FCB

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Summer
2014/15

Bargaining Digest

An employer's guide to developments in Enterprise Bargaining

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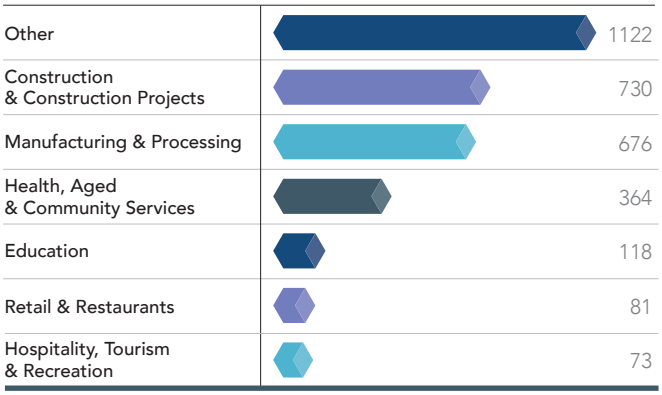
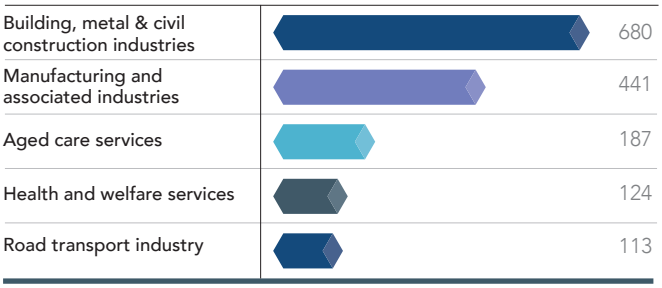
Where the action is

Who
is making EAs?

New EAs, key industry groups
(EAs commencing during 6 months to 31/12/14)

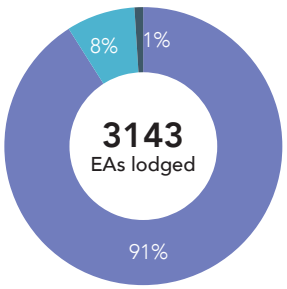


Top 5 FWC sub-industries
(EAs commencing during 6 months to 31/12/14)



What Type
of deals are being struck?

Total EAs lodged
(in 6 months to 31/12/14)

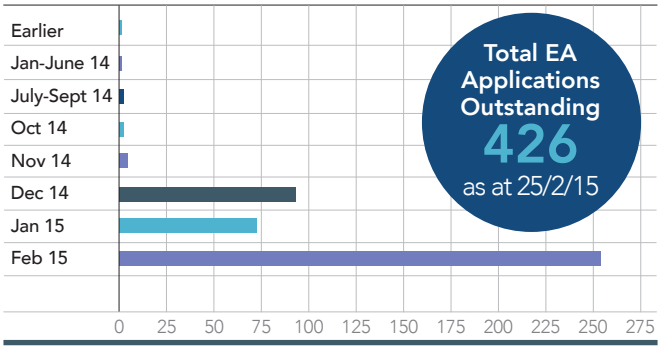


Single Enterprise
Multi Enterprise
Greenfields

Lodgements
↑35%
from previous 6 month period

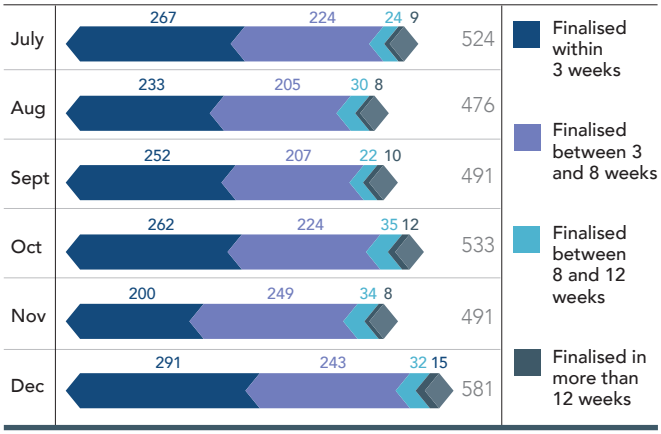
How Many
EAs are outstanding?

Volume of applications lodged at this time that remain outstanding
(by when lodged)

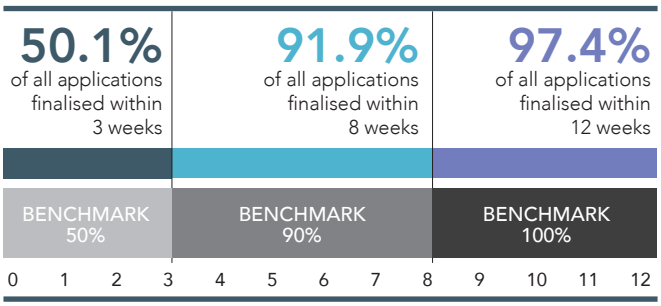


How Quickly
is the FWC approving EAs?

Agreement applications finalised
(6 months to 31/12/14, per FWC website)

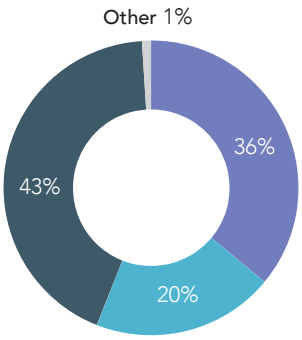


Alignment with benchmarks (December 2014)



Disputes & Industrial Action

What
are employees striking about?
(6 months to 30/06/14)

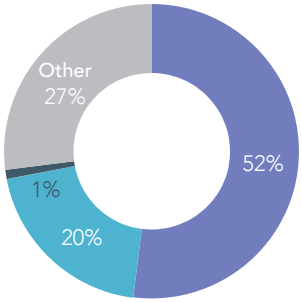


- Non EA related
- EA remuneration related
- EA conditions related

How Many
industrial disputes are happening?
(6 months to 30/09/14)

