



EDITION 1

June - July
2014

Bargaining Digest

An employer's guide
to developments in
Enterprise Bargaining

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Rules in Focus



Clarity about Notices of Representational Rights:

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Selected FWC Full Bench Decisions



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Canavan Building P/L (29/5/14)
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Other Selected Decisions



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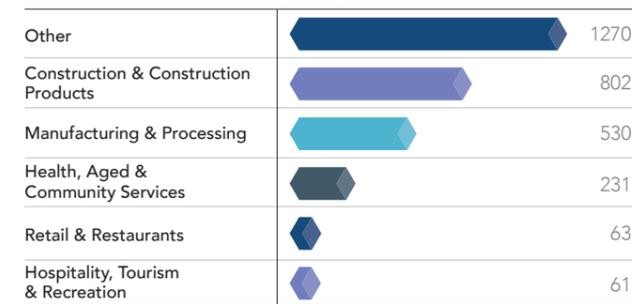
Workload Management:

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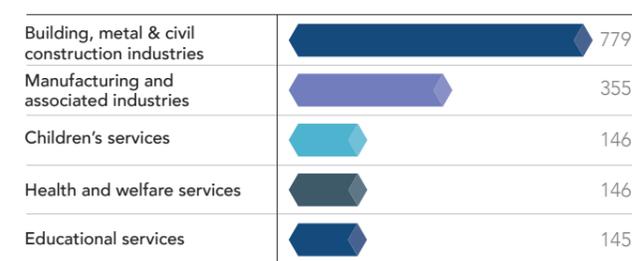
Where the action is

Who is making EAs?

New EAs, key industry groups
(EAs commencing during 6 months to 31/3/14)

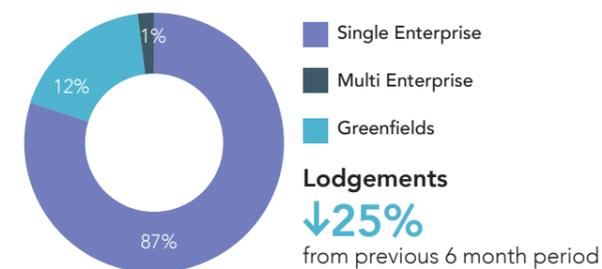


Top 5 FWC sub-industries
(EAs commencing during 6 months to 31/3/14)



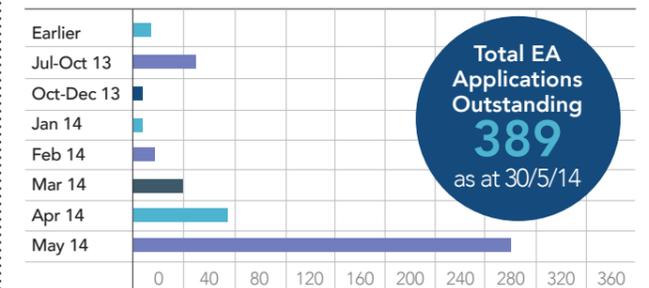
What Type of deals are being struck?

Total EAs lodged
(in 6 months to 31/3/14)



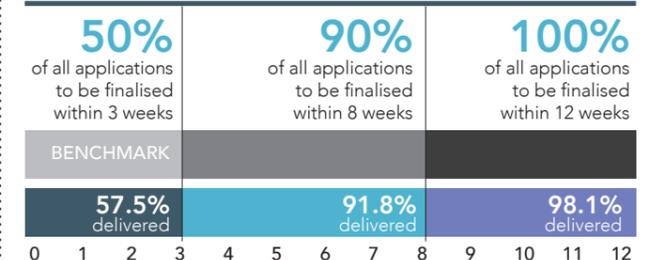
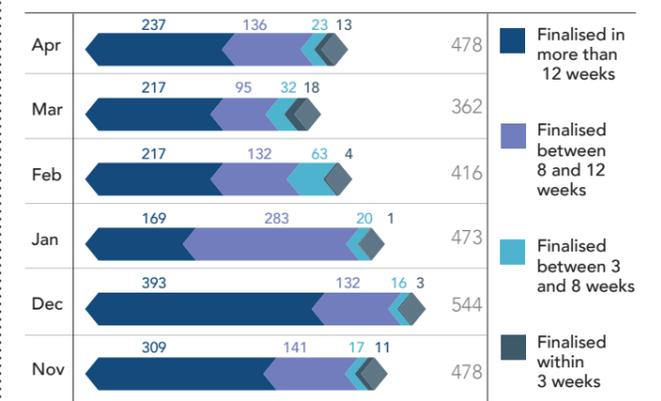
How Many EAs are outstanding?

