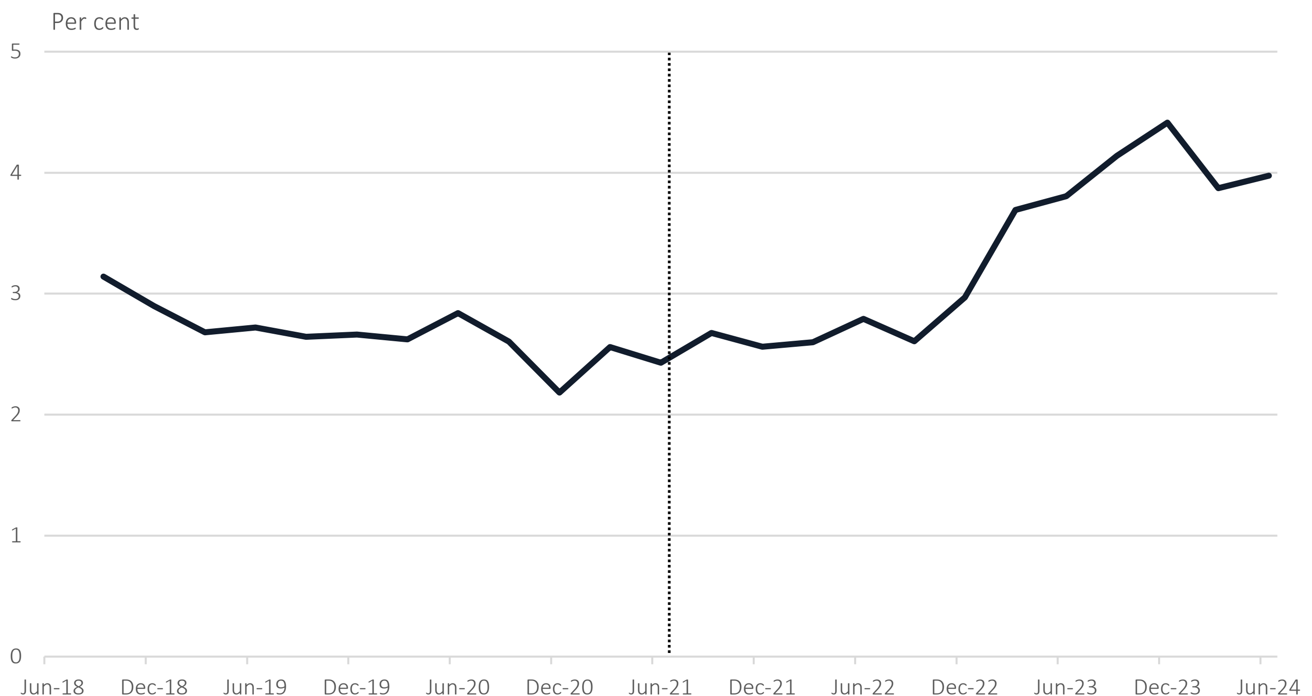
The AAWI was higher during the current reporting period than in the previous period (Chart 4). This reflects wage outcomes in agreements approved in 2023 and the first half of 2024 where the AAWI was greater than 4 per cent.

In the current reporting period, the AAWI peaked at 4.4 per cent in the December quarter 2023. This was above the previous reporting period's peak of 3.1 per cent in the September quarter 2018.

Chart 4: AAWI for enterprise agreements approved each quarter, September quarter 2018 to June quarter 2024



Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Chart 5 presents the five industries with the largest number of employees covered by enterprise agreements approved over the reporting period—together comprising almost 7 in 10 employees covered by enterprise agreements approved during the reporting period. The chart shows that AAWIs in approved enterprise agreements were higher towards the end of the reporting period across most of these industries, with only the AAWI in Retail trade peaking in 2022.

