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

2012–2015

Bernadette O'Neill, General Manager

November 2015

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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Diana Lloyd, Manager, Media and Communications

GPO Box 1994

Melbourne VIC 3001

Phone: 03 8656 4848

Email: Diana.Lloyd@fwc.gov.au

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List of abbreviations

AAWI	Average Annualised Wage Increase
ABS	Australian Bureau of Statistics
AMWU	Australian Manufacturing Workers' Union
ANZSIC	Australian and New Zealand Standard Industrial Classification
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
AWIRS	Australian Workplace Industrial Relations Survey
AWRS	Australian Workplace Relations Study
BOOT	Better Off Overall Test
CFMEU	Construction, Forestry, Mining and Energy Union
CMS	Case Management System
EEH	Employee Earnings and Hours
Explanatory Memorandum	*Explanatory Memorandum to the Fair Work Bill 2008* (Cth)
Fair Work Act	*Fair Work Act 2009* (Cth)
Fair Work Commission	Commission
Federal Court of Australia	Federal Court
IFA	Individual flexibility arrangement
NES	National Employment Standards
NOERR	Notice of Employee Representational Rights
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 (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and extensions to unpaid parental leave.

This report presents findings for the 26 May 2012–25 May 2015 period from the review into the developments in enterprise agreement making in Australia. Pursuant to s.653(3) this report is due to the Minister for Employment within six months from the end of the reporting period, i.e. by 25 November 2015.[1]

Key legislative developments in enterprise agreement making

During the reporting period the Australian Parliament passed the *Fair Work Amendment Act 2012*, the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* and the *Fair Work Amendment Act 2013* to amend the Fair Work Act. The amendments:

- provide the Commission with a new function of 'promoting cooperative and productive workplace relations and preventing disputes';[2]
- prohibit the making of an enterprise agreement with only one employee;[3]
- require enterprise agreements to include a consultation term that requires employers to consult with employees in relation to changes to their regular rosters or ordinary hours of work;[4]
- make opt-out clauses an unlawful term;[5] and
- provide that a term of an enterprise agreement that requires or permits superannuation contributions to be made to a specified fund for the benefit of a default fund employee is an unlawful term, unless the fund meets certain criteria.[6]

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[1] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012. The initial General Manager's report presented results which included data up to 30 June 2012 as a result of data collection periods. This report includes data from 1 July 2012 to 30 June 2015 for the same reason.

[2] Fair Work Act, s.576(2)(aa).

[3] Fair Work Act, s.172(6).

[4] Fair Work Act, s.205(1)(a).

[5] Fair Work Act, s.194(ba).

[6] Fair Work Act, s.194(h).

Key findings from the quantitative data about enterprise agreement making

During the reporting period, a total of 19 763 applications for approval of enterprise agreements were lodged and 18 656 were approved. The number of enterprise agreements approved each year has fluctuated, trending downwards over the reporting period. The number of employees covered by enterprise agreements has also declined over the reporting period. The largest amount of enterprise agreements approved over the reporting period by industry were in construction and manufacturing, which together accounted for almost half of all enterprise agreements approved. The average number of employees who were covered by an enterprise agreement was 135, slightly higher than in the previous reporting period.

Representatives of employers were asked why, or why not, enterprise agreements had been made at their enterprise. Their main reasons for making enterprise agreements were employee organisation demands, to reward employees, and because the terms and conditions of awards were not suitable or flexible enough for their enterprise. The main reasons enterprises gave for not making enterprise agreements were that they considered award rates and conditions adequate, they preferred to negotiate with individual employees and/or they considered the enterprise bargaining process too difficult to implement.

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.[7]

For the reporting period, the most common method of setting pay for the designated groups was by an award. Enterprise agreements were the second most common method of setting pay for all designated groups except young people, where 'other' methods of setting pay were more prevalent.

In terms of wage developments in approved enterprise agreements over the reporting period, there was no consistent trend relating to female Average Annualised Wage Increases (AAWIs) compared with male AAWIs. Part-time employee AAWIs were lower than AAWIs for full-time employees. Non-English speaking background employee AAWIs were broadly similar to English speaking background AAWIs. Young employees exhibited lower AAWIs than both employees aged between 21 and 45 and mature age employees.

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

Key innovations at the Commission in enterprise agreement making

The Commission, through its Future Directions program, implemented two initiatives which relate to enterprise agreement making during the reporting period. Its enterprise agreement triage pilot sought to improve timeliness, cost effectiveness and consistency in the approval of enterprise agreements and the New Approaches initiative responded to the Commission's new statutory obligation of promoting cooperative and productive workplace relations and preventing disputes.

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1 Introduction

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

The Commission is comprised of Members who are appointed by the Governor-General under statute, headed by a President.[8] The President is assisted by a General Manager,[9] also a statutory appointee, who oversees the administration of Commission staff. Commission staff are engaged to provide support to the tribunal and its Members. Further information about the Commission can be found on its website, www.fwc.gov.au.

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

- review the developments in enterprise agreement making;
- conduct research into the extent to which individual flexibility arrangements (IFAs) under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
- conduct research into the operation of the provisions of the National Employment Standards (NES) relating to employee requests for flexible working arrangements and 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.[10]

The Fair Work Act specifies that the research must be conducted in relation to the first three years following the commencement of s.653 and each subsequent three-year period,[11] 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.[12]

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

[9] Fair Work Act, s.656.

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

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

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

This report presents developments in enterprise agreement making in Australia for the three-year review period from 26 May 2012 to 25 May 2015.[13]

The report is divided into six sections dealing with developments in enterprise agreement making:

- Section 1 — overview of resources used in the report;
- Section 2 — bargaining for an enterprise agreement;
- Section 3 — disputes arising during the bargaining process;
- Section 4 — the approval and processing of enterprise agreements;
- Section 5 — the content of enterprise agreements; and
- Section 6 — the coverage of enterprise agreements.

No significant developments in the termination of enterprise agreements occurred during the reporting period.

1.1 Overview of resources used in the report

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

- survey data from Australian Bureau of Statistics (ABS) collections;
- administrative data collected by the Commission;
- data drawn from the Australian Workplace Relations Study (AWRS) conducted by the Commission, which links employer data with employee data collected for the period;
- data from the Workplace Agreements Database (WAD), compiled and maintained by the Department of Employment;
- other commissioned research; and
- case law.

1.1.1 Australian Bureau of Statistics data

ABS data sources that are used in this report include the Employee Earnings and Hours (EEH) and Labour Force surveys.

1.1.1.1 Employee Earnings and Hours survey

The EEH survey is an employer-based survey conducted biennially. It measures weekly and hourly earnings of employees. In addition, it provides detailed information about the characteristics of

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[13] Section 653(1A) of the Fair Work Act provides that the General Manager is required to review and undertake research for the three-year period from commencement of the provision and each later three-year period. Section 653 commenced operation on 26 May 2009 (see s.2 of the Fair Work Act). The initial reporting period concluded 25 May 2012. The initial General Manager's report presented results which included data up to 30 June 2012 as a result of data collection periods. This report includes data from 1 July 2012 to 30 June 2015 for the same reason.

The *Fair Work Amendment Bill 2014* was passed by both Houses of the Australian Parliament on 11 November 2015. As this report presents developments in enterprise agreement making in Australia for the three years from 26 May 2012 to 25 May 2015, amendments made to the Fair Work Act in relation to greenfields enterprise agreements and protected action ballot orders passed by the Australian Parliament, are outside the reporting period for this report have not been addressed.

employers and their employees, allowing for an analysis by gender, industry, occupation, state, firm size, type of employee and method of setting pay.

1.1.1.2 Labour Force survey

The monthly Labour Force survey is the primary source for official ABS estimates of employment and other labour market activity in the Australian civilian population aged 15 years and over. It collects comprehensive labour market information cross-referenced by detailed demographic data on a monthly basis. The data provide information on the employment of designated groups.

1.1.2 Fair Work Commission administrative data

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

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

CMS plus records similar information in relation to bargaining and other applications.

1.1.3 Australian Workplace Relations Study

The AWRS is the first Australia-wide statistical data set linking employer data with employee data since the 1995 Australian Workplace Industrial Relations Survey (AWIRS).

The AWRS provides an additional set of data for the Commission on matters related to enterprise agreements that are not ordinarily reported on by the Commission, or any agency. This includes data on why enterprise agreements are or are not entered into by workplaces, as well as data in relation to designated groups.

1.1.3.1 AWRS design

The AWRS is representative of employers and employees in the national jurisdiction of workplace relations (i.e., covered by the Fair Work Act).[14]

Although the AWRS was designed to produce statistically reliable population estimates for the Australian economy, there were some business units excluded. These included:

- businesses with fewer than five employees;
- businesses in the Agriculture, forestry and fishing industry[15] and in the Defence industry;[16] and
- certain public sector and private sector businesses that are not 'national system' employers.[17]

The AWRS is a resource for producing population estimates of Australian enterprises and their employees in relation to workplace relations matters and enables analysis of employment and workplace relations matters that are not canvassed by other national surveys.

1.1.3.2 AWRS sample and data collection methodology

Data were collected from enterprises between February and July 2014.

A total of 3057 enterprises participated in the AWRS by responding to the Employee Relations (HR) questionnaire. This was the first questionnaire component (of five employer survey components) to be administered and had to be completed in order for the enterprise to be considered as recruited. Data collection methods included computer assisted telephone interviews and online questionnaires.

The employee survey was conducted at enterprises that participated in the AWRS. All employees of enterprises with 521 employees were invited to participate (i.e., the study coordinator and up to 20 employees) as was a random selection of 20 employees from enterprises with more than 21 employees. Data were collected through a questionnaire that could be completed online or in hard copy format.

A total of 7883 employees completed the employee survey, from 1384 of the 3057 enterprises.

The data collected through the AWRS surveys have been weighted up to population estimates sourced from ABS catalogues. All data presented for analysis have been weighted using the appropriate weight from each survey.

1.1.3.3 Further information about the AWRS

Further information about the research design and process, survey instruments, sampled population and units of analysis, sample characteristics and survey weights, and recruitment and response outcomes is available in the AWRS Technical notes.

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[14] Certain private sector non-incorporated businesses in Western Australia and public sector organisations that are not constitutional corporations (ie some local councils and state government departments) were not in the sample.

[15] As defined by the Australian and New Zealand Standard Industrial Classification (ANZSIC) industry division.

[16] As defined by the ANZSIC sub-division 76: Defence; Businesses with fewer than five employees and those in the Agriculture and Defence industries are commonly excluded from industrial relations surveys. See, for example, AWIRS 1990 and 1995.

[17] See s.14 of the Fair Work Act.

1.1.4 Workplace Agreements Database

The WAD is a census database that contains information about federal enterprise agreements that have been certified or approved since the introduction of enterprise bargaining in October 1991. On average, about 8000 enterprise agreements are added to the WAD each year with around 200 separate data fields coded.

The WAD contains data on enterprise agreements such as industry (based on the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 classification), sector, duration of an enterprise agreement and number of employees covered. Other key characteristics such as the title of the enterprise agreement, the section of the Act under which the enterprise agreement was approved and the parties involved in the bargaining process are also entered. Where available, the database includes wage information (including quantum and timing of increases).

1.1.5 Other commissioned research

This report refers to a research report undertaken by the Fair Work Commission, *Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace.*[18] As part of the research, employers, employees and their representatives were invited to nominate enterprise agreement clauses they believed were innovative or productivity enhancing. These nominations, together with an overview of relevant literature and data, aim to provide a resource for those with an interest in identifying or developing clauses in enterprise agreements that may contribute to workplace productivity and innovation, and provide a source of information to guide any future work seeking to explore the development of more targeted resources in this area.

The report refers to findings made in Buchanan et al *Report No. 7/2013—Minimum wages and their role in the process and incentives to bargain*.[19] This commissioned research examines how minimum wage increases impact on over award wages and the incentives to bargain. The study included enterprise case studies, a content analysis of enterprise agreements, and the generation and statistical analysis of workplace survey data. This multi-method approach was used to investigate the motivations, processes and outcomes of wage setting at the workplace level, and examine the role that the minimum wages increases play in shaping enterprise agreement making and over award wage determination.

The report also considers findings made in the study *Fair Work Australia's influence in the enterprise bargaining process*.[20] The study examined the influence of the Commission through its supervisory role in the enterprise bargaining process, and the consequences of the Commission's involvement for the way that employers, employees and employee organisations manage industrial relations at the workplace level. It provided the Commission with empirical data relevant to the reporting requirement in s.653(1)(a), to 'review the developments, in Australia, in making enterprise agreements'.

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[18] Fair Work Commission, *Future Directions 2014–15: Initiative 29, Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*.

[19] Workplace Research Centre (University of Sydney) *Report No. 7/2013—Minimum Wages and their role in the process and incentives to bargain*, Fair Work Commission 2013.

[20] Associate Professor Anthony Forsyth (RMIT University), Professor Peter Gahan and Associate Professor John Howe (University of Melbourne), *Fair Work Australia's influence in the enterprise bargaining process*, Fair Work Commission 2012.

1.1.6 Case law

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

1.1.7 Issues of comparability between the 2012 and 2015 reports

Some results for this 2012–2015 report, such as those relying on data from the Labour Force survey and the WAD, are directly comparable with those in the 2009–2012 report as the method of data collection and the definitions have not changed over time. Where appropriate, comparisons are drawn between the previous and current reporting periods.

Results in relation to other quantitative data, such as the EEH and AWRS, are not directly comparable with similar results presented for the 2009–2012 report. While there are some similarities in the way that data was generated, the differences between the data sets and their method of collection should ensure caution is exercised when comparing data sets from the two different periods.

