



**Australian Government**

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**Department of Employment**

**Productivity Commission inquiry into the  
workplace relations framework**

**Submission of the  
Department of Employment**

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## 1. Introduction

1. The Department of Employment (the department) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into the workplace relations framework. The inquiry is examining the operation of the national workplace relations system, which is defined by the inquiry's terms of reference as encompassing the *Fair Work Act 2009* (Fair Work Act), including the institutions and instruments that operate under the Act, and the *Independent Contractors Act 2006*. The national workplace relations system established under the Fair Work Act is the predominant workplace relations system operating in Australia, covering approximately 94 per cent of private sector employees, as well as a significant proportion of the public sector.<sup>1</sup>

2. On 19 December 2014, the Australian Government commissioned the Productivity Commission to undertake a review of the workplace relations framework. The commitment to commission the inquiry was made in *The Coalition's Policy to Improve the Fair Work Laws* election policy, released in May 2013 prior to the September 2013 federal election.<sup>2</sup>

3. The terms of reference for the review are broad, allowing for the Productivity Commission to undertake a comprehensive examination of the workplace relations framework. The terms of reference note the rationale for the inquiry, which is consistent with the commitment made in the Government's election policy:

The Australian Government's objectives in commissioning this inquiry are to examine the current operation of the Fair Work Laws and identify future options to improve the laws bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ.

4. The terms of reference also require the Productivity Commission to conduct an appropriate public consultation process including holding hearings, inviting public submissions and releasing a draft report to the public.

5. The Government's election policy includes the commitment to carefully consider the recommendations and findings of the Productivity Commission and that if there is a good case for sensible and fair changes, they will be taken to the next election before being implemented.

6. The Productivity Commission released a series of five discussion papers on 22 January 2014, which were designed to assist parties to make submissions by the 13 March 2015 deadline. The Productivity Commission will release a draft report in June/July 2015 and then seek further information and feedback from interested parties. The terms of reference call for the inquiry to be completed by November 2015.

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<sup>1</sup> Source: ABS, *Employee Earnings and Hours, May 2012, Cat. No. 6306.0, unpublished data.*

<sup>2</sup> *The Coalition's Policy to Improve the Fair Work Laws*, May 2013. Liberal Party of Australia, [www.liberal.org.au/improving-fair-work-laws](http://www.liberal.org.au/improving-fair-work-laws).

7. Many stakeholders have also recently considered the operation of the Fair Work Act through the 2012 post-implementation review of the Fair Work legislation. Similarly many stakeholders have also participated in the two and four yearly reviews of modern awards by the Fair Work Commission.

8. The Fair Work Act and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* were subject to a post-implementation review in 2012 because they were exempted from completing Regulation Impact Statements by the then Prime Minister. The Acts were therefore required to undergo post-implementation reviews within two years of their full implementation, as per Australian Government regulation impact analysis requirements. The review was undertaken by a three member panel appointed by the former government.<sup>3</sup> The review involved significant stakeholder consultation as is required under the regulation impact analysis rules.

9. Consistent with the regulation impact analysis requirements, the Fair Work Act Review 2012 involved an assessment as to whether the legislation was meeting its objectives and adequately addressing the problems identified by government that it was intended to address.

10. The Fair Work Act Review 2012 did not involve a full examination of the ongoing appropriateness and adequacy of the workplace relations system. It was a much narrower review than that contemplated by the current inquiry by the Productivity Commission, which has been asked to undertake a thorough examination of all aspects of the workplace relations system and to make any recommendations for change that will serve the country into the future.

11. The Fair Work Commission is currently undertaking a detailed examination of each modern award through its four yearly review of modern awards.

12. A review with the scope of the 2015 Productivity Commission inquiry has not been conducted since the Hancock Committee reported to the Hawke Government in 1985. There have been substantial changes to workplace relations and the economy since the Hancock Report, including the de-centralisation of wage fixing, introduction of enterprise bargaining, evolution of Australian industry and the labour market and significant expansion of the reach of the federal system.

13. There is already a considerable amount of information available that may assist the Productivity Commission. Rather than re-state the contents of that Government and departmental material in this submission, the department provides links to previous submissions and public reports below.

14. In terms of forecasting labour demand over the short-to-medium term, the department publishes employment projections by industry, occupation, skill level and region. These are available at: <http://lmip.gov.au/default.aspx?LMIP/EmploymentProjections>.

