Education & Employment References Senate Committee – Inquiry – Penalty Rates

Introduction

1. The Fair Work Commission (Commission) welcomes the opportunity to provide background information to assist the Senate Education and Employment Legislation Committee inquiry into Penalty Rates.

2. The Commission is Australia's national workplace relations tribunal. It is an independent body with powers to carry out a range of functions including:

    - providing a safety net of minimum conditions, including minimum wages in awards;
    - facilitating good faith bargaining and approving enterprise agreements;
    - dealing with applications in relation to unfair dismissal;
    - regulating how industrial action is taken;
    - resolving a range of collective and individual workplace disputes through conciliation, mediation and in some cases public tribunal hearings; and
    - functions in connection with workplace determinations, equal remuneration, transfer of business, general workplace protections, right of entry and stand down.

3. The work of the Commission is carried out by Commission Members, overseen by the President and supported by administrative staff, in accordance with the *Fair Work Act 2009* (Cth) (FW Act).

4. The Commission's role is to administer its jurisdiction in accordance with the FW Act. The Commission does not enter into the legal policy debate other than to point out where technical changes may make administration of the law simpler.

National Employment Standards, Modern Awards and Enterprise Agreements

5. The FW Act provides for a safety net of minimum terms and conditions through the National Employment Standards (NES), modern awards and national minimum wage orders.

6. The NES are statutory minimum terms and conditions of employment in respect of:

    - maximum weekly hours;
    - requests for flexible working arrangements;
    - parental leave and related entitlements;
    - annual leave;
    - personal/carer's leave and compassionate leave;
    - community service leave;
    - long service leave;

- public holidays;
- notice of termination and redundancy pay; and
- the Fair Work Information Statement.[1]

7. Modern awards generally cover a whole industry or occupation[2] and provide minimum terms and conditions of employment that may, amongst other matters, include:

   - minimum wages;
   - type of employment;
   - arrangements for when work is performed;
   - overtime rates;
   - penalty rates;
   - annualised wage arrangements;
   - allowances;
   - leave, leave loadings and arrangements for taking leave;
   - superannuation; and
   - procedures for consultation, representation and taking leave.[3]

8. An enterprise agreement is a binding instrument made between one or more employers and their employees (or in the case of a 'greenfields' agreement between one or more employers and one or more relevant unions) that governs terms and conditions of employment. Enterprise agreements are made at an enterprise level and can be tailored to meet the needs of the particular enterprise.

9. Enterprise agreements must not exclude the NES or any provision of the NES.[4] To approve an agreement, the Commission must be satisfied that the agreement does not exclude any provision of the NES[5] and a term of an enterprise agreement has no effect to the extent that it does so.[6]

10. If an enterprise agreement applies to an employee in relation to particular employment, the relevant modern award no longer applies to the employee in relation to that employment.[7] The enterprise agreement together with the NES provide minimum terms and conditions in relation to the employment.

11. Enterprise agreements continue to operate after their 'nominal expiry date' until they are replaced by new agreements or terminated by the Commission on application.

12. Enterprise agreements must satisfy a better off overall test in comparison to the relevant award or awards. The better off overall test is a global test rather than a line by line assessment.

[1] FW Act Part 2-2.
[2] Modern enterprise awards are confined to a single enterprise or franchise (FW Act s.168A).
[3] FW Act s.139.
[4] FW Act s.55.
[5] FW Act s.186.
[6] FW Act s.56.
[7] FW Act s.57.

Base rate of pay

13. An employee's 'base rate of pay' under an enterprise agreement cannot at any time be less than the base rate of pay that would otherwise apply to the employee under an award (the award rate) or, if the employee is not covered by an award, a national minimum wage order (the employee's order rate).[8] If, over time, the agreement base rate falls below the award base rate, the agreement has effect as if the agreement rate was equal to the award rate/employee's order rate; that is the agreement base rate is notionally increased to equal the award base rate.[9] The base rate of pay is defined as the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

    - incentive-based payments and bonuses;
    - loadings;
    - monetary allowances;
    - overtime or penalty rates; and
    - any other separately identifiable amounts.[10]

Statutory Approval Requirements

14. Approval processes for enterprise agreements vary depending on the type of agreement. There are 3 types of enterprise agreements:

    - Single-enterprise agreements – involving a single employer or two or more employers that can be considered to be co-operating in a single enterprise (such as some franchisees). Such employers are known as 'single interest employers'. Agreements (other than greenfields agreements) are between the employer and the employees: a union may, in certain circumstances, seek to be "covered" by the agreement but the FW Act does not distinguish between "union agreements" and "non-union agreements".

    - Multi-enterprise agreements – involving 2 or more employers that are not all single interest employers. A special stream of bargaining for multi-enterprise agreements is available to enable low-paid employees who have not historically participated in enterprise-level collective bargaining to make a multi-enterprise agreement. The Commission can make low paid authorisations that allow access to this stream.

    - Greenfields agreements – involving a genuine new enterprise that one or more employers are establishing or propose to establish, where they have not yet employed any persons necessary for the normal conduct of the enterprise. Such agreements may be either single-enterprise agreements or multi-enterprise agreements. Greenfields agreements are usually made with one or more of the relevant employee organisations that the agreement is expressed to cover.

15. Before approving an enterprise agreement, the Commission must be satisfied that it meets the legislative criteria set out in Division 4 of Part 2-4 of the FW Act, including that it passes the 'better off overall test' (see further below).

[8] FW Act ss.206(1) and 206(3).
[9] FW Act ss.206(2) and 206(4).
[10] FW Act s.16.

16. Other requirements the Commission must be satisfied have been met include that:

- the prescribed pre-approval steps were taken;
- if the enterprise agreement is not a greenfields agreement, it has been approved in a vote of the employees who will be covered by the agreement, by a majority of the employees who cast a valid vote[11];
- the agreement does not contain terms which exclude or have the effect of excluding the NES or a provision of the NES;
- the agreement does not include any 'unlawful terms' or 'designated outworker terms';
- the group of employees covered by the agreement was fairly chosen;
- the agreement specifies a date as its nominal expiry date (which must not be more than 4 years after the date of Commission approval); and
- the agreement provides a dispute settlement procedure.[12]

17. Before approving a greenfields agreement, the Commission must also be satisfied that:

- the relevant union(s) that will be covered by the agreement are (as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement; and

- it is in the public interest to approve the agreement.[13]

18. During 2015–16, the FW Act was amended to extend good faith bargaining obligations to greenfields agreement negotiations and to enable an employer to apply to the Commission for approval of a greenfields agreement if no agreement had been reached with the relevant union(s) within a 6 month negotiation period. In addition to the standard approval test, in these circumstances the Commission is required to ensure that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with prevailing pay and conditions in the relevant industry.[14] As at 30 June, 2017 no such applications have been lodged.

[11] In the case of a proposed multi-enterprise agreement, the agreement is only made by a particular employer and its employees if the agreement was approved in a vote of the employees of that employer who will be covered by the agreement, by a majority of those employees who cast a valid vote.
[12] FW Act ss.186–188.
[13] FW Act s.187((5).
[14] FW Act s.187(6).

Lodging an Agreement for Approval

- A majority of employees employed at the time who will be covered by the proposed agreement must approve the agreement by voting for it before it can be lodged;
- A copy of the agreement signed by the employer and an employee representative is lodged with the Commission along with an application for approval;
- The employer provides a signed statutory declaration which includes an outline of the bargaining process and lists what terms are more or less beneficial than equivalent terms in the relevant award.

19. Once an enterprise agreement is made, a bargaining representative for the enterprise agreement must apply to the Commission for approval of the agreement.