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



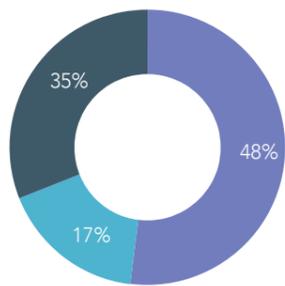
How Quickly is the FWC approving EAs?

Agreement applications finalised
(6 months to 30/4/14, per FWC website)



Disputes & Industrial Action

What are employees striking about?

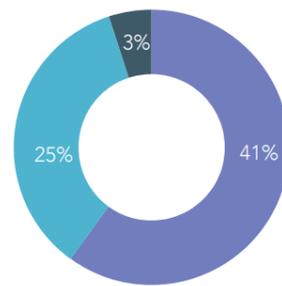


- Non EA related**
24,600 employees involved;
17,600 working days lost
- EA remuneration related**
2,200 employees involved;
8,600 working days lost
- EA conditions related**
49,800 employees involved;
31,800 working days lost

How Many industrial disputes are happening?



Why are striking employees returning to work?



- Pre-determined Resumption of Work**
41%
- Negotiation (no 3rd party)**
25%
- Mediation (3rd party)**
3%

Sources

- Where the Action is**
 - FWC, Current Agreement downloads (point in time at 31/3/14)
 - FWC, Agreements in Progress data (point in time at 30/5/14)
 - FWC, Quarterly Sch 5.2, Part 1 Reports FY14, Q2 & Q3 (published 30/5/14)
 - FWC, Timeliness Benchmarks data (published 30/5/14)
- Disputes & Industrial Action**
 - ABS, Industrial Disputes data, 6 months to 31/12/13 (published 5/6/14)
 - FWC, Quarterly Sch 5.2, Part 1 Reports FY14, Q1 & Q2 (published 30/5/14)
- Private Sector Wage Patterns**
 - ABS, CPI data to 30/3/14 (published 23/4/14)
- ABS, Wage Price Index data to 30/3/14 (published 21/5/14)
- FWC, Annual Wage Case Decisions, June 2014, June 2013
- Australian Government, Department of Employment: Trends in Enterprise Bargaining Report to 31/12/14 (published 21/3/14)
- Facts & Figures (Page 18)**
 - FWC, Quarterly Sch 5.2, Part 1 Reports FY14 Q1-3; FY13, Q4
 - Explanatory Memorandum, Fair Work Amendment Bill 2014, p.xii
 - ABS, Counts of Australian Business, Including Entries and Exits (published March 2014)
 - ACIF, Forecasts for engineering building & construction (published November 2013)

Where are disputes happening?

(Number of days lost in 6 months, per 1000 employees)



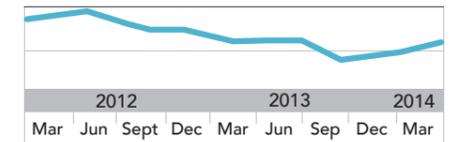
Private Sector Wage Patterns

Industry Comparison

		Annual Wages Growth	
Arts and recreation services	↑	0.9%	3.6%
Education & training	↑	1%	3.5%
Construction	↑	0.2%	3.2%
Manufacturing	↑	0.1%	3.1%
Health care & social assistance	↓	-0.3%	3.1%
Electricity, gas, water & waste	↓	-2.1%	3%
		higher in public sector (3.5%)	
Rental, hiring and real estate services	↑	0.3%	2.8%
Public administration & safety	↓	-0.8%	2.8%
Financial & Insurance Services	↓	-0.4%	2.7%
Retail trade	↓	-0.2%	2.5%
Mining	↓	-1.8%	2.4%
Information media and telecommunications	↓	-0.3%	2.4%
Wholesale trade	↓	-1.8%	2.3%
Transport, postal & warehousing	↓	-1.3%	2.3%
Accommodation and food services	↓	-0.3%	2.2%
Administrative and support services	↓	-1.3%	2.2%
Other services	↓	-1.2%	2.2%
Professional, scientific and technical services	↓	-1.3%	1.9%
		! much higher in public sector (3.2%)	

Growth in Context

Are wages recovering?