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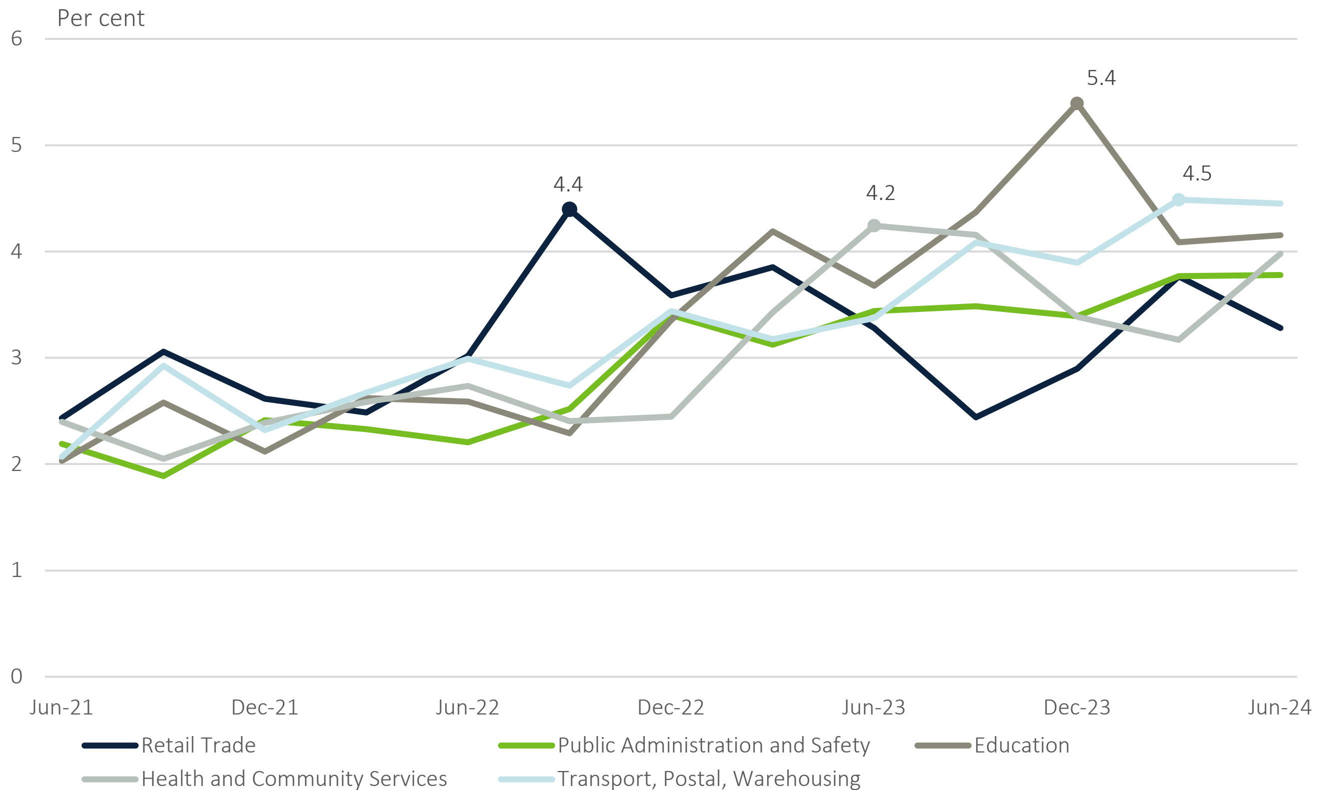
Chart 5: AAWI in enterprise agreements by selected industries, June quarter 2021 to June quarter 2024



Note: Selected industries based on those with the largest number of employees on agreements approved over the 3 years to June quarter 2024, which from largest to smallest include: Health and community services, Education, Public administration and safety, Retail, and Transport, postal and warehousing. Employees on agreements in these 5 industries account for 69 per cent of the total across all industries over the period.

Source: Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining*, June quarter 2024,

The Commission's statistical report on enterprise agreement approval applications lodged with the Commission finds that the average wage growth among quantifiable agreements across all industries was 3.7 per cent between 1 July 2022 and 30 June 2024.

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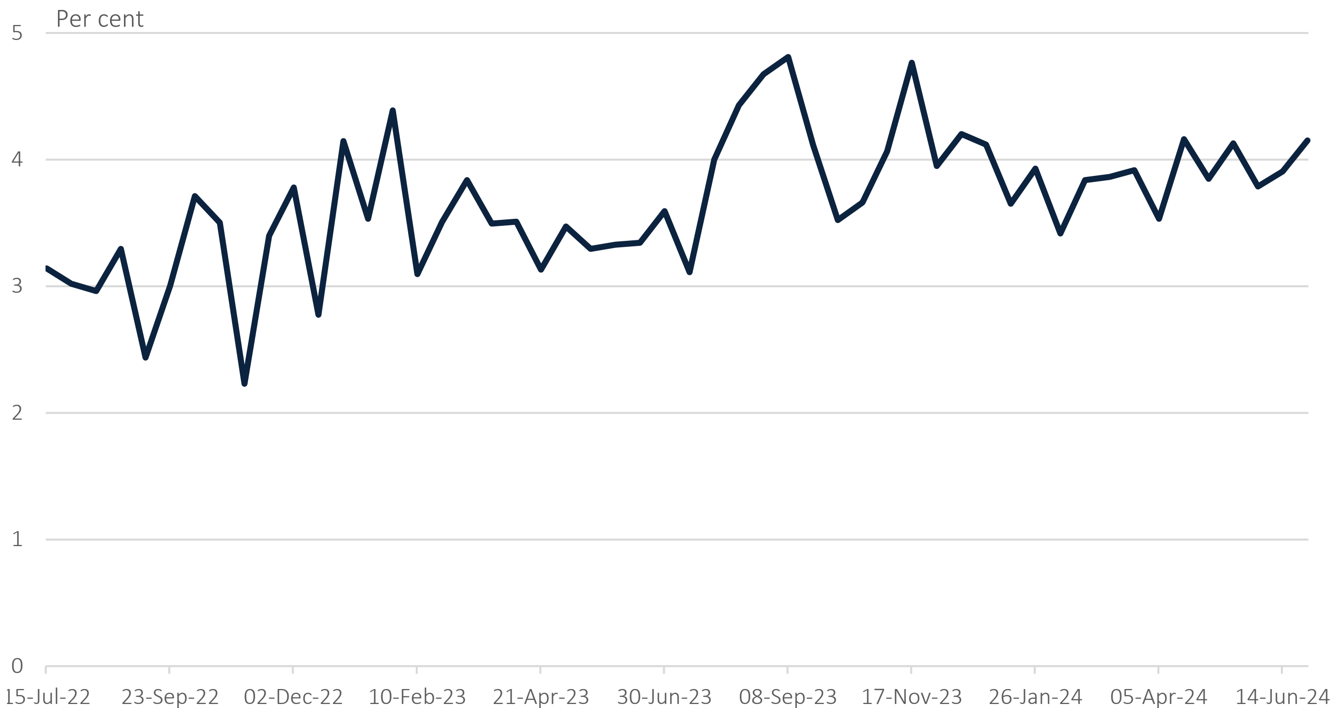
Chart 6: AAWI in enterprise agreement approval applications lodged with the Commission, fortnight to, 15 July 2024 to 28 June 2024