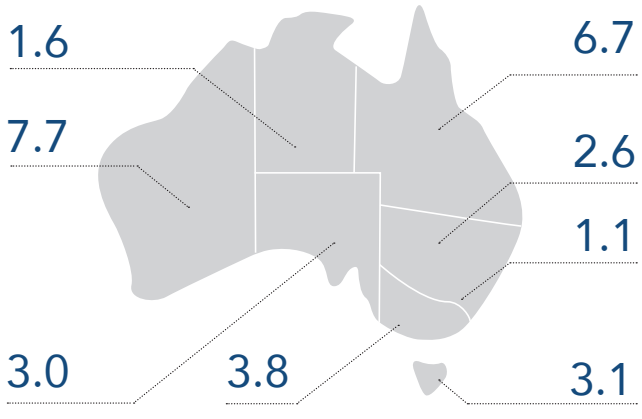
99
industrial disputes commenced

Why
are striking employees returning to work?
(6 months to 30/06/14)



- Pre-determined Resumption of Work **52%**
- Negotiation (no 3rd party) **20%**
- Mediation (3rd party) **1%**

Where
are disputes happening?
(Number of days lost in 6 months to 30/06/14, per 1000 employees)



Sources

Where the Action is

- FWC, Current Agreement downloads (point in time at 31/12/14)
- FWC, Agreements in Progress data (point in time at 9/2/14)
- FWC, Quarterly Sch 5.2, Part 1 Report, FY15 Q1, (published 2014)
- FWC, Quarterly Sch 5.2, Part 1 Report, FY15 Q2, (published 20/02/15)
- FWC, Timeliness Benchmarks data (published for 6 months ending 31/12/14)

Disputes & Industrial Action

- ABS, Industrial Disputes Report, September 2014 (published 4/12/14)
- FWC, Quarterly Sch 5.2, Part 1 Reports, FY15 Q1, FY14 Q4 (published 2014)

Private Sector Wage Patterns

- ABS, CPI data to 31/12/14 (published 28/01/15)
- ABS, Wage Price Index data to 31/12/14 (published 25/02/15)
- FWC, Annual Wage Review 2013–2014 (published 4 June 2014)
- Australian Government, Department of Employment: Trends in Enterprise Bargaining Report September Quarter 2014 (published 20/1/15)

Private Sector Wage Patterns

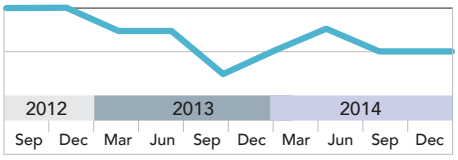
Industry Comparison

(December 2014)

	Annual Wages Growth	Change from same quarter last year	
Mining	2.4%	↓	-1.7%
Manufacturing	2.8%	→	-0.0%
Electricity, gas, water & waste	3.3%	↓	-0.1%
	! lower in public sector (0.5%)		
Construction	2.5%	↓	-0.3%
Wholesale trade	2.5%	↑	0.4%
Retail trade	2.2%	↓	-0.5%
Accommodation & food services	2.6%	↓	-0.4%
Transport, postal & warehousing	2.4%	→	0.0%
Information media & telecommunications	2.5%	↑	0.2%
Financial & Insurance Services	2.8%	↑	0.2%
Rental, hiring & real estate services	2.5%	↓	-0.4%
Professional, scientific & technical services	1.6%	↓	-0.3%
Administrative & support services	2.0%	↓	-0.4%
Public administration & safety	2.5%	↓	-0.3%
Education & training	3.3%	↑	0.1%
Health care & social assistance	2.7%	↓	-0.3%
Arts & recreation services	3.9%	↑	1.4%
Other services	2.2%	↓	-0.1%

Growth in Context

Wage inflation slows



Modern Award Increase	JULY 2014 3%	?	JULY 2015 **Pending**
Annual CPI Rate	DEC 2013 2.7%	↓	DEC 2014 1.7%

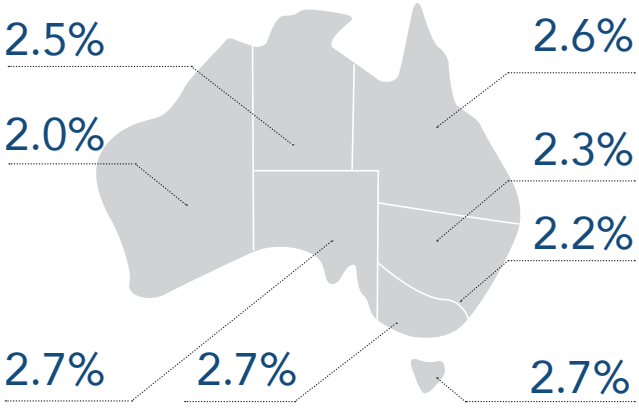
Average Annualised Wage Increase (Private Sector)

Wage Price Index	DEC 2013 2.5%	=	DEC 2014 2.5%
Collective Agreement Increases (newly approved)	SEPT 2013 3.4%	=	SEPT 2014 3.4%
Collective Agreement Increases (already in force)	SEPT 2013 3.6%	↓	SEPT 2014 3.5%

State by State Differences

Annual Wages Growth

(December 2014)



Rules in Focus

Choose your scope carefully

Many employees start bargaining without giving proper, early consideration to the scope of employees the EA will cover, or why. This might be because they've always had an EA and are "just rolling it over"; or it might because they're new to bargaining and aren't aware of the procedural requirements. However, whatever the circumstances, to have an EA approved an employer must actually persuade the FWC that the group of employees has been "fairly chosen".

It is a common misconception that the scope will be "fairly chosen" as long as the employees are "geographically, operationally or organisationally distinct" (eg, limited to a particular site or type of work). However, this "distinctness" is not decisive. It is only one of the factors the FWC may consider. Other circumstances may also be relevant. For example, the choice of scope cannot be arbitrary (eg, selected at random without due consideration) or unlawfully discriminatory (eg, based on gender or racial demarcations).

Case in Point

This recent Full Bench appeal highlights how important it is to articulate and evidence the rationale for your scoping decisions early.