Modern Award Increase	JULY 2013	↑	JULY 2014
	2.6%		3%

Annual CPI Rate	MAR 2013	↑	MAR 2014
	2.5%		2.9%

Average Annualised Wage Increase (Private Sector)

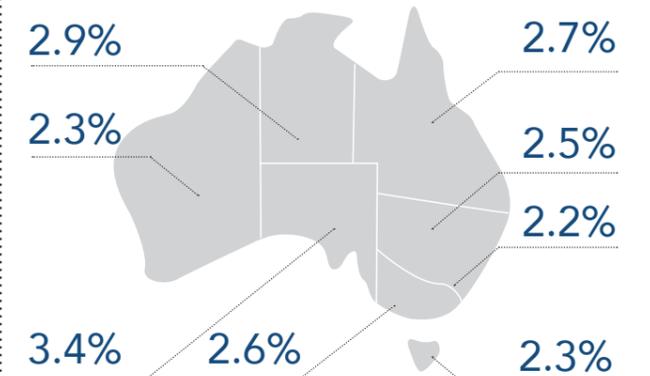
Wage Price Index	MAR 2013	↓	MAR 2014
	3.2%		2.6%

Collective Agreement Increases (newly approved)	DEC 2012	↑	DEC 2013
	3.4%		3.6%

Collective Agreement Increases (already in force)	DEC 2012	=	DEC 2013
	3.8%		3.8%

State by State Differences

Annual Wages Growth



Rules in Focus

Clarity about Notices of Representational Rights

Recent FWC decisions show that some employers are still missing the basics when it comes to process requirements. Over the last 6 months, a number of EA applications were rejected because employees had not been issued with a Notice of Representational Rights that complied with the legislation, or at all. Remember that if you fail to follow the pre-approval requirements, including correctly issuing NRRs, you may need to repeat significant parts of the bargaining process (including conducting a new vote!). Not only is this a bad look, it can also be time-consuming and expensive.

Any secondary or accompanying communications also need to be carefully managed

Key procedural errors made by employers included:

- paraphrasing the prescribed notice in an email instead of sending the notice itself
- adding a statement to the notice (eg, a statement that the company is required to provide employees with the notice, or information about how the company plans to manage the negotiation process if a large number of bargaining representatives are specified)
- adding a nomination section to the form to allow employees to fill in the details of their bargaining representative using the same document
- leaving out part of the required content when selecting from the options in the template document, or
- not giving notices to “prospective employees” who commenced employment before the EA was made.

Remember that notices must be in the form set by the regulations and must not include any additional content. Any secondary or accompanying communications also need to be carefully managed to ensure they aren't inconsistent with the notice or misleading about employee rights.

Case in Point

Following an Appeal to the FWC Full Bench in April, it is now clear that:

- ✓ you **are** allowed to give employees extra information at the same time as you issue the Notice of Representational Rights (this overrules the earlier, controversial Shape Shopfitters decision) BUT
- ✗ if you are going to provide extra information (eg, a cover note, bargaining representative nomination forms, etc) you **can't** do anything to suggest that the extra information is actually part of the notice (ie, don't bundle the documents together and describe them all as “the notice”).

In the particular case, the employer hadn't altered the prescribed form at all, but it had stapled two additional documents to it (ie, two BR nomination forms). It then attached this whole bundle to its F17 application form, which implied it had represented the whole 3-page document as “the notice”, rather than the first page only. The Full Bench declined to approve the agreement because “the notice” contained additional content and, therefore, hadn't been validly given.

Peabody Moorvale Pty Ltd v CFMEU
[2014] FWCFB 2042

Selected FWC Full Bench Decisions

Statutory and operational changes haven't completely extinguished our industrial history, and careful review of the underpinning rules is needed in every case.

Annual leave pre-payments breach the NES, not compliant

Full bench resolves conflict between FWC and Federal Court rulings

Canavan Building P/L [2014] FWCFB 3202 (29/5/14)

In the past, the FWC approved an EA allowing an employer to pre-pay annual leave (by using an 'up front' loading). Employees were not paid at the time they took leave because they'd already been paid for it in advance. At the time, this was considered different to 'cashing out' annual leave, because employees retained the right to time off, although they received payment earlier than required.

Now, the Full Bench has effectively reversed this position, refusing to approve a similar EA which included pre-payments. In doing so, it cited a Federal Court decision which seemed to conflict with the FWC's earlier ruling, finding instead that even pre-paying annual leave breaches the NES.

Any employers who still pre-pay employee leave should review those arrangements, whether they're written into an EA or not.

Although the case provides some welcome clarity, it is a further blow to many employers who would prefer to pay 'loaded' rates, rather than accruing and granting paid leave as a separate entitlement. Many see the pre-payment method as better aligned to flexible or non-standard work patterns (particularly 'regular casuals'), or use it to manage the 'true costs' of labour as and when they are incurred. Ironically, some employees would also prefer to receive (and spend!) the payments sooner.

As a consequence of this decision, any employers who still pre-pay employee leave should review those arrangements, whether they're written into an EA or not.