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<sup>3</sup> *Towards More Productive and Equitable Workplaces: An evaluation of the Fair Work legislation*, Edwards, J.; McCallum, R. & Moore M. Australian Government, 2012.

15. In terms of the minimum wage and award wages, the Government makes submissions to the Fair Work Commission's Annual Wage Review which provide the Fair Work Commission with a range of data and information on these issues. The Government made four separate submissions to the 2013-14 Annual Wage Review. These are available as follows:

- Initial submission  
[http://www.fwc.gov.au/documents/sites/wagereview2014/submissions/ausgovt\\_sub\\_a\\_wr1314.pdf](http://www.fwc.gov.au/documents/sites/wagereview2014/submissions/ausgovt_sub_a_wr1314.pdf)
- Post-budget submission  
[http://www.fwc.gov.au/documents/sites/wagereview2014/post\\_budget/austgovt\\_post\\_budsub\\_awr1314.pdf](http://www.fwc.gov.au/documents/sites/wagereview2014/post_budget/austgovt_post_budsub_awr1314.pdf)
- Response to Expert Panel's questions  
[http://www.fwc.gov.au/documents/sites/wagereview2014/inreply/austgovt\\_replsub\\_a\\_wr1314.pdf](http://www.fwc.gov.au/documents/sites/wagereview2014/inreply/austgovt_replsub_a_wr1314.pdf)
- Consultation questions  
<https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14-7>.

16. The Government's initial submission to the 2014-15 Annual Wage Review is due with the Fair Work Commission on 27 March 2015.

17. In terms of the safety net, the Government has so far made three submissions to the Fair Work Commission's four yearly review of modern awards. This review is currently underway and is expected to conclude in early 2016. The Government's submissions are as follows:

- Initial submission  
[www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141\\_sub\\_AusGov\\_030214.pdf](http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141_sub_AusGov_030214.pdf)
- Annual leave common issue  
[www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM201447-sub-AusGov-190914.pdf](http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM201447-sub-AusGov-190914.pdf)
- Part-time and casual employment common issue  
[www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-sub-AusGov-191114.pdf](http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-sub-AusGov-191114.pdf)

18. Furthermore, on 16 June 2014, the Fair Work Commission published a history of reviews of the award system, available here:

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/4-yearly-review-Guide-to-Award-Stage.pdf>.

19. The department's quarterly Trends in Enterprise Bargaining report, which measures wage outcomes in federally registered enterprise agreements is available at:

<http://employment.gov.au/trends-federal-enterprise-bargaining>.

20. The department's Workplace Agreements Database contains information on all known federal enterprise agreements that have operated since the introduction of the Enterprise Bargaining Principle in October 1991. The database contains information on approximately 140,000 collective agreements, of which there are just over 19,000 current agreements covering around 2.3 million employees. There are also a large number of agreements that have passed their nominal

expiry date but continue to operate, however there is no way of accurately estimating how many of these agreements there are. This submission provides a range of unpublished data using the Workplace Agreements Database.

21. The department has also constructed a database of the 122 modern awards and this submission provides some unpublished data from that source.

22. In order to assist the Productivity Commission to take into account Government legislation currently before the Parliament, the submission also provides an explanation of amendments to the Fair Work Act included in the Fair Work Amendment Bill 2014 and the Fair Work Amendment (Bargaining Processes) Bill 2014, which are currently before the Parliament.

## 2. Data and evidence to assist the Productivity Commission

### The safety net

#### Minimum and award wages

23. Chart 1 on the following page shows the number of Australian employees by method of pay setting, based on Australian Bureau of Statistics data.

24. Some commentators say that there are around 1.5 million employees who rely on the minimum wage. This is inaccurate. If the term 'minimum wage' is taken to refer to the *national* minimum wage rate announced each year by the Fair Work Commission as the basic hourly wage rate (below which most employees cannot be paid) the department estimates that in May 2014 around 1.6 per cent of all employees (or 157,100 employees) were paid the national minimum wage rate. The national minimum wage is currently \$16.87 per hour (or \$640.90 per week or \$33,326.80 per year for full-time employees). This figure includes:

- 62 800 award-reliant workers
- 20 700 workers covered by a collective agreement, and
- 73 600 award and agreement free workers.

25. The national minimum wage rate of \$16.87 is contained in 45 of the 122 modern awards. In a number of these awards, the national minimum wage rate is paid as an introductory rate or a trainee rate. Under awards such as the Hospitality Industry (General) Award 2010 and the Restaurant Industry Award 2010, employees with little or no experience generally receive the introductory rate for up to three months while training to become a level 1 employee. For the remaining 77 modern awards, the lowest adult rate is higher than the national minimum wage rate.