20. The application must be lodged with the Commission within 14 days of the enterprise agreement being made or (if the agreement is not a greenfields agreement) within such further period as the Commission allows.[15]

21. The application must be lodged using the prescribed application form and be accompanied by a signed copy of the enterprise agreement and a statutory declaration from each employer.[16]

22. If the agreement is not a greenfields agreement, each union that is a bargaining representative and each bargaining representative who has been appointed by one or more employees, that wishes to advise the Commission about whether they:

    - want to be covered by the enterprise agreement; and/or
    - support approval of the agreement and/or agree with the information contained in the employer's statutory declaration,

    must lodge a statutory declaration before the Commission approves the agreement.[17]

23. The relevant forms for a single-enterprise agreement are:

    - Form F16 – Application for approval of enterprise agreement
    - Form F17 – Employer's statutory declaration in support of an application for approval of an enterprise agreement
    - Form F18 – Statutory declaration of employee organisation in relation to an application for approval of an enterprise agreement

[15] FW Act s.185.
[16] FW Act ss.185 and 185A and Fair Work Commission Rules 2013 r.8 and r.24. A signed copy of the agreement is not required in the case of a greenfields agreement that has not been agreed with the relevant union(s) (s.185A). In the case of a greenfields agreement agreed with union(s), each union must also provide a statutory declaration (r.24(5)).
[17] Fair Work Commission Rules 2013 r.24(3) and r.24(4).

- Form F18A – Statutory declaration of employee representative in relation to application for approval of an enterprise agreement[18]

A full list of forms relating to enterprise agreements is at Attachment A.

24. In considering whether to approve an enterprise agreement the Commission may, except as provided by the FW Act, inform itself in relation to any matter before it in such manner as it considers appropriate. This may include the Commission inviting oral or written submissions, requiring a person to provide copies of documents or records or to provide any other information, or holding a hearing.[19] Most enterprise agreement approval applications are dealt with 'on the papers' (ie without a hearing).

25. Any employer, employee or union[20] that was a bargaining representative for an agreement is entitled to intervene and make submissions in relation to the application for approval of the agreement. However, an employee organisation that is not a bargaining representative but merely represents employees who could be covered by the agreement does not have a right to be heard in relation to the approval of an agreement; whether an organisation has a right to be heard will depend on the circumstances of each case[21]. Furthermore, in a particular case the Commission can choose to inform itself by hearing from any person, whether or not they have 'a right to be heard'.

26. If the Commission approves an enterprise agreement, a copy of the Commission approval decision and the approved agreement must be published along with any undertakings accepted by the Commission.[22] Copies are sent to all the parties involved, and the decision and agreement are published on the Commission's website. If the Commission decides not to approve an enterprise agreement, a copy of the Commission decision is published on the Commission's website.

The Better Off Overall Test

27. An enterprise agreement passes the better off overall test (BOOT) if the Commission is satisfied, as at the 'test time', that each award covered employee, and each prospective award covered employee, would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.[23]

28. The BOOT is applied as at the test time—that is, the time when the application for approval of the agreement was lodged with the Commission.[24] An 'award covered employee for an agreement' is an employee covered by the agreement who at the test time is covered by a modern award that: covers the employee in relation to the work he or

[18] The Form F18A is used by an individual who has been nominated as an employee bargaining representative of an employee who will be covered by the agreement while the Form F18 is used by an employee organisation (generally a union) which is a bargaining representative of an employee who will be covered by the agreement.
[19] FW Act s.590.
[20] A union with members who will be employees covered by a non-greenfields agreement, will generally be a bargaining representative for the agreement unless the members appoint another person as their bargaining representative (FW Act s.76).
[21] *Construction, Forestry, Mining and Energy Union v Collinsville Coal Operations Pty Limited* [2014] FWCFB 7940 at [48]–[75].
[22] FW Act s.601(4).
[23] FW Act s.193(1). In the case of a greenfields agreement the test is applied only in respect of each prospective award covered employee for an agreement (s.193(3)).
[24] FW Act s.193(6).

she is to perform under the agreement, and covers his or her employer.[25] A 'prospective award covered employee for an agreement' is a person who would be an award covered employee if he or she were at the test time employed by an employer covered by the agreement.[26]

29. The BOOT is a global test requiring consideration of advantages and disadvantages to award covered employees and prospective award covered employees. The application of the BOOT therefore requires the identification of the terms of an enterprise agreement which are more beneficial for an employee than the relevant modern award, the terms of the agreement which are less beneficial for the employee than the relevant modern award, and then an overall assessment of whether the employee would be better off under the agreement than under the award.[27]

30. An enterprise agreement may pass the BOOT even if some award entitlements have been reduced, as long as overall those reductions are more than offset by the benefits of the agreement.[28]

31. Section 193(1) states that the Commission must be satisfied that *each employee* is better off under the agreement than the award. In assessing an agreement the member must consider to whom the benefits listed as more and less beneficial will apply . It may be that due to rostering and hours worked, casual or permanent status, entitlement to certain allowances and the personal circumstances of an individual employee, they may or may not be better off under an agreement than the award that would otherwise apply. [29]

32. The BOOT does not require the Commission to enquire into each employee's individual circumstances.[30] The Commission may assume, in the absence of any evidence to the contrary, that where a class of employees to which an employee belongs is better off overall under an enterprise agreement, then the particular employee will be better off overall.[31]

33. Before the BOOT can be applied, it is necessary to correctly identify the modern award(s) that cover the employees and their employer(s) in relation to the work to be performed under the enterprise agreement.

34. While only one modern award can cover an employee in relation to particular employment, multiple modern awards will need to be considered in applying the BOOT where different awards cover different classes of employees who are covered by the same enterprise agreement.

35. To determine the award that covers an employee, it may be necessary to examine the major, substantial or principal aspect of the work performed by the employee at the test time, including the amount of time spent performing particular tasks, the circumstances of the employment and what the employee was employed to do. The question is one of fact

[25] FW Act s.193(4).
[26] FW Act s.193(5).
[27] *Re Armacell Australia Pty Ltd* (2010) 202 IR 38 at [41].
[28] Ibid [8].
[29] See for example [2016] FWCFB 2887 at [11] and [23].
[30] Explanatory Memorandum to Fair Work Bill 2008 at [818].
[31] FW Act s.193(7).

to be determined by reference to the duties actually attaching to the employee's position, rather than its title.[32]

Loaded Rates of Pay

36. An enterprise agreement can include 'loaded rates' of pay which include compensation for benefits under the relevant modern award which are not separately provided for by the agreement.

37. Typical award benefits that could be incorporated into a loaded rate include:

- shift allowances;
- weekend penalties;
- payment for reasonable additional hours;
- payment for overtime (which may include overtime rates for work performed in addition to the total of ordinary hours to be worked under the award each week and for work outside the span of ordinary working hours under the award); and
- work-related allowances.

Loaded rates in modern awards

38. In the recent Penalty Rates decision, the Full Bench foreshadowed the development of loaded rates for insertion into awards in the hospitality and retail sectors. The inclusion of schedules of loaded rates would allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.

39. The Bench noted:

> [2080] In raising this matter, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. Determining an appropriate loaded rate would not be straightforward. For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday.
>
> [2081] It has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant.
>
> [2082] To deal with this challenge it may be necessary to consider a number of loaded rates to match particular roster configurations. It is likely that there are commonly used roster configurations in the industries under consideration. So, by way, of example, there may be a loaded rate struck for employees who work no more than two Saturdays in any 28 day cycle, and another rate for employees who work every Sunday, but not Saturdays.