Source: Fair Work Commission

6.3.2 Coverage by method of setting pay

The ABS EEH, undertaken in May 2021 and May 2023, presents data on coverage by method of setting pay towards the end of the previous reporting period[244] and during the current reporting period.

The share of employees paid by a collective agreement declined across each of the last two reporting periods, falling to 34.0 per cent in May 2023. In contrast, the share of employees on awards and individual arrangements both increased (Chart 7).

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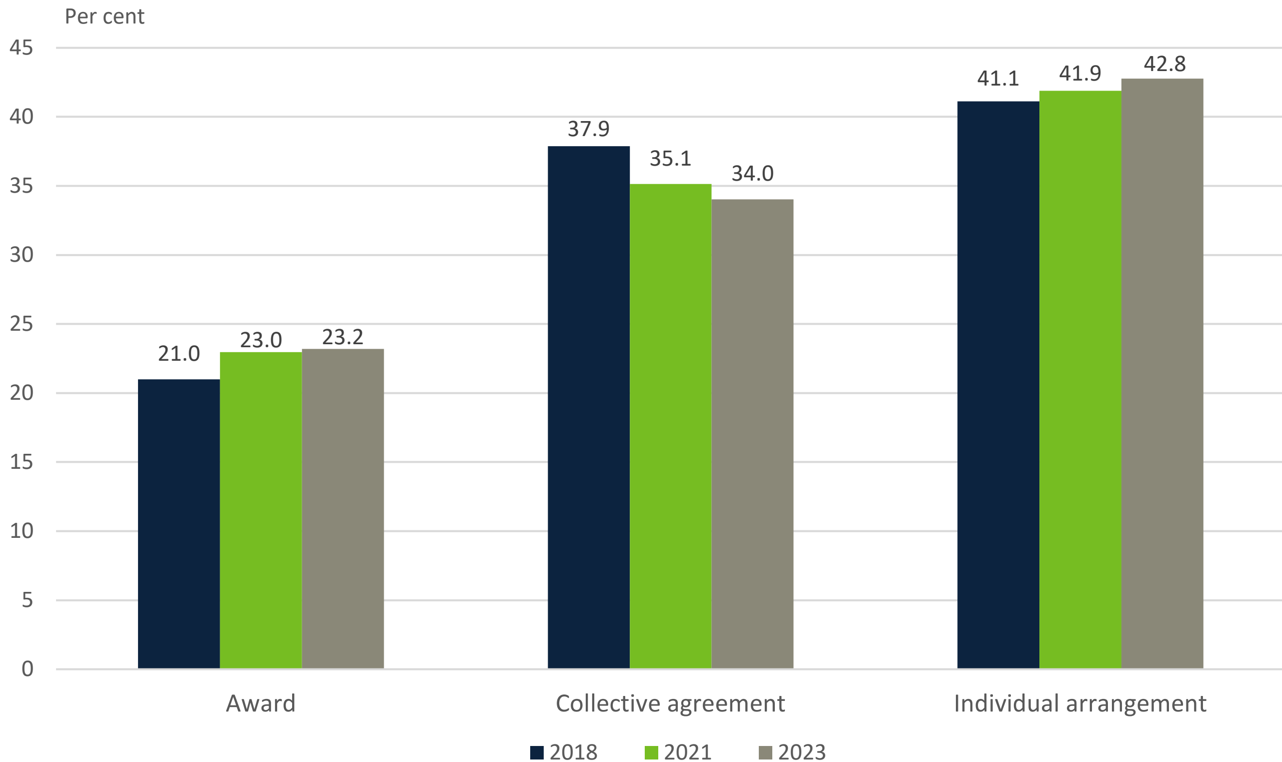
[244] These data were not available for the previous reports.