26. Chart 1 also shows the number of low paid employees in Australia - 13.3 per cent of all employees were low paid in 2014. Low paid employees are defined as employees earnings less than two-thirds of the median hourly wage. In May 2014, the median hourly wage was \$28.00 and employees earning below \$18.67 per hour were considered low paid.

27. Australia's level of award-reliance has declined over the longer term, with employees increasingly being paid in accordance with a workplace agreement or via individual arrangements in contracts of employment. Individual arrangements include such things as formal common law contracts of employment and also informal over-award payments. The move away from centralised wage fixing and the increased focus on bargaining at the enterprise level has resulted in the significant decline in the number of award-reliant employees. In 1990, around 67 per cent of Australian employees were paid exactly the award rate.<sup>4</sup> In 2000, 23.2 per cent of employees had their pay set by an award. This decreased to 15.2 per cent in 2010. However, in 2014 the level of award-reliance has increased to stand at 18.8 per cent (or 1,860,700 employees).<sup>5</sup>

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<sup>4</sup> OECD Economic Surveys: Australia 2004

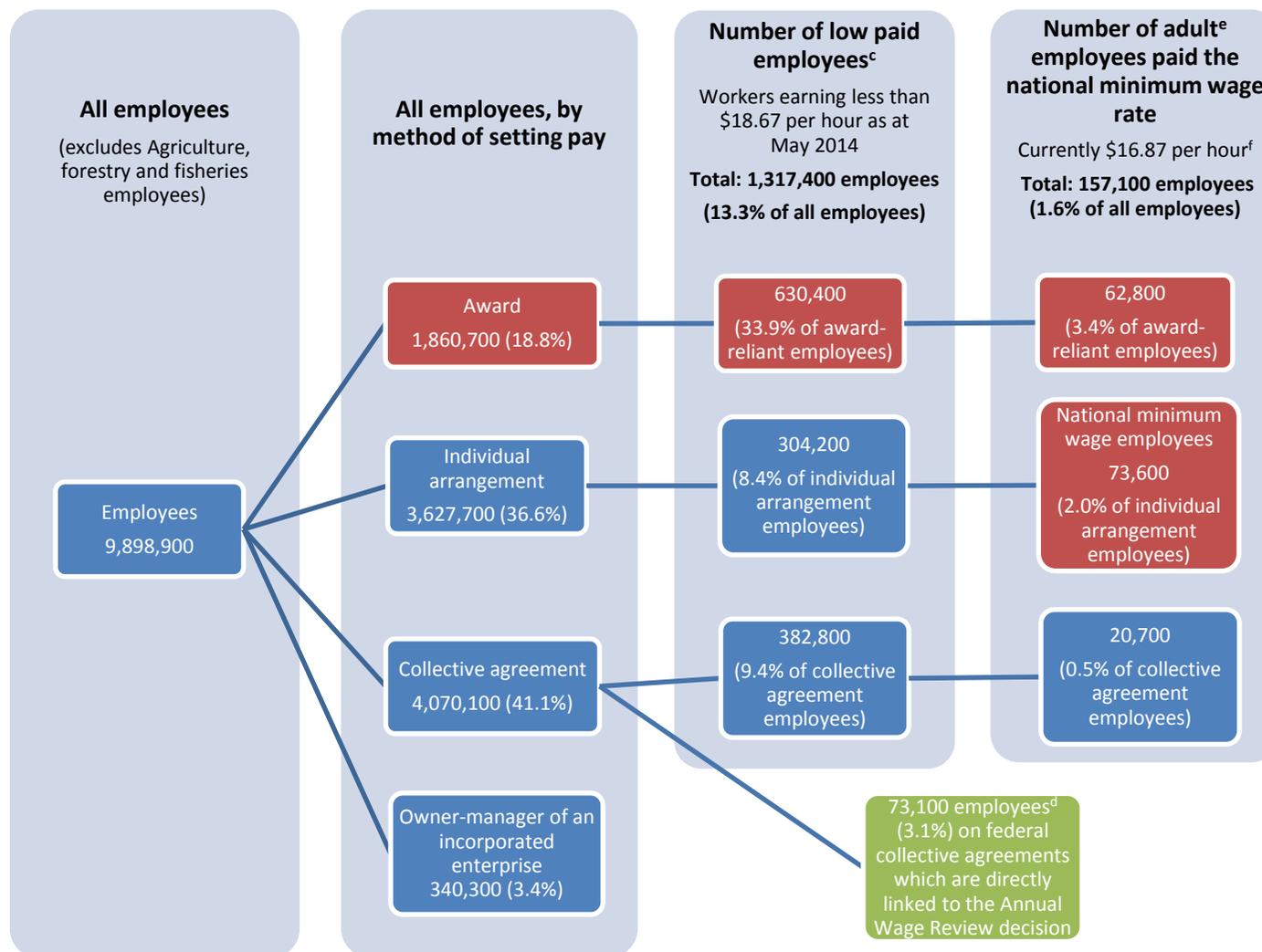
<sup>5</sup> ABS *Employee, Earnings and Hours* 2000, 2010, 2014