Employee views take precedence in scope order dispute

Unless there is a good reason, FWC will approve employee scope proposals over an employer's wishes; geographic, operational or organisational distinctions are not enough

AWU v BP Refinery (Kwinana) P/L [2014] FWCFB 1476 (3/4/14)

In this case, the FWC had to decide between two competing scope order applications. Bargaining had stalled, and a scope order was needed to "promote the fair and efficient conduct of bargaining" by breaking the impasse. The union (with 87% employee support) wanted a single agreement covering all employees. The company wanted two separate EAs: one for operations staff, another for lab technicians. In the previous bargaining round in 2010, the union had agreed to separate agreements.

The FWC noted that, typically, there will not be only one way of fairly choosing a group to be covered by an EA. Both proposals covered "fairly chosen" groups, and just because lab employees were distinct from the operators didn't mean the company's wishes should prevail. On the contrary, the decision effectively states that - everything else being equal - the views of employees carry greater weight than the wishes of the employer, unless there is a particular reason to prefer the employer's proposal (eg, something making the employer's proposal more fair or more efficient than the other(s)).

All too often, bargaining notices simply recite the same coverage as existing agreements, even if the circumstances have changed. This decision reminds employers to consider their bargaining strategy carefully, before bargaining starts. This includes turning your mind to whether employees or unions are likely to seek scope orders and, if so, whether particular reasons can be used to persuade them (or the FWC) otherwise.

Nursing union entitled to represent personal carers

Blue Care ordered to delay vote and hold bargaining meetings with QNU

Uniting Church in Australia Property Trust (Q) T/A Blue Care and Wesley Mission Brisbane v QNU [2014] FWCFB 1447 (24/3/14)

Over recent years, there has been significant change in agreement making, award structures and the nature of jobs performed in various industries. Often, traditional union demarcation lines will have become redundant, so continuing to apply them thoughtlessly can create problems. This case, however, also reminds us that statutory and operational changes haven't completely extinguished our industrial history, and careful review of the underpinning rules is needed in every case.

Blue Care operates aged care facilities in Queensland, with staff covered by 2 separate EAs: one for qualified nurses and one for "care and support" staff. Late last year, QNU successfully obtained a bargaining order, requiring the employer to delay its proposed vote on a new care and support EA and conduct at least 4 meetings with the QNU in its capacity as bargaining representative for 2 personal carers. The employer, however, argued that the QNU's rules didn't give it industrial coverage to represent personal carers, unless they were solely engaged in assisting nurses.

The Commission reflected that coverage for personal carers in aged care had a "long and tortured history" and also that "the lines between a nursing home and an aged care facility have blurred". However, it concluded personal carers were still eligible for membership of the QNU, which covers not only qualified nurses but also "assistants-in-nursing". The broad multi-skilling flexibility permitted in the new EA didn't prevent personal carers from being "assistants-in-nursing" for that purpose, even if they also performed a substantial range of other tasks. The Full Bench upheld the bargaining orders against the employer.

Construction award not relevant for plumber's labourers

BOOT is discretionary, but FWC must use the correct Award

CFMEU v B J Jarrad P/L [2013] FWCFB 8740 (28/11/13)

The employer was a plumbing contractor but, in addition to plumbers, it also employed general labourers and undertook civil works to support its plumbing works and activities. The employer believed the Plumbing and Fire Sprinklers Award was appropriate for the BOOT; but the CFMEU argued the Building and Construction General On-site Award contained more appropriate classifications for some labourers and should be used for assessing whether those employees would be better off.

The Full Bench acknowledged that assessing the BOOT is a "discretionary decision", rather than an absolute test, because no single consideration (or combination of considerations) is determinative, and the decision-maker is allowed some latitude. However, it confirmed that if the BOOT is conducted by reference to the wrong award, that is a matter of law - not discretion - and the decision would be open to appeal.

When conducting the BOOT, the Commission is required to form an overall impression of an enterprise agreement.

Ultimately, the Full Bench agreed the employer's labourers were covered by the Plumbing Award, even though the On-site Award contained more specific descriptors for labouring work. Since the On-site Award expressly excluded employees covered by the Plumbing Award, there was no need to assess which instrument contained the "most appropriate" classifications for the work they performed.

The union's position isn't determined by what is stated in the bargaining notice.

MUA circumvents protected ballot restrictions

Protected action ballot authorised after MUA proposes new scope, excluding employees unable to strike

Mermaid Marine Vessel Operations P/L v MUA [2014] FWCFB 1317 (7/3/14)

The employer had two EAs in place with overlapping coverage provisions: the "Gorgon EA" and a "General EA". The Gorgon EA remained within its nominal term, but the General EA had nominally expired. Bargaining had begun "to replace" the General EA, but the scope in the bargaining notice was broad enough to capture employees covered by both existing agreements.