Fair Work
Commission

Chart 7: Pay-setting arrangements, May 2018, May 2021 and May 2023



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

Source: ABS, *Employee Earnings and Hours, Australia*, various.

6.4 Effect on designated groups

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

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

Fair Work
Commission

The Fair Work Act does not define young persons or mature age persons. Using the same approach as the previous report on agreement making, data are presented for those aged under 21 years (young persons), and those aged 45 years and over (mature age persons).[245]

Table 11 shows the coverage by method of setting pay for these designated groups in May 2021 and May 2023 using data from the ABS EEH. The use of collective agreements to set pay declined for all groups between May 2021 and May 2023. Collective agreements were the most common method of setting pay among females in both periods. Awards were the most common for part-time employees and those aged under 21 years in May 2023.

Table 11: Selected characteristics of employees by method of setting pay, May 2021 and May 2023

	Collective agreement		Award		Individual arrangement		Total	
	2021	2023	2021	2023	2021	2023	2021	2023
	(%)	(%)	(%)	(%)	(%)	(%)	(%)	(%)
Female	39.4	37.8	26.9	27.0	33.7	35.2	100.0	100.0
Part-time	38.6	36.7	35.8	37.6	25.6	25.7	100.0	100.0
Aged under 21 years	30.1	26.7	54.6	57.0	15.3	16.3	100.0	100.0
Aged 45 years or over	39.6	39.3	17.4	16.8	43.0	43.9	100.0	100.0

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

Source: ABS, *TableBuilder: Employee Earnings and Hours, Australia*, various.

6.5 Developments in wages and conditions for designated groups

This section uses the WAD to present the wage outcomes for employees in the designated groups that were covered by enterprise agreements approved during the reporting period. The WAD has been used to identify approved enterprise agreements covering each of these groups or where these groups

[245] O'Neill B (2018), *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth) 2015–2018*, November.

Fair Work
Commission

make up a majority or minority share of employees. The AAWI is then calculated to determine their wage outcomes compared to other employee cohorts.

6.5.1 Wage developments for approved enterprise agreements

Women

Consistent with the last reporting period, the AAWI for women was lower than for non-women each year between 2021–22 and 2023–24. In addition, when comparing enterprise agreements covering a higher or lower proportion of women, those with a share of women employees below 40 per cent regularly recorded higher AAWI outcomes than enterprise agreements with a larger share of women employees in each year of the reporting period..

Table 12: AAWI in enterprise agreements approved by gender and proportion of women covered, 2018–19 to 2023–24

Overall	2018–19 (%)	2019–20 (%)	2020–21 (%)	2021–22 (%)	2022–23 (%)	2023–24 (%)
Women	2.6	2.5	2.2	2.5	3.1	4.0
Non-women	2.8	2.8	2.4	2.7	3.3	4.1
Share of women employees in enterprise agreements						
<40% women	3.0	2.9	2.7	2.8	3.4	4.3
40–60% women	2.6	2.5	2.1	2.5	3.6	4.0
>60% women	2.6	2.5	2.1	2.5	3.0	4.0

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Part-time employees

The results in Table 13 show that part-time employees generally had lower AAWIs than full-time employees between 2018–19 to 2023–24.

AAWI outcomes varied in 2022–23 and 2023–24 between agreements comprising different shares of part-time employees compared with the previous reporting period.

Fair Work Commission

Table 13: AAWI in enterprise agreements approved by part-time employment, 2018–19 to 2023–24

Overall	2018–19 (%)	2019–20 (%)	2020–21 (%)	2021–22 (%)	2022–23 (%)	2023–24 (%)
Full-time	2.7	2.8	2.4	2.7	3.1	4.0
Part-time	2.6	2.6	2.3	2.5	3.1	3.8
Share of part-time employees in enterprise agreements						
<40 per cent part-time	2.7	2.7	2.3	2.6	3.1	4.2
40–60 per cent part-time	2.7	2.8	2.5	2.5	3.8	3.6
>60 per cent part-time	2.7	2.5	2.4	2.5	3.6	3.7

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Employees from a non-English speaking background

The AAWI outcomes for employees from a non-English speaking background were equal to or slightly higher than employees from an English-speaking background across the three years of the current reporting period. There was no consistent pattern in AAWI outcomes for enterprise agreements with either a higher or lower share of employees with a non-English speaking background across this period.