- OneSteel Recycling negotiated an EA with the AWU, which it submitted to the FWC for approval in mid 2014. The EA had the same scope as its predecessor agreement, covering operators at 4 sites in Victoria. The scope of coverage was not an issue during negotiations.
- In its application documents, the employer declared that the group of employees was fairly chosen, but simply stated: "Consistent with previous Enterprise Agreements, the Agreement covers all Operational wages employees engaged in classifications listed in the Agreement at [4 named sites]. However the Agreement does not cover salaried staff (administrative, technical and managerial employees)."

It is a common misconception that the scope will be "fairly chosen" as long as the employees are "geographically, operationally or organisationally distinct"

In practical terms, to satisfy the FWC, an employer needs to do a number of things:

- **Articulate your reasons clearly**
  This might seem obvious, but it is often overlooked. Making a choice is an active process, so unless you can say when, how and by whom the choice was made, chances are you're simply assuming a decision has been made. Also, if you can't explain *why* a particular scope was chosen, it will be difficult to argue that your choice was fair.
- **Evidence the process**
  When you're choosing the scope, it's important to document your choice as well as the things you considered. For example, the decision and reasons may be noted in board minutes or even just a diary note (depending on who the decision maker is). Similarly, some of the factors you consider (eg, arguments raised by unions, promises made when acquiring a new business, etc) could be recorded in bargaining communications or minutes, demonstrating that scope was actively considered, not just glossed over.
- **Persuade the FWC the choice was fair**
  When you lodge an EA, you need to complete a form declaring how the scope was fairly chosen. This is your first opportunity to persuade the Commission and if you complete your forms carefully (taking into account your rationale, the evidence you have gathered and the relevant case law), you may be able to avoid the delay, cost and inconvenience of providing further information and/or attending an approval hearing. Conversely, simply asserting the choice was fair, without a clear rationale, is likely to hold up or even prevent approval.

- Commissioner Ryan, who initially heard the application, knew the employer already had a similar EA in place at 2 other sites in Victoria. He was concerned about the scope, so he sought further information from the employer. The business provided further details and asserted the group was "an organisationally, geographically and operationally distinct". However, the additional details still didn't explain how the 4 sites were distinct from the others. Commissioner Ryan remained unconvinced and rejected the application.
- On appeal, the Full Bench overturned the decision, finding it was procedurally unfair not to give the employer another opportunity to explain itself. It also allowed the company to submit further evidence. This included a sworn statement by the Employee Relations Manager, which addressed matters that helped explain the rationale for the EA's scope. After considering this further evidence, the Full Bench found the scope of the EA was fairly chosen and sent the agreement back to be considered again for approval by another Commissioner.

Although OneSteel Recycling's EA was eventually approved, it took nearly 6 months and 3 FWC hearings to achieve that outcome. This must have been costly for the business and, if it hadn't been able to back up its reasons, its EA may not have been approved at all. It's difficult to avoid the conclusion this could have been avoided by simply completing the F17 declaration differently.

OneSteel Recycling Pty Limited [2014] FWC 5783 (21/8/14)
OneSteel Recycling Pty Limited [2014] FWCFB 7560 (13/11/14)
OnesSteel Recycling Victoria Enterprise Agreement 2014 [2014] FWCA 8420 (12/12/14)

Selected FWC Full Bench Decisions

Bench rules on interpreting EAs

AMIEU v Golden Cockerel Pty Ltd
[2014] FWCFB 7447 (27/11/14)

In a dispute about how to interpret Golden Cockerel's EA, the FWC has re-emphasised that it does not 'make' EAs, it merely approves them. As such, it confirmed that the *Acts Interpretation Act 1901* cannot be used to help interpret EAs if their meaning is unclear or disputed.

This decision is consistent a Federal Court finding on the same point, decided earlier in 2014. However, this was the first time the FWC Full Bench had ruled on the matter itself. The FWC also used the opportunity to remind readers of the general principles applying to EA interpretation, with its judgment examining a range of considerations, including how to determine whether an EA is ambiguous or has a 'plain meaning' and when evidence of surrounding circumstances can be taken into account to aide interpretation (eg, evidence about what was said or done during negotiations, but not evidence of what the parties *actually intended*). Importantly, the FWC reiterated that a *"narrow pedantic approach to interpretation should be avoided, a search of the evident purpose is permissible and meanings which avoid inconvenience or injustice may reasonably be strained for"*.

With this in mind, the case underlines the importance of ensuring the bargaining process results in clear and unambiguous drafting, to minimise the risk that interpretation will result in unexpected outcomes. Once the EA has been made, actual intentions cease to be relevant, so it will often to be prudent to 'road test' tricky or important terms before settling on the final language (eg, testing rostering provisions with payroll or the line managers who will actually administer them). This exercise can help ensure the agreed wording is functional, practical and unambiguously represents each party's genuine intentions.

Union successfully appeals non-union EA

CEPU & AMWU v Main People Pty Ltd
[2014] FWCFB 8429 (25/11/2014)

Despite the *John Holland* case we reviewed in our last edition, it seems clear that unions will continue to object in any way they can when it comes to non-union EAs made with small numbers of employees. Here, two Queensland unions successfully had the Main People Pty Ltd Agreement overturned, after it had been already been approved by the FWC. Importantly, FWC found the unions were entitled to object, although neither of them acted as bargaining representatives for the EA, neither had members employed under the EA and their objection was lodged after the time limit for appeals.

The unions argued the group of employees covered by Main People's EA wasn't "fairly chosen" and undermined bargaining. It was made with only 3 employees, each of whom had appointed themselves as bargaining representative. However, its scope was broad enough to extend to new employees in a range of other classifications, without geographic or industry based limitations.
Like in John Holland, the FWC found nothing inherently wrong with the scope, stating: *"There is nothing unusual or necessarily untoward in a relatively new business making an enterprise agreement early in its life with a small number of employees, with an expectation that the business will grow and eventually employ a much larger number of employees, who would then be covered by the agreement."*

However, it accepted the unions' second argument that the BOOT hadn't been applied properly, because the FWC wasn't given information about the full range of comparator awards. The BOOT should have considered not only the three employees who voted, but any prospective employees who might be covered at a later stage. This serves as a practical reminder that any non-union strategy demands attention to all the details, even if the strategy itself is perfectly "fair".