2 Bargaining for an enterprise agreement

This chapter deals with developments in bargaining for an enterprise agreement during the reporting period and considers:

- legislative changes affecting bargaining;
- significant decisions in relation to bargaining; and
- reasons for making an enterprise agreement indicated by quantitative data.

2.1 Legislative changes affecting bargaining

The 2013 amendments to the Fair Work Act conferred a new role on the Commission of 'promoting cooperative and productive workplace relations'.[21] The Commission's initiatives developed in response to these amendments are dealt with separately in Section 3.

2.2 Significant decisions in relation to bargaining

The following cases discuss developments in case law in enterprise agreement making during the reporting period.

2.2.1 Notice of employee representational rights

In *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)*,[22] a Full Bench of the Commission considered whether a Notice of Employee Representational Rights (NOERR) contained 'other content' prohibited by s.174(1A)(b). The Full Bench concluded that an employer had breached the notice requirements set out in s.174(1A) when it stapled additional information to the NOERR. The Full Bench determined that it could not approve the enterprise agreement because s.174(1A) required strict compliance and it had no discretion to waive a procedural defect in the presentation of the NOERR, the content of which was prescribed by the *Fair Work Regulations 2009* (Cth). The Full Bench also noted that s.174(1A) did not preclude an employer giving additional material to employees at the same time as providing the NOERR, as long as it was provided separately.

2.2.2 Good faith bargaining provisions

In *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia and Another*,[23] the Federal Court of Australia (Federal Court) held that, despite the Fair Work Act not explicitly requiring employers to take any positive steps to satisfy good faith bargaining requirements, an employer who 'sits "mute" and merely reject[s] proposals or terms which are being advanced for its consideration' may not be bargaining in good faith.[24] The Federal Court said a party bargaining under the Act 'cannot adopt the role of a disinterested suitor, only rejecting offers and proposals made by other "bargaining representatives".'[25]

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[21] Fair Work Act, s.576(2)(aa).

[22] [2014] FWCFB 2042.

[23] (2012) 206 FCR 576.

[24] (2012) 206 FCR 576, 588.

[25] (2012) 202 FCR 576, 588.

However, while the Federal Court confirmed that persistent surface bargaining may breach the good faith bargaining requirements, it overturned some of the Commission's bargaining orders (including on the basis that the Commission is not empowered to issue orders that would have the effect of requiring a party to make a concession).

2.3 Reasons for making an enterprise agreement indicated by quantitative data

Table 2.1 presents AWRS data showing reasons why organisations had made an enterprise agreement. The data are also presented by comparing enterprises on the basis of the predominant gender of the enterprise.

For all enterprises, the main reasons given for using an enterprise agreement were: employee organisation or employee association demands (23 per cent), to reward employees with a higher wage relative to award rates (22 per cent) and because the terms and conditions of awards are not suitable or flexible enough (21 per cent).

This data is consistent with findings from research conducted in the previous reporting period. Data from the award reliance survey was used by Buchanan et al to analyse the factors associated with enterprises relying on awards or enterprise agreements for their wage setting. Buchanan et al found that employers with an enterprise agreement in place reported the main reason for paying above award rates was that the award was not suitable or flexible enough for the enterprise.[26]

The AWRS data was further disaggregated to enable a comparison of enterprises based on the dominant gender at the enterprise. Using the AWRS data, enterprises were classified as predominantly male/female if more than half of their workforce was male/female.

When considered by gender, enterprises with a predominantly male workforce were more likely to report that they used an enterprise agreement due to a preference for negotiating directly with employees rather than to follow amounts determined by the Commission (16 per cent compared to 6 per cent) and to reduce the complexity of using multiple awards (25 per cent compared to 15 per cent).

[26] Buchanan et al. *Minimum wages and their role in the process and incentive to bargain*, Fair Work Commission 2013, p. 33.

Table 2.1: Reasons why enterprises use an enterprise agreement by predominant gender of enterprise, per cent of enterprises with an enterprise agreement

	Predominant gender of enterprise		
	Male (%)	Female (%)	Total (%)
Employee organisation/employee association demands/log of claims	23.6	12.3	22.9
Want to reward employees with higher wage than award rates	19.7	23.9	22.0
Award terms and conditions not suitable or flexible enough (e.g. allowances, penalty rates, hours of work, overtime rates, etc.)	23.6	26.9	20.9
To reduce complexity – would otherwise be using multiple awards	24.9	14.8	17.7
Prefer to negotiate directly with our employees than follow amounts determined by the Fair Work Commission	16.0	5.5	13.7
Applicable award wages are not competitive for attracting and retaining workers	14.2	7.5	13.3
Predictability of wage increases	9.5	9.0	8.0
For payroll and/or rostering convenience	9.8	7.2	7.7
Head office/franchisor requirement (i.e., no choice of wage-setting practice)	5.0	11.1	7.4
Some employees/jobs performed are not covered by an award ('award-free')	3.5	1.4	3.0
Other	27.5	30.2	26.8

Note: Data on the predominant gender of the enterprise is based on a smaller sample than the total. Respondents could select multiple responses and therefore proportions may not add up to 100. Enterprises were classified as predominantly male/female if more than half of their workforce is male/female. All data are weighted using an enterprise weight.

Source: Fair Work Commission, Employer survey, *Australian Workplace Relations Study 2014*.

Table 2.2 presents data from the AWRS on why enterprises without an enterprise agreement have not put one in place. The main reasons reported by these enterprises are that award rates and conditions are adequate (32 per cent), that they prefer to negotiate with individual employees than a collection of employees (19 per cent) or that they find the enterprise bargaining process too difficult to implement (13 per cent). There were few differences between enterprises with a predominantly male or predominantly female workforce on reasons why the enterprise does not use an enterprise agreement.

Table 2.2: Reasons why enterprises do not use an enterprise agreement by predominant gender of enterprise, per cent of enterprises without an enterprise agreement

	Predominant gender of enterprise		
	Male (%)	Female (%)	Total (%)
Award rates and conditions are adequate	30.6	30.6	31.8
Prefer to negotiate with individual employees than a collection of employees	19.6	16.9	19.2
Too difficult to implement (i.e., too much red tape and legal work)	12.9	16.5	12.7
The diversity of operations and roles across the business/organisation would require more than one enterprise agreement	6.1	7.1	6.9
The financial cost of negotiating an enterprise agreement would outweigh any performance/productivity benefits	4.7	4.9	3.8
Do not have the management resources to initiate negotiations with employees (e.g. do not have the legal and/or facilitation expertise within the business/organisation)	2.5	2.0	2.3
Concern about negative effects of negotiations on employee relations (i.e., potential to disrupt stability and lead to industrial action)	2.4	np	1.6
Concern about the financial cost of meeting employee demands/expectations	1.3	np	1.1
Wages and conditions pre-set by controlling/owning company or franchisor	1.2	0.7	1.1
Other	19.6	19.8	19.9

Note: Data on the predominant gender of the enterprise is based on a smaller sample than the total.

Respondents could select multiple responses and therefore, proportions may not add up to 100. Enterprises were classified as predominantly male/female if more than half of their workforce is male/female. Missing or 'don't know' responses are excluded. np = not published due to the estimate having a relative standard error of greater than 50 per cent. All data are weighted using an enterprise weight.

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

3 Disputes arising during the bargaining process

The Commission's powers to facilitate bargaining and resolve disputes that arise during the bargaining process include:

- making a bargaining order;[27]
- making a serious breach declaration;[28]
- making a majority support determination;[29]
- making a scope order;[30]
- dealing with a bargaining dispute;[31]
- making a low-paid authorisation;[32]
- making a single-interest employer authorisation;[33]
- making an order for a protected action ballot;[34]
- making a low-paid workplace determination;[35]
- making an industrial action related workplace determination;[36]
- making a bargaining related workplace determination.[37]

In addition to these specific powers, the Commission must also perform its functions and exercise its powers in a manner that promotes harmonious and cooperative workplace relations.

This chapter deals with developments in disputes arising during the bargaining process over the reporting period and considers, where appropriate for each of the specific powers mentioned above:

- quantitative data on bargaining disputes; and
- significant decisions in relation to bargaining disputes.

[27] Fair Work Act, s.230.

[28] Fair Work Act, s.235.

[29] Fair Work Act, s.236.

[30] Fair Work Act, s.238.

[31] Fair Work Act, s.240.

[32] Fair Work Act, s.243.

[33] Fair Work Act, s.248.

[34] Fair Work Act, s.443.

[35] Fair Work Act, s.261; s.262.

[36] Fair Work Act, s.266.

[37] Fair Work Act, s.269.

3.1 Quantitative summary of bargaining applications

The Commission retains data on the number of applications made by parties under each of the bargaining provisions described above. Table 3.1 reports the total number of bargaining applications and types of applications lodged with the Commission during the reporting period. Table 3.2 reports the total number of bargaining applications and types of applications finalised by the Commission during the reporting period.

Table 3.1: Bargaining applications – lodgments, 2012–15

Type of application	2012–13	2013–14	2014–15
s.229 – Application for a bargaining order	78	96	87
s.236 – Application for a majority support determination	74	77	96
s.238 – Application for a scope order	15	24	12
s.240 – Application to deal with a bargaining dispute	231	208	270
s.242 – Application for a low-paid authorisation	0	1	0
s.248 – Application for a single interest employer authorisation	8	16	11
Total	**406**	**422**	**476**

Source: Fair Work Commission, *Fair Work Commission Annual Report 2012–2013; Fair Work Commission Annual Report 2013–14; Fair Work Commission Annual Report 2014–15.* [38]

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

Table 3.2: Bargaining applications – finalisations, 2012–15

Type of application	2012–13	2013–14	2014–15
s.229 – Application for a bargaining order	92	82	114
s.236 – Application for a majority support determination	72	74	115
s.238 – Application for a scope order	12	30	15
s.240 – Application to deal with a bargaining dispute	247	197	277
s.242 – Application for a low-paid authorisation	1	3	1
s.248 – Application for a single interest employer authorisation	10	16	11
Total	**434**	**402**	**533**

Source: Fair Work Commission, *CMS plus.*

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

[38] Appendix 2 reproduces the number of bargaining applications from the 2009–2012 reporting period.

Over the reporting period, a total of 1304 bargaining applications were made. This represents an average of 36 per month.[39]

The data show the numbers of applications made for bargaining orders, majority support determinations and applications for the Commission to deal with bargaining disputes have increased since the beginning of the current reporting period.

The following sections discuss the developments and trends in each type of bargaining application.

3.2 Bargaining orders

Section 229 sets out who may apply for and what must be included in an application for a bargaining order.

Table 3.1 shows that the number of applications for a bargaining order has fluctuated from 78 applications in 2012–13 to 96 in 2013–14.

3.2.1 Significant decisions in relation to bargaining orders

In *The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), v Peabody Energy Australia Coal Pty Ltd*,[40] a Full Bench of the Commission considered whether the employer had breached the good faith bargaining provisions in circumstances where the employer refused to engage in discussions with APESMA after APESMA had put a significantly revised proposal to it.

The Full Bench outlined the obligations of the good faith bargaining provisions as follows:

> [W]e consider that the good faith bargaining requirements required the company to do more than simply respond by letter to the significantly revised proposal put by APESMA. At least, there was an obligation to meet and discuss the proposal and to explain in such meeting or meetings whether the proposal or a modified form of it might be acceptable to the company. This is not to say that the company would be obliged to accept the proposed agreement, only that there was an obligation to give further consideration in the bargaining process and through a meeting or meetings with APESMA to put and explain its position and response to a substantially revised proposal which would seem to have addressed the main concerns previously expressed by the company.[41]

The Full Bench issued a bargaining order.

3.3 Serious breach declarations

No applications were made for a serious breach declaration in the reporting period.

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[39] Forsyth et al., p. 34.

[40] [2015] FWCFB 1451.

[41] [2015] FWCFB 1451 at para. 26.

3.4 Majority support determinations

A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the Commission for a majority support determination.[42] The Commission must make the majority support determination where it is satisfied that:

- a majority of the employees who will be covered by the enterprise agreement want to bargain;
- the employer, or employers, who will be covered by the enterprise agreement have not yet agreed to bargain, or initiated bargaining, for the enterprise agreement;
- the group of employees who will be covered by the enterprise agreement was fairly chosen; and
- it is reasonable in all the circumstances to make the determination.[43]

Table 3.1 shows that the number of applications for a majority support determination during the reporting period has ranged from 74 in 2012–13 to 96 in 2014–15.

3.4.1 Significant decisions in relation to majority support determinations

In *ResMed Limited v The Australian Manufacturing Workers' Union*,[44] a Full Bench of the Commission considered whether an employee organisation could apply for a majority support determination which would apply to all employees where the Commission had found at first instance that only one employee at the workplace was eligible to be a member of the organisation.

The Full Bench found that an employee organisation does not need to be eligible to cover all classes of employees to whom the enterprise agreement would apply in order to apply for a majority support determination. This decision was upheld by the Federal Court in an application for judicial review.[45]

In *Cotton On Group Services Pty Ltd v National Union of Workers*,[46] a Full Bench of the Commission refused an employer permission to appeal against a finding at first instance that a group of employees covered by a majority support determination had been fairly chosen. The Full Bench endorsed the Member's approach in determining that the employees were geographically, operationally or organisationally distinct on the basis that the concept of distinctness 'was more a matter of degree',[47] and that the group did not have to be unique within the corporation to be distinct for the purposes of the Act.

3.5 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.[48]

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[42] Fair Work Act, s.236.

[43] Fair Work Act, s.237.

[44] [2014] FWCFB 2418.