[32] *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCCA 4 at [133]; citing *City of Wanneroo v Holmes* (1989) 30 IR 362 at 379; and *Joyce v Christoffersen* (1990) 26 FCR 261 at 278.

> [2083] Any loaded rate and the associated roster configuration, would, of course, need to be relevant to the needs of industry and employees. Accordingly, there would be benefit in further engagement with interested parties as to the dominant roster patterns in the relevant industries so that appropriate rates can be developed.
>
> [2084] We envisage that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.[33]

40. The Full Bench subsequently confirmed its view that there is merit in considering the insertion of appropriate loaded rates into the relevant awards, but indicated that it would be prudent to await the completion of the judicial review of the determinations arising from the Penalty Rates decision before commencing the process of developing the loaded rates.[34]

Undertakings

41. Where the Commission has a concern that an enterprise agreement does not meet the approval requirements in ss.186 and 187 of the FW Act (which include the BOOT), the Commission can approve the agreement if it accepts a written undertaking from one or more employers covered by the agreement which meets that concern.[35] An undertaking is not used where the undertaking would result in substantial changes to the agreement[36], but may be accepted to address a potential situation where particular circumstances may mean an individual or class of employees may not otherwise be better off overall under the agreement.[37]

42. Before accepting such an undertaking, the Commission must:

- seek the views of each known bargaining representative for the agreement; and
- be satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement.[38]

43. An undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking.[39] If an undertaking is accepted by the Commission, the undertaking is taken to be a term of the agreement.[40] The undertaking is both noted in the decision and forms part of the agreement which is published on the Commission's website.

44. A Commission Member may accept undertakings that provide for an audit or reconciliation of employees' earnings under the agreement compared to what their earnings would have been under the relevant modern award. Such an undertaking must

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[33] [2017] FWCFB 1001.
[34] Penalty Rates Transitional Arrangements decision [2017] FWCFB 3001 at [281].
[35] FW Act s.190(2).
[36] FW Act s.190(b); see also [2014] FWC 1955.
[37] See for example [2016] FWCFB 2887 at [34] and [2010] FWAA 5655.
[38] FW Act ss.190(3) and 190(4).
[39] Fair Work Regulations 2009 reg 2.07.
[40] FW Act s.191(2).

specify that reconciliations will be carried out in a timely manner[41] and if a shortfall is identified, the requirement for the employer to compensate the employee must be enforceable.[42] Further, as confirmed by the Full Court of the Federal Court in *Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd*[43], the compensation cannot merely equal the amount an employee would have been entitled to under the award; it must ensure they are better off.

Public Interest Test

45. The FW Act allows the Commission to approve an enterprise agreement that does not pass the BOOT if the Commission is satisfied that, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest.[44]

46. The Commission may only approve an enterprise agreement on this basis if failure to pass the BOOT is the only reason the Commission is not required to approve the agreement.[45]

47. An example of circumstances in which the Commission might be satisfied that it would not be contrary to the public interest to approve such an enterprise agreement, is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and assist in the revival of, the enterprise concerned.[46] Other public interest considerations could involve, for example, deciding whether a term of the agreement undermines or reduces entitlements in a modern award to the extent that members of the public whose employment is regulated by that award may have interests which are impacted by the approval of the agreement. It may also be the case that there is a public interest in maintaining a level playing field among employees in a particular industry or sector.[47]

48. Only a very small number of agreements have been made under these powers.[48]

Agreement Triage Pilot

49. Until October 2014 all enterprise agreement approval applications were allocated directly to Commission Members to deal with and determine as they deemed appropriate. (Some specialist administrative support was available to Members, for example, to provide some analysis regarding the BOOT. Members sought this assistance in approximately 5 per cent of applications.)

50. In October 2014 the Commission piloted an 'agreement triage process' to promote greater consistency and improve timeliness in enterprise agreement approval decisions. The triage process involves a team of legally qualified staff conducting a comprehensive analysis of agreements lodged for approval. The analysis includes completion of the detailed checklist at Attachment B. This analysis assists the Commission Member dealing

[41] See *United Voice v MSS Security Pty Ltd* [2017] FWCFB 651 at [42].
[42] *Re SDA and Beechworth Bakery* [2017] FWCFB 1664.
[43] [2016] FCAFC 161.
[44] FW Act s.189(2).
[45] FW Act s.189(1)(b).
[46] FW Act s.189(3).
[47] *Re Agnew Legal Pty Ltd* [2012] FWA 10861 (Asbury C, 24 December 2012) at [12].
[48] Examples of decisions to approve such agreements are *Re Milingimbi & Outstations Progress Resource Association* [2011] FWAA 1431 (Lawler VP, 4 March 2011) and *Re Poolhaven Pty Ltd* [2011] FWAA 4036 (Asbury C, 27 June 2011).

with the application, in making their decision under the FW Act. At all times the decision as to whether to approve an agreement is made by a Member.

51. In May 2015, the triage pilot was independently reviewed by Inca Consulting in association with Dr George Argyrous, Senior Lecture in Evidence-Based Decision Making, University of NSW. The review reported:

> It was noted that the centralised triage approach provided for "a simpler, more consistent process for assessing agreements." In particular, it was noted that greater consistency could be achieved through using a small and dedicated team rather than the work being performed in a more dispersed way through Members' chambers.
>
> Importantly, the pilot approach has allowed for the detection of some trends in the lodgment of new enterprise agreements. For example, common errors made by applicants have been detected that delay the approval of agreements (or result in them being withdrawn). Observing these trends and identifying the types of employers or industries where 'mistakes' commonly occur has allowed FWC to embark on some 'early intervention' or 'outreach' work. For example, the Notice of Employee Representational Rights Guide has been developed to hopefully see fewer agreements withdrawn on a technicality.[49]

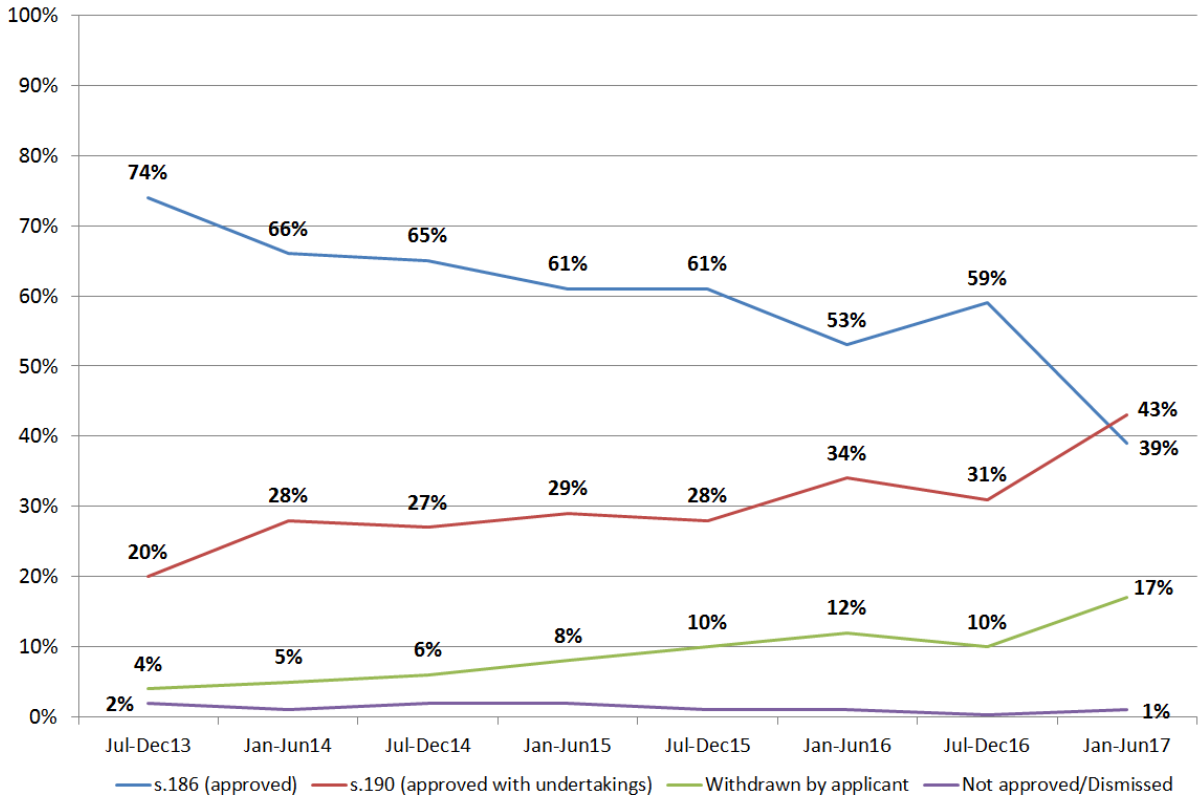
52. The report of the review of the agreement triage pilot is available on the Commission's website at Agreement triage pilot independent review May 2015.

