Fair Work Commission

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

2018–2021

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

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Table of contents

List of tables

List of charts

List of abbreviations

AAWI	average annualised wage increase
ABS	Australian Bureau of Statistics
BOOT	better off overall test
Commission	Fair Work Commission
EEH	Employee Earnings and Hours
Fair Work Act	*Fair Work Act 2009* (Cth)
Fair Work Commission	Commission
NERR	notice of employee representational rights
NES	National Employment Standards
WAD	Workplace Agreements Database

Executive summary

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

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

This report presents findings for the period 26 May 2018 to 25 May 2021 from the review into the developments in enterprise agreement making in Australia. Pursuant to s.653(3), this report is due to the Minister for Industrial Relations within six months from the end of the reporting period (by 25 November 2021).

Key legislative developments in enterprise agreement making

During the reporting period, key legislative developments in enterprise agreement making included:

- *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth)*
- *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)*
- *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 (Cth)*
- *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*
- *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*

Key case law developments in enterprise agreement making

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

- genuine agreement;
- the better off overall test (BOOT);
- employees employed at the time (for the purpose of voting);
- the NES; and
- undertakings.

Key findings from the quantitative data about enterprise agreement making

Fewer enterprise agreements were approved (12 307 compared with 13 449) and fewer employees were covered by these agreements (1 942 329 compared with 2 129 508) in the current reporting period than in the previous reporting period.

Key findings from the quantitative data about designated groups

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

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

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

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

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

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

1 Introduction

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

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

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

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

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

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

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

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

[3] Fair Work Act, s.657.

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

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

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

This report presents developments in enterprise-agreement making in Australia for the three-year period from 26 May 2018 to 25 May 2021.[7]

The report contains five sections dealing with developments in enterprise-agreement making:

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

2 Resources used to inform the report

The following resources were used to inform the report:

- the Australian Bureau of Statistics' (ABS) Survey of Employee Earnings and Hours (EEH);
- administrative data collected by the Commission;
- data from the Workplace Agreements Database (WAD), which is compiled and maintained by the Attorney-General's Department; and
- case law.

2.1 Survey of Employee Earnings and Hours

The ABS 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 Fair Work Commission administrative data

The Commission's administrative data contain information relevant to the approval of enterprise agreements, such as:

- the name of the new enterprise agreement;
- the type of enterprise agreement;
- party names;
- industry;
- prior enterprise agreements;
- date and location of lodgment;
- enterprise agreement approval processing time;

[7] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012 and presented data up to 30 June 2012 as a result of data collection periods. This report includes data from 1 July 2018 to 30 June 2021 for the same reason.

- lodgment documents and other related documents, including approval documents, application for approval, employer and employee declarations of support;
- location of the hearing and the Member dealing with the matter;
- the decision; and
- any correspondence between the Commission and the parties.

2.3 Workplace Agreements Database

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

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

Additional information such as the title, industry, sector, duration, number of employees covered, section of the Fair Work Act which the enterprise agreement was approved, and the parties involved in the bargaining process is also captured.

2.4 Case law

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

3 Legislative developments relating to enterprise agreements

The Fair Work Act is the key legislation governing agreement making. In the reporting period, relevant amendments to the Fair Work Act include:

- *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth);
- *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth);
- *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth); and
- *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth).

Additionally changes were made to the *Fair Work Regulations 2009* (Regulations). In the reporting period, relevant amendments to the Regulations include:

- Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020 (Cth); and
- Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020 (Cth).

These developments are discussed below.

3.1 *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth)

This Bill was passed on 6 December 2018 and the relevant amendments came into effect on 12 December 2018.

The Explanatory Memorandum states that the amendment:

- provides an entitlement to unpaid family and domestic violence leave consistent with the Model Term inserted in 123 modern awards on 1 August 2018; and
- extends that entitlement to all employees in the national system.[8]

The amendment defines family violence as 'violent, threatening or other abusive behaviour by a close relative of an employee that:

(a) seeks to coerce or control the employee; and

(b) causes the employee harm or to be fearful.'[9]

The employee may take the leave if:

'(a) the employee is experiencing family and domestic violence; and

(b) the employee needs to do something to deal with the impact of the family and domestic violence; and

(c) it is impractical for the employee to do that thing outside the employee's ordinary hours of work.'[10]

The amendment inserts a new entitlement in the National Employment Standards (NES) to five days of unpaid leave in a 12-month period,[11] available to full-time, part-time and casual employees.[12] The leave does not accrue from year to year.[13]

The employee may take this leave as a single continuous five-day period, or separate periods of one or more days, or separate periods to which the employee and employer agree, which may be a period of less than one day.[14]

An employer may seek evidence that would satisfy a reasonable person that the leave is taken for the prescribed purpose. If provided, this evidence must be treated as confidential.[15]

3.2 *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth)

This Bill was passed on 5 December 2018 and the relevant amendments came into effect on 12 December 2018.

The Revised Explanatory Memorandum states that the amendments in Schedule 2 to the Fair Work Act:

- respond to the recommendation of the Productivity Commission's Final Report into the Workplace Relations Framework by enabling the Commission to overlook minor procedural or technical errors when approving an enterprise agreement.[16]

[8] Explanatory Memorandum, Fair Work Amendment Bill 2018 (Cth) vi.

[9] Fair Work Act, s.106B(2).

[10] Fair Work Act, s.106B(1).

[11] Fair Work Act, s.106A(1).

[12] Fair Work Act, s.106A(2)(c).

[13] Fair Work Act, s.106A(1).

[14] Fair Work Act, ss.106A(4)(a)–(c).

[15] Fair Work Act, ss.106C and 107(3)(d); also see Explanatory Memorandum, Fair Work Amendment Bill 2018 (Cth) viii.

Previously, any departure from the genuine agreement obligations provided for at s.188 – **When employees have genuinely agreed to an enterprise agreement,** including departing from the prescribed form and content of the Notice of Employee Representational Rights and meeting certain legislated timeframes, may have meant that the agreement was incapable of approval.

The amendment allows the Commission to find that an agreement has been genuinely agreed to by the employees when the Commission is satisfied that, but for minor procedural or technical errors, the agreement would have been genuinely agreed to[17] and the employees were not likely to have been disadvantaged by the errors.[18]

Under the amendment, it is now open to the Commission to consider the context and impact of a minor error to inform a finding on the s.188 requirement for genuine agreement. [19]

3.3 *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth)

This Bill was passed on 12 November 2020 and the relevant amendments came into effect on 27 November 2020.

The Explanatory Memorandum states that the amendment responds to the Senate Select Committee on Stillbirth Research and Education Report to improve the unpaid parental leave entitlements in the NES for new parent employees who experience traumatic events during or in anticipation of unpaid parental leave, including stillbirth and premature birth.[20]

The amendment preserves minimum leave entitlements for parents of stillborn babies and babies who die during the first 24 months of life by:

- ensuring that parents of stillborn babies have the same entitlement to unpaid parental leave as parents of live babies (including by allowing these employees to start unpaid parental leave in relation to a stillborn child even if they have not previously given notice to their employer);[21]
- removing an employer's ability to recall a parent on unpaid parental leave back to work or cancel any planned period of unpaid parental leave following a stillbirth or death of a child or infant;
- ensuring that employees in these circumstances who wish to return to work earlier can do so by providing their employer with at least four weeks' written notice;[22] and
- allowing employees who are on unpaid parental leave to take compassionate leave following the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.[23]

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[16] Revised Explanatory Memorandum, Fair Work Amendment Bill 2017 (Cth) iv.

[17] Fair Work Act, s.188(2)(a).

[18] Fair Work Act, s.188(2)(b).

[19] *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others* [2019] FWCFB 318. The Full Bench stated that the 'impact of the errors is to be assessed by reference to the objects of those requirements and not by reference to any more general sense of 'genuine agreement': at [117].

[20] Explanatory Memorandum, Fair Work Amendment Bill 2018 (Cth) i.

[21] Fair Work Act, s.77A(1).

[22] Fair Work Act, ss.77A(4)–(5).

The amendment also allows parents to agree with their employer to work while their baby is in hospital and recommence their unpaid parental leave when the baby is discharged. This applies where the baby requires hospitalisation immediately following birth either due to premature birth or other birth-related complications.[24]

3.4 *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth)

This Bill was passed on 22 March 2021 and the relevant amendments came into effect on 27 March 2021.

The Revised Explanatory Memorandum states that the relevant amendments:

- provide certainty to businesses and employees about casual employment; and
- give regular casual employees a statutory pathway to ongoing employment by including a casual conversion entitlement in the NES of the Fair Work Act.[25]

The amendments:

- introduce a definition of 'casual employee';
- repeal the definition of 'long term casual employee' and introduce a new definition of 'regular casual employee';
- introduce a new National Employment Standard that:
  - requires employers, other than small business employers, to offer eligible casual employees conversion to full-time or part-time employment (subject to the employer having reasonable grounds not to do so); and
  - allows eligible casual employees (including casual employees of a small business employer) to request conversion to full-time or part-time employment.
- provide for the Commission to conciliate disputes about casual conversion and allow some disputes about casual conversion to be dealt with in Court as small claims; and
- provide for the Commission to vary enterprise agreements and modern awards to resolve difficulties in their interaction with the new casual definition or casual conversion arrangements.

Section 15A introduces a definition of a casual employee. A person is a casual employee if in offering employment, the employer 'makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work' and the employee accepts the offer on that basis.[26]

To determine whether the employer makes no firm advance commitment to continuing and indefinite work, regard must be given only to whether:

- the employer can elect to offer work and whether the person can elect to accept or reject work;
- the person will work as required according to the needs of the employer;

[23] Fair Work Act, s.104(b).

[24] Fair Work Act, s.78A.

[25] Revised Explanatory Memorandum, Fair Work Amendment Bill 2020 (Cth) i.

[26] Fair Work Act, s.15(A)(1).

- the employment is described as casual employment; and
- the person will be entitled to a casual loading or a specific casual rate of pay.[27]

Furthermore, the amendment makes clear that a regular pattern of hours in itself does not indicate a firm advance commitment to continuing and indefinite work;[28] and whether a person is a casual employee is decided at the time of offer and acceptance of employment, not inferred from any subsequent conduct.[29]

Section 66B introduces a right to casual conversion. A person employed for 12 months must be made an offer to convert to permanent employment if they have worked a regular pattern of hours on an ongoing basis in the past six months.[30] The offer must be in writing and must be equivalent to the hours they have been working.[31] An employer is not required to make an offer of conversion to a casual employee if there are reasonable grounds not to make the offer.[32]

3.5 *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*

The *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* was introduced to address a concern that the statutory timeframes for applications to vary an agreement may have delayed urgent applications for enterprises at risk due to the impact of the COVID-19 pandemic. The Government amended the requirements around 'genuine agreement', including that the employer must take all reasonable steps to provide employees with a copy of the proposed variation to an agreement, and any other incorporated material, during the 7 calendar day access period before the vote on a proposed variation.

This April amendment temporarily shortened the access period for a proposed variation of an enterprise agreement from 7 calendar days to 1 calendar day.

Initially this amendment was to remain in place for 6 months. On 13 June 2020, the *Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations 2020* repealed the April amendment. Accordingly, the April amendment only applied to applications where the access period commenced on and between 17 April 2020 and 12 June 2020.

Agreement variation applications almost tripled between 1 April and 31 August 2020 compared with the same period in 2019. The increase in variation applications peaked in June–July but by October 2020 had returned to trend levels. Applicants seeking changes to agreements to help deal with the tough economic conditions brought on by the pandemic drove the increase in agreement variations. The most common variation sought was to remove or defer scheduled wage increases, many of which were due to come into effect on 1 July 2020. Applications to extend the nominal expiry date and insert later wage increases were also common.

The restrictions imposed by the COVID-19 pandemic also required the Commission to amend the Commission's Rules so that statutory declarations, including those made by employers in relation to

[27] Fair Work Act, ss.15(A)(2)(a)–(d).

[28] Fair Work Act, s.15(A)(3).

[29] Fair Work Act, s.15(A)(4).

[30] Fair Work Act, ss.66B(1)(a)–(b).

[31] Fair Work Act, ss.66B(2)(a)–(b).