[45] *ResMed Limited v The Australian Manufacturing Workers' Union (AMWU)* [2015] FCA 360.

[46] *Cotton On Group Services Pty Ltd v National Union of Workers* [2014] FWCFB 8899.

[47] [2014] FWCFB 8899, para. 8.

[48] Fair Work Act, s.238.

Table 3.1 above shows that the number of applications for scope orders has ranged from 12 in 2014–15 to 24 in 2013–14. In total, 51 applications for scope orders were lodged in the reporting period.

3.5.1 Significant decisions in relation to scope orders

The approach of the Commission in addressing scope order applications was considered by a Full Bench in *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd*.[49] This case examined whether operations employees and laboratory employees at a refinery should bargain for separate enterprise agreements or bargain for one enterprise agreement as one group. At first instance, a scope order was made that the two groups of employees bargain for separate enterprise agreements. On appeal, the Full Bench quashed this order and made a scope order that the operations employees and laboratory employees bargain for and be covered by the one enterprise agreement. The Full Bench observed, in relation to whether a group is fairly chosen, that 'the weight to be attached to the geographical, operational or organisational distinctness of groups with a broader group will be neutral in determining whether an order ought be made, unless there are particular features of, or circumstances associated with, that distinctness that render the broader group one that is not fairly chosen.'[50]

The Full Bench went on to say that: 'It is implicit in the right to bargain collectively that the preferences of employees as to the appropriate collective should be respected unless there is some good reason under the legislation to decide otherwise – a reason that relates to the conduct and efficiency of bargaining or to the efficient operation of the employer's business. It is, after all, the employees who are in the best position to determine the collective that best suits their legitimate interests.'[51]

3.6 Bargaining disputes

A bargaining representative may apply to the Commission to deal with a bargaining dispute.[52] The Commission may deal with a bargaining dispute in a number of ways, including by mediation or conciliation, or by making a recommendation or expressing an opinion. Further, the Commission may arbitrate with the agreement of the parties.[53]

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

Table 3.1, above, shows that 54.3 per cent of all bargaining related applications lodged in the reporting period were applications for the Commission to deal with a bargaining dispute. Relatively few decisions followed these applications, as such matters are generally dealt with by way of conference or mediation.

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[49] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476.

[50] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at para. 16.

[51] *The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd* [2014] FWCFB 1476 at para. 29.

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

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

Findings from research conducted into the 2009–12 reporting period suggested that 'this provision constitutes an important avenue for parties to access the assistance of the tribunal during bargaining'.[54] Parties interviewed as part of the research into the 2009–12 trends reported that they placed particular importance on the skill of Commission Members in conciliating matters and supported Commission Members taking a 'proactive' approach to resolving bargaining disputes.[55] The proactive approach of the Commission is particularly relevant to the Commission's dispute prevention initiatives under the New Approaches framework.

3.7 Low-paid authorisations

A low paid authorisation is intended to assist low-paid employees, who have not had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level, to engage in enterprise-level collective bargaining.[56] In the current reporting period only one application for a low paid authorisation was lodged with the Commission and this was refused.

3.7.1 Significant decisions dealing with a low paid authorisation

In this one matter, *United Voice*,[57] Deputy President Gostencnik refused to issue a low-paid authorisation to facilitate multi-employer bargaining for employees of five private sector security companies. The Deputy President accepted that many of the relevant employees were 'low-paid', but took the view that as employees of two of the companies had been (or were) covered by enterprise agreements, they had not encountered substantial difficulty accessing enterprise bargaining. The Deputy President also indicated the application was premature, as there were opportunities on foot to continue to bargain collectively, and '[d]ifficulties or barriers to bargaining at the enterprise level will usually only be realised once bargaining for an agreement at that level has been attempted'.[58]

In the current reporting period, the Commission also considered and dismissed an application, made in the previous period, for a low-paid authorisation to facilitate bargaining for nurses employed in general practice clinics. The Commission held that 'the case for the authorisation is not strong and several important factors indicate that multi-employer bargaining may be undesirable or less appropriate than genuine enterprise-based bargaining'.[59] Therefore, it was not in the public interest to make the authorisation.

3.8 Single-interest employer authorisations

A single-interest employer authorisation allows two or more employers to bargain for a single-enterprise agreement.[60] The employers must have genuinely agreed to bargain together and must carry on similar business activities under a franchise. During the reporting period there was a total of 35 applications made for a single-interest employer authorisation.

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[54] Forsyth et al., p. 126.

[55] Forsyth et al., p. 160.

[56] *Explanatory Memorandum to the Fair Work Bill 2008* at para. 992.

[57] *United Voice* [2014] FWC 6441 at para. 131–134.

[58] [2014] FWC 6441 at para. 66 and 131.

[59] *Australian Nursing Federation v IPN Medical Centres Pty Limited and Others* [2013] FWC 511 at para. 162.

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

Table 3.1 shows that eight applications were made in 2012–13, increasing to 16 in 2013–14, before declining again to 11 in 2014–15. No significant Full Bench decisions of the Commission were made during the reporting period as to the substance of the single-interest employer authorisation provisions in the Fair Work Act.

3.9 Protected action ballot orders

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

Table 3.3 shows the applications made for protected action ballot orders, and related orders, over the reporting period. In addition to an application for a protected action ballot order, parties may apply to vary or revoke the protected action ballot order, or the employees may apply to extend the period within which the authorised protected industrial action may be taken by a further 30 days.[61] Table 3.4 shows the applications finalised for protected action ballot orders, and related orders, over the reporting period.[62]

Table 3.3: Protected action – lodgments, 2012–15

Type of application	2012–13	2013–14	2014–15
s.437 – Application for a protected action ballot order	915	627	641
s.447 – Application for variation of a protected action ballot order	12	12	6
s.448 – Application for revocation of a protected action ballot order	38	54	44
s.459 – Application to extend the 30-day period in which industrial action is authorised by protected action ballot	115	124	133
Total	**1080**	**817**	**824**

Source: Fair Work Commission, *Fair Work Commission Annual Report 2012–2013; Fair Work Commission Annual Report 2013–14; Fair Work Commission Annual Report 2014–15*.

[61] 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.

[62] 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 3.4: Protected action – finalisations, 2012–15

Type of application and method of finalisation	2012–13	2013–14	2014–15	Total
s.437 – Application for a protected action ballot order				
Adjourned indefinitely	10	8	0	18
Application dismissed (s.587)	0	0	1	1
Application withdrawn	64	36	50	150
Ballot order not issued	4	7	0	11
Ballot order issued (s.443)	847	560	574	1981
Ballot order not issued (s.443)	0	0	19	19
Ballot order not required (matter concluded)	0	0	3	3
Ballot order not required (parties negotiating)	0	0	1	1
Ballot order varied	0	1	0	1
Decision issued: interim or procedural (s.589)	0	0	9	9
Decision issued: procedural	1	4	0	5
FWC order varied or revoked	0	2	0	2
Order issued	0	0	1	1
Order issued (interim or procedural s.589)	0	0	5	5
Order issued (procedural)	0	1	0	1
Recommendation issued (procedural)	2	0	0	2
Total	**928**	**619**	**663**	**2210**
s.447 – Application for variation of protected action ballot order				
Application withdrawn	1	0	1	2
Ballot order varied	11	12	0	23
Ballot order varied (s.447)	0	0	5	5
Total	**12**	**12**	**6**	**30**
s.448 – Application for revocation of protected action ballot order				
Application adjourned indefinitely	2	0	0	2
Application withdrawn	1	0	1	2
Ballot order revoked	34	52	0	86
Ballot order revoked (s.448)	0	1	43	44
FWC order varied or revoked	3	0	0	3
Total	**40**	**53**	**44**	**137**
s.459 – Application to extend the 30 day period in which industrial action is authorised by protected action ballot				
Application withdrawn	4	2	1	7
Extension granted	113	119	0	232
Extension granted (s.459)	0	0	136	136
Order issued (interim or procedural s.589)	0	0	2	2
Total	**117**	**121**	**139**	**377**

Source: Fair Work Commission, *CMS plus.*

Research has also found that the making of a protected action ballot order, and any subsequent authorisation by employees of protected industrial action, does not necessarily result in industrial action being taken. The protected industrial action may be threatened, or employers may put in place measures to mitigate the loss of notified industrial action, which may result in administrative costs for employers sufficient to progress the claims of employees.[63]

3.10 Low-paid workplace determinations

Over the current reporting period no applications were made for a low-paid workplace determination.

3.11 Industrial action related workplace determinations

Over the reporting period the Commission made four industrial action related workplace determinations. These related to: the State of Victoria in 2012–13;[64] Schweppes Australia in 2012–13;[65] Parks Victoria in 2013–14;[66] and G4S Custodial Services in 2014–15.[67]

3.12 Bargaining related workplace determinations

Over the reporting period no applications were made for a bargaining related workplace determination.

3.13 Dispute prevention initiatives and new approaches

During the reporting period the Commission launched a number of dispute prevention programs through its New Approaches initiative. The Commission's New Approaches initiative is one way the Commission is responding to its new statutory obligation to promote cooperative and productive workplace relations.[68]

A goal of this project is to assist employees and employers to communicate and solve problems together to prevent disputes that may otherwise lead to working days or productivity being lost, including before and during enterprise bargaining. As part of the New Approaches program, Commission Members are available to attend workplaces and provide specialised training in relation to enterprise bargaining and dispute resolution.

The Orora Fibre Packaging and Sydney Water case studies featured below provide an example of the preventative role the Commission can play in workplace relations.

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[63] Productivity Commission (2015), *Draft Report into the Workplace Relations Framework*, pp. 658–659; 667–668.

[64] *State of Victoria v CPSU, the Community and Public Sector Union* [2012] FWAFB 6139.

[65] *Schweppes Australia Pty Ltd v United Voice – Victoria Branch* [2012] FWAFB 8599.

[66] *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950.

[67] *CPSU, the Community and Public Sector Union v G4S Custodial Services Pty Ltd* [2014] FWCFB 9044.

[68] Fair Work Act, ss.3 and 576(2)(aa).

Case study: Orora Fibre Packaging[69]

Collaborative problem solving, supported by the Commission, has helped turn around a business and keep manufacturing and jobs in Australia.

Orora Fibre Packaging supplies a range of corrugated cardboard boxes, packaging and displays to brands across Australia. But it was facing a crisis. The business was facing financial challenges which had the potential to significantly impact its workforce in Australia.

Drastic changes were needed to keep local manufacturing and jobs. But the company and employee organisation did not have the relationship or processes in place to constructively discuss options. Their relationship was adversarial and combative, reflecting the many years where neither side had trusted the other. This was evidenced by the number of disputes that had been referred to the Commission.

Today things are very different. There has not been an industrial dispute referred to the Commission in over 18 months. With some timely assistance from the Commission and expert facilitation by a consultant, the company, workforce and their employee organisation, the Australian Manufacturing Workers' Union (AMWU), have adopted a new approach based on collaborative problem solving. They found the common ground of wanting to keep manufacturing and jobs in Australia, which helped them develop a relationship based around goodwill.

The Commission's role was informal. There was no ongoing file and no formal matter was ever lodged. Instead, the company was aware of the Commission's New Approaches initiatives promoting cooperative and productive workplaces. They worked with President Ross, Deputy President Booth and Commissioner Roe to support their new relationship.

On a number of occasions Commission Members facilitated a candid dialogue between the employee organisation, the company and its consultants where the situation of the business was laid bare. The parties met in joint conferences with the Members, but also used the individual Members as sounding boards during difficult moments. This latter role was particularly useful during the finalisation of an enterprise agreement and during a tricky period when there was the possibility of industrial action over an issue that was external to the company.

Assisted by this informal process a new approach has been developed based on openness, trust and collaboration. It is still a work in progress that depends heavily on the goodwill of the parties. But industrial disputes are now part of the parties' history, while the business has moved onto a more sound financial footing. The business has been turned around and there has been a significant improvement in productive performance.

AMWU Print Division National Secretary Lorraine Cassin agrees with Group General Manager of Orora Fibre Packaging Rick Woods when he describes the change as one of the most rewarding initiatives he has been involved in, calling it a victory for collaboration. They both say that it could not have been achieved without the assistance of the Commission, which they say acted impartially as conscience for both sides.

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[69] Fair Work Commission, *Fair Work Commission Annual Report 2013–2014*, p. 53.

Case study: Sydney Water[70]

An extraordinary turnaround in industrial relations has been achieved at Sydney Water. As touched on in the Commission's 2013–2014 annual report, the relationship between the company and the employee organisation could have been described as hostile, with up to a dozen different disputes before the Fair Work Commission. Now, not a single dispute has been notified to the Commission in almost two and a half years.

It is morning at a water treatment plant in Sydney, where staff are in a meeting to discuss the challenges facing the business and ways to overcome them. In a scene that would have been unimaginable three years ago, Sydney Water Chief Executive Kevin Young and [then] Australian Services Union Branch Secretary Sally McManus are standing side by side answering questions.

'It's a remarkable thing considering the past, because I don't think that ever occurred before. But it's something we're doing more and more,' Mr Young said. Ms McManus agreed, saying 'There's no way whatsoever that would have happened three years ago – no way. It would have been me addressing the members and they would have been passing resolutions probably condemning the Managing Director and probably in another few hours be out on strike.'

The relationship has changed from one of distrust to openness. 'The way it works now, it's very different,' Ms McManus said. 'Management will come to us with changes that they want to make and they'll be open and honest about why they want to do it, what's driving it, what they're trying to achieve. And we'll be open and honest about what our interests are and what we would like to see out of that.'