> It will be interesting to see whether another case emerges involving self-appointments signed on the same day the bargaining period commences (and whether doing this would effectively 'lock out' a default union entirely).

AMIEU 'genuinely trying', despite also pursuing Plan B

Coles Supermarkets (Australia) Pty Ltd v AMIEU [2015] FWCFB 379 (30/1/15)

In a decision which reiterates how difficult it is to oppose protect action ballot orders, Coles recently failed to prevent the AMIEU from obtaining PABOs to support union claims for State specific meat-worker EAs in Tasmania and Victoria.

In early 2014, Coles initiated bargaining for a national EA covering its whole supermarket workforce, including all meat-workers. This represented a change from the 'status quo' framework because, although the company's pre-existing retail EA covered meat-workers in Queensland and the Northern Territory, meat-workers in other States were covered by separate, State-specific meat-worker EAs. These State-specific EAs hasn't yet expired, so at the time, most meat-workers were barred from taking industrial action to support their bargaining position.

> Despite the technical arguments raised by Coles, FWC took a 'big picture' approach to deciding whether the AMIEU had been genuinely trying to reach agreement.

From the outset, the Victorian and Tasmanian AMIEU branches sought to carve their members out of the national EA, at least partly on the basis their members would be disadvantaged if required to bargain with other retail employees and if unable to take industrial action. The union wanted to retain separate meat-worker EAs in different States, while at the same time indicating they would be prepared to consider a compromise position, separating meat-workers from other supermarket employees through a national meat-worker EA. Discussions continued on this 2-pronged basis throughout most of 2014 but, once the Tasmanian and Victorian meat-worker EAs expired, the union applied for ballot orders to support industrial action in those States.

Coles argued the AMIEU wasn't genuinely trying to reach State-based EAs, so shouldn't be allowed to conduct the ballots or industrial action. In part, this was because, at the time the union applied for the PABOs, it was also still actively pursuing a separate 'scope order' application for a national meat-worker EA. The union also hadn't yet served State-specific logs of claims for Tasmania or Victoria (although discussion of terms and conditions had progressed, subject to the scope issues being resolved).

Despite the technical arguments raised by Coles, FWC took a 'big picture' approach to deciding whether the AMIEU had been genuinely trying to reach agreement. It looked at the history of the bargaining as a whole, and it noted that throughout the whole period the union had maintained its primary claim for State-based EAs, despite also pursuing its concessionary 'Plan B' position in relation to a national meat-workers EA. Within that context, the timing and technical issues raised by Coles failed to persuade the tribunal that that the AMIEU wasn't genuinely trying to reach agreement. The protected action ballot orders were allowed to stand.

Selected FWC Full Bench Decisions

Union didn't bargain but can still be covered

CFMEU v Collinsville Coal Operations Pty Ltd
[2014] FWCFB 7940 (5/12/14)

Collinsville Coal, which employs staff at Glencore's Collinsville mine, made an EA with 21 employees, each of whom appointed themselves as their own bargaining representative. The CFMEU opposed approval of the EA, even though (indeed, because) it was not directly involved in the bargaining process. The union's submissions described its application as a "test case" about the role of the CFMEU because "a modus operandi emerging in the black coal industry for both owner operators and contractors is to have a handful of employees involved in making an enterprise agreement and then having it apply to a larger group of employees".

> A modus operandi emerging in the black coal industry for both owner operators and contractors is to have a handful of employees involved in making an enterprise agreement and then having it apply to a larger group of employees.

Initially, the FWC refused to allow the objections, deciding the CFMEU wasn't eligible to be covered by the non-union EA because it hadn't been a bargaining representative. On appeal, however, the Full Bench decided differently. At least one of the 21 employees was a CFMEU member, who stated he had "caved under pressure" to sign the self-appointment form. The FWC found no evidence the employee had been coerced, however, he hadn't signed his self-appointment form until after bargaining had commenced. This meant the CFMEU had been his default representative for the initial phase of the bargaining, until the self-appointment took effect. Although the CFMEU hadn't actively been involved in bargaining, its status as default representative for part of the period meant it was entitled to apply to be covered by the EA. In all other respects, however, it was not a bargaining representative at the relevant time, so it wasn't entitled actively to oppose approval of the EA.

Importantly, the FWC noted that the period of bargaining commenced not at the time the employer issued a valid notice of employee representational rights (which was the same day the employee signed the self-appointment) but rather at the earlier time when the employer first agreed to bargain or initiated bargaining (which in this case was some 10 or more days earlier). Given the particular timing involved, it will be interesting to see whether another case emerges involving self-appointments signed on the same day the bargaining period commences (and whether doing this would effectively 'lock out' a default union entirely).

When can casuals vote?

Swinburne University of Technology
[2014] FWCFB 9023 (16/12/14)

Given the large volume of casual and 'sessional' employees in the education sector, it may be unsurprising this case arose in a university setting. However, the decision is relevant for all employers negotiating EAs that will cover casual or irregular employees.

Swinburne had been engaged in lengthy negotiations for a proposed EA covering academic, executive and general staff – including casual and 'sessional' employees. However, after staff finally voted to approve the EA, the National Tertiary Education Union objected to it being approved by the FWC. It argued there was no 'genuine agreement' because Swinburne had improperly included casual and sessional employees in the ballot. According to the NTEU, 47 employees were ineligible to vote because they were not employed by Swinburne at the time employees were asked to vote (even

Other Selected Decisions

though they had been engaged at various times during the 2013 academic year). The scenario is somewhat unusual because, more frequently than not, unions object when casuals or irregular employees are improperly *excluded* from the ballot.

For context, the Act states that employees are eligible to participate if they are "employed at the time" an agreement is put to vote. On a strictly literal reading, this would mean a casual who is not working precisely at the time voting occurs could not be included. However, the FWC found this approach would be overly technical and could produce absurd results. Instead, it confirmed that the relevant test is whether a person is employed, or usually employed by the employer (by reference to the nature of the employment, patterns in the industry and the employer's enterprise), not whether the person was working or attended work when the request to vote was made or the vote was conducted.