[32] Fair Work Act, s.66C.

agreement approval applications, did not need to be physically signed in the presence of an authorised witness.[33]

4 Case law relating to enterprise agreements

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

Before a Member can approve an agreement, they must be satisfied that the conditions in ss.186 and 187 of the Fair Work Act have been met. This report discusses a number of decisions relating to these requirements including:

- genuine agreement;
- better off overall test (BOOT);
- employees employed at the time (for the purpose of voting);
- the NES; and
- undertakings.

4.1 Genuine agreement

For an agreement to be genuinely agreed, the employer must take all reasonable steps to:

- ensure that during the access period, the employees (the relevant employees) employed at the time who will be covered by the agreement are given a copy of the written text of the agreement and any material incorporated by the agreement, or have access, throughout the access period, to a copy of those materials;[34]
- notify the relevant employees of the time, place and method of the vote by the start of the access period for the agreement;[35]
- ensure that the terms and effects of the agreement are explained to employees, and the explanation accounts for the particular circumstances and needs of the employees;[36] and
- employees must not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights (NERR) is given.[37]

The final requirement – that employees cannot approve an agreement until 21 days after the last NERR is given – calls upon further provisions about the NERR in both the Fair Work Act and Fair Work Regulations. These are:

- this requirement is not met unless the NERR is validly issued under s.173; and

[33] Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020 (Cth) Sch 1 Part 3.

[34] Fair Work Act, s.180(2).

[35] Fair Work Act, s.180(3).

[36] Fair Work Act, s.180(5).

[37] Fair Work Act, s.181(2).

- a NERR will be valid if it complies with the content and form requirements of s.174(1A).[38] The Fair Work Regulations at 2.05 prescribe a template attached in its Schedule 2.1.

As to the content and form requirements for the NERR, a Full Bench of the Commission had previously held:

> 'There is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity.'[39]

The result was that when a NERR was found to be invalid due to departures in form and content from the template (regardless of how minor the departures may have been) it would be considered that employees had not genuinely agreed to the agreement and the application was not able to be approved.

In their *Workplace Relations Framework Final Report*, the Productivity Commission pressed 'substance rather than form',[40] and recommended that 'the FWC should have the discretion to overlook a procedural defect (that poses no risks to employees).'[41]

Responding to this recommendation, the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) was passed, providing the Commission with the 'discretion' recommended by the Productivity Commission.

The text of the amendment at s.188(2) reads:

> 'An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:
>
> (a) the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> (b) the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the requirements mentioned in paragraph (1)(a) or (b) or the requirements of sections 173 and 174.'

4.1.1 Genuine agreement under the s.188(2) amendment

To provide clarity on the scope of this new amendment, a Full Bench was constituted in *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others*.[42]

The Full Bench interpreted the purpose and operation of the new provision, then applied this to a number of matters displaying common defects in genuine agreement.

The Full Bench found that s.188(2):

> 'does not apply to all procedural or technical requirements with which an employer must comply when bargaining for an enterprise agreement. The 'minor procedural or technical errors' referred to in s.188(2)(a) must be errors

[38] *Peabody Moorvale Pty Ltd v CFMEU* [2014] FWCFB 2042 [44].

[39] Ibid at [46].

[40] Productivity Commission Inquiry Report: Overview and recommendations (No 76, 2015) 34.

[41] Ibid 35.

[42] [2019] FWCFB 318.

'made *in relation to* the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights.'[43]

The Full Bench considered the wording of the new amendment and turned to define the operation of individual terms. The Full Bench found that:[44]

- the word 'minor' is a limitation upon the type of errors contemplated by s.188(2)(a);
- a procedural requirement, which constitutes a 'procedural error' within the meaning of s.188(2)(a), is a failure to follow a particular process or course of action, for example providing employees with a NERR not later than 14 days after the notification time; and
- a technical requirement, which constitutes a 'technical error' within the meaning of s.188(2)(b) includes an obligation to comply strictly with the form and content of an instrument, such as the NERR.

Moving to the application, the Full Bench proposed that:[45]

- a single error may have both procedural and technical components;
- the errors may be examined in the context of the matter: only informing the employees of the time and place at which the vote will occur 4 days before the vote may be considered a minor error where there is a rollover, a history of bargaining at the enterprise and high voter turnout;
- the nature of the requirement is important: for example, the need to inform employees of the time and date of the vote is more significant than informing them of the 'voting method', because the first requirement may impact on the employees' capacity to participate in the voting process, and the second may not; and
- some species of error are unlikely to be classified as 'minor': the deletion of the prescribed text of the NERR which deals with an employee's right to appoint a bargaining representative and the role of the unions as the default bargaining representatives.

The Full Bench also offered some guidance on how the amendment should be understood:[46]

- the word 'likely' in s.188(2(b) means 'probable' in the sense that there is an odds-on chance of it happening, rather than merely being some possibility of it happening;
- the word 'disadvantaged' describes employees prevented from exercising their bargaining rights within the Fair Work regime; and
- in assessing whether employees were not likely to have been disadvantaged by an error, it may be necessary to consider the particular circumstances of the employees concerned.

4.1.2 Genuine agreement under s.180(5)

Section 180(5) states that:

[43] [2019] FWCFB 318 at [117].

[44] Ibid.

[45] Ibid.

[46] Ibid.

> 'The employer must take all reasonable steps to ensure that: (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.'

Following the Federal Court decisions in *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd*[47] and *One Key Workforce Pty Ltd v Construction Forestry, Mining and Energy Union*,[48] there has been continued focus on the explanation of terms given to employees prior to the vote; and the associated content of that explanation that must be known by the Commission before it can be satisfied that s.180(5)(a) has been met.

In *Construction, Forestry, Maritime, Mining and Energy Union v Dawsons Maintenance Contractors Pty Ltd,*[49] the Full Bench considered the approval of an agreement that generally displaced the relevant modern awards. However, the agreement incorporated the classification structures from the relevant modern awards by reference. Some specific award allowances were also preserved.

The relevant questions determined on appeal were whether the employer had taken all reasonable steps to ensure:

- the relevant employees were given copies of or had access to material incorporated by reference into the agreement per s.180(2); and
- the terms of the agreement and the effect of those terms were explained to the relevant employees per s.180(5).[50]

The Full Bench considered the decision *One Key Workforce Pty Ltd v Construction Forestry, Mining and Energy Union*[51] and explained generally the evidentiary requirements for the Commission to be satisfied that all reasonable steps had been taken with respect to the genuine agreement requirements in the Fair Work Act. The Full Bench held that:

> ' … satisfaction on the part of the Commission that all reasonable steps have been taken would logically require cogent evidence on the part of the applicant employer as to the nature and detail of the explanation given. Mere blandishments to the effect that the agreement has been explained or that questions have been answered will inevitably be insufficient, as it is unlikely, if not impossible for the Commission to be satisfied that a genuine agreement has been reached on the basis of such general statements.'[52]

The Full Bench considered the employer's failure to either give to employees or provide access to the classification descriptors contained in the relevant modern awards was a failure to comply with s.180(2). This was because taking all reasonable steps required no less than providing employees with hard copies to the descriptors or a hyperlink to the relevant clause in the modern award because the agreement incorporated the award classification structures.[53]

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[47] [2017] FCA 1266

[48] [2018] FCAFC 77

[49] [2018] FWCFB 2992

[50] Ibid [8].

[51] [2018] FCAFC 77

[52] [2018] FCAFC 77 at [48]

[53] [2018] FCAFC 77 at [46]-[48]

Further, there was no evidence that any steps were taken by the employer to identify or explain many of the less beneficial provisions in the agreement when compared to the relevant modern awards. Whilst some of these provisions were the subject of undertakings, the absence of any identification or explanation of these less beneficial provisions meant that s.180(5) was not complied with.[54]

Construction, Forestry, Maritime, Mining and Energy Union v Ditchfield Mining Services Pty Limited[55] concerned the approval of an agreement based on information before the Commission—including details of the meeting held to explain the agreement—that critically did not contain the content of the explanation given.[56]

Returning to the first instance decision of Flick J in *Construction, Forestry, Mining and Energy Union v One Key Workforce Pty Ltd*,[57] the Full Bench derived four propositions for the explanation of terms:

1. whether an employer has complied with the obligation in s.180(5) depends on the circumstances of the case;
2. the focus of the enquiry as to whether an employer has complied with s.180(5) is first on the steps taken to comply, and then on whether the steps taken were reasonable in the circumstances, and that these were all the reasonable steps that should have been taken in the circumstances;
3. the object of the reasonable steps that are to be taken is to ensure that the terms of the agreement, and their effect, are explained to relevant employees in a manner that considers their particular circumstances and needs. This requires attention to the content of the explanation given; and
4. an employer does not fall short of complying with the obligation in s.180(5) of the Fair Work Act merely because an employee does not understand the explanation provided.[58]

Looking to the circumstances, the Full Bench considered that reasonable steps would include an explanation of the less beneficial terms of the agreement compared to the employees' existing terms and conditions under the award. As the content known to the Commission didn't include this information, the Full Bench found that it was not open to the Deputy President to conclude that the employer took all reasonable steps.[59]

In *Construction, Forestry, Maritime, Mining and Energy Union v McNab Constructions Pty Ltd*,[60] the employer held meetings with relevant groups of employees and provided employees with a summary of the agreement compared to its predecessor. While a statutory declaration of these steps was attached to the agreement application, a copy of the summary document was not.

The CFMMEU argued that the Commission at first instance:

[54] [2018] FCAFC 77 at [54]–[58]

[55] [2019] FWCFB 4022

[56] [2019] FWCFB 4022 at [73]-[75]

[57] [2017] FCA 1266

[58] [2019] FWCFB 4022 at [65]–[68]

[59] [2019] FWCFB 4022 at [84]–[85]

[60] [2020] FWCFB 5080

> 'erred because there was no material before the Commission as to the content of any explanation given to employees concerning the terms of the Agreement or the effect of those terms. It follows … that there was no basis for the Deputy President's finding that "the explanatory material provided to employees was sufficient to explain its effect in detail'.[61]

Although based on the predecessor agreement, the Full Bench noted:

- the agreement contained 'material change, including in relation to coverage of the agreement, overtime, weekend penalties, night work, allowances, casual conversion, and shift work';[62] and
- 'This was not a case of a general rollover with a discrete and obvious change – for example, a simple percentage wage increase – such that a sworn statement from the deponent of the F17 statutory declaration that the employer explained the difference between the proposed and current agreements necessarily conveyed what the content of that explanation was.'[63]

As a result, the Full Bench concluded:

> 'without having seen the summaries of changes provided to employees or any other material disclosing the content of any explanation given to one or more employees, it was not open to the Deputy President to conclude that "the explanatory material provided to employees was sufficient to explain its effect in detail".[64]

In *Construction, Forestry, Maritime, Mining and Energy Union & Others v The Trustee for Celotti Australia Discretionary Trust T/A Celotti Workforce*,[65] employees were asked to approve an agreement that covered work regulated by 12 awards. The appeal was advanced on four bases including that the agreement was not genuinely agreed to by the relevant employees as there was a disjunct between the work performed by employees and the 12 incorporated awards. The appellants further submitted that Celotti did not take all reasonable steps to explain the terms of the agreement and its effects to relevant employees.

The Full Bench found the explanatory document provided by Celotti to relevant employees identified the coverage of the agreement as applying to all on-hire employees that would otherwise be covered by the 12 awards, however, the differences were not explained against each of the 12 awards.[66] The Full Bench held further concerns regarding inaccuracies in the explanatory document and explanation of casual conversion.[67]

The Full Bench considered that employees may not have had a reasonable understanding of how the conditions of their employment might be affected by an enterprise agreement, finding that 'unless employees independently sought clarification, provision of the access pack was the only step taken by

[61] [2020] FWCFB 5080 at [18]

[62] [2020] FWCFB 5080 at [3]

[63] [2020] FWCFB 5080 at [26]

[64] [2020] FWCFB 5080 at [26]

[65] [2020] FWCFB 5011

[66] [2020] FWCFB 5011 at [39].