Table 14: AAWI in enterprise agreements approved by employees from a non-English speaking background employment, 2018–19 to 2023–24

Overall	2018-19 (%)	2019-20 (%)	2020-21 (%)	2021-22 (%)	2022-23 (%)	2023-24 (%)
Non-English-speaking background	2.6	2.6	2.3	2.6	3.5	4.1
English speaking background	2.7	2.7	2.4	2.6	3.3	4.1
Share of non-English speaking background employees in enterprise agreements						
<20 per cent	2.7	2.7	2.4	2.6	3.2	4.2
≥20 per cent	2.6	2.5	2.3	2.7	3.7	3.9

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Fair Work
Commission

Young and mature persons

In the current reporting period, the AAWI for young persons was slightly higher than for other groups in 2021–22 and 2022–23 yet was lower than for other groups in 2023–24. This pattern was also evident in agreements with a higher share of young persons (≥20 per cent) compared with those with a lower share (Table 15).

AAWI outcomes for mature-aged persons were generally lower than other age groups, except for in 2023–24. While agreements with a higher share of mature-aged persons reported lower AAWI outcomes in the previous reporting period, the outcomes were better in the two most recent years.

Table 15: AAWI in enterprise agreements approved by age group, 2018–19 to 2023–24

Overall	2018–19 (%)	2019–20 (%)	2020–21 (%)	2021–22 (%)	2022–23 (%)	2023–24 (%)
Young (under 21 years)	2.7	2.6	2.6	2.7	3.6	3.9
≥ 21 years and ≤44 years	2.7	2.7	2.4	2.6	3.2	4.1
Mature (45 years and over)	2.7	2.6	2.2	2.6	3.2	4.1
Share of young employees in enterprise agreements						
<20 per cent	2.7	2.7	2.3	2.6	3.2	4.1
≥20 per cent	3.2	2.5	3.3	3.1	3.5	3.5
Share of mature employees in enterprise agreements						
<20 per cent	3.6	3.3	3.3	2.8	3.2	3.9
≥20 per cent	2.7	2.6	2.3	2.6	3.2	4.1

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

6.5.2 Developments in conditions for approved enterprise agreements

This section focuses on the coverage of the range of employment conditions across the designated groups in enterprise agreements approved over the reporting period.

The conditions provided in Table 16 cover most employees from these designated groups who are covered by federal enterprise agreements, with shiftwork/rostering (87.3 per cent) and occupational health and safety (90.4 per cent) provisions being relatively less prevalent. However, compared with

Fair Work Commission

the previous reporting period (82.9 per cent)[246], there was a relatively large increase in the proportion of agreements that contained occupational health and safety provisions, including across all designated groups.

The table also highlights that, compared with all agreements during the reporting period:

- **Women** were more likely to be covered by parental leave provisions and less likely to be covered by shiftwork/rostering provisions.
- **Part-time employees** were more likely to be covered by termination, change and redundancy provisions and less likely to be covered by shiftwork/rostering and occupational and health and safety provisions.
- **Persons with a non-English speaking background** were more likely to be covered by shift work/rostering provisions and less likely to be covered by occupational health and safety, general training arrangements and superannuation provisions.
- **Young persons (under 21 years)** were more likely to be covered by shiftwork/rostering and public holiday provisions and less likely to be covered by parental leave provisions. Compared with the previous reporting period, there was a relatively large increase in the proportion covered by general training arrangements provisions.
- **Mature-aged persons (45 years and over)** were less likely to be covered by most provisions.

[246] Furlong M (2021), *General Manager's report into developments in making enterprise agreements under the* Fair Work Act 2009 *(Cth) 2-18-21*, November 2021, p. 45, Table 6.10,.

Fair Work Commission

Table 16: Coverage of designated groups by core provisions, 2021–24

	Women	Part-time	Non-English speaking background	Under 21 years	45 years and over	All
	(%)	(%)	(%)	(%)	(%)	(%)
Annual leave	99.4	99.9	98.9	98.7	99.2	99.2
General training arrangements	96.2	96.4	91.9	94.9	95.5	95.4
Hours of work	99.4	99.6	98.7	99.2	98.8	98.9
Long service leave	99.1	99.4	97.2	98.6	98.2	98.2
Occupational health and safety	90.3	89.8	87.3	90.7	89.8	90.4
Parental leave	97.3	96.4	96.2	88.0	95.5	95.6
Personal carer's leave	99.4	99.7	99.0	98.7	98.6	98.8
Public holidays	96.5	96.4	97.2	98.7	96.3	96.7
Shift work/rostering provisions	85.2	86.7	91.0	93.4	86.8	87.3
Superannuation	98.4	99.2	96.7	99.0	97.6	98.2
Termination change and redundancy	97.9	99.2	96.7	97.5	97.0	97.1
Type of employment	99.7	99.7	99.1	98.9	99.2	99.3

Note: 'Type of employment' is any reference to casual employment, part-time employment, fixed-term employment, home-based work/telework, or temporary employment. It is possible that not every employee covered by an agreement has access to every provision in an agreement.