Kevin Young describes the new relationship as consultative and honest. 'It's very transparent,' Mr Young said. 'If we've got major issues with any part of the business we sit down and we talk and we understand why we need to make some reform. We put some proposals together and we talk to people early and then we nut out the best way forward.'

The turnaround occurred after both parties sought the assistance of the Fair Work Commission to develop a new working relationship. Deputy President Booth instituted a year-long process that helped the parties 'let go' of their long-held hostilities and find common ground.

Ms McManus said, 'It involved a lot of work by the Commission for us to put aside, not ignore but put aside, our previous grievances which in some circumstances would go back 50 years on both sides, to work from a position of "Okay, what do we agree on?" rather than what are we against.'

Deputy President Booth convened a two-day workshop involving management and the employee organisation that proved to be a turning point in the relationship.

'It was one of the most honest two days that I've ever had,' Mr Young said.

The new relationship has allowed new conversations to occur about how to improve the business and become more efficient.

'So in our civil area we went depot by depot for the first time,' Mr Young said, 'and we said look, we've done benchmarking of how we're going against what the typical costs are in the market and there's a gap. We're not sure what the answers are but we want to work with you and we want to

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[70] Fair Work Commission, *Fair Work Commission Annual Report 2013–2014*, p. 63.

close this gap and I think a fair time would be three years.'

There are now regular meetings between management, staff and the employee organisation where progress is discussed.

4 The approval and processing of enterprise agreements

This chapter provides an overview of:

- changes and developments in approval and processing of enterprise agreements indicated by quantitative data, and
- the Commission's enterprise agreement triage pilot program.

4.1 Changes and developments in approval and processing of enterprise agreements indicated by quantitative data

Tables 4.1, 4.2 and 4.3 show the number of enterprise agreements that were lodged and finalised between 1 July 2012 and 30 June 2015. In total 19 763 applications were lodged and 18 656 were approved in the three-year period.[71]

The tables show that 7 087 enterprise agreements were lodged in the period 1 July 2012 to 30 June 2013, with 6 754 lodged from 1 July 2013 to 30 June 2014 and 5 922 lodged from 1 July 2014 to 30 June 2015.

Table 4.1: Enterprise agreement – lodgment and approval, 1 July 2012 to 30 June 2013

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	6333	712	42	7087
Finalised				
Approved (s.186)	4614	574	25	5213
Approved (with undertakings – s.190)	1425	111	11	1547
Approved (exceptional circumstances – s.189)	12	---	---	12
Not approved	59	3	1	63
Application withdrawn	281	29	4	314
Total finalised	6391	717	41	7149

Source: Fair Work Commission, *Fair Work Commission Annual Report 2012–13, Table 4; CMS plus.*

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

Table 4.2: Enterprise agreement – lodgment and approval, 1 July 2013 to 30 June 2014

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	5945	749	60	6754
Finalised				
Approved (s.186)	4156	632	32	4820
Approved (with undertakings – s.190)	1445	113	24	1582
Approved (exceptional circumstances – s.189)	1	---	---	1
Not approved	99	3	1	103
Application withdrawn	269	20	5	294
Total finalised	5970	768	62	6800

Source: Fair Work Commission, *Fair Work Commission Annual Report 2013–14, Table 21; CMS plus.*

Table 4.3: Enterprise agreement – lodgment and approval, 1 July 2014 to 30 June 2015

	s.185 – Single-enterprise	s.185 – Greenfields	s.185 – Multi-enterprise	Total
Lodged	5449	407	66	5922
Finalised				
Approved (s.186)	3433	351	29	3813
Approved (with undertakings – s.190)	1594	48	26	1668
Approved (exceptional circumstances – s.189)	0	---	---	0
Not approved	114	2	1	117
Application withdrawn	382	17	8	407
Total finalised	5523	418	64	6005

Source: Fair Work Commission, *Fair Work Commission Annual Report 2014–15, Table 25; CMS plus.*

Appendix 1 provides a breakdown of agreements lodged and approved by industry.

The median number of days to process an enterprise agreement from lodgment to finalisation is reported in Table 4.4 by enterprise agreement type. Table 4.4 shows that greenfields agreements had the lowest mean number of processing days across all three years.

Table 4.4: Median processing times 1 July 2012 to 30 June 2015

Enterprise agreement type	Median number of days		
	2012–13	2013–14	2014–15
s.185 – Single-enterprise	16	17	21
s.185 – Greenfields	14	14	14
s.185 – Multi-enterprise	22	26	34

Source: Fair Work Commission, *Fair Work Commission Annual Report 2014–15, Table 26*.

4.2 Enterprise agreement triage pilot

In 2014 the Commission introduced, as part of its *Future Directions 2014-15* program,[72] an enterprise agreement triage pilot to improve timeliness, cost effectiveness and consistency in approving enterprise agreements. This pilot ran from 6 October 2014 to 30 June 2015 and has been a key development in the processing and approval of enterprise agreements by the Commission.

The pilot involved assigning enterprise agreements lodged for approval to specially-trained staff to ensure compliance with each of the statutory obligations, including bargaining, voting and prescribed content and whether each enterprise agreement met the better off overall test (BOOT). Commission Members continue to make all decisions as to whether an enterprise agreement should be approved, assisted by the analysis of the administrative staff.

The pilot commenced with assessments of Victorian enterprise agreements in the building, metal and civil construction industry, some enterprise agreements from Western Australia and all enterprise agreements from Tasmania. It then expanded in December 2014 to incorporate all enterprise agreements from Western Australian and the Australian Capital Territory.

The pilot was independently reviewed in April 2015. Key findings of the review were:

- During the pilot there was a consistent improvement in timeliness for approvals.[73]
- The pilot had facilitated more consistent treatment of enterprise agreement approval applications. Common issues affecting bargaining were also more easily observable, such as industries or types of employers where 'mistakes' occur. This provides the Commission with an opportunity to more actively assist parties to prepare enterprise agreements and avoid common pitfalls.[74]

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[72] On 8 May 2014, the Fair Work Commission launched *Future Directions—Continuing the Change Program*, a publication setting out 30 initiatives that the Commission intended to implement over the following two years. The initiatives were a result of consultation with Commission Members, staff and key stakeholders. See https://www.fwc.gov.au/about-us/operations/strategy-vision-future-directions.

[73] Inca Consulting, *Enterprise Agreements Triage: A review of the pilot,* May 2015, p. 7.

[74] Inca Consulting, *Enterprise Agreements Triage: A review of the pilot,* May 2015, pp. 7–8.

- The pilot was cost effective, with Commission staff performing non-determinant work and freeing up Members for more complex matters.[75]
- Commission staff can effectively and efficiently assess the compliance of enterprise agreements with the Fair Work Act, and to the satisfaction of the Commission Members overseeing the pilot.[76]

From 1 July 2015, a greater range of enterprise agreement applications have been progressively referred to the triage process. It is anticipated that by early 2016, 80 per cent of enterprise agreement approval applications may be assessed under the triage process.[77]

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[75] Inca Consulting, *Enterprise Agreements Triage: A review of the pilot,* May 2015, p. 10.

[76] Inca Consulting, *Enterprise Agreements Triage: A review of the pilot,* May 2015, p. 13.

[77] Fair Work Commission, *Fair Work Commission Annual Report 2014–15*, p. 101.

5 The coverage of enterprise agreements

This chapter deals with developments in the coverage of enterprise agreements over the reporting period. This chapter covers:

- legislative changes in the coverage of enterprise agreements;
- developments in coverage indicated by quantitative data;
- effect on designated groups; and
- enterprise agreements by business size.

5.1 Legislative changes in the coverage of enterprise agreements

The *Fair Work Amendment Act 2012* amended the Fair Work Act to insert s.172(6), which prohibits the making of an enterprise agreement with only one employee, as follows:

> Requirement that there be at least 2 employees
>
> (6) An enterprise agreement cannot be made with a single employee.

The provision commenced on 1 January 2013.[78]

5.1.1 Employees fairly chosen

In *John Holland Pty Ltd re Western Region Agreement Western Australia 2012–2016*, a single Member approved an enterprise agreement made with only three employees, finding they had been fairly chosen.[79]

On appeal, a Full Bench quashed the approval of the enterprise agreement on the basis that the group of three employees was not geographically, operationally or organisationally distinct and had not been fairly chosen.[80]

On application for judicial review to the Federal Court, the decision of the Full Bench was quashed, and it was held the three employees covered by the enterprise agreement were fairly chosen. The Federal Court held that an enterprise agreement can be valid even when it covered only a small number of employees and it covered work classifications other than those held by the covered employees, as an enterprise agreement can be made with the intention it will apply to a much broader group of employees over time.[81] On appeal, a Full Court of the Federal Court upheld the Federal Court's decision and the validity of the enterprise agreement.[82]

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[78] *Fair Work Amendment Act 2012*, item 1 and item 1 of Schedule 4.

[79] *John Holland Pty Ltd re Western Region Agreement Western Australia 2012–2016* [2012] FWAA 4449.

[80] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2012] FWAFB 7866 at para. 35.

[81] *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union and Fair Work Commission [2014] FCA 286* at paras 30–40.

[82] *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16 at para. 85.

5.2 Developments in coverage indicated by quantitative data

This section outlines trends and developments in the coverage of enterprise agreements over the reporting period, noting changes to the number of individuals covered and the industries covered. This part includes discussion of:

- coverage by method of setting pay; and
- overall coverage of enterprise agreements.

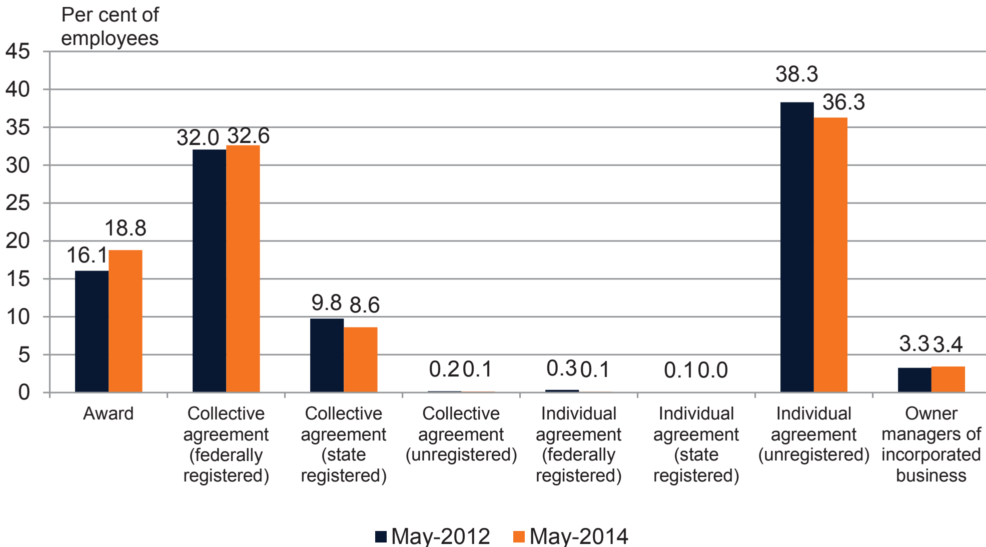
5.2.1 Coverage by method of setting pay

Chart 5.1 presents data on the methods used to set pay for employees with respect to May 2012 and May 2014.[83] It contains additional detail on the jurisdictional coverage of collective and individual agreements. The data show that collective and individual agreements were the most common instruments used to set pay for employees in each period.[84]

The most common form of collective agreements were those registered at the federal level, with almost one-third of employees covered by a federally-registered collective agreement in May 2012 and May 2014.

The largest single category of pay-setting arrangements in both periods was unregistered individual agreements. The proportion of employees covered by unregistered individual agreements fell slightly from 38 per cent in May 2012 to 36 per cent in May 2014.

Chart 5.1: Workplace pay-setting arrangements, May 2012 and May 2014



Source: ABS, *Employee Earnings and Hours*, expanded CURF, various, Catalogue No. 6306.0.55.001

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[83] The most recent available data.

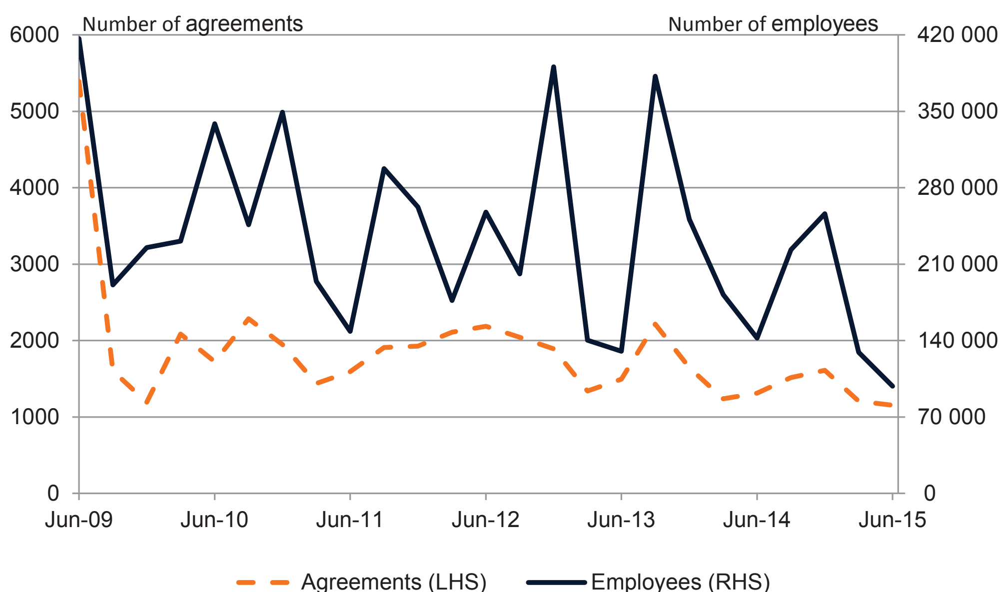
[84] The ABS data uses the term 'collective agreement'.