[67] [2020] FWCFB 5011 at [39], [42]

Celotti to explain the agreement terms. In this context, Celotti did not have regard to the particular circumstances of its employees given its generalised approach.'[68]

The Full Bench concluded that:

- the steps taken by Celotti to explain the terms of the agreement and the effect of those terms were not all the reasonable steps that should have been taken; and
- the reliance, by the Deputy President at first instance, upon Celotti's contention that employees had the opportunity to seek further clarification was misplaced as an invitation to ask questions of management does not cure an otherwise deficient explanation.[69]

In light of this, the Full Bench found that the Deputy President could not have been satisfied that the agreement had been genuinely agreed to by the relevant employees within the meaning of s.188(1)(a)(i) and so could not be satisfied that the approval requirement in s.186(2)(a) had been met.[70]

In *The Australian Workers' Union v Professional Traffic Solutions Pty Ltd*,[71] the Full Bench considered the employer's responses in their Form F17. Relevantly, in response to question 3.5 in the Form F17 in respect to whether the agreement contained any less beneficial terms than the terms and conditions in the award, and/or conferred any entitlements not conferred by the award, the employer stated it did not. The Full Bench held:

> 'As this view was plainly incorrect, it must follow that the employer's explanation could not amount to the taking of all reasonable steps to explain the terms of the Agreement and their effect, as required by s 188(a)(i) and there were reasonable grounds to believe the employees did not 'genuinely agree' to the Agreement, as required by s 188(c)…'[72]

The Full Bench also held that the explanation in question 2.6 of the Form F17 could not have been sufficient for the Commission at first instance to be satisfied that all reasonable steps had been taken by the employer to explain the terms of the agreement and their effect on the relevant employees.[73]

In *The Australian Workers' Union v Rigforce Pty Ltd t/a Rigforce,*[74] the explanatory document concerning how the agreement changed from its predecessor stated that the minimum rates of pay had been increased. However, it was apparent to the Full Bench, and Rigforce conceded, that this statement was incorrect.[75]

The Full Bench found that except for the incorrect statement in the explanatory document, it might be said that the approach taken by the employer was a model of its kind.[76] However, that incorrect statement

[68] [2020] FWCFB 5011 at [50]

[69] [2020] FWCFB 5011 at [51]

[70] [2020] FWCFB 5011 at [52]

[71] [2018] FWCFB 6333

[72] [2018] FWCFB 6333 at [35]

[73] [2018] FWCFB 6333 at [43]

[74] [2019] FWCFB 6960

[75] [2019] FWCFB 6960 at [23]

[76] [2019] FWCFB 6960 at [38]

changed the position. The Full Bench found that in the circumstances, the reasonable step required to be taken by Rigforce for the purpose of s.180(5) was to give an accurate explanation of any change in the quantum of the rates of pay and that this step was all the more necessary because the minimum rates of pay for permanent employees were to be reduced.[77] Consequently, the Full Bench concluded that the requirements of s.180(5) had not been met.

In *The Australian Workers' Union v Gray Australia Pty Ltd as trustee for The Gray Family Trust T/A Ceres Farm & Kenrose Co Pty Ltd and Others*,[78] the Full Bench considered an appeal against the approval of 31 agreements in the horticultural industry. The agreements were made when changes to the *Horticulture Award 2010* were being considered as part of the 4-yearly review of modern awards. The Commission had issued a decision provisionally confirming that there would be forthcoming changes to the award to provide ordinary hours and overtime entitlements for casual employees. The approved agreements did not provide entitlements consistent with these forthcoming changes to the award.

The Full Bench held that for these agreements to be genuinely agreed to, the explanation provided to employees in respect of the forthcoming changes to the award needed to reflect the actual nature of the forthcoming changes.[79] The explanation provided to employees must have identified that the award would be varied so as to prescribe the precise nature of the overtime entitlements for casuals, and further explained that the effect of the agreements is that such entitlements will not be available to the casual employees covered by the agreements.[80]

The Full Bench was of the view that an explanation by the employers to employees that did not set out the changes to the award and the effect of the agreement in respect of such changes would mean that the agreement was not genuinely agreed to.[81] The common ground between the agreements was that it was stated to employees that a change to the award with respect to overtime entitlements to casuals was forthcoming, however the changes explained did not either correctly or adequately reflect the forthcoming changes for casuals.[82]

The Full Bench was not satisfied that the forthcoming changes to the award were accurately or adequately explained to employees in accordance with s.180(5). Thus, the agreements were not genuinely agreed to.[83]

In *Construction, Forestry, Maritime, Mining and Energy Union and others v Specialist People Pty Ltd,*[84] the Full Bench considered whether an agreement approved at first instance was genuinely agreed to.

The Full Bench was not satisfied that the employer's obligation under s.180(5) was met because the explanatory material did not:

[77] [2019] FWCFB 6960 at [40]

[78] [2019] FWCFB 4253

[79] [2019] FWCFB 4253 at [92]

[80] [2019] FWCFB 4253 at [95]

[81] [2019] FWCFB 4253 at [95]

[82] [2019] FWCFB 4253 at [97]

[83] [2019] FWCFB 4253 at [99]

[84] [2019] FWCFB 7919

> '… explain the differences between the rates and conditions of employment provided for in the Agreement as compared to those under the four awards the Agreement was intended to displace in their application to Specialist People's employees. That step was one reasonably necessary to be taken at least in respect of the Building and Construction Award, the Hydrocarbons Award and the Electrical Contracting Award because, as Specialist People has conceded, employees would not be better off overall under the Agreement than under those awards when applicable. That was something the employees obviously needed to know before they were asked to vote to approve the Agreement.'[85]

The Full Bench accepted an undertaking that ensured employees were better off overall under the *Building and Construction General On-Site Award 2010*, the *Hydrocarbons Industry (Upstream) 2010 Award* and the *Electrical, Electronic and Communitcations Contracting Award 2010*. The Full Bench considered this undertaking was also appropriate to resolve their concern with the s.180(5) non-compliance because:

> '… by ensuring that employees are better off overall under the Agreement by a significant margin when performing work covered by the Building and Construction Award, the Hydrocarbons Award and the Electrical Contracting Award, it effectively renders moot the omission we have identified in that the detriment which required explanation would no longer exist.'[86]

Thus, the Full Bench confirmed that undertakings can be accepted to resolve non-compliance with s.180(5) in appropriate circumstances.

4.1.3 'Access period' under s.180(4)

In *Construction, Forestry, Maritime, Mining and Energy Union and Ors v CBI Constructors Pty Ltd,*[87] the Full Bench considered whether an agreement had been genuinely agreed where employees were notified of the voting details on 22 June 2017 for a vote on 29 June 2017.[88] At first instance, the Commission approved the agreement.

Section 180(3) requires that the employer must take all reasonable steps to notify employees of the voting details by the start of the access period. In this appeal decision, the Full Bench considered the meaning of 'access period' defined in s.180(4) as '…the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).'

The Full Bench found that s.180(4) is to be construed on the basis that the 'access period' consists of seven clear calendar days, and that by the application of s.36(1) of the *Acts Interpretation Act 1901* (Cth) the access period ends at the end of the calendar day immediately preceding the day on which the voting process for a proposed agreement commences.[89]

The Full Bench held that the employer did not take all reasonable steps to notify the relevant employees of the voting details at the start of the access period because they had only provided 7 calendar days' notice rather than 7 clear calendar days' notice. To comply with the legislative requirement, voting notification

[85] [2019] FWCFB 7919 at [22]

[86] [2019] FWCFB 7919 at [23]

[87] [2018] FWCFB 2732

[88] [2018] FWCFB 2732 at [9]–[10]

[89] [2018] FWCFB 2732 at [42]

would have had to have occurred on 21 June 2017. The initial decision was quashed, and the agreement application dismissed.[90]

4.2 Better off overall test

When approving an enterprise agreement, the Commission is required to consider whether the enterprise agreement passes the better off overall test (BOOT).[91] An enterprise agreement that is not a greenfields agreement passes the BOOT if the Commission is satisfied, as at the test time, that each award covered employee, and prospective award covered employee, would be better off overall if the agreement applied than if the relevant modern award applied.[92]

The BOOT requires the identification of agreement terms which are more beneficial, and the terms which are less beneficial, and then an overall assessment is made as to whether employees would be better off under the agreement than under the relevant award.[93]

In the *Loaded Rates Agreements*[94] decision, five agreement approval applications were referred to a Full Bench. All of the agreements provided 'loaded rates' of pay, being higher rates of pay which are meant to incorporate, in part or in whole, penalty rates and other financial benefits which are covered by separate provisions in the appropriate modern awards.

The Full Bench set out the following principles for the application of the BOOT to a loaded rates agreement:

1. The BOOT requires **every** existing and prospective award covered employee to be better off overall.
2. Section 193(7) permits the Commission to assume that if a class of employees to which a particular employee belongs would be better off under the agreement than under the relevant modern award, then the employee would be better off overall in the absence of evidence to the contrary.
3. The application of the BOOT to a loaded rates agreement will, in order for a meaningful comparison to be made, require an examination of the practices and arrangements concerning the working of ordinary and overtime hours by existing and prospective employees that flow from the terms of the agreement.
4. The starting point for the assessment will necessarily be an examination of the terms of the agreement in order to ascertain the nature and characteristics of the employment for which the agreement provides or permits.
5. In the case of existing employees, this may involve an examination of existing roster patterns worked by various classes of employees as at the test time. The use of sample rosters to compare remuneration produced by a loaded rates pay structure compared to the relevant modern award may be an effective method of doing this.
6. In the case of prospective employees, the assessment will necessarily involve a degree of conjecture.

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[90] [2018] FWCFB 2732 at [45]

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

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

[93] *Re Armacell Australia Pty Ltd* [2010] FWAFB 9985 at [41]

[94] [2018] FWCFB 3610

7. If the information concerning patterns of working hours needed to assess whether a loaded rates agreement passes the BOOT is not contained in the employer's Form F17 statutory declaration accompanying the approval application, it may be necessary for the Commission to request or require the production of such information.

8. The BOOT involves the making of an overall assessment as to whether an employee would be better off under the agreement, which necessitates identification of the terms in the agreements which are more and less beneficial to the employee than under the relevant award.

9. The overall assessment required will essentially be a mathematical one where the terms being compared relate directly to remuneration. The assessment will be more complex where the agreement contains some superior entitlements which are non-monetary in nature, accessible at the employee's option or which are contingent upon specified events occurring.

10. In respect of non-monetary, optional or contingent entitlements in an agreement, the assumption cannot readily be made that they have the same value for all employees.

11. Where a loaded rates agreement results in significant financial detriment for existing or prospective employees compared to the relevant award, it is unlikely that a non-monetary, optional or contingent entitlement under the agreement will sufficiently compensate for the detriment for all affected employees such as to enable the agreement to pass the BOOT.[95]

The Full Bench added that it would be difficult to pass the BOOT with loaded rates of pay for casual employees unless the casual employees were performing regular and ongoing work with an entitlement to guaranteed hours and rosters. This is because a casual employee could, in a given pay period, work on a day or at a time which would attract the payment of penalty rates under the relevant award and not be engaged on any other hours or at any other times. Thus, if the agreement provided for a casual loaded rate which was less than the highest penalty rate in the relevant award, the casual employee would not be better off overall, unless the agreement provided some other benefit to the casual employee which offset the disadvantage, and/or imposed some restriction on when a casual employee could be engaged to work, and/or required the hours of work of a casual employee to be balanced over time between hours which would attract the payment of penalty rates under the relevant award and hours which would not.[96]

In *Aerocare Flight Support Pty Ltd T/A Aerocare,*[97] the Commission approved an agreement with various loaded rates of pay. Undertakings were accepted addressing BOOT concerns that had arisen from modelling financial outcomes for a particular set of employees. The particular set of employees was considered to be representative as per s.193(7) for purposes of undertaking the BOOT.