53. Initially the triage process was confined to enterprise agreements in a small number of industries and states, but was progressively expanded. By the end of November 2016, the triage process was applied to all applications for approval of agreements.

54. The chart below contains a breakdown of agreement matters by result since the commencement of the triage process. It shows the percentage over time of applications for approval of single enterprise agreements that have been granted, granted with undertakings, withdrawn by the applicant, and dismissed. Prior to the triage pilot, 74% of applications for approval of single enterprise agreements were approved without undertakings compared to 39% in the first six months of 2017. Twenty per cent of applications prior to the pilot were approved subject to one or more undertakings, compared to 43 per cent in 2017, and 4 per cent of applications were withdrawn by the applicant compared to 17 per cent in 2017. The increase in the number of undertakings suggests that the triage process has identified potential shortcomings in agreements lodged with the Commission for approval.

[49] Inca Consulting, *'Enterprise Agreements Triage – A Review of the Pilot'* (2015), p.8.

Chart 1 – Agreements by result type



55. At all times the judgment as to whether an agreement should be approved or not is made by Members, to be exercised in accordance with their oath of office and the requirements of the FW Act. The triage process has, however, assisted Members exercise their function in a consistent and rigorous way.

56. In recent months there has been media commentary about a number of enterprise agreements approved by the Commission under the FW Act and predecessor legislation. A list of many of those agreements is at Attachment C. All but one of these agreements were approved before the triage process outlined above was in place. In the case of the Coles agreement, analysis was given to the Member that based on the agreement as lodged, it may not pass the BOOT. The agreement was subsequently approved with four undertakings. The decisions were based on the material the Member had before them at the time, including the agreement signed by the employer and employee representative and the accompanying statutory declaration.

Other Improvements to the Agreement Approval Process

57. The Commission continually reviews its processes and services to the public. This includes publishing guides and other documents to assist parties to comply with the legislation. In relation to agreement-making, these resources presently include:

- Notice of Employee Representational Rights Guide;
- Making a Single Enterprise Agreement – Step by Step Guide;
- Single Enterprise Agreement Legislative Checklist (Attachment B);

- Single Enterprise Agreement Date Calculator (which assists parties to comply with the various time frames when making and lodging an enterprise agreement); and

- Enterprise Agreements Benchbook.

58. Since 2010 the Commission has published on its website enterprise agreements which have been lodged for approval. Whilst there is no statutory requirement to do this, publication assists the Commission to 'perform its functions and exercise its powers in a manner that ... is open and transparent'[50] and to 'inform itself in relation to any matter before it in such manner as it considers appropriate'[51]. Publication of agreements lodged for approval allows interested persons to seek to make submissions to the Commission before the application is determined by the Commission.

59. On 1 May 2017, following consultation with peak industry bodies, the Commission changed its process for notifying interested parties that an enterprise agreement has been lodged for approval. These changes were designed to ensure that the Commission's processes are more transparent, efficient and user focused. The revised arrangements are:

    - details of each enterprise agreement approval application and a link to the agreement are published on the Commission's 'Agreements in progress' webpage;

    - all bargaining representatives identified in the documents lodged, are sent an email confirming the application has been lodged. Parties are notified that they have 7 business days from the date of lodgment to make any submissions supporting or objecting to approval;

    - where no submissions are received within 7 business days a Commission Member may determine whether the agreement can be approved having regard to materials lodged with the application and any further materials the Member may request the parties to provide.

60. Previously an application for the approval of an enterprise agreement was listed for hearing in a particular State or Territory. Under the new process, the Commission no longer sends out notices of listing for agreement approval applications. Instead, the Agreements in progress webpage is the central location for finding information concerning all agreement approval applications. To complement this change, the search function on the Agreements in progress webpage has been enhanced to give parties easier access to public information about ongoing applications. The changes do not affect current listing practices where a Member requires an attendance hearing.

[50] As required by FW Act s.577(c).
[51] FW Act s.590(1).

Variation and Termination of Enterprise Agreements

61. Under the FW Act, an enterprise agreement continues to operate after its nominal expiry date until it is replaced by a new enterprise agreement or the Commission terminates the agreement on application.[52]

62. Pursuant to provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, agreements made under previous legislation continue to have effect as 'agreement-based transitional instruments' until replaced or terminated.[53]

63. Agreements made under previous legislation that continue in operation were subject to the requirements of the relevant legislation at the time they were made. Some enterprise agreements that have continued to operate past their nominal expiry date may not satisfy the better off overall test under the FW Act.

64. The process required to terminate an enterprise agreement depends on whether termination is sought before or after the agreement's nominal expiry date. Similar processes apply to the termination of agreement-based transitional instruments.

65. There is no capacity for the Commission to terminate an enterprise agreement on its own motion in any circumstances either before or after the nominal expiry date, for example, if the agreement no longer passes the BOOT.

Termination before or after nominal expiry date

66. An employer and its employees may agree to terminate an enterprise agreement. Termination is agreed to by the employees if it is approved in a vote of the employees covered by the agreement, by a majority of the employees who cast a valid vote.[54]

67. If termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the Commission for approval of the termination within 14 days after the termination is agreed to, or within such further period as the Commission allows.[55]

68. Termination of an agreement has effect from the day specified in the Commission decision approving the termination.[56]

Termination after nominal expiry date

69. If an enterprise agreement (whether made under the FW Act or previous legislation) has passed its nominal expiry date, any of the employers, employees or unions covered by the agreement may apply to the Commission for the termination of the agreement.[57]

70. Pursuant to provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, agreements made under previous legislation continue to have

[52] FW Act s.54.
[53] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* schedules 3 and 3A.
[54] FW Act ss.219–221.
[55] FW Act s.222.
[56] FW Act s.224.
[57] FW Act s.225.

effect as 'agreement-based transitional instruments' until replaced or terminated.[58] It should be noted that agreements made under previous legislation will not have been subject to the better off overall test against modern awards.