In Swinburne's case, the FWC approved the EA, finding no evidence that ineligible employees voted or affected the outcome of the vote. However, the case doesn't completely resolve how to determine whether a particular casual employee is "usually employed" (eg, if they haven't worked for 6 months, are they still usually employed?). In practical terms, each employer will still need to consider its own factual circumstances carefully before finalising the voting pool.

Employer obtains scope order to counteract union bickering

APT Management Services Pty Ltd and APA GasNet Australia (Operations) Pty Ltd v AMWU & ors [2015] FWC 699

APT, an energy infrastructure company, wanted to replace its two existing EAs. One of these covered NSW exclusively, while the other covered the remaining employees nationally. APT also wanted to use the latest bargaining round to 'redraw' the geographic dividing lines separating the two EAs. Instead of isolating NSW employees from all others, it wanted one EA broadly covering the North West of Australia, with another broadly covering the South East (including NSW).

> One official acknowledged you would occasionally "need UN peace keeping intervention" even to get State branches of the AMWU to agree with each other!

The change in scope didn't materially affect negotiations for the North West EA, which proceeded smoothly. However, the proposed scope of the South East EA captured employees who, until then, had enjoyed different terms and conditions: some were covered by the NSW EA, while others were covered by the national EA. The disparity of existing terms and conditions (and the attempt to consolidate them within one EA) led to a range of disagreements. Fundamentally, it appears the different unions involved remained 'wedded' to traditional State based differences and were not prepared to compromise the status quo or negotiate change.

With negotiations floundering, APT sought a scope order to break the impasse and assist bargaining to proceed fairly and efficiently. Ironically, the unions actually resisted the application by arguing that, even if the scope order was made, it still wouldn't stop them bickering or resolve their differences! Indeed, one official acknowledged you would occasionally "need UN peace keeping intervention" even to get State branches of the AMWU to agree with each other!

Ultimately, none of the other parties proposed a scope that was different to APT's scope proposal, so the FWC was faced with a choice between not making the order and "doing nothing", or granting the order which at least might help to refocus bargaining so it could proceed more efficiently. It approved APT's application and gave a spray to the unions, saying: "the best outcome for all the employees will be achieved if sensible change is embraced and not stymied by fear which is fostered by historical differences between Branches of one or another Union".

Other Selected Decisions

Undertakings don't save Cagemaker EA

Barlina Pty Ltd [2014] FWC 8887 (10/12/14)

In a bold decision, Commissioner Ryan refused to approve an EA because it contained terms that were not about "permitted matters", even though the legislation contains an express provision intended to "save" such agreements. In doing so, he took a different approach to his other FWC colleagues, who have otherwise been prepared to approve EAs in similar circumstances.

Under the Act, an agreement can only become an "Enterprise Agreement" if it is about "permitted matters". However, the Act also says that if an EA contains a provision that is not about a permitted matter, then that provision is taken to have no effect (ie, that part of the text is rendered void and doesn't form part of the EA). This means that if an EA is approved *despite* containing provisions about non-permitted matters, the rest of the EA can still operate effectively.

> An enterprise agreement cannot contain provisions which deal with pre-employment issues such as medical checks by prospective employees as such matter [sic] do not pertain to the employer/employee relationship.

In this particular case, the Cagemaker Enterprise Agreement 2014 was initially lodged for approval in a form that included a number of errors and misrepresentations. It also contained terms dealing with pre-employment medicals and other processes for prospective employees. As a preliminary step, the FWC wrote to Barlina, informing it that "an enterprise agreement cannot contain provisions which deal with pre-employment issues such as medical checks by prospective employees as such matter [sic] do not pertain to the employer/employee relationship". In response, the employer tried to offer undertakings to resolve the issue, saying it wouldn't apply those particular provisions of the document. However, Commissioner Ryan didn't accept that the undertakings resolved the issue, instead treating the employer's application as completely invalid and declining to deal with it further. In doing so, he stated:

> *"an enterprise agreement that deals with non permitted matters is an agreement that does not meet the requirements of s.172(1) and therefore should not be dealt with by the Commission."*

Incidentally, Commissioner Ryan also said the EA would fail the approval process on other grounds too, because it contained so many misrepresentations (eg, references to the wrong laws) and other BOOT problems. Indeed, he indicated that the sheer number of undertakings needed to pass the BOOT would have changed the EA substantially, making it "a very different agreement" from the one which was presented to and voted on by the employees.

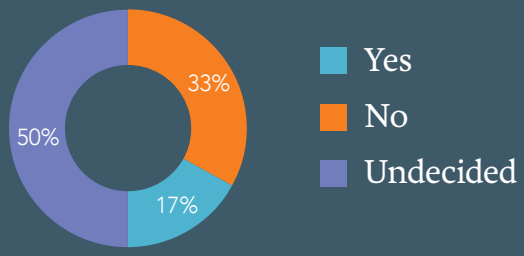
It remains to be seen whether Commissioner Ryan's approach to non-permitted matters will be followed by other members of the FWC (or the Full Bench). In the meantime, however, a different version of Barlina's EA has been approved (minus the offending non-permitted provisions) and all employers should carefully vet their EA documents to ensure they meet the requirements of the Act.

Viewpoint

Last edition, we asked readers:

"Do the Coalition's proposed changes to Greenfields bargaining make it more attractive to your business?"