The approval was challenged by two unions in *Transport Workers' Union of Australia and Australian Municipal, Administrative, Clerical and Services Union v Swissport Australia Pty Ltd T/A Swissport Pty Ltd*.[98] The Full Bench considered when the Commission can apply the BOOT to a class of employees as per s.193(7) rather than undertaking the 'exhaustive task'[99] of investigating whether or not each individual

[95] [2018] FWCFB 3610 at [115]

[96] [2018] FWCFB 3610 at [121]–[122]

[97] [2020] FWCA 251

[98] [2020] FWCFB 4232

[99] [2020] FWCFB 4232 at [71]

employee would be better off overall. The Full Bench considered the *Loaded Rates Agreements*[100] decision and cited the Bench's observations that 'the selection of a class for the purpose of s.193(7) will only be of utility if … the enterprise agreement affects the members of the class in the same way such that there is likely to be a common BOOT outcome.'[101] Further, the class needs to include prospective award covered employees contemplated by s.193(1), although the extent to which one may extrapolate the characteristics of these employees will depend on the circumstances.[102]

Originally, the Commissioner had selected a class of 35 'at risk'[103] employees to undertake the BOOT. Whilst the approach was 'logical',[104] the Full Bench found the class selection was not consistent with the 'effective application of s.193(7)'[105] as it did not examine existing work patterns for various categories of current employees, nor review existing rosters in a way that would predict the outcome for prospective employees.[106] As the Commissioner 'applied the wrong approach to the operation of s.193(7)',[107] the appeal was upheld.

4.3 Employed at the time

Section 181(1) of the Fair Work Act provides that an employer that will be covered by a proposed agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

The meaning of 'employed at the time' is not defined in the Fair Work Act, however, it has been considered in case law.

4.3.1 The meaning of 'at the time'

In *Kmart Australia Ltd,*[108] the Commission dismissed the application on the basis that it was not satisfied that the agreement was genuinely agreed to by employees as required by s.186(2)(a) of the Fair Work Act. The Commission was also not satisfied that the agreement was 'made' in accordance with s.182(1), on the basis that Kmart did not request employees to vote who were employed at the time of the voting process and would be covered by the agreement. In the initial decision, the period during which the employees were requested to vote was understood by the Commission to be constituted by, or including (together with the access period) the period from the commencement to the conclusion of the voting process.

On appeal,[109] the grounds advanced were principally founded on the Commission's construction of s.181(1), namely, that employees who were employed after the commencement of the voting process, and prior to

[100] [2018] FWCFB 3610

[101] [2018] FWCFB 3610 at [102]

[102] [2018] FWCFB 3610 at [103]

[103] [2020] FWCFB 4232 at [79]-[80]

[104] [2020] FWCFB 4232 at [85]

[105] [2020] FWCFB 4232 at [85]

[106] [2020] FWCFB 4232 at [85]

[107] [2020] FWCFB 4232 at [87]

[108] [2019] FWC 6105

[109] *Appeal by Shop, Distributive and Allied Employees Association, Appeal by Kmart Australia Limited t/a Kmart, Appeal by The Australian Workers' Union* [2019] FWCFB 7599

its conclusion, were to be the subject of an employer request under that provision. The Full Bench found that the 'request' contemplated by s.181(1) is a single act or event which occurs at the end of the access period and immediately prior to (or perhaps upon) the commencement of the voting process.[110] Section 181(1) refers to the 'request' being directed at employees employed 'at the time' who will be covered by the agreement. The Full Bench preferred the approach whereby the 'time' of the request referred to in s.181(1) encompasses the whole of the access period and is to be equated to the 'time' referred to in s.180(2)(a).[111]

4.3.2 Casuals and the meaning of 'employed'

During the reporting period a majority of the Full Federal Court found that only employees employed at the time the employer requests the employees to approve the agreement (the time of voting) are eligible to vote.[112]

In *Construction, Forestry, Maritime, Mining and Energy Union v Noorton Pty Ltd T/A Manly Fast Ferry*,[113] all of the employees asked to vote to approve the agreement were casual employees. The Full Bench first considered whether the employees who were requested to approve the agreement by voting for it were employed at the time. The Full Bench held that a person who is a casual employee, but who is not working on a particular day or during a particular period, is unlikely to be employed on that day or during that period.[114] The Full Bench observed there was no evidence before the Commission of the terms of engagement of the casual employees, or the positions into which the employees were, at the time they were asked to vote, engaged.

The Full Bench held that at least some of the employees who were asked to vote to approve the agreement did not work on the day of the vote or during the access period. The Full Bench considered that the Commission erred in concluding that the relevant employees who were casual employees, and who were asked to vote to approve the Agreement, were all 'employees employed at the time'. The Full Bench held that due to the paucity of evidence before the Commission about the nature of, and the terms under which employees were engaged as casual employees, it could not have been satisfied that the agreement was made in accordance with s.182(1).

4.4 Greenfields agreements

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

In *Construction, Forestry, Maritime, Mining and Energy Union v CPB Contractors Pty Ltd and The Australian Workers' Union,*[115] the Full Bench considered an agreement that covered an enterprise created to cover

[110] [2019] FWCFB 7599 at [31]

[111] [2019] FWCFB 7599 at [33]

[112] *National Tertiary Education Industry Union v Swinburne University of Technology* (2015) 232 FCR 246 at [24]-[27]

[113] [2018] FWCFB 7224

[114] [2018] FWCFB 7224 at [22]

[115] [2018] FWCFB 3702

work previously undertaken by contractors and labour hire workers. The agreement was approved as a greenfields agreement at first instance. On appeal, the Full Bench considered whether the enterprise was a 'genuine new enterprise.'

The Full Bench confirmed that a greenfields agreement must always cover a genuine new enterprise that the employer or employers are establishing or proposing to establish.[116] The Full Bench considered the meaning of 'genuine new enterprise'[117] and made the following comments on what the Commission needs to consider when assessing whether an enterprise is a 'genuine new enterprise':

> 'The search is for the objective character and identity of the enterprise to which the Agreement will apply and its novelty in relation to the employer's business. The degree of segmentation from its existing enterprise is an important consideration. Also relevant are any differences in operational methods, and the intended client base to be serviced by the new enterprise. Whilst in some cases the answer will be clear, in many cases it will be a question of fact and degree whether or not the enterprise created as a result of an insourcing, in this case of a workforce to perform some work previously undertaken by contractors (and their employees) and labour hire workers, is genuinely new.'[118]

The Full Bench found that the enterprise covered by this agreement existed at the time that the agreement was made and was not a genuine new enterprise.[119] The first instance approval decision was quashed, and the agreement application dismissed.[120]

4.5 Undertakings

If the Commission has a concern that an enterprise agreement does not meet the approval requirements in ss.186 and 187 of the Fair Work Act, the Commission can approve the agreement if it receives and accepts a written undertaking from the employer(s) covered by the agreement which addresses that concern.[121]

The Commission may only accept a written undertaking from an employer after seeking the views of each bargaining representative[122] and if satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to an employee or result in substantial changes to the agreement.[123]

In *Construction, Forestry, Maritime, Mining and Energy Union v C&H Acquisition Pty Ltd*,[124] the Full Bench considered whether the effect of accepting undertakings is likely to result in substantial changes to an agreement.

Prior to the approval of the agreement, the employer provided an undertaking that the coverage of the agreement would not exclude employees who exceeded the high-income threshold (the coverage

[116] [2018] FWCFB 3702 at [7], [44]

[117] [2018] FWCFB 3702 at [45]–[59]

[118] [2018] FWCFB 3702 at [45]

[119] [2018] FWCFB 3702 [68]–[71]

[120] [2018] FWCFB 3702 at [71]

[121] Fair Work Act, s.190(2).

[122] Fair Work Act, s.190(4).

[123] Fair Work Act, s.190(3).

[124] [2020] FWCFB 3134

undertaking). The appellant submitted that the coverage undertaking constituted a substantial change to the agreement. The respondent submitted that no employees were affected by the coverage undertaking.

The Full Bench considered that substantial change for the purposes of s.190 of the Fair Work Act referred to a degree of change that altered the nature of the agreement. The Full Bench held the word 'substantial' in s.190(3)(b) signifies a degree or quality of change that is substantial in the sense that it would alter the essence or nature of the agreement, it is concerned with change that is transformative of the agreement so as to raise concerns that the change may have affected the way in which employees chose to vote in approving the agreement.[125]

The Full Bench agreed that the scope of an enterprise agreement is one of its fundamental features, however, that does not mean that any change to the scope of an agreement is a substantial change and each case turns on its own facts and circumstances.[126] The Full Bench found that acceptance of the coverage undertaking would be unlikely to impact any employees. The Full Bench further found that the coverage undertaking would not result in substantial change to the agreement.

See also the discussion in section 4.1.2 re *Construction, Forestry, Maritime, Mining and Energy Union and others v Specialist People Pty Ltd*[127] regarding whether undertakings can be accepted to resolve non-compliance with s.180(5) in appropriate circumstances.

4.6 Unlawful terms

Section 186(4) of the Fair Work Act requires the Commission to be satisfied that an agreement does not include any unlawful terms. Section 194 defines 'unlawful terms' to include a 'discriminatory term'.

In *Application by Metropolitan Fire and Emergency Services Board,*[128] the Commission, at first instance, considered whether to approve an agreement that contained terms restricting the employment and deployment of part-time firefighters. The Commission considered whether these provisions were discriminatory terms for the purposes of s.195 because they could indirectly discriminate against women and employees with parental and carer responsibilities.

The Commission decided that it was bound to follow the Federal Court judgment in *Shop, Distributive and Allied Employees' Association v National Retail Association (No 2)*[129] with respect to the interpretation of what is a 'discriminatory term' for the purposes of s.195.[130] In that case, the Federal Court had concluded that, in the case of s.153 (which is similar to s.195), a term of an enterprise agreement will only be a discriminatory term to the extent that it directly discriminates against an employee covered by the agreement because of, or for reasons including, the employee's particular identified characteristic or attribute.[131]

[125] [2020] FWCFB 3134 at [37]

[126] [2020] FWCFB 3134 at [43]

[127] [2019] FWCFB 7919

[128] [2019] FWC 106

[129] [2012] FCA 480

[130] [2019] FWC 106 at [355]

[131] [2012] FCA 480 at [52]–[58]

The Commission held that the terms restricting the employment and deployment of part-time firefighters were not discriminatory terms for the purposes of s.195 because they only provided for indirect discrimination.[132] However, the agreement was approved with undertakings enabling employment and rostering of part-time firefighters to resolve a concern relating to s.55 non-compliance with the flexible working arrangement provisions set out in the NES.[133]

In *The Hon. Christian Porter MP, Attorney General and Minister for Industrial Relations v Metropolitan Fire and Emergency Services Board; United Firefighters' Union of Australia*[134] the Full Bench considered:

- an application by the employer to vary some of the part-time provisions in the agreement to ensure consistency with the undertakings provided on part-time employment pursuant to s.217; and[135]
- applications by the Minister for Industrial Relations to review the decisions at first instance on various grounds including the determination that the part-time provisions were not discriminatory for the purposes of s.195.[136]

The Full Bench undertook the review of whether the part-time provisions were discriminatory by considering the part-time provisions in the agreement as altered by the undertakings given at first instance and the variations that they approved pursuant to s.217 in this decision.[137] The Full Bench held that the undertakings and variations removed any grounds of indirect discrimination from the part-time provisions in the agreement and that there was no longer any practical purpose in reviewing the first instance decision with respect to s.195.[138] Thus, the Full Bench was not required to determine to finality the issue of the interpretation of s.195.[139]

Notwithstanding this, the Full Bench made some comments with respect to s.195 and said that:

- s.195 defines a 'discriminatory term' for the purpose of s.186(4) concerning unlawful terms;
- the Commission's assessment as to whether s.186(4) is satisfied is undertaken prior to the agreement taking effect; and
- the assessment required by s.195 is whether a particular term 'discriminates' against an employee covered by the agreement for a proscribed reason. This task is congruent with the identification of directly discriminatory terms, as the text of this term will disclose whether it discriminates or not.[140]

The Full Bench considered that 'given that indirect discrimination is concerned with actual impacts and effects, it is not clear to us how it could be relevant to s.195, which exists for the purpose of an assessment which must be made before an agreement commences operation and has any effect on anybody'.[141]

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[132] [2019] FWC 106 at [355]

[133] *Metropolitan Fire and Emergency Services Board* [2019] FWCA 1023

[134] [2019] FWCFB 6255

[135] [2019] FWCFB 6255 at [5]

[136] [2019] FWCFB 6255 at [2]–[4]

[137] [2019] FWCFB 6255 at [60]

[138] [2019] FWCFB 6255 at [67]

[139] [2019] FWCFB 6255 at [73]

[140] [2019] FWCFB 6255 at [68]

The Full Bench expressed concern as to how the assessment required to be made pursuant to s.186(4) in respect of discriminatory terms could be conducted if s.195 was construed to include indirect discrimination:

> 'an examination of the text of the relevant agreement would not suffice, since it would be necessary to explore the impact of facially neutral terms upon employees covered by the agreement …Because the actual effects of terms would not be known (unless perhaps "rolled over" from a previous agreement), the Commission would need to speculate as to what effects might occur in the future.'[142]

Thus, the Full Bench considered it was implausible that Parliament intended s.186(4) and s.195 to be construed to include indirect discrimination.[143]

4.7 NES

The National Employment Standards (NES) are 11 minimum terms and conditions of employment (set out in Part 2-2 of the Fair Work Act) that apply to national workplace relations system employees. An enterprise agreement cannot contain a term that excludes the NES or any provision of the NES.[144] An enterprise agreement may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES and terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee when compared to the NES.[145]

4.7.1 Personal/carer's leave

In *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) & Ors*[146] the High Court allowed an appeal from a judgment of the Full Court of the Federal Court of Australia (Full Federal Court) concerning how the entitlement to paid personal/carer's leave is calculated under s.96(1) of the Fair Work Act.