71. When an application for termination of an enterprise agreement is made, the Commission must terminate the agreement if the Commission:

- is satisfied that it is not contrary to the public interest to do so; and
- considers it appropriate to terminate the agreement taking into account all of the circumstances (including the views of the employer(s), employees and any union(s) covered by the agreement and the likely effect the termination will have on each of them).[59]

72. If the Commission decides to terminate an enterprise agreement under these provisions, the termination operates from the day specified in the Commission's decision.[60]

73. The Commission does not compile data about the number of agreements that are operating past their nominal expiry date. If an agreement is not terminated, it continues to operate past its nominal expiry date until it is replaced by another agreement.[61]

Applications lodged to terminate enterprise agreements

74. The following table provides a summary of the applications to terminate enterprise agreements lodged over the last two financial years:

	2016–17	**2015–16**
s.222 - Application for approval of a termination of an enterprise agreement	97	92
s.225 - Application for termination of an enterprise agreement after its nominal expiry date	303	311

75. A list of terminated enterprise agreements is maintained and published on the Commission's website.

76. Analysis of applications to terminate enterprise agreements in 2015–16 showed that less than 3 per cent of applications were contested.

77. The Commission may also vary an agreement before the nominal expiry date. Further detail about varying an enterprise agreement is provided in Attachment D.

[58] FW (TPCA) Act Schedules 3 and 3A.
[59] See for example, *Re Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540 (22 April 2015); upheld in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Aurizon Operations Ltd* [2015] FCAFC 126 (3 September 2015).
[60] FW Act s.227.
[61] See FW Act ss.54 and 58.

Appeal and Judicial Review Processes

78. The appeal process is a means of promoting consistent decision making and ensuring that decisions are made in accordance with the FW Act. It may also allow contentious issues to be tested. Appeals are heard by a Full Bench of the Commission (comprising at least 3 Commission Members, including at least one Member who is the President, a Vice President or a Deputy President).[62]

79. A person 'who is aggrieved by a decision' to approve or refuse to approve an enterprise agreement made by a single Member of the Commission, may appeal the decision, with the permission of the Commission.[63] Without limiting when the Commission may grant permission to appeal, the Commission must grant permission if it is satisfied that it is in the public interest to do so.[64]

80. Standing to bring an appeal extends beyond any employer(s), employees and unions(s) who were directly involved in negotiating the agreement or who are covered by the agreement, to include others with an interest in the decision beyond that of an ordinary member of the public. This could include a union or an employer association that was not a bargaining representative.

81. For example, in *CFMEU v CSRP Pty Ltd*,[65] the Full Bench considered whether a union had standing to appeal the approval of an enterprise agreement in circumstances where none of the employees who voted to approve the agreement were members of the union and the union was not a bargaining representative for the agreement. The Full Bench found that the union had standing, citing *CEPU and AMWU v Main People* as it was likely that some members of the union would be employed by the employer in classifications covered by the agreement at some stage in the future, given the nature of the employer's business and the industry in which it operated.[66]

82. The Commission may do any of the following in relation to the appeal or review:

    - confirm, quash or vary the decision;
    - make a further decision in relation to the matter that is the subject of the appeal or review;
    - refer the matter that is the subject of the appeal or review to a Commission Member and require the Member to deal with the subject matter of the decision; or require the Member to act in accordance with the directions of the Commission.[67]

83. An application for judicial review of a Commission appeal decision can be brought in the Federal Court of Australia.[68]

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[62] FW Act s.618.
[63] FW Act s.604(1). See for example Duncan Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo, Australasian Meat Industry Employees Union, The Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo [2016] FWCFB 2887.
[64] FW Act s.604(2).
[65] [2017] FWCFB 2101.
[66] [2014] FWCFB 8429.
[67] FW Act s.607(3).
[68] See for example United Voice v MSS Security Pty Ltd [2016] FCAFC 124; and Shop, Distributive & Allied Employees Association v ALDI Foods Pty Ltd [2016] FCAFC 161.

Agreement Appeal Outcomes

84. Decisions on applications to approve enterprise agreements comprise the third largest category of appeal matters. In 2016–17, of the total number of 196 appeals, Commission Full Benches determined 23 appeals in relation to agreement approval applications, with 17 appeals upheld and 6 appeals being dismissed.

85. In 2015–16, five of the 14 appeals upheld involving enterprise agreement approval applications related to the BOOT. In three of these, the error related to the selection of the award(s) for the purpose of the BOOT, one required a more frequent reconciliation and in one instance the appeal Bench found that the agreement (the Coles 2014–2017 Agreement) did not pass the BOOT. In 2016–17, four of the 17 appeals upheld involving enterprise agreement approval applications related to the BOOT. Further details of these matters are at Attachment E.

Table 1: Outcomes of appeal matters

Matter Type	Appeals upheld			Appeals dismissed			Total appeal decisions		
	2016-17[69]	2015-16	2014-15	2016-17	2015-16	2014-15	2016-17	2015-16	2014-15
Unfair dismissals	15	29	32	87	110	102	102	139	134
General protections	1	2	-	12	10	-	13	12	-
Agreement approvals	17	18	8	6	21	11	23	39	19
s.739 disputes	14	14	11	16	29	22	30	43	33
Industrial action	3	6	1	1	2	5	4	8	6
Modern Awards	0	0	1	0	0	0	0	0	1
Bargaining disputes	4	3	3	2	8	5	6	11	8
Right of entry	1	3	4	3	5	5	4	8	9
Anti-bullying	1	0	-	1	4	-	2	4	-
Miscellaneous	7	3	6	5	1	18	12	4	24
Total	63	78	66	133	190	168	196	268	234

[69] Data for 2016–17 is provisional

Commission Powers to Review Enterprise Agreement Approval Decisions

86. Whilst the Commission can vary or revoke certain decisions on its own initiative, this does not include a decision to approve or not to approve an enterprise agreement.[70] Accordingly, unless a decision to approve or not approve an agreement is appealed or is the subject of a review application by the Minister, the Commission has no power to initiate a review of the decision.

87. The Minister for Employment can apply to the Commission for review of any decision made by a single Member, including a decision to approve or not approve an enterprise agreement, if the Minister believes the decision is contrary to the public interest.[71]

Agreement Approval Data

88. Enterprise agreement approval applications constitute a significant part of the Commission's work. The Commission has dealt with between 5,500 and 8,599 agreement approval applications per year since 2011. Provisional data show that in 2016–17, 5698 applications to approve enterprise agreements were lodged with the Commission. Of these, 4858 were approved, 39 were not approved, and 709 were withdrawn.

89. The overwhelming majority of enterprise agreement approval applications made to the Commission are for non-greenfields single enterprise agreements.

Table 2: Enterprise agreement approval—lodgments

Type of application	Lodged			Approved			Not approved			Application withdrawn			Total Finalised[72]		
	2016-17[73]	2015-16	2014-15	2016-17	2015-16	2014-15	2016-17	2015-16	2014-15	2016-17	2015-16	2014-15	2016-17	2015-16	2014-15
s.185—Single-enterprise	5474	5238	5449	4663	4523	5027	39	48	114	689	582	382	5391	5153	5523
s.185—Greenfields	177	258	407	162	252	399	0	1	2	11	9	17	173	262	418
s.185—Multi-enterprise	47	33	66	33	26	55	0	4	1	9	4	8	42	34	64
Total	**5698**	**5529**	**5922**	**4858**	**4801**	**5481**	**39**	**53**	**117**	**709**	**595**	**407**	**5606**	**5449**	**6005**

[70] FW Act s.603.
[71] FW Act s.605.
[72] Results are not confined to applications lodged in this period.
[73] Data for 2016–17 is provisional.

90. The Workplace Agreements Database maintained by the Department of Employment, contains data on wage increases and conditions of employment in around 150,000 collective agreements made under the FW Act and previous legislation. The Department publishes quarterly Trends in Federal Enterprise Bargaining Reports derived from this data, including details of the proportion of agreements made by industry.