After a year of bargaining unsuccessfully, the union applied for a protected action ballot order (PABO). The company objected because the Act doesn't allow PABO applications if any employees who would be covered by the proposed EA remain covered by an existing EA, unless it has passed its nominal expiry date (or will do so within 30 days). Cleverly, the union withdrew its application and instead wrote to the employer, proposing an altered scope for the EA, which excluded Gorgon employees. It then made a fresh PABO application. The union argued its new application was valid, because it related to the union's proposed EA (with the narrower scope), not to the employer's proposed EA (with the scope set out in the notice of representational rights).

The Full Bench confirmed that the union's position isn't determined by what is stated in the bargaining notice and found that "the proposed agreement" in this case was the union's EA. Having decided that the union had standing for its PABO application, it then remitted the application to Commissioner Cloghan to decide whether the union had also been genuinely been trying to reach agreement with the employer in connection with the union's proposed EA. Commissioner Cloghan subsequently granted the PABO.

Confusion over coverage; approval quashed

Reminder to be clear about who's covered and who can vote

AMIEU v Teys Australia Beenleigh P/L [2014] FWCFB 1313 (4/4/14)

The employer allowed 21 trainee supervisors to vote in a ballot to approve an EA, but the AMIEU argued they were not covered by it and shouldn't have voted. Although some 709 employees voted, the outcome was split, with only 8 votes differentiating "for" and "against". If the trainee supervisors hadn't been allowed to vote, the outcome might have been different.

The EA's wording excluded employees "engaged in... managerial or supervisory work" and, initially, FWC approved the EA, reasoning that "unless and until production employees who are in the role of Trainee Supervisors, or undergoing workplace health and safety training, are specifically engaged as Supervisors or Workplace Health and Safety Officers... they are covered by the Agreement". In the decision, however, the FWC also interpreted the eligibility rules loosely, saying employees would be eligible to vote if they will "likely" be covered by the EA, rather than accepting that the group of employees eligible to vote is fixed (ie, limited to those who will - definitely - be covered by the EA). The Full Bench rejected this loose approach, quashing the approval decision and sending it back to be considered properly.

In practice, working out exactly who is eligible to vote on a particular date can be tricky. Without clear drafting and up to date information about who does what when, it can be tempting to 'err on the side of caution' to resolve the ambiguity. However, this case reminds us that a loose approach to eligibility can be fatal to an EA, so it is prudent to consider (and, if possible, resolve) any disputes about eligibility well before the vote occurs (to avoid an EA being struck down later).

Other Selected Decisions

Non-union strategy pays off for John Holland

Federal Court overrules FWC; 3-employee EA doesn't undermine bargaining

John Holland Pty Ltd v CFMEU [2014] FCA 286 (27/3/14)

John Holland has been vindicated in making an EA with 3 non-union employees before hiring others at a new site in WA. Although the FWC initially approved the EA, the CFMEU appealed the decision, arguing its scope wasn't fairly chosen and undermined collective bargaining. The primary concern was that, although only 3 individuals were employed when the EA was made, its wide application meant future employees (including employees at other sites) would be denied an opportunity to bargain. The FWC Full Bench agreed and overturned the approval.

"Plainly, the Full Bench was of the view that there was something wrong with three employees being able to make an agreement which covered work classifications other than their own".

Now, the Federal Court has stepped in to resolve the issue. It took a 'black letter' approach, confirming that the group of employees who must be "fairly chosen" is the group who made the agreement, not the group who might, in future, be covered by it. In addition, the Court confirmed the words "fairly chosen" in the Act are not to be interpreted as "chosen in a manner which would not undermine collective bargaining" and inferred it was not the place of the FWC to reinterpret or extend the legislation. It stated:

"Plainly, the Full Bench was of the view that there was something wrong with three employees being able to make an agreement which covered work classifications other than their own. However, if there is a lacuna in the Fair Work Act, on which I express no view, then the remedy would appear to lie in legislative amendment."

36 health sector employers bargain for single agreement

An example of ministerial approval for single interest employer authorisation covering doctors in training

Victorian Hospitals Industry Association [2013] FWC 7680 (2/10/13)

A group of 36 employers (all health services employers involved in providing public health services in Victoria) sought authorisation to bargain together (through their industry association) for a single agreement covering doctors in training. Although they all provided similar services, the employers were separate legal entities and otherwise unrelated from each other.

This fourth generation MEA is an example of employers working together.

Ministerial approval is a requirement under the Act if separate employers wish to bargain together, unless they are "related bodies corporate", or otherwise engaged in a joint venture or common enterprise. Although the Minister's reasoning is not disclosed in FWC's published decision, relevant factors include (amongst others):

- whether the relevant employers were governed by a common regulatory regime; and
- whether the relevant employers were substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

It is likely these two factors were particularly significant determinants underpinning the Minister's decision. The Agreement has since been made and approved.