Section 96(1) of the Fair Work Act provides that '[f]or each year of service with his or her employer… an employee is entitled to 10 days of paid personal/carer's leave'.

The decision arose in the context of a challenge to the enterprise agreement of Mondelez Australia Pty Ltd (Mondelez). Under the enterprise agreement, the ordinary hours of work are 36 hours per week and shift lengths may be eight or 12 hours. The appeals proceeded on an assumption that the employees worked an average of three shifts per week.[147] In accordance with the enterprise agreement, Mondelez credited the employees with 96 hours of paid personal/carer's leave per year of service. When employees would take paid personal/carer's leave for a single 12-hour shift, Mondelez would deduct 12 hours from their accrued

[141] [2019] FWCFB 6255 at [69]

[142] [2019] FWCFB 6255 at [70]

[143] [2019] FWCFB 6255 at [68]–[73]

[144] Fair Work Act, s.55

[145] Fair Work Act, s.55(4)

[146] [2020] HCA 29

[147] [2020] HCA 29 at [6]

balance. Over the course of one year of service, these employees would accrue a quantum of paid personal/carer's leave that is sufficient to cover eight 12-hour shifts.[148]

The employees, together with the AMWU, argued that s.96(1) of the Fair Work Act entitled them to paid personal/carer's leave sufficient to cover ten absences from work per year. That argument was accepted by a majority of the Full Federal Court which held that a 'day' in s.96(1) refers to 'the portion of a 24 hour period that would otherwise be allotted to work' (the 'working day' construction).[149]

A majority of the High Court rejected the 'working day' construction and held that what is meant by a 'day' or '10 days' must be calculated by reference to an employee's ordinary hours of work. The High Court declared:

> 'The expression '10 days' in s 96(1) of the *Fair Work Act 2009* (Cth) means an amount of paid personal/carer's leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period.'[150]

4.8 Mandatory terms

Part 2-4 Division 5 of the Fair Work Act provides that enterprise agreements must include a flexibility term and a consultation term.

If an enterprise agreement does not include a flexibility term or a consultation term or the terms do not meet all the requirements set out in the Fair Work Act, the model terms as prescribed by the Fair Work Regulations are taken to be a term of the agreement.[151]

In *Auld and ors v Teekay Shipping (Australia) Pty Ltd*[152] the Commission was required to consider, among other requirements, whether or not the respondent complied with any consultation obligations as required by s.389(1)(b) of the Fair Work Act.

The *Teekay Shipping (Australia) Pty Limited Seagoing Ratings Dry Cargo Enterprise Agreement 2015* applied to the applicants' employment. The agreement did not contain a consultation term that complied with the requirements of s.205 and the model consultation term was taken to be a term of the agreement.[153] The preliminary question to be determined was whether the model consultation term, taken to be a term of the Agreement, applies in substitution of, or in conjunction with, clause 9 of the agreement (which deals with consultation).[154]

A Full Bench of the Commission concluded that the inclusion of the model consultation term does not have the effect of displacing and rendering inoperative the existing consultation provisions of the agreement.

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[148] [2020] HCA 29 at [8]

[149] [2019] FCAFC 138 at [203]

[150] [2020] HCA 29 at [45]

[151] Fair Work Act, s.202(4), s.205(2).

[152] [2019] FWCFB 6047

[153] [2017] FWCA 5411 at [5]

[154] [2019] FWCFB 6047 at [11]

The Full Bench concluded that a non-compliant agreement consultation term together with the model consultation term operate as terms of the agreement and any conflict between the two provisions may be resolved through the usual means of interpreting agreements.[155]

The Full Bench also found that when read together, the agreement consultation term and the award consultation term (operating as an incorporated term), result in the agreement containing a consultation term which meets the description in s.205 of the Fair Work Act.[156]

Following a writ of mandamus issued by the Federal Court,[157] the Full Bench expressed the provisional view that the question of whether the model consultation term applies in substitution of, or in conjunction with clause 9 of the agreement does not arise because the model consultation term is not taken to be a term of the agreement. The Full Bench also expressed the provisional view that if wrong in the conclusion and the model consultation term is taken to be a term of the agreement, the model consultation term applies in conjunction with clause 9 of the agreement and the award consultation term operates as an incorporated term and will have effect subject to any inconsistency with an express provision of the agreement.[158]

The respondent then lodged an originating application in the Federal Court seeking constitutional writs to quash the orders made by the Commission and declarations that the agreement did not contain a consultation term that complied with s.205, the model consultation term was a term of the agreement and applied to the exclusion of the non-compliant agreement consultation term.[159]

The Federal Court found that the model consultation term became a term of the agreement at the time of its approval. The Federal Court also found that the terms of the model consultation term applied to the exclusion of any rights or obligations in clause 9 of the agreement or the award consultation term.

In conclusion, the Federal Court found that if an enterprise agreement fails to contain a consultation term that complies in all respects with s.205(1) and (1A), s.205(2) deems the model consultation term to be a part of the agreement so that consultation must occur only in accordance with the statutorily prescribed mechanism.[160] Thus, if a model consultation term is taken to be a term of the Agreement, it applies in substitution of an agreement consultation term.[161]

4.9 Procedural issues in relation to the approval of enterprise agreements

This section reports case law developments on the powers of the Commission in relation to the procedural aspects of approving agreements.

[155] [2019] FWCFB 6047 at [74]

[156] [2019] FWCFB 6047 at [88]

[157] *Teekay Shipping (Australia) Pty Ltd v Auld* [2020] FCAFC 19

[158] [2020] FWCFB 1074 at [14]

[159] *Teekay Shipping (Australia) Pty Ltd v Auld* [2020] FCAFC 206 at [37]

[160] [2020] FCAFC 206 at [80]

[161] [2020] FCAFC 206 at [67] and [69]

4.9.1 No power to redact pay rates

The Australian Workers' Union v Oji Foodservice Packaging Solutions (Aus) Pty Ltd[162] considered whether the Commission has power to redact wage rates.

Section 601 of the Fair Work Act contains, among other things, certain publication requirements including:

> '(4) The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:
>
> (a) a decision that is required to be in writing and any written reasons that the FWC gives in relation to such a decision;
>
> (b) an enterprise agreement that has been approved by the FWC under Part 2-4.
>
> The FWC must do so as soon as practicable after making the decision or approving the agreement.'

The Full Bench held that s.601(4) requires the Commission to publish in full an 'enterprise agreement that has been approved by the FWC' and the construction the Full Bench adopted reflected the ordinary, everyday meaning of the word 'publish' which is 'to [make] generally known, declare or report openly; announce …'[163]

The Full Bench noted that s.601(4)(b) uses language in a mandatory form, and on an ordinary grammatical reading the words 'must publish' and 'an enterprise agreement that has been approved by the FWC under Part 2-4' means publishing the whole 'enterprise agreement'. The Commission does not approve a redacted agreement.[164]

The Full Bench found that the Commission lacked the requisite power under s.594 to make an order to redact wage rates from an enterprise agreement that has been approved by the Commission, for the purpose of publication under s.601(4)(b). The Full Bench held it is not open to the Commission to make an order under s.594(1)(c) prohibiting or restricting publication of any material (including wage rates) that forms part of an approved enterprise agreement.[165]

4.9.2 No power to correct obvious errors

Advantaged Care Pty Ltd v Health Services Union[166] raised the question of whether s.602 permits a Member of the Commission to correct an obvious error, defect or irregularity in the text of an enterprise agreement.

Section 602 provides:

> '**602 Correcting obvious errors etc. in relation to the FWC's decisions**
>
> (1) The FWC may correct or amend any obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the FWC (other than an error, defect or irregularity in a modern award or national minimum wage order).

[162] [2018] FWCFB 7501

[163] [2018] FWCFB 7501 at [48]

[164] [2018] FWCFB 7501 at [53]

[165] [2018] FWCFB 7501 at [73]

[166] [2021] FWCFB 453

Note 1: If the FWC makes a decision to make an instrument, the FWC may correct etc. the instrument under this subsection (see subsection 598(2)).

Note 2: The FWC corrects modern awards and national minimum wage orders under section 160 and 296.

(2) The FWC may correct or amend the error, defect or irregularity:

(a) on its own initiative; or

(b) on application.'

The Full Bench considered s.602 and used statutory interpretation principles to ascertain its legal meaning. The Full Bench noted that s.602(1) provides that the Commission may 'correct or amend any obvious error, defect or irregularity … in relation to *a decision of the FWC'*. Further, that s.598(2) provides that a decision 'to make or vary an instrument' is a 'decision of the FWC' for the purpose of s.602(1).[167]

The Full Bench found the Commission's finding at first instance that an enterprise agreement was an 'instrument' for the purpose of s.598(2) was uncontentious. Further, the fact that an enterprise agreement was an instrument was not sufficient to enliven the power in s.602.[168]

The Full Bench then found that the Fair Work Act did not confer a power on the Commission to make an enterprise agreement. Rather an enterprise agreement was made by the parties specified and in the manner described in ss.172 and 182.[169]

The Full Bench found that the Commission at first instance correctly determined that an enterprise agreement was *not* an instrument *made by* the Commission and that consequently there was no power to correct or amend an obvious error, defect or irregularity in an enterprise agreement pursuant to s.602.[170]

4.9.3 Valid approval applications

The Commission recently considered two cases where the validity of the parties' application was in question.

In the first case, the Commission dismissed the agreement approval application at first instance because it did not meet the legislative signing requirements and therefore was not a valid application under s.185 of the Fair Work Act.[171] The application was made by the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), which was a bargaining representative for the agreement. The application was not accompanied by a Form F17 nor a copy of the agreement signed by the employer. The employer's unequivocal position was that it would never sign the agreement and did not agree to the terms of the agreement.