Here are the answers you gave us:



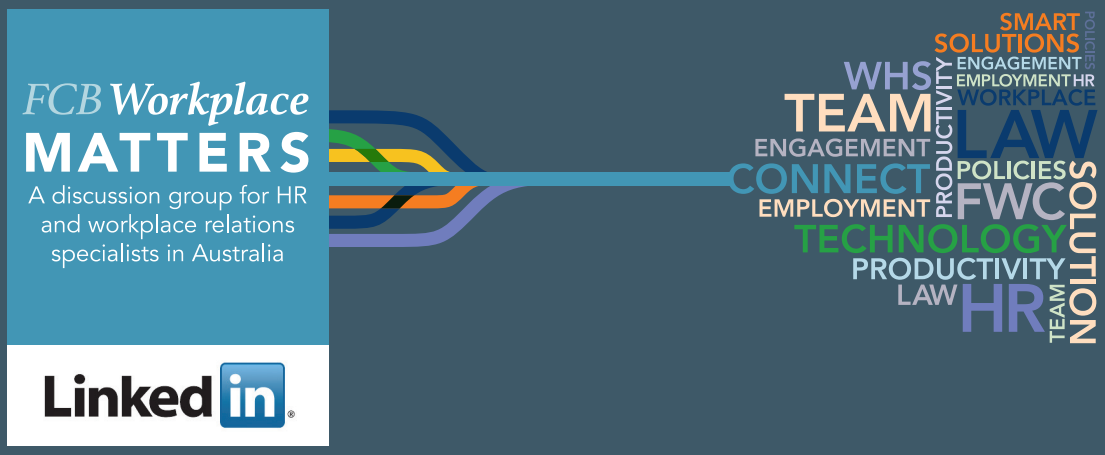
Our question this time is about productivity. In particular, given the Productivity Commission is currently considering whether changes to legislation would improve productivity, we would like you opinion:

"Do you believe that changing the Fair Work Act will produce more productive bargains?"

Click here to vote

www.surveymonkey.com/r/DSCBPGG

We also invite you to join our Workplace MATTERS discussion page on LinkedIn.



Flexibility in Focus

Enterprise agreement clauses that enhance flexibility

Late last year, the FWC released a report aimed at identifying how effectively EAs improve productivity and innovation. In part, the report analysed a variety of clauses from existing EAs, which had been nominated by employees, employers and unions as examples of clauses that they believed were "innovative or productivity enhancing". Interestingly, a number of the case studies dealt with flexibility, so we have selected 3 of those clauses to include in the "Driving Innovation" section of this edition.

When we talk about "flexibility" in EAs, people often assume we mean either:

- **IFA clauses** (ie, the mandatory clauses allowing employees to make "Individual Flexibility Arrangements"); or
- Clauses which allow parents, carers and other specific groups to request **"flexible working arrangements"** (ie, in line with the entitlements under the National Employment Standards).

However, EA clauses can provide for workplace flexibility in a variety of other ways too (even if the title of a particular clause doesn't include the word flexibility at all). The 3 clauses we have selected from the FWC report demonstrate this point. For example, we've summarised the clauses and provided some brief observations below:

Employer	Clause	Summary	Observations
Thiess	Multi-skilling	Breaks down traditional classification silos that limit the tasks a particular employee can perform, allowing them to be deployed more flexibly to perform any task within their competency level.	Multi-skilling clauses are essentially designed to prevent a "that's not in my job description" mentality. In effect, they require employees to "chip in" and perform work that would usually be done by a different classification level, as and when needed, usually without having to pay overtime or "higher duties" penalties. Of course, this can make the BOOT assessment tricky, because you may need to compare pay rates across several Award classifications. Unions also often object to clauses which could result in skilled staff being required to perform more menial tasks than those they are trained to perform.
Cerebos	Hours of Work	Moves away from a traditional rostering process, by allowing merchandisers the flexibility to determine their own hours of work (within limits).	This type of clause could be quite confronting for many managers, as the freedom it affords employees reduces the ability of managers to monitor or control their movements at any given point in time. However, given the reality that merchandising staff work in remote locations and are difficult to monitor anyway, it is also the type of clause that (in the right workplace) could encourage staff to take more ownership and responsibility for how they organise their own work and encourage managers to adopt a high trust, high performance management mindset (rather than a micro-management approach).
Coles & Bi-Lo	Leave	Allows employees to pre-book guaranteed periods of leave throughout the year (eg, school holidays).	Essentially, this is just a process for pre-approving leave (which could probably quite easily have been included in a policy, rather than the EA). However, in effect, the clause provides (and – perhaps most importantly – demonstrates the employer's commitment to) "quasi" flexible working arrangements for employees who don't formally have the right to request flexibility under the NES (eg, parents of children who are already at school).

Ultimately, one of the key observations arising from the FWC's report is that it doesn't much matter whether an EA includes "general commitments" to productivity (or flexibility). For an EA clause to improve outcomes, it needs to resonate with its target audience and be practical and appropriate for the setting in which it will be applied (including the particular workplace, industry and management cultures). The 3 clauses showcased in this edition are examples of clauses that have worked well for the particular businesses concerned but they are by no means the only way EAs can be used to provide or promote flexibility. Nonetheless, we hope they provide at least a taste of what may be possible in your next round of negotiations.

Back in the spotlight: Shining the light on workforce productivity

This article was first published in FCB Group's Workplace Relations Review 2015.

In the early 90's, enterprise bargaining became the structural saviour of workforce productivity. Since that time, however, its shine has gradually faded. Indeed, in many industries today, agreement making is seen as little more than the unavoidable price of industrial peace. In 2015, corporate leaders are increasingly questioning the value of industrial bargains that simply 'follow the pattern' without adding value or improving efficiency. The political and legislative spotlight is also being squarely redirected towards enterprise bargaining, to ensure it supports productive workplace co-operation. Creative negotiators will use this opportunity to reinvigorate workforce bargains, drive innovation and protect their businesses from emerging market pressures. On the other hand, those who fail to factor in productivity—whether in terms of growth or efficiency—can expect to feel the heat under fresh scrutiny from both senior management and the Fair Work Commission.

What is productivity, really?

Improving productivity basically comes down to one of two things: either you achieve more without having to invest more effort and resources; or you achieve the same, but reduce your level of effort and resources. The simplicity of this proposition, however, can easily become lost or forgotten when disproportionate attention is given to macro-economic concepts (eg, 'national productivity') or particular financial formulations (eg, goods/services produced per hour worked).

Ultimately, how you assess productivity (particularly at a workplace level) is subjective and will always depend on a range of considerations, including:

- **How you define your productive output:** For example, are you in a commercial business focused on producing returns for shareholders? Or is your mission to deliver low cost social services? Is it perhaps a combination of both?

- **How you define your input costs:** The standard input unit for 'labour productivity' is hours worked, but this assumes each hour worked is of equal value and, of itself, this doesn't factor in things like unpaid work hours, discretionary effort (some employees will always work harder than others!) or differences in capacity (eg, an employee with a cognitive disability may produce less per hour than an able bodied employee, even if they put in the same effort and receive the same pay).