Although it recognised that the parallel process had been unfair to the NUW, this unfairness could have been resolved in another way if the NUW had instead pursued good faith bargaining orders

Scope order not the solution in NUW/TWU power tussle

FWC refuses scope order, even though “parallel” bargaining at Linfox was unfair to NUW

National Union of Workers v Linfox Australia Pty Ltd [2013] FWC 9851 (16/12/13)

Linfox was seeking to negotiate a replacement EA with the same scope as its existing national distribution centre EA, covering approximately 146 sites and nearly 3000 workers. The TWU had been the sole employee bargaining representative when the existing EA was negotiated, and it remained the dominant workforce representative in the fresh negotiations. The NUW, however, had recently acquired a significant number of new “in scope” members and had also become involved in the latest bargaining round, principally for employees in the warehouse section of one large site, the Truganina distribution centre servicing Coles Supermarkets in Victoria.

Despite the NUW’s significant presence at Truganina, its limited coverage at other sites meant it had “marginal capacity to influence the progress of the negotiations for the national agreement”, with the “detailed work and hard bargaining” occurring in private between Linfox and the TWU. Indeed, Linfox excluded the NUW from the main negotiations, on the basis the TWU was unlikely to participate if the NUW turned up. Instead, Linfox conducted separate “parallel” bargaining processes with each union. The FWC accepted that this parallel process was “significantly less fair to the NUW” than joint negotiations would have been.

Unsurprisingly, one of the NUW’s key claims was to seek a separate agreement for the Truganina warehouse. Linfox responded to this proposal, but did not agree to it, and was not bargaining for a separate warehouse EA. It was, however, expecting to incorporate some site specific conditions into the proposed EA after further consultations, including matters relating to Truganina that would be subject to further bargaining with the NUW. Despite this, the NUW applied for a scope order to separate

out Truganina’s warehouse. It argued that the current bargaining was not proceeding efficiently or fairly because the NUW was not privy to discussions between Linfox and the TWU. It also argued that site specific concerns were being ignored, denying its members an effective voice. In making its application, the NUW highlighted the fact that Linfox already had approximately 20 other EAs with the NUW that were limited to particular warehouse operations.

Despite the existence of other warehouse EAs, and although the Truganina warehouse employees were “geographically, operationally and organisationally distinct”, the FWC was still satisfied that the existing scope of the national agreement was also “fairly chosen”. Furthermore, although the parallel negotiation process had favoured the TWU, the FWC reflected that it had “not been particularly inefficient” from the Linfox/TWU perspective, taking into account Linfox’s view that parallel negotiations were in fact more efficient than having the national process stall entirely if the TWU refused to participate in joint bargaining with the NUW. Against this backdrop, the FWC was not prepared to find that the process had been inefficient, despite finding that a single negotiation process would have “improved the efficiency and fairness of the bargaining for the NUW without creating any significant inefficiency or unfairness for the TWU and/or Linfox”.

Although it recognised that the parallel process had been unfair to the NUW, this unfairness could have been resolved in another way if the NUW had instead pursued good faith bargaining orders to require common bargaining meetings (a process which the NUW had previously commenced, but later abandoned). Taking this into account, and noting that the TWU and Linfox had already reached in principle agreement about the core terms of agreement, the FWC ultimately found that making a scope order at such a late stage would create significant unfairness to the TWU and Linfox, and compromise and complicate the process unnecessarily. Importantly, however, the decision notes that the outcome may have been different if the NUW’s application had been made a few months earlier.

Viewpoint

This is the inaugural edition of FCB’s Enterprise Bargaining Digest. In future editions, we plan to publish reader feedback and opinions relating to enterprise bargaining. To get the ball rolling, we are inviting you to participate in our inaugural reader poll. The results will be published in the next edition and on our LinkedIn discussion page.

“Do the Coalition’s proposed changes to Greenfields bargaining make it more attractive to your business?”