The CFMMEU appealed the first instance decision in *Construction, Forestry, Maritime Mining and Energy Union v Griffiths Cranes Pty Ltd.*[172] It contended that the Commission wrongly answered the preliminary

[167] [2021] FWCFB 453 at [34]

[168] [2021] FWCFB 453 at [35]

[169] [2021] FWCFB 453 at [37]

[170] [2021] FWCFB 453 at [41]

[171] [2018] FWC 6708

[172] [2019] FWCFB 1717

question of whether there was a valid application absent a copy of the agreement signed by the employer as required by s.185(2).[173]

The Full Bench majority did not consider that the Fair Work Act evinces a purpose to render applications to approve agreements that are not accompanied by one or more of the instruments described in s.185(2) invalid and of no effect. Instead, the Commission is conferred with a discretionary power to dismiss applications under s.587(1)(a) or waive any irregularity in the form or manner in which the application is made under s.586(b).[174]

The Full Bench majority found that this application was not invalid merely because it was unsigned by the employer and did not comply with s.185(2). The application was not made in accordance with the Fair Work Act, which resulted in it being amenable to dismissal under s.587(1)(a) or remedial action under s.586. The appeal was upheld, the decision at first instance quashed and the application remitted back to the Commission to consider the discretion in s.586(b).[175]

In the second case, *Retail and Fast Food Workers Union Incorporated v Hungry Jack's Australia Pty Ltd t/a Hungry Jack's,*[176] the Full Bench quashed the first instance decision approving the agreement because the failure of the initial Member to give reasons for his decision.[177] The Full Bench re-determined the approval application with one of the main issues being whether a competent application had been made under s.185.[178]

At the time of bargaining, Hungry Jack's Pty Ltd (Hungry Jack's) was the employer of approximately 16,000 persons working in a chain of well-known fast-food restaurants in Australia. Hungry Jack's was a subsidiary of Hungry Jack's Australia Pty Ltd (HJA).[179] HJA did not employ anyone who performed work in the fast-food restaurants in Australia.[180]

A notice of employee representational rights was circulated to all Hungry Jack's employees in August 2016 which said: 'Hungry Jack's Pty Ltd gives notice that it is bargaining in relation to an enterprise agreement National Hungry Jack's Enterprise Agreement 2017 which is proposed to cover employees that work in the Fast Food Industry.'[181] Bargaining proceeded with Hungry Jack's complying with the relevant requirements in s.180.[182] The agreement was then made by the relevant employees of Hungry Jack's voting to approve the agreement on 17 April 2019.[183]

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[173] [2019] FWCFB 1717 at [13]

[174] [2019] FWCFB 1717 at [55]

[175] [2019] FWCFB 1717 at [56]–[65]

[176] [2020] FWCFB 1693

[177] [2020] FWCFB 1693 at [49]

[178] [2020] FWCFB 1693 at [51]

[179] [2020] FWCFB 1693 at [2]

[180] [2020] FWCFB 1693 at [5]

[181] [2020] FWCFB 1693 at [2]

[182] [2020] FWCFB 1693 at [63]

[183] [2020] FWCFB 1693 at [10]

The approval application was lodged at the Commission by HJA rather than the employing entity Hungry Jack's.[184] The coverage clause in the agreement also specified that 'This agreement shall apply to Hungry Jack's Australia Pty Ltd, as well as its subsidiaries, licensees and their associated companies operating food outlets and all employees of Hungry Jack's as defined.'[185]

The Full Bench found the application was not capable of approval as the application in the form in which it was filed, incorrectly noted HJA as the applicant and therefore was not made in accordance with s.185. HJA was not a bargaining representative for the agreement because it was not an employer of anyone who would be covered by the agreement.[186]

The Full Bench was satisfied that there was no doubt the agreement was to cover Hungry Jack's and its employees in its fast-food restaurants as demonstrated by the notice of employee representational rights and the other material provided to employees during bargaining.[187] The application was held not to be invalid and a nullity because the error with respect to *HJA* incorrectly making the approval application could be corrected by s.586(a).[188]

The agreement was approved with various undertakings, including an undertaking that restricted the coverage of the agreement to employees of the employing entity Hungry Jack's.[189]

4.10 Use of model terms in enterprise agreements

Table 4.1 shows the incidence of use of the model flexibility terms in enterprise agreements over the reporting period. More than half had a flexibility term that differs from the model flexibility term, and specifies which term can be varied. Around one-third had the model flexibility term.

[184] [2020] FWCFB 1693 at [11]

[185] [2020] FWCFB 1693 at [4]

[186] [2020] FWCFB 1693 at [51]

[187] [2020] FWCFB 1693 at [59]

[188] [2020] FWCFB 1693 at [52]–[54]

[189] [2020] FWCFB 1693 at [87]–[92]

Table 4.1: Types of flexibility terms in enterprise agreements, 1 July 2018–30 June 2021, per cent of approved enterprise agreements

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

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

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

5 Quantitative data relating to enterprise agreements

5.1 Quantitative summary of bargaining applications

The Commission retains data on the number of applications made by parties under the bargaining provisions in the Fair Work Act. Table 5.1 reports the total number of bargaining applications and types of applications lodged with the Commission during the reporting period. There were 1010 bargaining applications made, representing an average of around 28 applications per month. The highest number of applications was made in 2018–19. The greatest number of applications made were to deal with a bargaining dispute, though the number of applications declined each year. The numbers of applications for a majority support determination and for bargaining orders declined in 2019–20 before increasing in 2020–21.

Table 5.1: Bargaining applications – lodgments, 2018–21

Type of application	2018–19	2019–20	2020–21
s.229 – Application for a bargaining order	79	54	76
s.236 – Application for a majority support determination	111	93	105
s.238 – Application for a scope order	14	10	6
s.240 – Application to deal with a bargaining dispute	175	143	121
s.242 – Application for a low-paid authorisation	0	0	0
s.248 – Application for a single interest employer authorisation	10	9	4
Total	**389**	**309**	**312**

Note: Applications lodged reflect the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the totals in Tables 5.1 and 5.2. 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.

Table 5.2 reports the number of finalised applications. The trend is slightly different than for lodgments, as the number of those which have been finalised fell over the reporting period.

Table 5.2: Bargaining applications – finalisations, 2018–21

Type of application	2018–19	2019–20	2020–21
s.229 – Application for a bargaining order	69	57	72
s.236 – Application for a majority support determination	96	95	102
s.238 – Application for a scope order	11	13	2
s.240 – Application to deal with a bargaining dispute	160	149	118
s.242 – Application for a low-paid authorisation	0	0	0
s.248 – Application for a single interest employer authorisation	9	8	6
Total	**345**	**322**	**300**

Note: Applications lodged reflect the number of applications lodged within the year. Matters may continue to be finalised from the preceding year, which is reflected in the disparity between the totals in Tables 5.1 and 5.2. 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 authorisations

A single-interest employer authorisation allows two or more employers to bargain for a single-enterprise agreement.[190] The employers must have genuinely agreed to bargain together and must carry on similar business activities under a franchise. Over the reporting period, there were a total of 23 applications lodged for a single-interest employer authorisation—10 applications in 2018–19, 9 applications in 2019–20 and 4 applications in 2020–21 (Table 5.1).

5.3 Scope orders

A scope order enables the Commission to resolve disputes arising during bargaining concerning the group of employees that a proposed enterprise agreement is intended to cover.[191]

There were 30 applications lodged for scope orders during the period—14 applications in 2018–19, 10 applications in 2019–20 and 6 applications in 2020–21 (Table 5.1).

5.4 Bargaining disputes

A bargaining representative may apply to the Commission to deal with a bargaining dispute.[192] 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.[193]

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

[191] Fair Work Act, s.238.

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

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

Similar to the previous reporting period, applications for the Commission to deal with a bargaining dispute accounted for the largest proportion of bargaining applications (more than 4 in 10 applications) over the current reporting period (Table 5.1).

5.5 Protected action ballot orders

Table 5.3 shows the number of applications made for protected action ballot orders and related orders. There were a total of 2341 applications for these orders over the reporting period, with lodgments rising in 2019–20 before declining in 2020–21.[194]

Table 5.3: Protected action – lodgments, 2018–21

Type of application	2018–19	2019–20	2020–21
s.437 – Application for a protected action ballot order	578	696	475
s.447 – Application for variation of a protected action ballot order	15	48	52
s.448 – Application for revocation of a protected action ballot order	33	28	27
s.459 – Application to extend the 30-day period in which industrial action is authorised by protected action ballot	150	115	124
Total	**776**	**887**	**678**

Source: Fair Work Commission.

Table 5.4 shows the number of applications finalised for these orders over the reporting period.[195]

[194] 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.

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

Table 5.4: Protected action – finalisations, 2018–21

Type of application and method of finalisation	2018–19	2019–20	2020–21	Total
s.437 – Application for a protected action ballot order				
Application dismissed (s.587)	2	1	1	4
Application withdrawn	47	36	28	111
Ballot order issued (s.443)	522	648	425	1595
Ballot order not issued (s.443)	5	4	3	12
Ballot order not required (matter concluded)	0	3	3	6
Total	**576**	**692**	**460**	**1728**
s.447 – Application for variation of protected action ballot order				
Application withdrawn	0	7	4	11
Ballot order varied	1	0	0	1
Ballot order varied (s.447)	12	41	44	97
Total	**13**	**48**	**48**	**109**
s.448 – Application for revocation of protected action ballot order				
Application withdrawn	1	0	1	2
Ballot order revoked (s.448)	33	28	26	87
Total	**34**	**28**	**27**	**89**
s.459 – Application to extend the 30 day period in which industrial action is authorised by protected action ballot				
Application withdrawn	6	5	7	18
Extension granted (s.459)	147	110	116	373
Total	**153**	**115**	**123**	**391**

Source: Fair Work Commission.

6 The numbers of enterprise agreements and wage outcomes

6.1 The numbers of enterprise agreements

Table 6.1 shows the number of enterprise agreements that were lodged and finalised by the Commission for each year between 1 July 2018 and 30 June 2021. In total, 12 480 applications were lodged and 12 321 were approved over the reporting period. The number of lodgments fell across the period, with 4932 applications in 2018–19, 3795 applications in 2019–20 and 3753 in 2020–21. However, the number of lodgments for greenfields agreements increased each year.

Of those finalised during the period, almost 6 in 10 agreements were approved with undertakings, however, this proportion declined each year.

Table 6.1: Enterprise agreement – lodgment and approval, 2018–19, 2019–21 and 2020–21

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
2018–19				
Lodged	**4694**	**202**	**36**	**4932**
Finalised				
Approved (s.186)	1473	129	8	1610
Approved (with undertakings – s.190)	3000	75	22	3097
Approved (exceptional circumstances – s.189)	2	0	0	2
Not approved	84	1	0	85
Application withdrawn	559	11	6	576
Total finalised	**5118**	**216**	**36**	**5370**
2019–20				
Lodged	**3526**	**254**	**15**	**3795**
Finalised				
Approved (s.186)	1534	148	8	1690
Approved (with undertakings – s.190)	2299	95	15	2409
Approved (exceptional circumstances – s.189)	0	0	0	0
Not approved	39	0	1	40
Application withdrawn	230	14	0	244
Total finalised	**4102**	**257**	**24**	**4383**
2020–21				
Lodged	**3419**	**316**	**18**	**3753**
Finalised				
Approved (s.186)	1700	219	7	1926
Approved (with undertakings – s.190)	1494	81	11	1586
Approved (exceptional circumstances – s.189)	1	0	0	1
Not approved	20	1	0	21
Application withdrawn	151	14	1	166
Total finalised	**3366**	**315**	**19**	**3700**

Source: Fair Work Commission.

6.1.1 Employee coverage by enterprise agreements

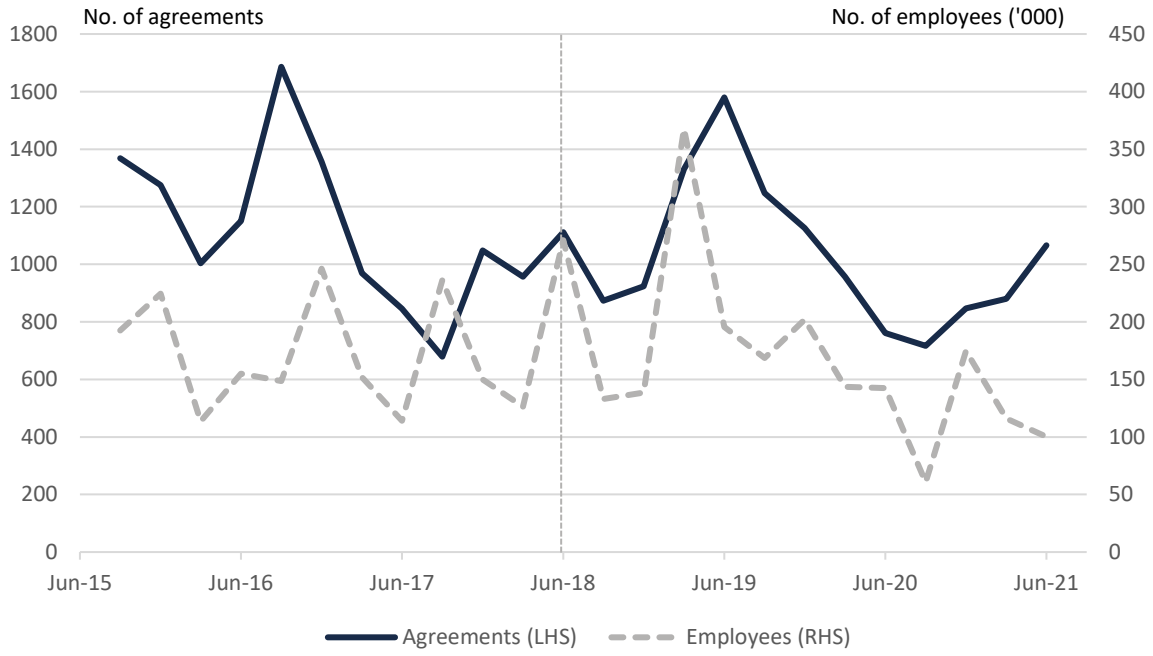
According to the WAD, 12 307 federal enterprise agreements were approved between 1 July 2018 and 30 June 2021.[196] During the reporting period, the number of enterprise agreements approved peaked at 1580 in the June quarter 2019. This was almost three years after the previous peak (Chart 6.1).