28. When some commentators give a figure for the number of employees receiving the 'minimum wage', they really mean to say the number of people receiving the award classification wage for their relevant classification. Some award classification wages can be as high as \$150,000 (for example, in the Air Pilots Award 2010). Accordingly, on some definitions and approaches, this amount is a 'minimum wage'. It is therefore important that the concept of 'minimum wage' that is used is clearly defined to avoid confusion.

29. Award-reliant employees are directly impacted by the Fair Work Commission's Annual Wage Review decision. Since 2010 the Fair Work Commission has increased the national minimum wage every year, with the same percentage increase flowing on to all award classification wages rates in modern awards.

30. In addition, there were 333,400 employees whose collective agreement was formally linked in some way to the Fair Work Commission's minimum wage Expert Panel's decision. As displayed in Chart 1, for 73,100 of these employees, the link was direct and automatic.

**Chart 1: Number of employees by method of setting pay and whether they are low paid, May 2014(a)(b)**



Source: ABS (2015), *Employee Earnings and Hours, May 2014*, Cat. No. 6306.0, published and unpublished data (including Department of Employment calculations); Department of Employment (2015), Workplace Agreements Database, September 2014.

Note: (a) All numbers are for May 2014, except for the number of employees on agreements linked to the Annual Wage Review decision (in green), which is for 30 September 2014. (b) The Fair Work Commission sets award minimum wages and the national minimum wage, these workers are coloured red in the chart. (c) Low paid employees are defined as employees earnings less than two-thirds of the median hourly wage. In May 2014, the median hourly wage was \$28.00 and employees earning below \$18.67 per hour were considered low paid. (d) This data is derived from the Workplace Agreements Database. It includes the number of employees covered by an agreement with a clause which states that the entirety of the Annual Wage Review decision will be applied in full and automatically to wages. These workers may also be low paid or earning the national minimum wage rate and thus also covered in the boxes above. (e) This excludes workers paid junior, apprentice and disability rates of pay. (f) The national minimum wage in May 2014 was \$16.37. Employees paid at or below \$16.50 per hour in May 2014 are considered to be paid the national minimum wage rate (this uses an upper error band of 13 cents).

31. Other employees may also be affected by the Annual Wage Review decision. For example:
- there will be wage implications for workers who are paid at or just above the award classification wage, but have their pay set through an individual arrangement (such as a common law contract or informal arrangement) or collective agreement – wages in agreements must always be at or above the relevant award wage
  - the minimum wage adjustment may be reflected in loadings and allowances which are calculated as a percentage of award or agreement minimum wages, and
  - the award classification wage adjustment may also be passed on to higher wage earners at an employer’s discretion in order to maintain wage relativities.
32. The Fair Work Commission can set special minimum wages to apply to junior employees (under 21 years), employees with a disability and employees to whom training arrangements apply.
33. These special wage rates exist in the national minimum wage order and in many modern awards. It is estimated that over 300,000 award-reliant employees (or around 20 per cent of award employees) are covered by such special minimum wage rates. This is described in Table 1 below.