5.2.2 Overall coverage of enterprise agreements

The WAD reported that a total of 18 659 enterprise agreements were approved over the reporting period (1 July 2012 to 30 June 2015). The number of enterprise agreements approved each year has fluctuated while trending downwards over the three years, peaking in the September quarter of 2013. The number of employees covered by enterprise agreements exhibited more volatility (peaking in December 2012), though it too trended downwards.[85]

In the current reporting period, there were fewer enterprise agreements approved than in the previous reporting period (18 659 compared with 21 993) and fewer employees covered (2 526 688 compared with 2 917 522) (Chart 5.2).

**Chart 5.2: Number of enterprise agreements approved and number of employees covered per quarter,
2009–10 to 2014–15**



Source: Department of Employment, Workplace Agreements Database, June 2015 Agreement making by industry

Table 5.1 shows the number of enterprise agreements approved over the last two reporting periods by industry. The largest numbers of enterprise agreements approved over the reporting period by industry were in Construction and Manufacturing, which together accounted for around half of all enterprise agreements approved.

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

Table 5.1: Number of enterprise agreements approved per reporting period, by industry, 2009–10 to 2014–15

	2009–10 to 2011–12	2012–13 to 2014–15
Agriculture, forestry and fishing	396	152
Mining	517	465
Manufacturing	3830	3200
Electricity, gas, water and waste services	441	415
Construction	7244	5830
Wholesale trade	509	604
Retail trade	769	309
Accommodation and food services	736	439
Transport, postal and warehousing	1546	1432
Information media and telecommunications	169	153
Financial and insurance services	213	155
Rental, hiring and real estate services	373	332
Professional, scientific and technical services	448	504
Administrative and support services	683	663
Public administration and safety	764	603
Education and training	804	683
Health care and social assistance	1788	2066
Arts and recreation services	287	185
Other services	476	469

Source: Department of Employment, Workplace Agreements Database, June 2015.

Table 5.2 shows the number of employees covered by enterprise agreements approved over the last two reporting periods by industry.

A substantial number of employees were covered by enterprise agreements approved in Education and training and Health care and social assistance, accounting for 32 per cent of all employees covered by enterprise agreements approved over the reporting period.

Table 5.2: Number of employees covered by enterprise agreements approved per reporting period, by industry, 2009–10 to 2014–15

	2009–10 to 2011–12	2012–13 to 2014–15
Agriculture, forestry and fishing	12 817	7689
Mining	41 443	54 733
Manufacturing	244 650	207 908
Electricity, gas, water and waste services	63 087	63 463
Construction	129 278	116 820
Wholesale trade	49 108	41 366
Retail trade	348 932	284 943
Accommodation and food services	167 547	151 567
Transport, postal and warehousing	191 556	181 660
Information media and telecommunications	45 754	49 640
Financial and insurance services	221 393	187 307
Rental, hiring and real estate services	7812	10 023
Professional, scientific and technical services	34 885	42 149
Administrative and support services	51 142	56 234
Public administration and safety	449 950	160 432
Education and training	345 569	411 660
Health care and social assistance	424 438	409 090
Arts and recreation services	53 448	45 726
Other services	34 713	44 278

Source: Department of Employment, Workplace Agreements Database, June 2015.

Table 5.3 shows the industry distribution of enterprise agreements by type over the reporting period. Of the enterprise agreements approved during the reporting period, the single-enterprise non-greenfields agreement was the highest approved instrument across all industries, accounting for more than 90 per cent of enterprise agreements approved for most industries.

Table 5.3: Enterprise agreements approved by industry and type, 1 July 2012 to 30 June 2015

	Single enterprise non-greenfields (%)	Multi enterprise non-greenfields (%)	Single enterprise greenfields (%)	Multi enterprise greenfields (%)
Agriculture, forestry and fishing	96.7	1.3	2.0	0.0
Mining	89.5	0.2	10.3	0.0
Manufacturing	96.5	0.1	3.4	0.0
Electricity, gas, water and waste services	94.7	0.5	4.8	0.0
Construction	79.5	0.1	20.4	0.0
Wholesale trade	96.4	0.5	3.1	0.0
Retail trade	96.4	2.3	1.3	0.0
Accommodation and food services	97.0	0.2	2.7	0.0
Transport, postal and warehousing	91.7	0.1	8.2	0.0
Information media and telecommunications	95.4	1.3	3.3	0.0
Financial and insurance services	100.0	0.0	0.0	0.0
Rental, hiring and real estate services	87.7	0.0	12.3	0.0
Professional, scientific and technical services	83.7	0.4	15.9	0.0
Administrative and support services	80.7	0.5	18.7	0.2
Public administration and safety	98.3	0.0	1.7	0.0
Education and training	97.7	2.2	0.1	0.0
Health care and social assistance	98.7	0.9	0.3	0.0
Arts and recreation services	92.4	0.5	7.0	0.0
Other services	92.8	0.6	6.6	0.0

Source: Department of Employment, Workplace Agreements Database, June 2015.

Table 5.4 shows that the average number of employees who were covered by an enterprise agreement across all industries over the reporting period was 135, which is slightly higher than in the previous reporting period. The industry with the highest average number of employees covered by an enterprise agreement was Financial and insurance services, while the smallest average number of employees covered by an enterprise agreement was in the Construction industry.

Almost all industries experienced an increase in average numbers of employees covered by an enterprise agreement relative to the previous reporting period.

Table 5.4: Average numbers of employees covered by an enterprise agreement by industry, 2012–13 to 2014–15

	Average numbers of employees covered	
	2009–10 to 2011–12	**2012–13 to 2014–15**
Agriculture, forestry and fishing	32	50
Mining	80	117
Manufacturing	63	64
Electricity, gas, water and waste services	143	152
Construction	17	20
Wholesale trade	96	68
Retail trade	453	922
Accommodation and food services	227	345
Transport, postal and warehousing	123	126
Information media and telecommunications	270	324
Financial and insurance services	1039	1208
Rental, hiring and real estate services	20	30
Professional, scientific and technical services	77	83
Administrative and support services	74	84
Public administration and safety	588	266
Education and training	429	602
Health care and social assistance	237	198
Arts and recreation services	186	247
Other services	72	94
All industries	132	135

Source: Department of Employment, Workplace Agreements Database, June 2015.

5.3 Effect on designated groups

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

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

- young persons.

The Fair Work Act does not define young persons and mature age persons. As ABS data on age groups are presented as categories, data for young persons are presented within the ranges of 15 to 19 years, and 45 years and over for mature age persons. ABS data is used to show the number of employees for each designated group at June 2012 and June 2015 (Table 5.5).

Table 5.5: Employment levels for designated groups, June 2012 and June 2015

	Female	**Part-time**	**Non-English speaking background**	**Aged 15 to 19**	**Aged 45 and over**
	'000	'000	'000	'000	'000
Jun-12	5168.8	3376.1	1980.1	666.2	4410.2
Jun-15	5396.1	3602.9	2179.7	641.1	4615.9
Percentage change	4.4	6.7	10.1	–3.8	4.7

Note: Data are seasonally adjusted for female employees, part-time employees and employees aged 15 to 19 years. Data are expressed in original terms for employees from a non-English speaking background and employees aged 45 years and over.

Source: ABS, *Labour Force, Australia*, September 2015, Catalogue No. 6202.0; ABS, *Labour Force, Australia, Detailed - Electronic Delivery*, September 2015, Catalogue No. 6291.0.55.001.

5.3.1 Coverage of designated groups

Table 5.6 shows the coverage of designated groups (except non-English speaking background) by method of setting pay from the EEH. The table shows that the most common method of setting pay for the designated groups was by collective agreement. This was followed by individual agreements for female and employees aged 55 years or over. Part-time employees and employees aged under 21 years had higher coverage under an award compared with an individual agreement.

Table 5.6: Selected characteristics of employees by method of setting pay, May 2014, per cent

	Collective agreement	**Award**	**Individual agreement**	**Owner-manager of incorporate enterprise**	**Total**
	(%)	**(%)**	**(%)**	**(%)**	**(%)**
Female	45.2	21.4	31.4	2.0	100.0
Part-time	46.2	27.9	24.1	1.8	100.0
Aged under 21 years	44.5	37.9	17.5	np	100.0
Aged 55 years or over	47.7	14.8	31.0	6.5	100.0

Note: All data are weighted.

Source: ABS, *Employee Earnings and Hours*, expanded CURF, May 2014, Catalogue No. 6306.0.55.001.

Table 5.7 presents data for the proportion of employees who spoke a language other than English at home by the method of setting pay. Half of these employees indicated that they negotiated the wage amount with their employer.

Table 5.7: Employees who spoke a language other than English at home by method of setting pay, per cent

	(%)
Negotiated amount with my employer	50.3
My employer offered me an amount that was more than the award/standard rate, and I accepted	22.8
Award-reliant	13.9
Enterprise agreement	12.3
Other	0.7
Total	**100.0**

Note: The method of setting pay variable has been cross-checked between the employees' responses and their employers', and any discrepancy has been excluded. All data are weighted using the employee weight.

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

5.4 Enterprise agreements by business size

Table 5.8 shows the proportion of enterprises using an enterprise agreement by business size. The table shows that large enterprises have the highest proportion of enterprise agreements (72 per cent) followed by medium sized enterprises (27 per cent) then small enterprises (8.8 per cent).

Table 5.8: Proportion of enterprises using an enterprise agreement by business size

	Small (5–19 employees)	Medium (20–199 employees)	Large (200+ employees)	Overall
Yes	8.8	27.0	72.0	14.0
No	91.2	73.0	28.0	86.0
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

6 The content of enterprise agreements

This chapter deals with developments in the permitted content, mandatory content and unlawful terms of enterprise agreements over the reporting period. It contains the following sections:

- Developments in the permitted content of enterprise agreements
- Developments in the mandatory content of enterprise agreements
- Developments in the unlawful terms of enterprise agreements

6.1 Developments in the permitted content of enterprise agreements

6.1.1 Significant decisions regarding permitted matters

The Commission has dealt with issues in relation to permitted matters in considering the approval of enterprise agreements. In *Construction, Forestry, Mining and Energy Union*[86] the Commission was required to consider the validity of clauses in two proposed enterprise agreements, including a clause that purported to provide that the agreement would continue beyond its nominal expiry date until replaced by another agreement with, or which covered, the employee organisation. The Commission held that this clause did not appear to be a permitted matter under section 172(1), but that this would not prevent the approval of the enterprise agreement. However, if the clause was not permitted, s.253 of the Fair Work Act would provide that it was of no legal effect.[87]

In *Toyota Motor Corporation Australia Limited v Marmara*,[88] the Full Federal Court considered the operation of a 'no extra claims' clause in an enterprise agreement. The Court held that where a no extra claims clause purports to prevent the parties from agreeing to vary the agreement, it is invalid as it is inconsistent with the statutory rights of an employer and employees to agree to variations under Division 7 of Part 2-4 of the Fair Work Act.

6.1.2 Productivity and innovation in enterprise agreement clauses

In 2014, the Commission conducted research into productivity and innovation in enterprise agreement clauses.[89] The Commission's research found that 48.1 per cent of registered enterprise agreements contain clauses that include 'commitments to improving productivity' and 38.4 per cent contain clauses on 'specific productivity measures'.[90]

The Commission's research also examined enterprise agreement clauses that employers, employees and their representatives considered to be productivity enhancing or innovative in their enterprises, workplaces or work roles. The research included a number of case studies that illustrated the operating context of the nominated productivity enhancing or innovative clauses and indicated some of the factors outside of the clauses that may contribute to perceived productivity

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[86] [2013] FWC 1462.

[87] [2013] FWC 1462 at paras. 28–31.

[88] (2014) 222 FCR 152.

[89] Fair Work Commission, *Future Directions 2014–15: Initiative 29, Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*.

[90] Fair Work Commission, *Future Directions 2014–15: Initiative 29, Productivity and innovation in enterprise agreement clauses: an overview of literature, data and case studies at the workplace level*, pp.18-19.

enhancement. In addition, the case studies highlighted that productivity enhancing or innovative clauses were often closely tied to particular operations, roles or workplaces within an enterprise.

The case studies in the research demonstrated that some employers, employees and their representatives considered certain clauses to be productivity enhancing or innovative in their workplace. In such cases, three broad clause content themes were identified:

- clauses perceived as providing increased workplace flexibility, including around when work was performed or attendance for work;
- clauses perceived to play a part in developing a more highly skilled workforce, including through incentives or links with classification structures; and
- clauses perceived to engage employees in identifying, formulating and/or implementing improved workplace practices through consultation structures and/or incentives.

6.2 Wage and condition developments for designated groups

This section includes discussion of wage developments in enterprise agreements, conditions developments in enterprise agreements, and their effects on the groups designated in s.653(2) of the Fair Work Act. It also includes data on workplace productivity and profitability as linked to enterprise agreement making.

This section is structured as follows:

- Wage developments for approved enterprise agreements for designated groups
    - Women
    - Non-English speaking background employees
    - Young and mature aged persons
- Conditions developments for approved enterprise agreements for designated groups
    - Women
    - Part-time employees
    - Persons from a non-English speaking background
    - Young persons
    - Mature age persons

For the remainder of this section, analysis of enterprise agreement coverage for employees in the designated groups listed under s.653(2) of the Fair Work Act was undertaken using data from the AWRS and the WAD.