The number of enterprise agreements approved declined to 716 in the September quarter 2020, which coincided with the initial impact of the pandemic, before increasing to 1066 by the end of the reporting period (Chart 6.1).

The peak in the number of employees covered by federal enterprise agreements occurred in the March quarter 2019 (almost 370 000 employees). Following this, the number of employees fell to a low of just over 60 000 in the September quarter 2020 and remained around that level until the end of the reporting period.

In the current reporting period, there were fewer enterprise agreements approved (12 307 compared with 13 449) and employees covered (1 942 329 compared with 2 129 508) than the previous reporting period.

Chart 6.1: Number of enterprise agreements approved and number of employees covered per quarter, September quarter 2015 to June quarter 2021



Note: The vertical dashed line represents the end of the previous reporting period.

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

[196] There is a slight discrepancy in the number of agreements approved according to the Commission and the number of agreements finalised according to the WAD over the reporting period. While the Attorney-General's Department attempt to reconcile any differences, some may occur due to duplication or some agreements may have been missed.

Similar to the previous reporting period, most agreements approved in the current reporting period were in Construction and Manufacturing, which accounted for 54.4 per cent of all agreements approved. There were fewer agreements approved across most industries in this reporting period than the previous reporting period, except in Construction; Agriculture, forestry and fishing; Mining; Electricity, gas, water and waste services; and Transport, postal and warehousing (Table 6.2).

Table 6.2: Number of enterprise agreements approved per reporting period, by industry

	2015–18	2018–21
Agriculture, forestry and fishing	143	162
Mining	322	358
Manufacturing	2224	2088
Electricity, gas, water and waste services	381	402
Construction	4363	4613
Wholesale trade	506	307
Retail trade	166	161
Accommodation and food services	235	94
Transport, postal and warehousing	1059	1185
Information media and telecommunications	85	72
Financial and insurance services	117	75
Rental, hiring and real estate services	194	81
Professional, scientific and technical services	333	158
Administrative and support services	414	246
Public administration and safety	579	435
Education and training	657	570
Health care and social assistance	1161	930
Arts and recreation services	141	132
Other services	369	238
Total	**13 449**	**12 307**

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

Almost 2 million employees were covered by a federal enterprise agreement during this reporting period. Differences in the size of agreements approved across industries mean that the industries with the greatest number of employees covered by an agreement does not reflect the industries with the greatest number of agreements.

During this reporting period, around 1 in 6 employees covered by enterprise agreements approved were in Education and training. A relatively high proportion of the total number of employees covered by enterprise agreements approved were in Health care and social assistance (15.2 per cent); Retail trade (13.9 per cent); and Public administration and safety (12.0 per cent) (Table 6.3).

Compared with the previous reporting period, the number of employees covered by enterprise agreements approved in Retail trade more than doubled in this period, while the number of employees covered by enterprise agreements approved in Mining; Manufacturing; Construction; and Accommodation and food services also increased.

However, the number of employees covered by enterprise agreements approved declined in this reporting period for most industries, particularly Financial and insurance services; Health care and social assistance; Public administration and safety; and Transport, postal and warehousing.

Table 6.3: Number of employees covered by enterprise agreements approved per reporting period, by industry

	2015–18	2018–21
Agriculture, forestry and fishing	12 841	12 685
Mining	35 189	48 380
Manufacturing	137 615	152 406
Electricity, gas, water and waste services	52 837	49 008
Construction	100 564	116 833
Wholesale trade	29 229	20 093
Retail trade	114 816	270 812
Accommodation and food services	20 521	52 111
Transport, postal and warehousing	167 270	130 452
Information media and telecommunications	46 252	36 680
Financial and insurance services	156 642	65 582
Rental, hiring and real estate services	7143	2296
Professional, scientific and technical services	26 598	22 681
Administrative and support services	34 918	25 994
Public administration and safety	323 464	233 175
Education and training	358 787	348 513
Health care and social assistance	422 413	296 135
Arts and recreation services	40 684	31 329
Other services	41 725	27 164
Total	**2 129 508**	**1 942 329**

Source Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

The average number of employees covered by enterprise agreements over the reporting period was 158, slightly lower than the previous reporting period (162).

The industry with the largest average number of employees covered by an enterprise agreement was Retail trade (1682 employees)—almost double the next highest industry, Financial and insurance services (874) (Table 6.4).

Table 6.4: Average numbers of employees covered by an enterprise agreement by industry

	2015–18	2018–21
Agriculture, forestry and fishing	90	78
Mining	111	135
Manufacturing	62	73
Electricity, gas, water and waste services	142	122
Construction	24	25
Wholesale trade	58	65
Retail trade	701	1682
Accommodation and food services	87	554
Transport, postal and warehousing	157	110
Information media and telecommunications	546	509
Financial and insurance services	1341	874
Rental, hiring and real estate services	37	28
Professional, scientific and technical services	80	144
Administrative and support services	88	106
Public administration and safety	565	536
Education and training	545	611
Health care and social assistance	365	318
Arts and recreation services	312	237
Other services	114	114
All industries	**162**	**158**

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

6.2 Enterprise agreement outcomes

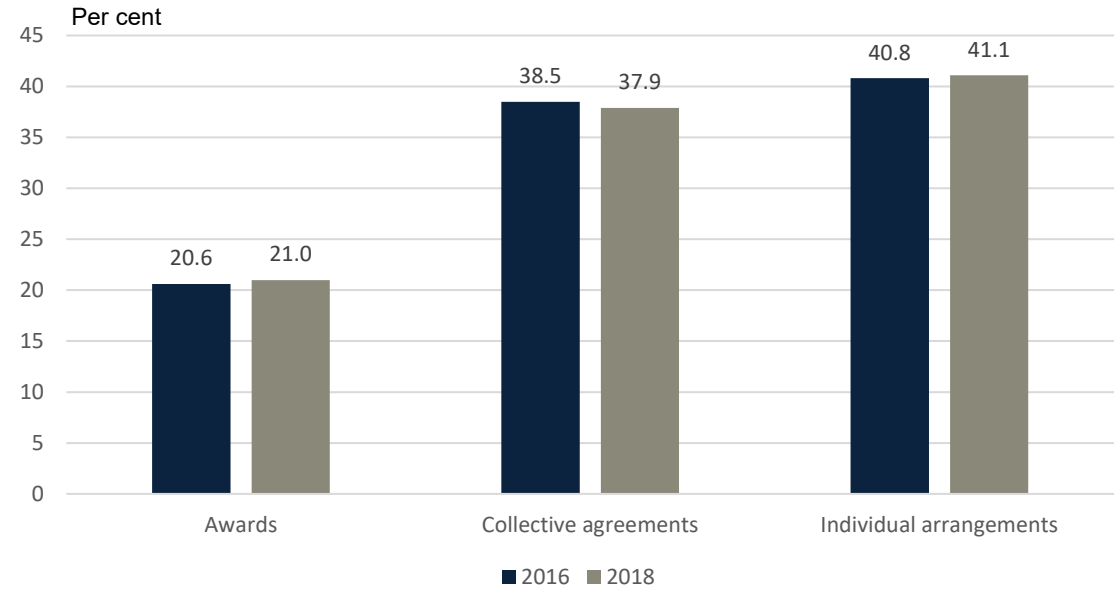
6.2.1 Coverage by method of setting pay

The ABS Survey of Employee Earnings and Hours (EEH), undertaken in May 2018, provides data on coverage by method of setting pay at the beginning of the reporting period. This is the most recent data, as the survey was delayed from May 2020 to May 2021 in response to COVID-19. The next survey is expected to be released in January 2022.[197]

Chart 6.2 compares the proportion of employees by method of setting pay in 2016 and 2018. In 2016, during the previous reporting period, the proportion of employees covered by collective agreements was 38.5 per cent. This proportion declined to 37.8 per cent in 2018, offset by increases in the proportion of employees covered by awards and individual arrangements.

[197] ABS (2020), *Statistical work program changes in response to COVID-19*, Media Statement.

Chart 6.2: Pay-setting arrangements, May 2016 and May 2018



Note: Estimates of the proportion of employees on awards and collective agreements in 2016 have been revised on the basis of the 2018 conceptual treatment of these methods of payment. Individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses.

Source: ABS, 'A Guide to Understanding Employee Earnings and Hours Statistics', Feature Article, in *Employee Earnings and Hours, Australia*, *May 2018;* ABS, *Employee Earnings and Hours, Australia*, various, Catalogue No. 6306.0.

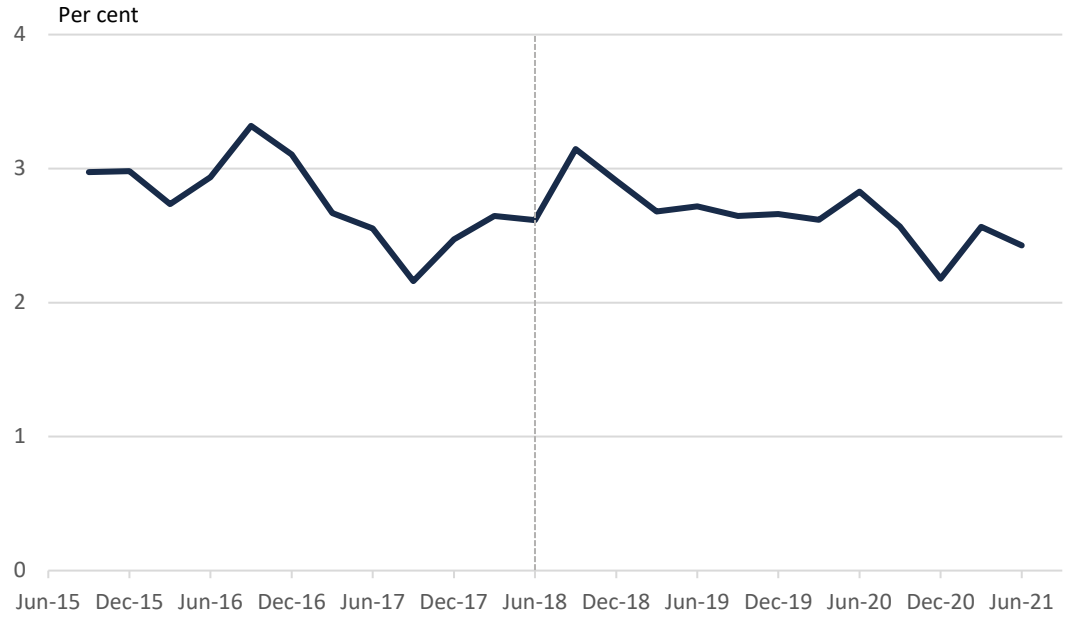
6.2.2 Wage developments in enterprise agreements

Wage outcomes from the WAD can only be calculated for enterprise agreements that provide quanitifiable wage increases across all employees over the life of the enterprise agreement.[198]

In the current reporting period, the AAWI for enterprise agreements approved declined from a peak of 3.1 per cent in the September quarter 2018 to a low of 2.2 per cent in the December quarter 2020. The AAWI has since increased slightly to 2.4 per cent in the June quarter 2021. The AAWI in the current reporting period has been mostly lower than during the previous reporting period (Chart 6.3).

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

Chart 6.3: AAWI for agreements approved in each quarter, September 2015 to June 2021itle



Source: Attorney-General's Department, *Trends in Federal Enterprise Bargaining Report*, June quarter 2021.