Attachment A—Forms relating to enterprise agreements

Form F16 – Application for approval of enterprise agreement (other than a greenfields agreement)

Form F17 – Employer's statutory declaration in support of an application for approval of an enterprise agreement (other than a greenfields agreement)

Form F18 – Statutory declaration of employee organisation in relation to an application for approval of an enterprise agreement (other than a greenfields agreement)

Form F18A – Statutory declaration of employee representative in relation to application for approval of an enterprise agreement (other than a greenfields agreement)

Form F19 – Application for approval of a greenfields agreement made under subsection 182(3) of the FW Act

Form F20 – Employer's statutory declaration in support of application for approval of a greenfields agreement made under subsection 182(3) of the FW Act

Form F21 – Statutory declaration of an employee organisation in relation to an application for approval of a greenfields agreement made under subsection 182(3) of the FW Act

Form F21A – Application for approval of a greenfields agreement made under subsection 182(4) of the FW Act

Form F21B – Employer's statutory declaration in support of application for approval of a greenfields agreement made under subsection 182(4) of the FW Act

Form F21C – Statutory declaration of an employee organisation in relation to an application for approval of a greenfields agreement made under subsection 182(4) of the FW Act.

Forms can be accessed on the Commission's website at Forms

Attachment B

Single enterprise agreement legislative checklist

Purpose of checklist

Under s.590 of the *Fair Work Act 2009*, when determining agreement approval applications Members of the Fair Work Commission (the Commission) can inform themselves through a range of sources, including research, analysis and/or material provided by parties. Members may also make additional requests for further information depending on the circumstances.

The single enterprise agreement legislative checklist is used by the Commission to assist Members when determining agreement approval applications.

The checklist is being published to provide parties with an overview of the requirements of agreement making, and to provide insight into the Commission's process for assessing agreement approval applications.

Single enterprise agreement legislative checklist

Matter: AGyyyy/xxxx

Member prepared for:

Prepared by:

Lodgment date:

Date prepared:

Modern award(s):

Similar agreements (Q1.3):

Union support (Form F18):

Topic	Summary/Comments
Section 1 – Forms and signature requirements	
Section 2 – Pre-approval requirements	
Section 3 – Mandatory terms	
Section 4 – National Employment Standards (NES)	
Section 5 – Better off overall test (BOOT)	

Summary notes

Industry:	
State:	
Pay rates:	

Section 1 – Forms and signature requirements	
Form F16 application form (s.185, rule 24 FW Rules) Signed and dated by employer or bargaining representative (if bargaining representative, instrument of appointment must be provided)	
Form F17 employer statutory declaration (s.185, rule 24(1) and (2) FW Rules) Signed by employer and authorised witness (including full name, work/residential address and position/title/authority)	
Form F18 employee organisation statutory declaration (s.183, s.185, rule 24(3) FW Rules) or Form F18A employee representative statutory declaration (s.183, s.185, rule 24(4) FW Rules) Signed by employee organisation or employee representative and authorised witness (including full name, work / residential address and position/title/authority)	
Agreement (s.185(2), reg. 2.06A FW Regs) Signed by the employer and at least 1 employee/employee representative and includes full name, address and authority of each person	

Section 2 – Pre-approval requirements	
Time between notification time and last notice of representational rights (s.173(3)) (Q2.8) The employer provided the Notice of employee rep rights no later than **14 days** after notification time	
Time between making of agreement (date voting concluded) and lodging of application for approval of agreement (s.182(1), s.185(3)) (Q2.8 & 2.9) Agreement was lodged no later than **14 days** after it was made	
Notice of representational rights provided to all employees and in prescribed form (s.173, s.174, Sch 2.1 of FW Regs) (Q2.3) • The Notice of employee representational rights is in prescribed form; and • The employer took all reasonable steps taken to give the Notice to each employee covered by the agreement and employed at the time of notification	
Genuine agreement (s.181, s.186(2)(a), s.188) – Time between issuing of notice of representational rights and date voting commenced) (Q2.8) Employees provided with the Notice of employee rep rights at least **21 days** before commencement of voting	
Genuine agreement (s.186(2)(a), s.188) – Copy of agreement given to employees or employees given access to agreement (s.180(2)) (Q2.4) The employer took all reasonable steps to give a copy of the agreement or incorporated material to employees during the access period or provide employees with access to it by the start of access period	
Genuine agreement (s.186(2)(a), s.188) – Notification of time, place and method of voting (s.180(3)) (Q2.5) The employer took all reasonable steps to notify employees of time, place and method of vote by the start of the access period	
Terms of the agreement (s.180(5), s.180(6)) (Q2.6 & Q2.7) The employer took reasonable steps to explain the terms of the agreement and the effect of the terms while taking into account the particular circumstances and needs of relevant employees	

Genuine agreement (s.186(2)(a), s.188) – Majority voted to approve (s.182(1)) (Q2.10) Did a majority of employees who cast a valid vote approve the agreement	
Employees covered by agreement (s.186(3), s.186(3A)) (Q2.2) Does the agreement cover all employees – if not, was the group fairly chosen considering geographical, operational or organisational distinctness	
Nominal expiry date (s.186(5)) (Q2.1) Is the nominal expiry date more than 4 years after approval date	
Unlawful terms, and designated outworker terms (s.172, s.186(4), s.186(4A), s.194, s.195, s.253) (Q2.13 and 2.14) Does the agreement contain **only lawful** terms? Unlawful terms include: • discriminatory terms • objectionable terms • terms that provide for a method which an employee or employer may elect not to be covered by the agreement • terms about unfair dismissal • terms about industrial action • terms about right of entry • terms about superannuation	
Particular types of workers – shift workers (s.187(4), ss.196–200) (Q2.16) Does the Agreement define or describe an employee as a shift workers for the purposes of the NES	
Right of entry term (s.186(4), s.194(f) & s.194(g) (Q2.13) Does the agreement contain any terms that deal with the rights of officials or employees or employees of employee organisations to enter the employer's premises	
Superannuation term (s.186(4), s.194(h)) (Q2.14) If the Agreement specifies a superannuation fund, does the fund: • offer a MySuper product; or • an exempt public sector superannuation scheme; or • a fund of which a relevant employee is a defined benefit member of	

Section 3 – Mandatory terms	
Dispute settlement term (s.186(6), reg 6.01, Sch 6.1 of FW Regs) (Q2.15) The term must: 1) Allow for settlement of disputes in relation to NES; and 2) Allow for representation of employees	
Flexibility term (ss.202–204, reg 2.08, Sch 2.2 FW Regs) (Q2.15) Does the term contain a flexibility term that complies with the requirements in s.202 and s.203	
Consultation term (s.205, reg. 2.09, Sch 2.3 FW Regs) (Q2.15) The term must: 1) Require employer to consult with employees regarding major workplace change that is likely to have a significant effect on employees AND change to regular roster of ordinary hours of work; and 2) Allows for representation of employees for the purposes of that consultation Further in relation **to change to regular roster or ordinary hours of work** the term must: 1) Require the employer to provide information to employees about the change; and 2) Require the employer to invite employees to give their views about the impact of the change; and 3) Require the employer to consider any views given by employees about the impact of the change	

Section 4 – National Employment Standards **(s.55, s56, s.186(2)(c), s.196, s.253)**	
Maximum weekly hours of work (s.62 – s.64) 38 hours per week	
Request for flexible working arrangements (s.65 – s.66) Section 65(1A) FW Act	
Parental leave (s.67 – s.88) 12 months unpaid + right to request further 12 months	
Annual leave (s.86 – s.94) 4 weeks paid leave (5 weeks for shift workers)	
Personal/carer's leave (s.95 – s.107) 10 days paid leave + 2 days paid compassionate leave + 2 days unpaid leave when paid leave has been used	
Community service leave (s.108 – s.112) 10 days paid jury leave + unpaid emergency service leave	
Long service leave (s.113 – s.113A) as per pre-reform award or NAPSA, or is silent, in accordance with state long service leave legislation	
Public holiday (s.114 – s.116) paid day off for each public holiday (employer can request employee not work if such request is reasonable)	
Notice of termination and redundancy (s.117 – s.123) Up to 4 weeks' notice (5 weeks' if over 45 and in job for over 2 years) depending on years of service **AND** between 4-16 weeks redundancy pay depending on years of service	
Fair Work Information Statement (s.124 – s.125)	

Section 5 — Better off overall test	
Relevant award(s)	
Award incorporated into agreement or read in conjunction with agreement?	
Do the agreement classifications align with the award?	
Has the employer provided classification matching?	