- **How you factor in other influencers:** A range of indirect factors also affect the value of output and input. For example, investing in skills training increases the real cost per hour of skilled labour; and substandard customer service can dilute the real value of a manufactured product (ie, by undermining future sales volumes).

Indeed, defining productivity can be particularly difficult in the (growing) services sector. In part, this is because the value of services tends to be less quantifiable than

manufactured goods (particularly for public services, such as health, education, aged care, etc). Another contributing factor is the indirect cost of maintaining a large, skilled workforce. To demonstrate this, and to highlight some practical examples of opportunities to improve workforce productivity, we've set out below a hypothetical (and very simplistic!) worked example from the aged care sector, where the mixture of public/private investment provides useful comparison points.

Making it real

In practice, the complexity and subjectivity involved in defining and analysing productivity (let alone improving it) adds an extra degree of difficulty to enterprise bargaining negotiations. Many employers shy away from this entirely, instead using bargaining simply to preserve the status quo (eg, by rolling over an existing agreement) or to buy industrial peace and employee trust (eg, by locking in above award benefits through a statutory instrument, rather than using more discretionary policy or contract provisions). We also frequently see agreements that give productivity lip service, but don't actively improve it. For example, they often include 'aspirational' clauses where the parties notionally commit to co-operate to improve productivity, but without including any practical mechanisms for doing so.

The reality is that enterprise bargaining can be used effectively to improve workplace productivity, but you need to be prepared to put in the effort to produce the returns. As a minimum, this is what you'll need:

- **Good communication**
  To reach a shared commitment to improve productivity, you need a shared vision. This demands clear and appropriate communication to ensure employees (and their representatives) both know and understand the key issues: the definition of productivity you are using, how your proposed initiatives relate to productivity, as well as the practical impact for them. Effective communication is also critical for ensuring accurate up to date information from and about employees (eg, whether they will vote for your proposals!).

Worked example: Aged Care Provider

Main revenue streams	Public funding	Resident fees	Private equity investment
Key output produced	Delivery to residents of services that meet funding specifications.	Fees generated from unfunded 'extra services'.	Returns to investors generated from resident fees and/or surplus funding.
Key workforce factor affecting output	Staff competency influences the provider's ability to meet service specifications and funding conditions.	Staff conduct influences the prices residents wial pay.	Staff conduct and competency influence consumers' choice of provider (and, in turn, revenue driven by market growth).
Key input cost	Amount of public funding.	Wages for staff involved in providing extra services.	Amount of capital investment.
Key workforce factor affecting input	Rates of pay and compliance costs under Modern Award.	Market expectations of high quality staff.	The competency and conduct of staff influence investor confidence.
Key productivity measure	Amount of public funds spent per funded resident.	Amount spent on wages (over and above funded portion) per dollar of fees generated.	Volume of returns per unit of investment.
Example of opportunity to improve productivit	Use EA to displace the Modern Award's "accrued day off" option. Use part of the administrative cost savings to fund above award base rates for affected full time employees.	Direct part of the fee revenue into a staff bonus/reward scheme to incentivise behaviours known to improve consumer satisfaction.	Direct part of the fee revenue into a staff bonus/reward scheme to incentivise behaviours known to drive consumer choice.

- **Good information**
  Effective productivity initiatives must be based on accurate information, and not just financial or operational data (although this is important). Subjective data is often forgotten. For example, have you surveyed staff to identify what they really expect? And have you read the most recent research about what drives consumer choice in your industry?
- **Good analysis**
  The practical ability to align bargaining outcomes with productivity objectives often lies in the analysis. For example, you'll need a realistic assessment of which input/output factors employees can influence, how much 'extra pie' you are prepared to offer to encourage that behaviour and, ultimately, whether offering those incentives will actually drive the desired outcomes. For example, some employees may say they want more money, but they won't necessarily work harder to take what's on offer!

> The best procedural rules can hope to achieve is to equalise each party's bargaining power

- **Good will**
  Productive co-operation, like bargaining generally, is about shared interests and commitment. Unless employees see real value in the goal of improving productivity (or a particular type of productivity), they won't engage. Often, this comes back to the employer's commitment to good process (especially the resources put into communicating with employees).
- **Good planning**
  All of this complexity can be tricky, but good planning and preparation can simplify the process and improve the prospects of success. Looking ahead to key timeframes, undertaking early research and analysis and getting good strategic advice are all critical.

Case in Point

Legislative Reforms: "You can lead a horse to water..."

In late 2014, amid concerns about productivity, the Federal Government introduced a new Bill aimed squarely at enterprise bargaining practices. If passed by the Parliament, the proposed changes would actively require bargaining representatives to discuss productivity improvements. This would not require the parties to actually agree to productivity improvements or include them in their EA. However, before the FWC could approve an EA (other than a Greenfields EA), it would have to ensure that improvements to productivity at the workplace "were discussed".

Although this proposal is clearly aimed at improving bargaining outcomes, it's hard to see how it could actually "enhance enterprise bargaining" as intended (other than simply by reminding less sophisticated bargaining representatives that productivity is important). Instead, for most employers, the change may well add more counterproductive 'red tape' to the approval process, because they would presumably need to generate, maintain and potentially submit extra documentary evidence confirming what was discussed during bargaining (eg, agendas, minutes, communications, etc). At best, it would add another 'tick a box' obligation to the approval form. At worst, it could enable the tribunal to intervene and void a bargain (even after employees have voted to approve it) if the FWC subjectively assesses the quality of productivity discussions as inadequate. That is, even though the Bill says "were discussed" not "were discussed genuinely or adequately", there is a risk the FWC might "fail to be satisfied" if it considers a discussion was contrived merely to tick the box.