Click here to vote

www.surveymonkey.com/s/BYNSR9V

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

FCB Workplace MATTERS
A discussion group for HR and workplace relations specialists in Australia



Driving Innovation

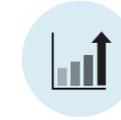


INDUSTRY



Manufacturing Industry

BUSINESS



OneSteel

UNIONS



The Australian Workers' Union

Performance Pay

Extract from a performance related payment scheme, incorporated into to the EA

- X.1 In addition to other payments, there shall be a quarterly performance recognition payment directly related to business performance improvements as indicated by the performance against set targets.
- X.2 The performance measures operating will be focused on specific critical improvement targets identified in the Business Plan. The specific measures and the targets will be reviewed at least annually following completion of the site Business Plan for each financial year but may be reviewed more often if circumstances dictate such a need.
- X.3 Payments under the scheme will be made at the end of each quarter, based on performance outcome against the targets and will be calculated as a percentage of each eligible employee's gross earnings for the quarter.
- X.4 For the purpose of calculating payments under this scheme, gross earnings shall be defined as award rates, overtime payments, shift allowances and payments for periods of leave in that quarter.
- X.5 Payments of up to 5.5% of quarterly gross earnings will be made for attainment of reasonably achievable performance targets; these payments can reach 6.75% in any quarter for achievement of exceptional levels of performance.
- X.6 There shall be provision for a "top up" payment, to the 6.75% reasonably achievable level, in the final quarter of each year should the payments made for the individual quarters not reflect the full year's performance.
- X.7 In the event of a catastrophe (such as a major fire) that occurs after targets have been set for a quarter, there will be a review of the targets so they remain reasonably achievable notwithstanding the effects of the catastrophe.

INDUSTRY



Hospitality, Tourism & Recreation

BUSINESS



Rooty Hill RSL

UNIONS



United Voice

INDUSTRY



Health, Aged Care & Community Services industry

BUSINESS



Regis

UNIONS



Australin Nursing & Midwifery Federation
NSW Nurses & Midwives' Association
Health Services Union

Fitness for Work / Drug & Alcohol Testing

Clause approved despite union contesting its reasonableness

- X.1 Employees must advise the Employer of any medication (prescribed or otherwise), drugs and/or alcohol which they are consuming or taking which may in any way affect the performance of their duties under the Agreement.
- X.2 Employees must report all illnesses or injuries that occur outside of work that may impact on the employee's ability to carry out their duties or where the carrying out of their duties may exacerbate their injury.
- X.3 Employees subject to illnesses or injuries that may impact on the employee's ability to carry out their duties will obtain a doctor's certificate for such illness or injuries, as well as a return to work plan from their doctor if requested by the Employer.
- X.4 Subject to clause X.5, if the Employer suspects on reasonable grounds that an employee has presented for their shift impaired by the use of alcohol, non-prescribed drugs or any controlled or illicit substance, the employee agrees to participate in an independent drug and alcohol test conducted in accordance with the Employer's Drug and Alcohol Testing Policy, as amended from time to time. Drug and alcohol testing for the purpose of this clause will be conducted by taking a sample of the employee's saliva.
- X.5 The Employer can only request an employee to participate in a drug and alcohol test if this requirement to participate in a test has been approved by the Employer's Human Resources Department, or other person nominated by the Employer's Human Resources Department.
- X.6 If a drug and alcohol test confirms the employee is impaired by the use of alcohol, non-prescribed drugs or any controlled or illicit substance whilst at work, the employee may be summarily dismissed.
- X.7 If the Employer has good reason to suspect that an employee is not fit to perform their normal duties, due to injury or other reason, then the Employer may require an employee to attend a doctor of the employee's choice, at the Employer's expense, for a full medical examination in order to certify them fit to perform their normal duties. Employees agree to attend such an examination if required, and understand that should they refuse they may not be permitted to commence work until such time as a medical clearance is obtained.

Workload Management

It is now common for unions to seek workload management clauses in aged care

- X.1 The parties to this agreement acknowledge that Employees and management have a responsibility to maintain a balanced workload and recognise the adverse effects that excessive workloads may have on Employee/s and the quality of resident care.
- X.2 To ensure that Employee concerns involving excessive workloads are effectively dealt with by management the following procedures should be applied:
 - (a) In the first instance, Employee/s should discuss the issue with their immediate supervisor and, where appropriate, explore solutions.
 - (b) If a solution still cannot be identified and implemented, the matter should be referred in writing to the Facility Manager for further discussion. The Facility Manager will respond within 3 business days.
 - (c) If a solution cannot be identified and implemented, the matter should be referred to an appropriate senior manager for further discussion. The senior manager will respond within a further 4 business days.
 - (d) The outcome of the discussions at each level and any proposed solutions should be recorded in writing and fed back to the effected [sic] Employees.
- X.3 Workload management should be an agenda item at staff meetings on at least a quarterly basis. Items in relation to workloads will be recorded in the minutes of the staff meeting, as well as actions to be taken to resolve the workloads issue/s. Resolution of workload issues should take into consideration the following factors (but not limited to):
 - (a) clinical assessment of residents' needs;
 - (b) the demand of the environment such as facility layout;
 - (c) statutory obligation, (including, but not limited to, workplace health and safety legislation);
 - (d) the requirements of nurse regulatory legislation;
 - (e) reasonable workloads;
 - (f) accreditation standards;
 - (g) budgetary considerations; and
 - (h) occupancy levels and hospital leave
- X.4 If the issue is still unresolved, the Employee/s may advance the matter through [clause Y - Dispute Resolution Procedure] with the exception of referring the matter to the FWC for arbitration, which may only occur by mutual agreement of the Employer and the relevant parties to this Agreement.