6.2.1 Wage developments for approved enterprise agreements in designated groups

This section focuses on the wage outcomes by designated group employees covered by enterprise agreements approved during the reporting period. Wage outcomes are reported with reference to the findings of the AWRS, where relevant, and using the AAWI measure. Where the AAWI

measure is used, the wage outcomes can only be calculated for enterprise agreements where a percentage wage increase could be quantified.[91]

6.2.1.1 Women

Table 6.1 presents results from employers surveyed for the AWRS on how wage amounts in their enterprise agreements compare with the applicable modern award. Most employers indicated that the wage amounts set in their enterprise agreement are 'well above' the applicable award rate (62 per cent). A further 29 per cent indicated that the wage amounts in their enterprise agreement are 'just above' the corresponding award rate; and a further 10 per cent that the enterprise agreement wages replicated amounts in the applicable award.

Table 6.1 also shows a substantive difference in results depending on the predominant gender of the enterprise. A considerably higher proportion of predominantly male enterprises than predominantly female enterprise had rates that were 'well above' the applicable award rates – approximately 73 per cent and 52 per cent, respectively.

Table 6.1: Comparison of enterprise agreement wage amounts to awards by predominant gender, per cent of enterprises with an enterprise agreement

	Predominant gender of enterprise		
	Male (%)	**Female (%)**	**All (%)**
Replicate award wage rates	4.9	16.3	9.5
Sit just above the award wage rates (for example, within $2 of applicable award rates)	23.1	31.0	28.5
Sit well above the award wage rates (for example, more than $2 above applicable award rates)	72.5	51.6	61.5
Enterprise agreement wages have not been compared to award wage rates	np	np	1.3

Note: Missing or 'don't know' responses are excluded. Enterprises are classified as predominantly male/female if more than half of their workforce is male/female. Data on the predominant gender of the enterprise is based on a smaller sample than the total. np = not published due to estimate having a relative standard error of greater than 50 per cent. All data are weighted using an enterprise weight.

Source: Fair Work Commission, *Australian Workplace Relations Study 2014*.

Table 6.1 provided data from the AWRS. However, the Department of Employment's WAD provides more direct data on wage outcomes from collective agreements by the gender at the workplace. Table 6.2 shows that female AAWIs did not exhibit a clear pattern relative to male AAWIs over the previous and current reporting periods. Nor was there a consistent trend between AAWIs in workplaces with higher proportions of female workers (more than 60 per cent) than workplaces with lower proportions of female workers.[92]

[91] For more information on AAWIs, refer to Appendix 7 – Technical notes.

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

Table 6.2: AAWI (%) in enterprise agreements by gender and by proportion of women, 2009–10 to 2014–15

Overall	2009–10 (%)	2010–11 (%)	2011–12 (%)	2012–13 (%)	2013–14 (%)	2014–15 (%)
Male AAWI	4.0	4.0	3.4	3.6	3.5	2.5
Female AAWI	3.9	3.9	3.7	3.3	3.5	3.5
Share of women employees in agreements						
<40 per cent women	4.0	3.9	3.8	3.5	3.4	2.9
40-60 per cent women	4.4	3.8	3.6	3.3	3.5	3.8
>60 per cent women	3.7	4.0	3.7	3.2	3.5	3.5

Source: Department of Employment, Workplace Agreements Database, June 2015.

Enterprises with a substantial proportion of part-time employees (greater than or equal to 20 per cent of the workforce) had lower AAWIs than full-time employees over the reporting period, which is consistent with trends exhibited in the previous reporting period (Table 6.3).

AAWIs for workplaces with low proportions of part-time employees (less than 20 per cent) exhibited higher AAWIs over the reporting period than workplaces with higher proportions of part-time employees, consistent with trends shown in the previous reporting period.

Table 6.3: AAWI (%) in enterprise agreements by type of employment and by proportion of part-time, 2009–10 to 2014–15

Overall	2009–10 (%)	2010–11 (%)	2011–12 (%)	2012–13 (%)	2013–14 (%)	2014–15 (%)
Full-time AAWI	3.8	3.9	3.8	3.5	3.5	3.4
Part-time AAWI	3.8	3.8	3.6	3.2	3.4	3.3
Share of part-time employees in enterprise agreements						
<20 per cent part-time	4.2	3.8	3.6	3.3	3.5	3.4
≥20 per cent part-time	3.6	3.7	3.6	3.1	3.3	3.3

Source: Department of Employment, Workplace Agreements Database, June 2015.

6.2.1.2 Non-English speaking background employees

Table 6.4 shows AAWIs for non-English speaking background employees were broadly similar to those of employees with an English speaking background over the reporting period, consistent with the previous reporting period.

Table 6.4: AAWI (%) in enterprise agreements by non-English speaking background status and by proportion of non-English speaking background employees, 2009–10 to 2014–15

Overall	2009–10 (%)	2010–11 (%)	2011–12 (%)	2012–13 (%)	2013–14 (%)	2014–15 (%)
Non-English speaking background AAWI	3.8	3.7	3.6	3.5	3.3	3.3
English speaking background AAWI	3.8	3.8	3.7	3.3	3.4	3.3
Share of non-English speaking background employees in enterprise agreements						
<20 per cent	3.8	3.9	3.6	3.3	3.4	3.2
≥20 per cent	3.8	3.6	3.7	3.6	3.3	3.4

Source: Department of Employment, Workplace Agreements Database, June 2015.

6.2.1.3 Young and mature age persons

Table 6.5 shows young employees (under 21) exhibited lower AAWIs than both employees aged between 21 and 45 and mature age employees (45 and over) over the reporting period, consistent with trends exhibited in the previous reporting period. AAWIs for mature age employees and employees aged between 21 and 44 were broadly similar over the two reporting periods.

AAWIs for workplaces with low proportions of young employees (less than 20 per cent) exhibited higher AAWIs over the reporting period than workplaces with 20 per cent of young employees or more, consistent with trends exhibited in the previous reporting period. AAWIs for workplaces with

low proportions of mature age employees (less than 20 per cent) exhibited lower AAWIs than for workplaces with higher proportions of mature age employees (Table 6.5).

Table 6.5: AAWI (%) in enterprise agreements for young and mature age workers and by proportion of employees, 2009–10 to 2014–15

Overall	2009–10 (%)	2010–11 (%)	2011–12 (%)	2012–13 (%)	2013–14 (%)	2014–15 (%)
Young (under 21) AAWI	3.6	3.8	3.7	3.1	3.2	3.2
≥21 and ≤44 AAWI	3.8	3.8	3.7	3.4	3.5	3.4
Mature (45 and over)	3.9	3.8	3.7	3.4	3.4	3.3
Share of young employees in enterprise agreements						
<20 per cent	3.8	3.9	3.9	3.5	3.4	3.3
≥20 per cent	3.6	3.6	3.6	3.0	3.1	3.1
Share of mature employees in enterprise agreements						
<20 per cent	3.4	3.8	3.9	3.1	3.3	3.2
≥20 per cent	3.9	3.8	3.7	3.4	3.4	3.3

Source: Department of Employment, Workplace Agreements Database, June 2015.

6.2.2 Conditions developments for designated groups

This section focuses on the developments in the range of conditions of employment by designated groups in enterprise agreements approved over the reporting period. An analysis of the core provisions coverage by designated groups shown in Table 6.6 is provided below.

Table 6.6: Coverage of designated group employees by core provisions in enterprise agreements, 2012–13 to 2014–15

	Female (%)	Part-time (%)	Non-English speaking background (%)	Under 21s (%)	Over 45s (%)	All (%)
Long service leave	97.4	97.8	96.6	97.2	96.2	95.6
Annual leave	99.0	99.5	98.5	99.0	98.7	98.6
Personal/carer's leave	98.7	99.1	98.8	98.9	98.3	98.2
Public holidays	96.1	97.1	96.5	98.9	95.2	95.5
Termination change and redundancy	91.7	93.3	95.5	98.3	91.0	92.7
Occupational health and safety	80.8	82.0	82.6	88.5	82.0	82.7
Equity issues	85.2	87.2	73.6	89.7	78.1	78.3
Superannuation	98.0	98.7	95.6	99.1	97.1	97.4
Parental leave	98.0	98.5	94.2	98.0	95.1	95.2
Type of employment	99.4	99.5	97.4	99.4	98.1	98.4
Hours of work	97.9	98.5	97.1	99.2	97.1	97.3
Shift work	77.0	82.1	87.1	57.9	82.0	80.1
Training	91.1	91.5	88.8	85.1	91.6	90.2

Note: 'Type of employment' is any reference to casual employment, part-time employment, fixed-term employment, home-based work/telework, or temporary employment. 'Equity issues' are any provisions for non-English speaking background workers, extended definition of family, Aboriginal and Torres Strait Islander cultural/ceremonial leave, special needs employees and mature age workers.

Source: Department of Employment, Workplace Agreements Database, June 2015.

6.2.2.1 Women

Relative to all employees, women were more likely to be covered by enterprise agreements with equity issues and parental leave provisions, but were less likely to be covered by enterprise agreements with shift work and occupational health and safety provisions.

6.2.2.2 Part-time employees

Relative to all employees, part-time employees were more likely to be covered by enterprise agreements with equity issues, parental leave and long service leave provisions, but were less likely to be covered by enterprise agreements with occupational health and safety provisions.

6.2.2.3 Persons from a non-English speaking background

Relative to all employees, non-English speaking background employees were more likely to be covered by enterprise agreements with termination change and redundancy provisions, but were less likely to be covered by enterprise agreements with equity issues, superannuation and training provisions.

6.2.2.4 Young persons

Relative to all employees, employees under the age of 21 were more likely to be covered by enterprise agreements with equity issues, occupational health and safety, termination change and redundancy and public holidays provisions. However, they were significantly less likely to be covered by enterprise agreements with shift work and training provisions.

6.2.2.5 Mature age persons

Relative to all employees, employees over the age of 45 were slightly more likely to be covered by enterprise agreements with shift work provisions and slightly less likely to be covered by enterprise agreements with termination change and redundancy provisions.

6.3 Developments in the mandatory content of enterprise agreements

This section deals with developments in the mandatory content of enterprise agreements including:

- legislative developments in the mandatory content of enterprise agreements;
- significant decisions regarding mandatory content; and
- use of model consultation terms in enterprise agreements.

6.3.1 Legislative developments to mandatory content in enterprise agreements

The *Fair Work Amendment Act 2013* amended the content of mandatory consultation terms in enterprise agreements. Consultation terms in enterprise agreements must now provide that employers must consult with employees in relation to changes to regular rosters or ordinary working hours and must consider any views given by the employees about the impact of the change.

Section 205(1)(a) of the Fair Work Act was amended as follows:[93]

> 20 Paragraph 205(1)(a)
>
> Repeal the paragraph, substitute:
>
> (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
>
> > (i) a major workplace change that is likely to have a significant effect on the employees; or
> >
> > (ii) a change to their regular roster or ordinary hours of work; and
>
> 21 After subsection 205(1)
>
> Insert:
>
> (1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
>
> > (a) to provide information to the employees about the change; and

---

[93] *Fair Work Amendment Act 2013,* Schedule 1 item 20.

(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views given by the employees about the impact of the change.

The model consultation term in Schedule 2.3 of the *Fair Work Regulations 2009* was amended to reflect these changes to the legislation.[94] The amendments to the Fair Work Act and the Fair Work Regulations commenced on 1 January 2014.[95]

This amendment was introduced with a package of amendments to implement recommendations made by the Fair Work Act Review Panel in the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* report, a post-implementation review of the Fair Work Act. The specific intention of amending the consultation clause was to: 'promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee's regular roster or ordinary hours of work, particularly in relation to the employee's family and caring arrangements, by requiring employers to genuinely consult employees about such changes and consider the impact of the change in making such changes raised by employees.'[96]

6.3.2 Significant decisions regarding mandatory content

In the reporting period a Full Bench of the Commission made a significant decision in relation to the incorporation of the model consultation term into enterprise agreements. In *Construction, Forestry, Mining and Energy Union v St John of God Health Care Inc; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; 'Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers' Union (AMWU)*[97] a Full Bench of the Commission held that a consultation clause that excluded certain employees from consultation and did not allow for employees' representation for the purposes of consultation did not comply with s.205(1). As the enterprise agreement for which approval was being sought did not include a consultation term that complied with s.205(1), under s.205(2) the model consultation term was taken to be a term of the enterprise agreement.[98]

The Full Bench held, if a Member of the Commission has come to the conclusion that a consultation term does not meet the requirements of the Fair Work Act, then the Member must note in the decision approving the enterprise agreement that the model consultation term applies.[99] In addition, the Full Bench concluded that undertakings may only be made for issues arising under ss.186–187 of the Fair Work Act in relation to the approval of enterprise agreements, and they could not remedy a defect under s.205.[100]

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[94] *Fair Work Amendment Regulation 2013 (No. 2).*

[95] *Fair Work Amendment Act 2013*, s.2.

[96] *Explanatory Memorandum to the Fair Work Amendment Bill 2013.*

[97] [2014] FWCFB 4011.

[98] [2014] FWCFB 4011 at para. 23.

[99] [2014] FWCFB 4011 at para. 23.

[100] [2014] FWCFB 4011 at para 25.

In *Gladstone Ports Corporation Ltd*,[101] the consultation clause in question was held not to comply with s.205 as it limited representation to representation by employee organisation delegates.[102] The Commission held that to comply with s205(1), a consultation clause must provide for employee representation but cannot limit or prescribe the form this representation must take.[103]The model consultation term was taken to form part of the enterprise agreement.