Pay rate comparison

Modern award classification	Agreement classification	Modern award rate	Agreement rate	Percentage difference

Entitlements table

	Agreement	Relevant modern award(s)
Hours		
Part-time employees		
Casual employees		
Shift penalties		
Weekend penalties		
Public holiday penalties		
Overtime		
Annual leave loading		
Allowances		

Better off overall test summary (s.186(2)(d), s.193)

Attachment C—Details of agreements referred to in media reports

Name	Number of employees covered	Date approved/ Nominal Expiry Date	Bargaining representatives [74]	Triage process?	
Coles Store Team Enterprise Agreement 2014-2017 [AE414390]	77,507 employees	Approved 10 July 2015 [75] Nominal expiry date: 31 May 2017	AMIEU, TWU, SDA, AWU, 2 employees	Yes Analysis identified issues including BOOT provided to Member	Agreement was approved subject to undertakings including a reconciliation and top-up payment, if applicable[76]. Appeal against decision to approve agreement upheld in May 2016 and agreement quashed from 5 July 2016[77]. Full Bench found the agreement did not pass the BOOT. As a result of the 2014-17 agreement being quashed, most employees reverted to being covered by the Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd Retail Agreement 2011 (see below). An application to terminate the 2011 agreement was made and subsequently withdrawn due to a technical issue. A new **application to terminate** the 2011 agreement by Ms Penny Vickers is scheduled for hearing before a Full Bench on 3–13 October 2017. If the Full Bench decides to terminate the 2011 Agreement, most employees will be covered by the relevant modern award that applies to their classification.

[74] As identified in the application
[75] [2015] FWCA 4136.
[76] The use of reconciliations (or 'audits') has been the subject several later decisions including the judicial review of a decision in *United Voice v MSS Security Pty Ltd & Anor*. In a subsequent decision the Full Bench found that it was inconsistent with s.190(3)(a) for the Commission to accept an undertaking requiring a reconciliation as "the employees are financially disadvantaged under the Agreement as there is a delay in the payment of the remuneration that they are, under the Award, entitled to" [2017] FWCFB 651 at [38]-[42]. See also *Re SDA and Beechworth Bakery* [2017] FWCFB 1664.
[77] [2016] FWCFB 2887.

Name	Number of employees covered	Date approved/ Nominal Expiry Date	Bargaining representatives [74]	Triage process?	
Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011 [AE888094]		Approved 7 September 2011 Nominal expiry date: 31 May 2014	SDA, AMIEU, AWU Queensland	No	
ALDI Regency Park Agreement 2015 [AE415743]	17 employees	Operated from: 29 September 2015 Nominal expiry date: 29 September 2019	No union or employee bargaining representative	No	Agreement was approved, subject to undertakings. SDA and TWU appealed the decision approving the agreement but the appeal was dismissed.[78] Judicial review was sought in the Federal Court and the matter is now before the High Court.[79]
KFC Team Members' Enterprise Agreement - Queensland and Tweed Heads (NSW) 2014 - 2017 [AE410007]	4229 employees	Operated from: 16 September 2014 Nominal expiry date: 30 June 2017	SDA, AWU	No	Agreement was approved, subject to undertakings.
McDonald's Australia Enterprise Agreement 2013 [AE402596]	99,706 employees	Approved 24 July 2013 Nominal expiry date: 24 June 2017	SDA	No	Agreement varied in 2016 to, amongst other changes, include a new classification – see [2016] FWCA 1209
Target Australia Retail Agreement 2012 [AE898762]	20,226 employees	Approved 12 December 2012 Nominal expiry date: 31 July 2016	SDA, NUW, AWU	No	

[78] [2016] FWCFB 91.
[79] See Federal Court decision dated 29 November 2016 [2016] FCAFC 161 for result of appeal; Judicial review of this decision [M173/2016] pending.

Name	Number of employees covered	Date approved/ Nominal Expiry Date	Bargaining representatives [74]	Triage process?	
Woolworths National Supermarket Agreement 2012 [AE897808]	95,571 employees	Approved 25 October 2012 Nominal expiry date: 30 June 2015	SDA, AMIEU, AWU	No	
Hungry Jacks Employees, SDA Enterprise Agreement 2006 [AG847494]		Operated from: 17 March 2006 Nominal expiry date: 31 March 2010	SDA	No	Agreement assessed by the AIRC under the No Disadvantage Test in s.170XA of the *Workplace Relations Act 1996*
Cleanevent Australian Pty Ltd Enterprise Agreement 2004 [AG837969]		Operated from 20 December 2004 Nominal expiry date: 1 May 2007	AWU	No	Agreement assessed by the AIRC under the No Disadvantage Test in s.170XA of the *Workplace Relations Act 1996*
Chiquita Mushroom (Pickers) AWU Enterprise Agreement 2004 [AG836203]		Operated from 10 August 2004 Nominal expiry date: 19 March 2007	AWU	No	Agreement assessed by the AIRC under the No Disadvantage Test in s.170XA of the *Workplace Relations Act 1996*

Attachment D—Varying an enterprise agreement

Subdivisions A and B of Div.7 of Pt.2-4 of the FW Act contain the statutory scheme concerning the variation of an enterprise agreement.

A variation of an enterprise agreement is made when a majority of affected employees who cast a valid vote approve the variation. The variation has no effect unless it is approved by the Fair Work Commission (Commission) under s.211 of the FW Act.

An enterprise agreement may also be varied by the Commission to remove an ambiguity or uncertainty (s.217 of the FW Act) on application by any of the following:

- one or more of the employers covered by the agreement;
- an employee covered by the agreement;
- an employee organisation covered by the agreement.

Under s.218 of the FW Act the Commission must also review an enterprise agreement if the agreement is referred to it by the Australian Human Rights Commission under s.46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

Applications lodged to vary enterprise agreements

The following table provides a summary of the applications to vary enterprise agreements lodged over the last two financial years:

	2016–17	**2015–16**
s.210 – Application for approval of a variation of an enterprise agreement	206	187
s.217 – Application to vary an enterprise agreement to remove an ambiguity or uncertainty	21	32
s.218 – Variation of an enterprise agreement on referral by the Australian Human Rights Commission	-	-

Details of variations to enterprise agreements are published on the Commission's website – see the List of recently varied agreements.