Source: Department of Employment and Workplace Relations, *Workplace Agreements Database*, June quarter 2024.

Fair Work Commission

Appendix A—Initiatives to support the Commission's bargaining and agreement-making functions and its users

As noted earlier in this report, the SJBP Act added to the functions of the Commission in s.576(2) of the Fair Work Act 'promoting good faith bargaining and the making of enterprise agreements'. The SJBP Act also expanded the Commission's role in facilitating bargaining.

As part of the Commission's continuing efforts to implement its new legislative functions in an open and transparent way and with the needs of the Commission's users in mind, during the reporting period the Commission delivered a range of initiatives and changes including:

- Establishing a **bargaining practice area** led by Deputy President Hampton as the National Practice Leader for bargaining, and continuation of the **agreements practice area** lead by Deputy President Masson, with additional Member resources allocated to support the enterprise bargaining changes.[247]
- Establishing a **specialised bargaining support team** to provide targeted bargaining-related support to the National Practice Leader for bargaining and moving to a centralised case management model for protected action ballot order applications.[248]
- Establishing the **Enterprise Agreements and Bargaining Advisory Group** to provide advice and receive regular feedback on the implementation and practical operation of the amendments. The

[247] See President's statement *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 – Facilitating enterprise bargaining and the agreement approval process*, 4 April 2023.

[248] See President's statement of 4 April 2023.

Fair Work Commission

group has become a primary consultative forum for the Commission's bargaining and enterprise agreements-related practice areas.[249]

- Delivery of a **customised online learning management system** with **2 education modules on interest-based bargaining.**[250]
- Completion of a **Bargaining Discovery Research Project** which aimed to better understand the perceptions, knowledge and information needs of relatively inexperienced employer and employee bargaining representatives in relation to bargaining and agreement making. The **Commission's response** outlines the actions it will and has taken in response to the project.[251]
- Publication of a range of **targeted materials and communications** including information packs, online tools, a video information series led by Commission Members, and templates and guidance material. This information material includes information targeted to users in relation to the bargaining and agreement making process as well as the 'zombie agreements' sunsetting process.[252]
- Delivery of **Member education and engagement sessions**.
- Refinement of the Commission's **online lodgment system** and **agreement-related online forms.**[253]
- Continuation of the **collaborative approaches program.**[254]
- Data dashboards.
- Performance reporting framework.

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[249] See President's statement of 4 April 2023.

[250] See Fair Work Commission Online Learning Portal.

[251] See Bargaining Discovery Research Report and our response | Fair Work Commission (fwc.gov.au).

[252] See President's statement *Implementing the Secure Jobs, Better Pay changes and the Fair Work Commission's performance in 2022-23*, 2 August 2023.

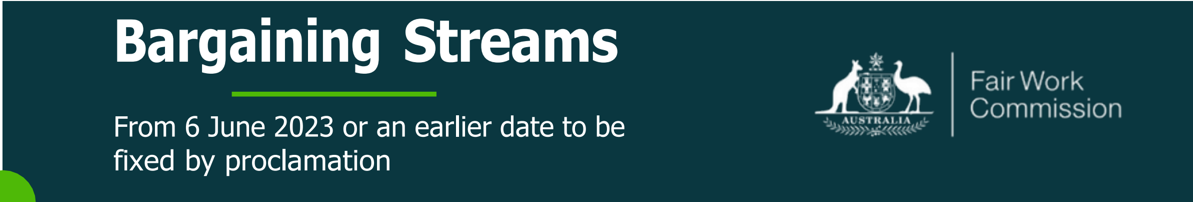
[253] See Fair Work Commission Online Lodgment Service.

[254] See Collaborative Approaches Program | Fair Work Commission (fwc.gov.au).

Fair Work Commission

Appendix B—Types of enterprise agreements

Fair Work Commission



Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation

	Single-enterprise agreement	Single-enterprise agreement (greenfields)	Supported bargaining agreement
Overview	Made by one employer or 2 or more related employers with the employees who are employed at the time and who will be covered by the agreement. Employers are 'related employers' if engaged in a joint venture or common enterprise or related bodies corporate.	Made by one employer or 2 or more related employers and each relevant employee organisation that the agreement is expressed to cover, in relation to a genuine new enterprise. Employers are 'related employers' if engaged in a joint venture or common enterprise or related bodies corporate.	A type of multi-enterprise agreement where a supported bargaining authorisation was in operation. This type of multi-enterprise agreement replaces the low-paid bargaining stream. Supported bargaining agreements are made with support by the FWC to assist employers and employees who have had difficulty bargaining at the single-enterprise level and other employees who face barriers to bargaining.
When does bargaining commence?	When one of the following occurs: • the employer agrees to bargain, or initiates bargaining • a majority support determination comes into operation • a scope order comes into operation • a bargaining representative makes a request to bargain to the employer, and the bargaining is for a single-enterprise agreement to replace one that has passed its nominal expiry date within the past 5 years.	When the employer who is a bargaining representative gives written notice to each employee organisation that is a bargaining representative for the agreement setting the starting day (of the 6-month notified negotiation period).	When the supported bargaining authorisation comes into operation. An application can be made by a bargaining representative or employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement. The FWC must be satisfied that it is appropriate for the employers and employees to bargain together, having regard to certain matters. The FWC must also make a supported bargaining authorisation if an application has been made and the Minister has made a declaration in respect of the industry, occupation or sector in which the employees are employed.
Small businesses included?	Yes.	Yes.	Yes.
Must an employee organisation be involved?	No.	Yes.	Yes. To make a supported bargaining authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.
Protected industrial action	Available. If a Protected Action Ballot Order (PABO) is made, conciliation by the FWC is mandatory.	Not available.	Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hours' notice must be given before taking protected industrial action.