Following the amendments to s.205, which came into effect on 1 January 2014, many parties did not vary the consultation provisions in their existing enterprise agreements, with the effect that the consultation provisions failed to comply with s.205. As a result, the model consultation term was taken to be a term of many enterprise agreements from that period. In *Fairbrother Pty Ltd [Facility Management] Tasmanian Enterprise Agreement 2014*,[104] when considering an application for approval of an enterprise agreement, the Commission found that the consultation provision in the enterprise agreement did not specify that consultation must occur regarding a change to regular rosters as required by ss. 205(1)(a)(ii) and 205(1A) of the Fair Work Act. As a result, the model consultation term was taken to be a term of the enterprise agreement.

6.3.3 Use of model terms in enterprise agreements

The following extracts from the WAD show the incidents of use of the model dispute resolution term in enterprise agreements over the reporting period:

Table 6.7: Model dispute resolution clause in enterprise agreements 1 July 2012 to 30 June 2015, per cent of approved enterprise agreements

	(%)
Model dispute resolution clause	10.3
Non-model dispute resolution clause	89.7

Source: Department of Employment, Workplace Agreements Database, June 2015.

The following extracts from the WAD show the incidents of use of the model consultation and flexibility terms in enterprise agreements over the reporting period:

Table 6.8: Model consultation clause in enterprise agreements 1 July 2012 to 30 June 2015, per cent of approved enterprise agreements

	(%)
Model consultation clause	30.0
Model consultation clause incorporated in decision	7.9
No model consultation clause	62.2

Source: Department of Employment, Workplace Agreements Database, June 2015.

[101] [2013] FWC 305.

[102] [2013] FWC 305 at para. 9.

[103] [2013] FWC 305 at para. 9.

[104] [2014] FWCA 2491.

Table 6.9: Types of flexibility terms in enterprise agreements 1 July 2012 to 30 June 2015, per cent of approved enterprise agreements

Type of flexibility term	(%)
Model flexibility term: the flexibility term is the model term	30.9
Model flexibility term incorporated: the Fair Work Commission Member's decision incorporates the model flexibility term into the enterprise agreement	3.7
No flexibility clause: model flexibility term taken to be a term of the enterprise agreement	2.9
Flexibility – specific: the flexibility term differs from the model flexibility term, and specifies which term can be varied	60.0
Flexibility – general: the flexibility term allows any term of the enterprise agreement to be varied	3.3

Source: Department of Employment, Workplace Agreements Database, June 2015.

6.4 Developments in relation to unlawful content in enterprise agreements

This section addresses relevant developments in relation to unlawful content in enterprise agreements during the reporting period with reference to:

- legislative changes to unlawful content in enterprise agreements; and
- significant decisions regarding unlawful content in enterprise agreements.

6.4.1 Legislative changes to unlawful content in enterprise agreements

Section 194 of the Fair Work Act was amended on 1 January 2013 by the *Fair Work Amendment Act 2012*,[105] to insert an additional unlawful term, s.194(ba), as follows:

> a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement.

The Explanatory Memorandum indicated that this amendment was intended to implement recommendations made by the Fair Work Act Review Panel in the *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* report, a post-implementation review of the Fair Work Act.[106]

This provision applies to enterprise agreements made before or after 1 January 2013, but does not apply to a person who elected to opt out of an enterprise agreement before that date.[107]

The *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* amended the Fair Work Act to insert an additional unlawful term, s.194(h), as follows:

> (h) a term that has the effect of requiring or permitting contributions, for the benefit of an employee (the ***relevant employee***) covered by the agreement who is a default fund employee, to be made to a superannuation fund or scheme that is specified in the agreement but does not satisfy one of the following:

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[105] *Fair Work Amendment Act 2012*, s. 2; *Fair Work Amendment Proclamation 2012* (F2012L02450).

[106] *Explanatory Memorandum to the Fair Work Amendment Bill 2012.*

[107] *Fair Work Act 2009*, Item 6 of Part 3 to Schedule 4.

(i) it is a fund that offers a MySuper product;

(ii) it is a fund or scheme of which the relevant employee, and each other default fund employee in relation to whom contributions are made to the fund or scheme by the same employer as the relevant employee, is a defined benefit member;

(iii) it is an exempt public sector superannuation scheme.

This provision makes it unlawful for an enterprise agreement to include a term that requires or permits superannuation contributions to be made to a specified fund for the benefit of a default fund employee, unless the fund meets certain criteria.

This term commenced on 1 January 2014 and applies to enterprise agreements approved by the Commission on or after that date.[108]

6.4.2 Significant decisions regarding unlawful content

In *Re The University of Melbourne*,[109] the Commission found that a parental leave clause providing for a return to work bonus in an enterprise agreement was not discriminatory. It was argued by a number of employee organisations that the parental leave clause discriminated against birth fathers returning from partner leave as they were not entitled to the return to work bonus.

In approving the enterprise agreement, however the Commission held that the bonus was not discriminatory and not an unlawful term as it was objectively reasonable that the bonus was paid to those returning from maternity leave or adoption and permanent care leave, and not those returning from partner leave.[110]

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[108] *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012,* s. 2; Item 12 of Part 2 to Schedule 4.

[109] [2014] FWCA 1133.

[110] [2014] FWCA 1133 at paras 62 to 66.

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Appendix 1 – Enterprise agreements – lodgment by industry, 1 July 2012 to 30 June 2015

Table A.1: Enterprise agreements – lodgment by industry, 1 July 2012 to 30 June 2015

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Aged care industry	545	5	1	551
Agricultural industry	82		1	83
Airline operations	156	3		159
Airport operations	16			16
Aluminium industry	17			17
Ambulance and patient transport	9			9
Amusement, events and recreation industry	56	1	2	59
Animal care and veterinary services	9			9
Aquaculture	4			4
Asphalt industry	64		1	65
Banking finance and insurance industry	132	2		134
Broadcasting and recorded entertainment industry	19		5	24
Building services	17		1	18
Building, metal and civil construction industries	4039	19	1232	5290
Business equipment industry	21			21
Cement and concrete products	145	1	3	149
Cemetery operations	12	1		13
Children's services	560	11		571
Christmas Island	1			1
Cleaning services	45	2	3	50
Clerical industry	210		1	211
Clothing industry	23			23
Coal export terminals	6		1	7
Coal industry	127	2	10	139
Commercial sales	15			15
Commonwealth employment	34			34
Contract call centre industry	13			13
Corrections and detentions	17		1	18
Diving services	18		2	20
Dredging industry	31		59	90
Dry cleaning and laundry services	10			10
Educational services	698	24		722
Electrical contracting industry	721		109	830
Electrical power industry	95	1	2	98
Fast food industry	146			146
Fire fighting services	11			11
Food, beverages and tobacco manufacturing industry	373	2	4	379
Funeral directing	10			10
Gardening services	29			29
Grain handling industry	20			20
Graphic Arts	135			135

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Hair and Beauty	5			5
Health and welfare services	809	15	12	836
Hospitality industry	158	1	12	171
Indigenous organisations and services	6			6
Industries not otherwise assigned	1			1
Journalism	31	1		32
Licensed and registered clubs	79			79
Live performance industry	36		13	49
Local government administration	240			240
Mannequins and modelling industry	1			1
Manufacturing and associated industries	2468	15	108	2591
Marine tourism and charter vessels	13			13
Maritime industry	106	1	32	139
Market and business consultancy services	1	2		3
Meat Industry	100	1	3	104
Mining industry	207	3	6	216
Miscellaneous	19	2		21
Nursery industry	5			5
Oil and gas industry	142		9	151
Passenger vehicle transport (non rail) industry	144	1	6	151
Pet food manufacturing	4			4
Pharmaceutical industry	63			63
Pharmacy operations	5	1		6
Plumbing industry	596	5	15	616
Port authorities	103		5	108
Postal services	2			2
Poultry processing	46			46
Publishing industry	18			18
Quarrying industry	93	3		96
Racing industry	30			30
Rail industry	75	1	15	91
Real estate industry	75	1		76
Restaurants	111			111
Retail industry	192	9	1	202
Road transport industry	575	11	5	591
Rubber, plastic and cable making industry	2			2
Salt industry	7			7
Scientific services	16		1	17
Seafood processing	6			6
Security services	178	2	1	181
Social, community, home care and disability services	238	4		242
Sporting organisations	8			8
State and Territory government administration	50	1	1	52
Stevedoring industry	55	2	5	62
Storage services	508	4	22	534

	s.185 – Single-enterprise	s.185 – Multi-enterprise	s.185 – Greenfields	Total
Sugar industry	21			21
Technical services	18			18
Telecommunications services	23	1		24
Textile industry	39			39
Timber and paper products industry	182	1	1	184
Tourism industry	21			21
Vehicle industry	226			226
Waste management industry	158		5	163
Water, sewerage and drainage services	67		1	68
Wine industry	54			54
Wool storage, sampling and testing industry	6			6
Total lodged	**17 133**	**162**	**1717**	**19 012**

Note: Industries are classified by Commission industry schedule.

Source: *CMS plus.*

Appendix 2 – Bargaining applications – lodgments, 1 July 2009 to 30 June 2012

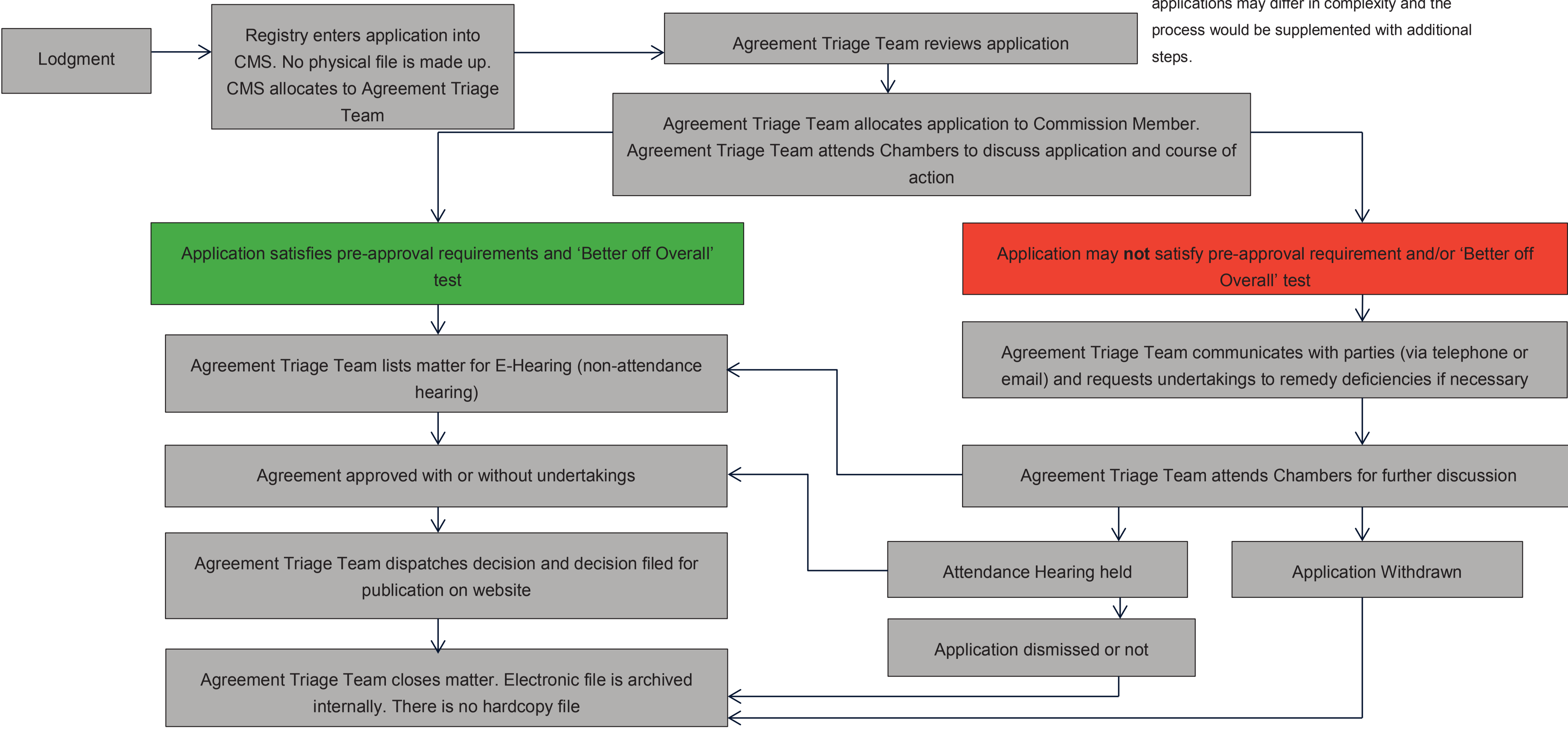
Table A: 2 Bargaining applications – lodgments 1 July 2009 to 30 June 2012

	Number of applications		
	2009–10	**2010–11**	**2011–12**
s.229 – Application for a bargaining order	121	96	99
s.236 – Application for a majority support determination	111	93	62
s.238 – Application for a scope order	48	31	30
s.240 – Application to deal with a bargaining dispute	506	221	307
s.242 – Application for low-paid authorisation	2	1	1
s.248 – Application for a single interest employer authorisation	22	22	31
Total	810	464	530

Source: *General Manager's report into enterprise agreement-making in Australia under the Fair Work Act 2009 (Cth.)* Fair Work Australia, November 2012 Table 4.1.

Appendix 3 – Overview of Enterprise Agreement Triage Process

Please note: This model illustrates an overview of the agreement triage process, however applications may differ in complexity and the process would be supplemented with additional steps.