Attachment E—Appeals and Judicial Reviews

Enterprise Agreement Appeals Upheld during 2016–17

Of the 17 appeals upheld involving enterprise agreement approval applications, four relate to the Better Off Overall Test:

Appeal by United Voice – Queensland Branch against decision dated 9 April 2015 Re: MSS Security P/L t/a MSS Security P/L; [2017] FWCFB 651, 31 January 2017.	Decision at first instance issued on 9 April 2015 approved *MSS Security QLD Enterprise Agreement 2014-2018* with an undertaking. Matter was appealed to the Full Bench of the Commission and decision at first instance quashed. Agreement was approved with different undertakings involving monthly audits of overtime to redress any shortfalls. Judicial Review was sought in the Federal Court and the Court quashed the Full Bench decision and decision to approve the agreement. Federal court remitted matter back to the Full Bench of the Commission to rehear the matter. The Full Bench of the Commission found that to accept undertakings providing for monthly audits was inconsistent with s.190(3)(a), as employees were financially disadvantaged under the agreement by the delay in the payment of remuneration to which they were entitled under the award. The decision to approve the agreement was quashed.
Appeal by Construction, Forestry, Mining and Energy Union against a decision dated 8 February 2017 Re EMF (WA) Pty Ltd; PR591567, 3 April 2017.	There were six grounds for the appeal, including that the Commissioner erred in concluding that, after accepting undertakings, the *EMF (WA) Pty Ltd Enterprise Agreement 2016* passed the better off overall test. Consent order issued upholding the appeal and quashing the decision to approve the agreement.
Appeal by Construction, Forestry, Mining and Energy Union against a decision dated 6 February 2017 Re ICER Pty Ltd as trustee for the ICER Trust T/A ICER; PR591564, 3 April 2017.	There were five grounds for the appeal, including that the Commissioner erred in concluding that, after accepting undertakings, the *ICER Enterprise Agreement 2016* passed the better off overall test. Consent order issued upholding the appeal and quashing the decision to approve the agreement.
Appeal by Shop, Distributive and Allied Employees Association against dated 9 December 2016 Re: Beechworth Bakery Employee Co P/L t/a Beechworth Bakery; [2017] FWCFB 1664, 6 April 2017.	Deputy President approved the *Beechworth Bakery Employee Co P/L Enterprise Agreement 2016* with certain undertakings to redress a reduction in Sunday penalties under the agreement. The undertaking gave an employee the right to request a comparison of award wages and those they received under the agreement if they thought that over a 4 month period they were not better off overall. On appeal, the Full Bench found that the undertaking did not create an enforceable right and that any review that found a shortfall in wages would lead to a four month period of delayed payment. The Full Bench held that the undertaking was not capable of addressing Commission's concern that agreement did not pass better off overall test. Appeal upheld and decision to approve agreement quashed.

Enterprise Agreement Appeals Upheld during 2015–16

Of the 14 decisions in which an appeal was upheld in 2015–16[80], 5 relate to the BOOT. In 3 of these, the error related to the selection of the award(s) for the purpose of the BOOT, one required a more frequent reconciliation and in one instance the appeal Bench found that the agreement (the Coles 2014–2017 Agreement) did not pass the BOOT.

Appeal by Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, Allied Services Union of Australia and Anor against decisions dated 14 April 2015 Re: Main People P/L [2015] FWCFB 4467, 13 August 2015	In the appeal against the decision to approve *Main People Pty Ltd Enterprise Agreement 2014* the Full Bench determined that the undertaking accepted substantially changed the Agreement by altering the scope of coverage. Further, the undertaking lacked sufficient certainty to be enforceable as it was unclear whether the undertaking was intended to give rise to an entitlement, and if so, the nature of any such entitlement; and to the extent the undertaking created a pay entitlement it was only payable annually upon request as opposed to being payable fortnightly or monthly under the comparator award. Decision quashed and referred to Deputy President for determination.
Appeal by United Voice – Queensland Branch against decision dated 9 April 2015 Re: MSS Security P/L [2015] FWCFB 6923, 12 November 2015	Appeal against decision to approve *MSS Security Qld Enterprise Agreement 2014-18*. Full Bench held undertaking accepted at first instance to conduct quarterly audits was inadequate as such audits should be conducted over shorter periods. Appeal upheld, decision quashed, agreement approved with revised undertaking of monthly audits. *Note this decision was the subject of judicial review – see entry for 2016–17 for result.*
Appeal by Maritime Union of Australia & Ors against decision dated 30 October 2015 Re: Sea Swift Pty Ltd T/A Sea Swift and Ors [2016] FWCFB 651, 8 February 2016	An appeal against the decision to approve the agreement was upheld as a Full Bench determined that the incorrect modern award had been applied by Commissioner in assessing the BOOT taking into account the substantive provisions and exclusions in the two potentially applicable awards Matter remitted back to Commissioner to finalise the approval process.
Appeal by Hart against decision dated 10 July 2015 Re: Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Ltd T/A Coles and Bi Lo [2016] FWCFB 2887, 31 May 2016	*See further information about this matter in Attachment C*
Appeal by AJ Convenience Services Pty Ltd T/A 7-Eleven Rozelle & 7-Eleven Bexley against decision dated 18 January 2016 [2016] FWCFB 2116, 5 May 2016	Appeal against decision dismissing application for approval of enterprise agreement. Appeal upheld on basis of denial of natural justice as the modelling and assumptions relied upon by the Commission in deciding the Agreement did not pass the BOOT were not put to the appellant to enable it to put a submission. Decision quashed and remitted to Deputy President to hear and determine.

[80] Note some decisions relate to more than one matter so the total number of decisions may not equal the total number of matters appealed.

Judicial reviews of FWC decisions relating to Enterprise Agreements in 2015–17	
All Trades Queensland Pty Ltd v CFMEU & Ors Federal Court of Australia Application filed 23 March 2017 [QUD92/2017]; listed for hearing.	[2017] FWCFB 132 An application was made for the approval of the *All Trades Queensland P/L Apprentice/Trainee Enterprise Agreement 2015* Full Bench found that the NAPSAs relied upon by All Trades Queensland were terminated on 1 January 2014 and do not cover any of the employees covered by the agreement. They found that the BOOT must be applied in accordance with s.193 of the FW Act using the relevant modern awards as the comparator instruments.
Aldi Stores v SDA & Anor High Court of Australia. Application [M173/2016] filed 16 December 2016, seeking special leave to appeal the decision and orders of the Full Court of the Federal Court in matter [VID349/2016]. Leave was granted to appeal the decision of the Full Federal Court in VID349/2016 on 8 March 2017. Directions have been issued to the parties to file submissions in the matter and it will be listed for hearing in due course. On 13 January 2017 Justice Jessup of the Federal Court issued an ex tempore decision granting ALDI a stay of enforcement of the Full Federal Court orders issued in VID349/2016, pending the resolution of the High Court special leave application.	[2016] FWCFB 91 An application to make the *ALDI Regency Park Agreement 2015* was granted in the first instance. An appeal of that decision on grounds including whether the agreement was a greenfields agreement, whether the employees who voted for the agreement had been fairly chosen and whether the BOOT had been properly applied was dismissed. The SDA sought judicial review of the decision in the Federal Court. On 29 November 2016 a Full Court of the Federal Court quashed the decisions of the Member and the Full Bench as they found that the employees voting for the agreement were not covered by the agreement. Aldi has since appealed that decision in the High Court.
CFMEU v One Key Workforce Pty Ltd Federal Court of Australia Application [NSD2058/2016] filed 28 November 2016 seeking relief under s.39B *Judiciary Act 1903*. This matter was listed for hearing on 11 July 2017 before a single Judge of the Federal Court. Decision pending	[2015] FWCA 7516 An application to approve the *RECS (QLD) Pty Ltd Enterprise Agreement 2015* was approved with undertakings.