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Fair Work Commission

Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation

Fair Work Commission

	Single-enterprise agreement	Single-enterprise agreement (greenfields)	Supported bargaining agreement
Bargaining orders	Available.	Available, but only if the 6-month notified negotiation period has not ended.	Available.
Bargaining disputes	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may apply for the FWC to deal with a bargaining dispute.
Intractable bargaining declarations	Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.	Not available.	Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.
Variations to add employers/ employees	Not applicable.	Not applicable.	A supported bargaining agreement may be varied to cover additional employers and employees upon joint application between the employer and employees to be added, or an application by an employee organisation entitled to represent the interests of the employees to be covered. The FWC must be satisfied that a majority of the employees support the variation.
Applies to general building and construction industry?	Yes.	Yes.	The FWC cannot make a supported bargaining authorisation if the agreement would cover employees in relation to general building and construction work.

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Fair Work
Commission

Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation

Fair Work
Commission

	Single interest employer agreement	Cooperative workplaces agreement
Overview	A type of multi-enterprise agreement where a single interest employer authorisation was in operation. A single interest employer agreement may be made with multiple employers with common interests or that are franchisees.	A type of multi-enterprise agreement where there was no supported bargaining authorisation or single interest employer authorisation in operation in relation to the agreement immediately before the agreement was made. A cooperative workplace agreement covers multiple employers that have agreed to bargain together.
When does bargaining commence?	When the single interest employer authorisation comes into operation. An application for a single interest employer authorisation can be made by the employers, or by a bargaining representative of an employee who will be covered by the proposed agreement. The FWC must make the single interest employer authorisation if satisfied that certain criteria are met, including that the employers are certain franchisees or have clearly identifiable common interests (and if the latter, that making the authorisation is not contrary to the public interest).	When a group of employers decide to bargain together.
Small businesses included?	Small businesses (less than 20 employees) only included by consent.	Yes, provided they consent, as all employers must agree to participate in the cooperative workplaces stream.
Must an employee organisation be involved?	Yes. To make a single interest employer authorisation, the FWC must be satisfied that at least some employees who will be covered are represented by an employee organisation.	Yes.
Protected industrial action	Available. If a PABO is made, conciliation by the FWC is mandatory. 120 hours' notice must be given before taking protected industrial action.	Not available.

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Fair Work
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Bargaining Streams

From 6 June 2023 or an earlier date to be fixed by proclamation

Fair Work Commission

	Single interest employer agreement	Cooperative workplaces agreement
Bargaining orders	Available.	Not available.
Bargaining disputes	A bargaining representative may apply for the FWC to deal with a bargaining dispute.	A bargaining representative may only apply for the FWC to deal with a bargaining dispute if all bargaining representatives for the proposed cooperative workplace agreement have agreed to the making of the application.
Intractable bargaining declarations	Available. The FWC must be satisfied that it has dealt with the dispute under s.240 and the applicant participated in the FWC's processes to deal with the dispute, there is no reasonable prospect of agreement being reached without the declaration, and it is reasonable in all circumstances to make the declaration, taking into account the views of the bargaining representatives.	Not available.
Variations to add employers/ employees	A single interest employer agreement may be varied to cover additional employers and employees upon joint application by the employer and employees to be added, or on application by an employee organisation entitled to represent the interests of the employees to be covered. The FWC must be satisfied that a majority of employees support the variation.	An agreement can be varied to add an employer and employees by agreement between that employer and those employees. Before approving the variation, the FWC must be satisfied of certain matters including that it is not contrary to the public interest (and see below for limitations on variations in relation to the general building and construction industry).
Applies to general building and construction industry?	The FWC cannot make a single interest employer authorisation if the agreement would cover employees in relation to general building and construction work.	The FWC can only approve a cooperative workplace agreement that covers general building and construction employees if the agreement is a greenfields agreement. Such a greenfields agreement cannot be varied to add employers and employees. A cooperative workplace agreement cannot be varied to add employees performing general building and construction work.