Appendix 4 – Schedule 2.2 Model flexibility term

(regulation 2.08)

Model flexibility term

(1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:

(a) the agreement deals with 1 or more of the following matters:

(i) arrangements about when work is performed;

(ii) overtime rates;

(iii) penalty rates;

(iv) allowances;

(v) leave loading; and

(b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and

(c) the arrangement is genuinely agreed to by the employer and employee.

(2) The employer must ensure that the terms of the individual flexibility arrangement:

(a) are about permitted matters under section 172 of the *Fair Work Act 2009*; and

(b) are not unlawful terms under section 194 of the *Fair Work Act 2009*; and

(c) result in the employee being better off overall than the employee would be if no arrangement was made.

(3) The employer must ensure that the individual flexibility arrangement:

(a) is in writing; and

(b) includes the name of the employer and employee; and

(c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and

(d) includes details of:

(i) the terms of the enterprise agreement that will be varied by the arrangement; and

(ii) how the arrangement will vary the effect of the terms; and

(iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

(e) states the day on which the arrangement commences.

(4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

(5) The employer or employee may terminate the individual flexibility arrangement:

(a) by giving no more than 28 days written notice to the other party to the arrangement; or

(b) if the employer and employee agree in writing — at any time.

Appendix 5 – Schedule 2.3 Model consultation term

(regulation 2.09)

Model consultation term

(1) This term applies if the employer:

(a) has made a definite decision to introduce a major change to production, program, organisation, structure or technology in relation to its enterprise that is likely to have a significant effect on the employees; or

(b) proposes to introduce a change to the regular roster or ordinary hours of work of employees.

Major change

(2) For a major change referred to in paragraph (1)(a):

(a) the employer must notify the relevant employees of the decision to introduce the major change; and

(b) subclauses (3) to (9) apply.

(3) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(4) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative; the employer must recognise the representative.

(5) As soon as practicable after making its decision, the employer must:

(a) discuss with the relevant employees:

(i) the introduction of the change; and

(ii) the effect the change is likely to have on the employees; and

(iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and

(b) for the purposes of the discussion—provide, in writing, to the relevant employees:

(i) all relevant information about the change including the nature of the change proposed; and

(ii) information about the expected effects of the change on the employees; and

(iii) any other matters likely to affect the employees.

(6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

(8) If a term in this agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the requirements set out in paragraph (2)(a) and subclauses (3) and (5) are taken not to apply.

(9) In this term, a major change is ***likely to have a significant effect on employees*** if it results in:

(a) the termination of the employment of employees; or

(b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or

(c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or

(d) the alteration of hours of work; or

(e) the need to retrain employees; or

(f) the need to relocate employees to another workplace; or

(g) the restructuring of jobs.

Change to regular roster or ordinary hours of work

(10) For a change referred to in paragraph (1)(b):

(a) the employer must notify the relevant employees of the proposed change; and

(b) subclauses (11) to (15) apply.

(11) The relevant employees may appoint a representative for the purposes of the procedures in this term.

(12) If:

(a) a relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and

(b) the employee or employees advise the employer of the identity of the representative; the employer must recognise the representative.

(13) As soon as practicable after proposing to introduce the change, the employer must:

(a) discuss with the relevant employees the introduction of the change; and

(b) for the purposes of the discussion—provide to the relevant employees:

(i) all relevant information about the change, including the nature of the change; and

(ii) information about what the employer reasonably believes will be the effects of the change on the employees; and

(iii) information about any other matters that the employer reasonably believes are likely to affect the employees; and

(c) invite the relevant employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

(14) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.

(15) The employer must give prompt and genuine consideration to matters raised about the change by the relevant employees.

(16) In this term:

relevant employees means the employees who may be affected by a change referred to in subclause (1).

Appendix 6 – Schedule 6.1 Model term for dealing with disputes for enterprise agreements

(regulation 6.01)

Model term

(1) If a dispute relates to:

(a) a matter arising under the agreement; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

(2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Commission.

(5) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note: If Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

(6) While the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(7) The parties to the dispute agree to be bound by a decision made by Fair Work Commission in accordance with this term.

Appendix 7 – Technical notes

Data used in this report

The data sources used in this report include:

- Department of Employment, Workplace Agreements Database (WAD);
- Fair Work Commission, Case Management System Plus (CMS plus), Fair Work Commission administrative data;
- Australian Bureau of Statistics (ABS), *Microdata: Employee Earnings and Hours, Australia, May 2014,* Catalogue No. 6306.0.55.001; and
- ABS, *Labour Force, Australia*, Catalogue No. 6202.0.

Workplace Agreements Database

Accuracy

Because the WAD is a census database rather than drawing on a sample of agreements, issues of sampling error are not relevant.

Non-sampling error, on the other hand, is an issue in any data. Non-sampling error refers to the inaccuracy in the data provided because of imperfections in recording data or inaccuracies in data provided to the Department of Employment. The Commission understands that efforts have been made to reduce non-sampling error by careful quality control of data.

Employee coverage

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

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

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

Measuring agreement coverage

Enterprise and collective agreements contain the terms and conditions of employment for a group of employees. Both the number of agreements and the number of employees they cover can be examined.

Average Annualised Wage Increases

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

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

- Summing the percentage wage increases to give a total percentage wage increase for each agreement. For agreements where the percentage wage increase is compounded, then the effective rate of interest is taken into account.
  - For example, for an agreement that contains three 5 per cent increases compounded over three years, then the total percentage wage increase would be the sum of 5 per cent, 5.25 per cent and 5.51 per cent. Flat dollar increases are converted to a percentage using average weekly ordinary time earnings drawn from ABS, *Average Weekly Earnings, Australia*, Catalogue No. 6302.0.
- Annualising the total percentage wage increase by dividing it by the effective duration (in years).

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

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

Agreement size

The composition of employees within and across all industries can also vary significantly from reporting period to reporting period. Employment conditions may vary significantly between small and large agreements, in part reflecting the different needs of such workplaces. In particular, larger agreements tend to be more comprehensive, with a greater number of provisions than small agreements.

Survey of Employee Earnings and Hours

Definitions of method of setting pay arrangements

The ABS define method of setting pay arrangements as follows:

Award only

> Awards are legally enforceable determinations made by federal or state industrial tribunals that set the terms of employment (pay and/or conditions), usually in a particular industry or occupation.

An award may be the sole mechanism used to set the pay and/or conditions for an employee or group of employees, or may be used in conjunction with an individual or collective agreement. Employees are classified to the Award only category if they are paid at the rate of pay specified in the award, and are not paid more than that rate of pay. [111]

Collective agreement

An agreement between an employer (or group of employers) and a group of employees (or one or more unions or employee associations representing the employees). A collective agreement sets the terms of employment (pay and/or conditions) for a group of employees, and is usually registered with a Federal or State industrial tribunal or authority.

Employees are classified to the Collective agreement category if they had the main part of their pay set by a collective agreement (registered or unregistered) or enterprise award. [112]

Individual arrangement

An arrangement between an employer and an individual employee on the terms of employment (pay and/or conditions) for the employee. Common types of individual arrangements are individual contracts, letters of offer and common law contracts. Employees are classified to the Individual arrangement category if they have their pay set by an individual contract, individual agreement registered with a Federal or State industrial tribunal or authority (e.g. Australian Workplace Agreement), common law contract (including for award or agreement free employees), or if they receive over-award payments by individual agreement.

However, the Fair Work Act 2009 does not allow the making of new individual employee agreements. Collective enterprise agreements contain a provision which allows flexibility in the workplace to be achieved by agreement between an employer and individual employee. Agreements which existed under the *Workplace Relations Act* will continue in existence under the *Fair Work Act 2009* as 'agreement-based transitional instruments'. These are defined by the *Fair Work (Transitional and Consequential Amendments) Act 2009*.[113]

Owner manager of incorporated enterprise

A person who works in their own incorporated enterprise - that is, a business entity which is registered as a separate legal entity to its members or owners (also known as a limited liability company).[114]

Employee coverage

The EEH survey sample is weighted to account for most employing organisations in Australia, including both public and private sectors, with a few exceptions. Enterprises that are primarily engaged in the Agriculture, forestry and fishing industry are outside the scope of the survey, as are foreign embassies, and private households employing staff. The employees of employers covered in the survey are in scope if they received pay for the reference period, with the exception of

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[111] ABS, *Employee Earnings and Hours, Australia,* May 2014, Catalogue No. 6306.0, glossary.

[112] ABS, *Employee Earnings and Hours, Australia,* May 2014, Catalogue No. 6306.0, glossary.

[113] ABS, *Employee Earnings and Hours, Australia,* May 2014, Catalogue No. 6306.0, glossary.

[114] ABS, *Employee Earnings and Hours, Australia,* May 2014, Catalogue No. 6306.0, glossary.

members of the Australian Defence Force, employees based outside Australia and employees on workers' compensation who are not paid through the payroll.[115]

The EEH survey includes information determining whether the main part of an employee's pay was set by an award, individual agreement or collective/enterprise agreement. The EEH survey's Confidentialised Unit Record File (CURF) provides additional detail of an employee's method of pay with data for individual and collective/enterprise agreements and agreements identified as either registered or unregistered. Information on the jurisdiction (federal or state) of registered agreements is also provided from the survey's CURF.

Employee earnings

Average weekly earnings for all employees and the average weekly earnings for full-time adult employees are key series produced from the EEH survey. Average hourly earnings measures can in turn be derived from data on average weekly earnings by dividing these measures by paid hours of work. This report primarily accounts for average weekly and hourly total cash earnings. These measures incorporate remuneration paid to employees on a regular basis for time worked (including overtime payments) and also for time not worked (such as long-service leave and recreation). The 'cash earnings' component are gross amounts (that is, before tax) and are inclusive of amounts salary sacrificed.

Accuracy of data

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

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

Because the results of the EEH survey are based on a sample of the population, this survey is also subject to sampling error. This means that the estimates in this sample may differ from the figures that would have been produced had the data been obtained from a full examination of all employers and employees. To minimise the risk of inaccuracy, the ABS employs a two-stage selection approach for the EEH survey. A random sample of around 9000 employer units are selected in order to adequately represent employers across different industries, states/territories, sectors and employee sizes. The employer sample culminates in data for around 60 000 employees who are randomly selected from the selected employers' payrolls.[116]

The EEH survey is not specifically designed to produce estimates of the number of employees in the workforce. The *Labour Force, Australia* publication is referred to by the ABS as the primary source for official estimates of employment.[117]

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[115] ABS (2010), *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0, p. 25.

[116] ABS (2010) *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0, p. 25.

[117] ABS (2010) *Employee Earnings and Hours, Australia,* Catalogue No. 6306.0, p. 28.

Labour Force survey

Accuracy

The Labour Force survey is a household survey that collects information from the occupants of selected dwellings by specially trained interviewers using computer-assisted interviewing.

Sampling error and non-sampling error are issues to consider with all sample surveys. Sampling error occurs because a sample, rather than the entire population, is surveyed. The risk of sampling error can be reduced by increasing the size of the sample. Non-sampling error is caused by human error or made by false information provided by respondents. Non-sampling error also arises because not all information can be obtained from all persons selected for the survey. However, the Labour Force survey has a high rate of cooperation from persons in selected dwellings.[118]

Employee coverage

The Labour Force survey includes all persons aged 15 years and over except members of the permanent defence forces, certain diplomatic personal of overseas governments, overseas residents in Australia and members of non-Australian defence forces stationed in Australia.[119]

Australian Workplace Relations Study

Accuracy

The AWRS is the first Australia-wide statistical data set linking employer data with employee data since the 1995 Australian Workplace Industrial Relations Survey. The AWRS surveyed both employers and their employees to collect information about a range of workplace relations and employment matters. The ability to link these data greatly enhances the extent of analysis that can be performed compared with data sets that only contain information from either employers or households.

As the AWRS is conducted by surveying a sample of the population, sampling and non-sampling errors can affect the analysis (refer to the discussion above for further information on sampling and non-sampling error).

Employee and employer coverage

The AWRS surveyed national system employers and employees within the private sector, public sector, non-government organisations and not-for-profit organisations.

The following sets out the coverage of the national system:

- In New South Wales, Queensland and South Australia the national system includes ALL employees (except most government and local government employees).
- In the Northern Territory the national system includes ALL employees (except members of the police force).
- In Tasmania the national system includes private enterprise and local government. It does not include state government.
- In Victoria and the Australian Capital Territory the national system includes ALL employees (except law enforcement officers or executives in the public sector in Victoria).

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[118] ABS (2012) *Labour Force, Australia,* Catalogue No. 6202.0, p. 31.

[119] ABS (2012) *Labour Force, Australia,* Catalogue No. 6202.0, p. 28.

- In Western Australia the national system includes constitutional corporations. It does not include state government or non-constitutional corporations.

Enterprises with fewer than five employees were not included within the scope of the AWRS. Consequently, workers employed by enterprises with fewer than five employees were not within the scope of the AWRS. Enterprises classified into the Agriculture, fishing and forestry ANZSIC 2006 industry division were not included in the scope of the AWRS, with their employees consequently also excluded.

As noted above, public sector enterprises in the national system of workplace relations were included in the scope of the study, except for enterprises in the Defence industry (ANZSIC sub-division 76: Defence), which are commonly excluded from survey research. Consequently, public sector employees working in the Defence industry were also not included in the scope of the AWRS.[120]

[120] Australian Workplace Relations Study, *Population: National System Employers & Employees*, https://www.fwc.gov.au/creating-fair-workplaces/research/australian-workplace-relations-study/awrs-technical-notes/resear-0 (accessed 15 October 2015).