Ultimately, legislation can't force people to achieve more productive bargaining outcomes. The purpose of statutory enterprise bargaining is to allow employers to opt out of the standard safety net terms in Modern Awards, in return for employees receiving a larger slice of the employer's pie. Although some of these deals may look unproductive to an outsider, we must assume that, rational employers (free from unlawful coercion) wouldn't sign up to an EA unless they actually see some net benefit in it for them. It is another question entirely whether this benefit can be quantified easily or factored into financial productivity measures. The best that procedural rules can hope to achieve is to equalise each party's bargaining power (at least, to some extent), for example, by allowing a limited right to strike but ensuring there is no obligation to reach agreement and preventing unlawful coercion.

Driving Innovation

INDUSTRY	BUSINESS	UNIONS
		
Retail	Cerebos (Australia) Limited	N/A

Hours of Work

Allowing merchandisers to determine their own work hours

X.1 The work expected to be completed will not require an employee to work:

- prior to 6:00 am or after 6:00pm; or
- on a weekend; or
- on a Public Holiday; or
- hours equal to or in excess of 3 8 hours in a week.

X.2 Each employee will determine the days on which they work, as well as their starting and finishing times. An employee may choose to work on any day and at any time, Monday to Sunday, which an employee can change at any time without notification to or the approval of the Company.

X.3 The day, starting and finishing times and/or hours worked will not attract additional payments and/or entitlements to those cited in the Certificate of Employment and/or in the Agreement.

X.4 Employees must obtain prior approval from their immediate Manager, to claim payment for hours in excess of the weekly hours cited in their Certificate of Employment, calculated on a month basis.

X.5 Any approved hours worked in excess of the weekly hours cited in the employee's Certificate of Employment, by agreement between the employee and their immediate Manager may be taken as time off on the basis of one hour off for each hour worked.

X.6 At each month end, any approved hours not taken by the employee as time off will be added to the employee's Annual Leave balance on basis of one hour for each hour worked.

INDUSTRY

Construction

BUSINESS

Thiess

UNIONS

CFMEU

Multi-skilling

Breaking down classification silos

WORKFORCE FLEXIBILITY

Workplace flexibility is a condition of employment. Employees shall be multi-skilled and work in a completely flexible manner. All employees will be required to perform a diverse range of functions within their level of skill and competence. There shall be no, restrictions or limitations on the performance of work, including or between traditional crafts, occupations, vocations and callings.

ATTACHMENT A CLASSIFICATIONS

All employees will perform work and will undertake indicative tasks and duties to the extent of:

- The classification under which they are engaged; and
- Their skills required under the terms of employment

Each *Construction Worker Level* (CW) builds on the preceding *Construction Worker Level* skills base as a prerequisite for ongoing skills development. Construction Workers are required to carry out all tasks identified for each level for which they have the skills/competency both at their classification level and the preceding classification level.

All skills will be assessed in accordance with the *'Thiess Contractors Skills Assessment System'* manual.

INDUSTRY

Retail

BUSINESS

Coles Supermarkets & Bi-Lo

UNIONS

SDA, AWU, AMIEU

Leave

Allowing employees to pre-book guaranteed leave

A permanent team member (excluding a Department Manager/Team Leader) may, by agreement with the Company, take pre-approved leave for specified periods of time to enable the team member to meet individual circumstances subject to the following:

A The guaranteed periods of leave will be set for at least the following 12 months by agreement between the team member and the Company. These periods can be changed by mutual agreement. The 12 month period referred to in this subclause may also be varied by mutual agreement;

B The team member and the Company will agree to the hours of work per four week cycle. All work will be rostered in line with the rostering principles of this Agreement;

C By agreement, team members may work during their guaranteed periods of leave. Payment for these hours will be at the team member's ordinary time earnings plus any applicable penalties. Team members will also accrue leave for these hours;

D The team member and the Company will review annually the guaranteed periods of leave;

E Leave can be taken as either paid leave (ie. annual leave or long service leave) or as unpaid leave. If unpaid leave is taken for more than one week then the team member's entitlements to annual leave, sick leave and long service leave will be frozen from the date of commencing unpaid leave;

F Leave cannot be taken during the last two weeks of December;

G A team member may discontinue working under this arrangement with 3 months' notice to the Company (or less as agreed). The team member will continue to be engaged on a permanent basis upon the end of this arrangement.

Bargaining Agreements

EA
an Enterprise Agreement made under the Act

Greenfields Agreement / Greenfields EA
an EA that is made between a union and employer before any employees commence employment

MEA
an EA that is a Multi Enterprise Agreement under the Act, covering a number of employers that are not "single interest" employers

SEA
an EA that is a Single Enterprise Agreement under the Act, covering a single employer or a number of "single interest" employers

Employee Organisations referenced in this edition

AMIEU
Australasian Meat Industry Employees' Union

AMWU
Australian Manufacturing Workers' Union

AWU
Australian Workers' Union

CEPU
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

CFMEU
Construction, Forestry, Mining and Energy Union

NTEU
National Tertiary Education Union

SDA
Shop, Distributive and Allied Employees Association

Other Terms

ABS
Australian Bureau of Statistics

Act
Fair Work Act 2009 (Cth)

BOOT
the Better Off Overall Test under the Act (an EA must pass this test to be approved by the FWC)

BR
a Bargaining Representative under the Act (who participates in negotiating the terms of a proposed EA)

F17
the form that is used by an employer to provide the FWC with details about an EA, when lodging it for approval (the F17 accompanies an F16 application form)

FWC
the Fair Work Commission

FWCFB
the Full Bench of the Fair Work Commission (usually consisting of 3 members of the Commission hearing a case together, rather than a single member hearing a case alone)

GFB
good faith bargaining (which is a requirement under the Act when parties are bargaining for an SEA that is not a greenfields EA)

IFA
an individual flexibility arrangement that complies with the Act

NES
the National Employment Standards under the Act (which include 10 minimum conditions applying to all employees)

NRR / NERR / bargaining notice
a Notice of Employee Representational Rights under the Fair Work (which must be issued to employees when bargaining commences)

P/L
denotes a proprietary limited (Pty Ltd) company

PABO
a Protected Action Ballot Order of the FWC authorising a union to conduct a ballot of its members (which is a condition of industrial action being protected action)

Protected action
industrial action (eg, a strike or 'go-slow') that is authorised under the Act

Scope order
an order made by FWC about which employees are to be included in the scope of bargaining for an EA

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