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Appendix C—Section 185 agreements by industry

Table C1: Enterprise agreements lodged by industry, 1 July 2021 to 30 June 2024

Industry	s.185 – Single-enterprise	s.185– Greenfields	s.185 – Multi-enterprise	Total
Aged care industry	351	2	2	355
Agricultural industry	102	0	2	104
Airline operations	130	4	0	134
Airport operations	34	0	0	34
Aluminium industry	20	0	0	20
Ambulance and patient transport	13	0	0	13
Amusement, events and recreation industry	46	1	0	47
Animal care and veterinary services	8	0	0	8
Aquaculture	6	0	1	7
Asphalt industry	53	0	0	53
Australian Capital Territory	3	0	0	3
Banking finance and insurance industry	82	0	2	84
Broadcasting and recorded entertainment industry	12	6	0	18
Building services	122	18	1	141
Building, metal and civil construction industries	2680	559	10	3249
Business equipment industry	16	0	0	16
Cement and concrete products	174	1	0	175
Cemetery operations	11	0	1	12
Children's services	58	0	3	61
Cleaning services	25	4	1	30
Clerical industry	54	2	1	57

Fair Work Commission

Industry	s.185 – Single-enterprise	s.185– Greenfields	s.185 – Multi-enterprise	Total
Clothing industry	4	0	0	4
Coal export terminals	7	0	2	9
Coal industry	87	9	0	96
Commercial sales	5	0	0	5
Commonwealth employment	130	0	0	130
Contract call centre industry	5	0	0	5
Corrections and detentions	21	0	0	21
Defence support	6	0	0	6
Diving services	8	2	0	10
Dredging industry	7	2	0	9
Dry cleaning and laundry services	25	0	0	25
Educational services	564	0	30	594
Electrical contracting industry	714	127	5	846
Electrical power industry	129	10	2	141
Fast food industry	25	0	0	25
Fire fighting services	62	3	0	65
Food, beverages and tobacco manufacturing industry	402	1	0	403
Funeral directing	9	0	0	9
Gardening services	20	1	0	21
Grain handling industry	13	0	0	13
Graphic Arts	53	1	1	55
Health and welfare services	395	17	12	424
Hospitality industry	81	7	1	89
Indigenous organisations and services	14	0	0	14
Industries not otherwise assigned	65	1	2	68
Journalism	20	0	0	20
Licensed and registered clubs	15	0	0	15
Live performance industry	35	14	0	49

Fair Work Commission

Industry	s.185 – Single-enterprise	s.185– Greenfields	s.185 – Multi-enterprise	Total
Local government administration	187	0	1	188
Manufacturing and associated industries	1603	41	3	1647
Marine tourism and charter vessels	8	1	0	9
Maritime industry	131	15	0	146
Market and business consultancy services	5	0	2	7
Meat Industry	98	0	0	98
Mining industry	193	5	0	198
Miscellaneous	57	6	2	65
Northern Territory	7	0	0	7
Oil and gas industry	144	21	0	165
Passenger vehicle transport (non rail) industry	90	4	0	94
Pet food manufacturing	3	0	0	3
Pharmaceutical industry	61	0	0	61
Pharmacy operations	7	0	0	7
Plumbing industry	539	55	0	594
Port authorities	52	0	0	52
Postal services	1	0	0	1
Poultry processing	71	0	0	71
Publishing industry	11	0	0	11
Quarrying industry	66	0	0	66
Racing industry	19	0	0	19
Rail industry	129	5	3	137
Real estate industry	21	0	0	21
Restaurants	12	0	1	13
Retail industry	92	1	1	94
Road transport industry	460	2	2	464
Rubber, plastic and cable making industry	7	0	0	7

Fair Work Commission

Industry	s.185 – Single-enterprise	s.185– Greenfields	s.185 – Multi-enterprise	Total
Salt industry	3	0	0	3
Scientific services	17	0	0	17
Seafood processing	10	0	0	10
Security services	65	4	2	71
Social, community, home care and disability services	165	0	7	172
Sporting organisations	12	0	0	12
State and Territory government administration	70	0	1	71
Stevedoring industry	71	3	0	74
Storage services	383	6	0	389
Sugar industry	17	0	0	17
Tasmania	4	0	0	4
Technical services	18	0	0	18
Telecommunications services	18	5	0	23
Textile industry	20	0	0	20
Timber and paper products industry	99	1	0	100
Tourism industry	25	0	0	25
Vehicle industry	94	1	1	96
Waste management industry	187	0	0	187
Water, sewerage and drainage services	89	0	0	89
Wine industry	35	0	0	35
Wool storage, sampling and testing industry	6	0	0	6
Total	**12 403**	**968**	**105**	**13 476**

Note: Table does not include 2 agreements made under s.182(4) of the Act during this period.

Source: Fair Work Commission.