6.3 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 persons:

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

The Fair Work Act does not define young persons 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).[199]

Table 6.5 shows the coverage by method of setting pay for these designated groups in May 2018. The most common pay-setting method for these groups was by collective agreement, except for those aged under 21 years where awards were the most common.

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

Table 6.5: Selected characteristics of employees by method of setting pay, per cent, May 2018

	Collective agreement (%)	Award (%)	Individual arrangement (%)	Total (%)
Female	41.1	25.5	33.4	100.0
Part-time	42.3	32.7	25.0	100.0
Aged under 21 years	39.9	43.1	16.9	100.0
Aged 45 years or over	41.8	17.1	41.1	100.0

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

Source: ABS, *Microdata: Employee Earnings and Hours, Australia,* May 2018.

6.4 Developments in wages and conditions for designated groups

This section covers developments in wages and conditions in enterprise agreements, and their effects on the groups designated in s.653(2) of the Fair Work Act using data from the WAD.

6.4.1 Wage developments for approved enterprise agreements in designated groups

This section analyses the wage outcomes for employees in the designated groups that were covered by enterprise agreements approved during the reporting period.[200]

6.4.1.1 Women

The AAWI for females was lower than for males across each year in the current reporting period, consistent with the previous reporting period (Table 6.6). The second part of the table shows that enterprise agreements with a lower share of females (less than 40 per cent) had higher AAWI outcomes than enterprise agreements with greater shares of females. The AAWI for both males and females fell over the reporting period.

[200] Not all enterprise agreements provide employee breakdowns by the designated groups.

Table 6.6: AAWI in enterprise agreements by gender and by proportion of women, 2015–21

Overall	2015–16 (%)	2016–17 (%)	2017–18 (%)	2018–19 (%)	2019–20 (%)	2020–21 (%)
Male	2.9	3.0	2.5	2.8	2.8	2.4
Female	2.9	2.6	2.3	2.6	2.5	2.1
Share of women employees in enterprise agreements						
<40 per cent women	3.0	3.4	2.6	3.0	2.9	2.6
40–60 per cent women	2.9	2.5	2.2	2.6	2.5	2.1
>60 per cent women	2.9	2.9	2.5	2.8	2.5	2.3

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

6.4.1.2 Part-time employees

AAWIs for part-time employees were mostly similar to full-time employees during the current reporting period. The only difference was a lower AAWI in 2019–20. AAWIs for part-time employees were mostly lower in the current reporting period compared with the previous reporting period, however, this was also the case for full-time employees (Table 6.7).

AAWI outcomes in this reporting period were slightly higher for workplaces with between 40 and 60 per cent of their employees working part-time compared with other workplaces.

Table 6.7: AAWI in enterprise agreements by full-time/part-time status and by proportion of part-time, 2015–21

Overall	2015–16 (%)	2016–17 (%)	2017–18 (%)	2018–19 (%)	2019–20 (%)	2020–21 (%)
Full-time	2.9	3.0	2.4	2.7	2.8	2.3
Part-time	2.9	2.7	2.3	2.7	2.6	2.3
Share of part-time employees in enterprise agreements						
<40 per cent part-time	2.9	2.8	2.4	2.7	2.7	2.3
40–60 per cent part-time	2.9	3.2	2.3	2.8	2.8	2.5
>60 per cent part-time	2.9	2.5	2.4	2.7	2.5	2.4

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

6.4.1.3 Non-English speaking background employees

AAWIs for employees with a non-English speaking background were slightly lower than for those with an English speaking background over the reporting period (Table 6.8).

Workplaces with 20 per cent or more of their employees with a non-English speaking background had slightly lower AAWIs compared with workplaces that had a smaller share of employees with a non-English speaking background over the reporting period.

Table 6.8: AAWI in enterprise agreements by non-English speaking background status and by proportion of non-English speaking background employees, 2015–21

Overall	2015–16 (%)	2016–17 (%)	2017–18 (%)	2018–19 (%)	2019–20 (%)	2020–21 (%)
Non-English speaking background	2.9	2.5	2.3	2.6	2.6	2.3
English speaking background	2.9	2.8	2.4	2.7	2.7	2.4
Share of non-English speaking background employees in enterprise agreements						
<20 per cent	2.9	2.8	2.6	2.7	2.7	2.4
≥20 per cent	2.9	2.5	2.2	2.6	2.5	2.3

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

6.4.1.4 Young and mature age persons

AAWIs for young and mature age workers were similar to those aged between 21 and 44 years in the first two years of the reporting period. However in 2020–21, AAWIs were higher for young workers compared with workers aged 21 years and over. AAWIs for each age category were mostly lower than the previous reporting period (Table 6.9).

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

AAWIs for workplaces with 20 per cent or more of their employees aged 45 years and over were lower than workplaces with smaller proportions of mature age employees across each year.

Table 6.9: AAWI in enterprise agreements by young and mature age workers and by proportion of employees, 2015–21

Overall	2015–16 (%)	2016–17 (%)	2017–18 (%)	2018–19 (%)	2019–20 (%)	2020–21 (%)
Young (under 21 years)	2.8	2.7	2.5	2.7	2.6	2.6
≥21 years and ≤44 years	2.9	2.9	2.5	2.7	2.7	2.4
Mature (45 years and over)	2.9	2.7	2.4	2.7	2.6	2.2
Share of young employees in enterprise agreements						
<20 per cent	2.9	2.8	2.4	2.7	2.7	2.3
≥20 per cent	2.8	2.6	2.6	3.2	2.5	3.3
Share of mature employees in enterprise agreements						
<20 per cent	3.0	4.0	3.7	3.6	3.3	3.3
≥20 per cent	2.9	2.7	2.4	2.7	2.6	2.3

Source: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

6.4.2 Developments in conditions for approved enterprise agreements in designated groups

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

An analysis of the coverage of the core provisions by designated groups based on the data in Table 6.10 is provided below. In aggregate, these core provisions cover most employees, with occupational health and safety (82.9 per cent) and shift work/rostering (88.6 per cent) provisions being relatively less prevalent. The table also highlights the following for the designated groups:

- **Women** were more likely to be covered by parental leave provisions and less likely to be covered by shift work/rostering provisions.
- **Part-time employees** were more likely to be covered by termination change and redundancy provisions and shift work/rostering provisions and less likely to be covered by occupational 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 and general training arrangement provisions.
- **Young persons** were more likely to be covered by termination change and redundancy provisions and less likely to be covered by general training arrangement provisions.
- **Mature aged persons** were more likely to be covered by general training arrangement provisions and less likely to be covered by shift work/rostering provisions and termination change and redundancy provisions.

Table 6.10: Coverage of designated groups by core provisions, 2018–21

	Female (%)	Part-time (%)	Non-English speaking background (%)	Under 21 years (%)	Over 45 years (%)	All (%)
Annual leave	99.5	99.7	99.1	99.7	99.2	99.3
General training arrangements	95.2	97.0	89.7	77.3	96.4	94.5
Hours of work	99.1	99.7	98.1	99.6	98.4	98.8
Long service leave	99.0	99.4	96.6	99.2	97.3	97.9
Occupational health and safety	81.8	79.9	77.5	81.1	81.8	82.9
Parental leave	97.8	96.3	92.8	91.5	95.8	95.7
Personal carer's leave	99.6	99.8	98.9	99.7	99.2	99.3
Public holidays	98.6	99.1	97.5	99.5	97.5	97.9
Shift work/rostering provisions	87.1	92.0	89.7	90.1	86.8	88.6
Superannuation	99.3	99.5	98.0	99.7	98.7	99.0
Termination change and redundancy	93.6	97.0	94.1	99.2	91.8	93.4
Type of employment	99.8	99.9	98.9	99.7	98.9	99.2

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: Attorney-General's Department, *Workplace Agreements Database*, June quarter 2021.

References

Data references

ABS, *Microdata: Employee Earnings and Hours, Australia*, May 2018.

Attorney General's Department, *Workplace Agreements Database*, June quarter 2021.

Fair Work Commission, Annual Report 2018–19.

Fair Work Commission, Annual Report 2019–20.

Fair Work Commission, Annual Report 2020–21.

Appendix A – Enterprise agreements – lodgment by industry, 1 July 2018 to 30 June 2021

Table A.1: Enterprise agreements – lodgment by industry, 1 July 2018 to 30 June 2021

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Aged care industry	230	2	1	233
Agricultural industry	134	3	0	137
Airline operations	112	1	2	115
Airport operations	13	1	0	14
Aluminium industry	11	0	0	11
Ambulance and patient transport	9	0	0	9
Amusement, events and recreation industry	22	0	0	22
Animal care and veterinary services	6	0	0	6
Aquaculture	7	0	0	7
Asphalt industry	54	0	1	55
Australian Capital Territory	14	0	0	14
Banking, finance and insurance industry	77	1	0	78
Broadcasting and recorded entertainment industry	10	0	12	22
Building services	18	1	2	21
Building, metal and civil construction industries	2980	3	484	3467
Business equipment industry	7	0	0	7
Cement and concrete products	133	0	4	137
Cemetery operations	8	0	0	8
Children's services	149	1	0	150
Cleaning services	26	0	4	30
Clerical industry	113	1	0	114
Clothing industry	13	0	0	13
Coal export terminals	7	0	0	7
Coal industry	112	0	10	122
Commercial sales	5	0	0	5
Commonwealth employment	49	0	0	49
Contract call centre industry	1	0	0	1
Corrections and detentions	19	0	1	20
Diving services	4	0	1	5
Dredging industry	5	0	3	8
Dry cleaning and laundry services	8	0	0	8
Educational services	450	17	1	468
Electrical contracting industry	595	2	80	677
Electrical power industry	86	2	1	89
Fast food industry	27	1	0	28
Fire fighting services	31	0	1	32
Food, beverages and tobacco manufacturing industry	319	1	0	320
Funeral directing	8	0	0	8
Gardening services	21	0	0	21
Grain handling industry	15	0	0	15
Graphic Arts	67	1	0	68
Hair and Beauty	1	0	0	1

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Health and welfare services	498	15	3	516
Hospitality industry	70	1	1	72
Indigenous organisations and services	8	0	0	8
Industries not otherwise assigned	1	0	0	1
Journalism	19	0	0	19
Licensed and registered clubs	25	0	0	25
Live performance industry	27	0	12	39
Local government administration	158	0	1	159
Manufacturing and associated industries	1617	7	41	1665
Marine tourism and charter vessels	13	0	0	13
Maritime industry	84	1	4	89
Market and business consultancy services	2	0	0	2
Meat Industry	71	0	1	72
Mining industry	147	1	2	150
Miscellaneous	19	0	2	21
Northern Territory	9	0	0	9
Oil and gas industry	102	0	11	113
Passenger vehicle transport (non rail) industry	107	0	9	116
Pharmaceutical industry	57	0	0	57
Pharmacy operations	2	0	0	2
Plumbing industry	516	1	35	552
Port authorities	62	1	2	65
Poultry processing	32	0	0	32
Publishing industry	9	0	0	9
Quarrying industry	49	0	0	49
Racing industry	25	0	0	25
Rail industry	97	0	7	104
Real estate industry	10	0	0	10
Restaurants	6	0	1	7
Retail industry	89	1	4	94
Road transport industry	405	1	13	419
Rubber, plastic and cable making industry	2	0	0	2
Salt industry	4	0	0	4
Scientific services	3	0	0	3
Seafood processing	6	0	0	6
Security services	95	0	3	98
Social, community, home care and disability services	160	2	0	162
Sporting organisations	4	0	0	4
State and Territory government administration	52	0	0	52
Stevedoring industry	52	0	3	55
Storage services	388	0	3	391
Sugar industry	16	0	0	16
Tasmania	11	0	0	11
Technical services	9	0	0	9
Telecommunications services	13	0	0	13
Textile industry	13	0	0	13

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Timber and paper products industry	110	0	0	110
Tourism industry	13	0	0	13
Vehicle industry	145	0	1	146
Waste management industry	141	0	2	143
Water, sewerage and drainage services	61	0	1	62
Wine industry	25	0	0	25
Wool storage, sampling and testing industry	4	0	0	4
Total lodged	**11639**	**69**	**770**	**12478**

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

Source: Fair Work Commission.