Will the Coalition's reforms really make Greenfields EAs more accessible for new projects?

The Issue

Employer groups claim some unions are using their position to delay bargaining and inflate wages claims unreasonably, holding up and/or jeopardising major projects that are of critical importance to the Australian economy.

The Proposal

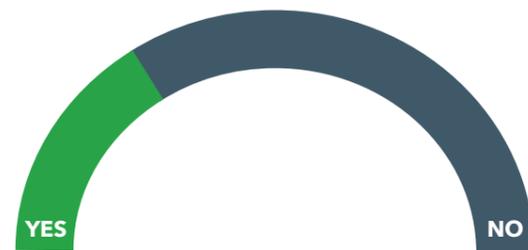
The Government has introduced draft legislation to:

- extend good faith bargaining obligations to greenfields negotiations
- allow employers to ask the FWC to approve a greenfields EA if the union hasn't agreed within 3 months
- only allow the FWC to approve greenfields EAs which provide pay and conditions "consistent with the prevailing standards and conditions" in the relevant industry.

Our Assessment

For some employers, the 3 month 'release valve' will shorten the timeframe between starting bargaining and lodging their EA with the FWC for approval. On the other hand, however, the new GFB and "prevailing standards" rules may well negate any practical benefit, by adding an extra layer of red tape that doesn't exist now.

Also, even if the changes benefit large project employers, the impact may make greenfields EAs even less accessible in other sectors.



At a glance

A Greenfields Agreement can be made to cover a genuine new business, activity, project or undertaking, before any employees are hired. The future employer bargains with the union(s) that would be entitled to represent the majority of future employees. If agreement is reached, the EA is lodged with the FWC for assessment and final approval.

Features of Greenfield Bargaining

- occurs before a new project starts, with project funding/start often linked to EA approval
- ensures that a period of 'industrial peace' and fixed labour costs are locked down (for up to 4 years) before the project starts
- most frequently used for big resources / construction projects requiring 'non-standard' work arrangements that are not easily accommodated under 'fall back' Modern Award arrangements
- there can be no industrial action during greenfield bargaining
- there are no good faith bargaining obligations on either party during greenfield bargaining.

More Analysis

Although adding a layer of good faith bargaining may sound like it could prevent unions adopting 'unreasonable' bargaining positions, the GFB rules are only procedural (eg, requiring meetings at reasonable times, etc). The GFB rules don't require either party to make concessions or reach agreement. Unions will still be free to disagree with employers about what is or isn't a 'fair deal' for workers flowing from a project. If anything, adding GFB obligations may increase the procedural 'red tape' associated with greenfield negotiations (and may even create new avenues for unions to delay bargaining by alleging breaches of good faith by employers if procedural requirements aren't adhered to strictly).

We also have serious concerns that the new industry standard requirement could delay approvals further. The FWC's current role is to maintain the minimum safety net by applying 'bottom line' tests to agreements (today, the 'better off overall test'; historically, the 'no disadvantage test' and 'fairness test'). Asking the FWC to assess prevailing industry conditions could re-introduce a broader, quasi 'fair wage' setting function to the FWC's role and:

- add complexity to the assessment process
- open a new avenue for dispute between employers and unions
- presumably, require employers to compile and submit extra evidence about industry norms, increasing transactional costs.

The *FairWork Amendment Bill 2014* is opposed by Labor and the Greens. It is unlikely to be finally considered until the senate clears in July.

Facts & figures

239,229

new businesses were started in Australia in FY2013 (15% in construction)

12% of EAs approved by the FWC are greenfields EAs

780

greenfields EAs approved in 12 months to 30/3/14

\$124 billion

estimated spending on engineering construction in FY2013

5 months

the estimated time period for 'protracted' greenfields negotiations for major resource & energy projects

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

Australian Meat Industry Employees' Union

ANMF

Australian Nursing & Midwifery Federation

AWU

Australian Workers' Union

CFMEU

Construction, Forestry, Mining and Energy Union

HSU

Health Services Union

MUA

Maritime Union of Australia

NSWNMA

NSW Nurses & Midwives' Association

NUW

National Union of Workers

QNU

Queensland Nurses' Union

TWU

Transport Workers' Union

UV

United Voice

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)

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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