**Table 1: Special minimum wage rates in awards by type of rate**

|                         | Number of awards | Number of employees (2014) |
|-------------------------|------------------|----------------------------|
| <b>Junior rates</b>     | 75               | 217,300*                   |
| <b>Apprentice rates</b> | 49               |                            |
| <b>Trainee rates</b>    | 102              | 107,600                    |
| <b>Disability rates</b> | 98               | 6,400                      |

Sources: Department of Employment: Modern Awards Database. ABS, Employee Earnings and Hours, May 2014, Cat. No. 6306.0, published and unpublished data, May 2012, 2014

\*Only available for 2012

### Data on the incidence of terms in modern awards

34. The department has extracted data on the incidence of around 140 conditions in modern awards. The incidence data records whether a particular term is present in an award but it does not capture the details of the term or assess variations between awards.
35. The department includes in this submission incidence data as at 1 October 2014 on a range of issues identified by the Productivity Commission in its Issues Papers. The data shows that:
- 10 of the 122 modern awards allow for a compressed working week (for example, an award may allow employees to work four ten-hour days per week)
  - 70 of the 122 modern awards contain a minimum engagement period per shift for part-time employees
  - 89 of the 122 modern awards contain a minimum engagement period per shift for casual employees
  - 32 of the 122 modern awards state that overtime payments are partially or completely absorbed into the regular ‘loaded’ hourly rate and/or into an annualised salary
  - 113 of the 122 modern awards provide that employees are paid penalty rates for work on public holidays (note that a further four awards absorb the public holiday loading into pay and the remaining five awards are silent on payment of the public holiday loading)

- 24 of the 122 modern awards provide for regular shifts longer than 12 hours or allow employees to work for more than 12 hours in a shift (note that shifts longer than 12 hours may include overtime)
- 86 of the 122 modern awards provide for shift loadings (for example, employees receive 15 per cent loading for afternoon shift, 30 per cent loading for night shift)
- 61 of the 122 modern awards contain Saturday penalty rates for ordinary hours worked (generally ranging between 20 per cent loading and 100 per cent loading)
- 61 of the 122 modern awards contain Sunday penalty rates for ordinary hours worked (ranging between 25 per cent loading and 100 per cent loading, with most of these providing for 100 per cent loading), and
- 26 of the 122 modern awards specifically state that weekend penalty rates will not be paid. However, an allowance for penalty rates may have previously been reflected in annualised salaries or hourly rates of pay in these awards.

## Enterprise agreements

36. The department maintains the Workplace Agreements Database. It contains information on all known federal enterprise agreements that have operated since the introduction of the Enterprise Bargaining Principle in October 1991. The Workplace Agreements Database covers general details (such as sector, ANZSIC, duration, employees covered), wage details (quantum and timing of increases) and employment conditions.

37. The collection of data for the Workplace Agreements Database involves the department analysing every enterprise agreement approved by the Fair Work Commission and recording the incidence of a range of specific clauses within the agreement. On average about 8,000 agreements are added to the database each year with approximately 250 separate data fields coded. The database collects details about wage increases included in agreements and employment conditions, such as flexibility clauses, productivity requirements, redundancy, superannuation, leave and training.

38. Information from the Workplace Agreements Database is reported in the department's *Trends in Federal Enterprise Bargaining* quarterly report, which contains data about the number of enterprise agreements made in the federal workplace relations system, the number of employees covered and the level of wage increases included in collective agreements.

## Current federal agreements – 1992-2014

39. Table 2 below provides data from the department's Workplace Agreements Database on current federal agreements in place since 1992. This displays trends in agreement coverage over time. The table shows the rapid growth in federal agreement coverage from 1992 through to 2010, when there was a record number of current agreements in place. While the number of current agreements has fallen since then, the number of employees covered has remained high. The most recent data available show that as at 30 September 2014, there were 19,049 current federal enterprise agreements in place, covering just over 2.3 million employees. The actual number of collective agreements in operation and coverage numbers are higher than is suggested by these

statistics as they do not include workplace agreements still in operation after their nominal expiry date.

**Table 2: All wage agreements current on the last day of the quarter by number of employees: September quarter 1992 - September quarter 2014**

|                         | 1992  | 1996    | 2000    | 2004    | 2008    | 2010    | 2012    | 2014    |
|-------------------------|-------|---------|---------|---------|---------|---------|---------|---------|
| <b>Agreements</b>       | 277   | 4,667   | 8,437   | 15,366  | 17,684  | 24,711  | 23,220  | 19,049  |
| <b>Employees ('000)</b> | 157.4 | 1,284.4 | 1,331.6 | 1,549.6 | 1,766.2 | 2,424.0 | 2,327.7 | 2,318.5 |

*Source: Department of Employment - Workplace Agreements Database*

Note: Data do not include those agreements that have passed their nominal expiry date but continue to operate in a workplace.

### Enterprise agreement clauses compared to relevant modern award clauses – Sample

40. The department has undertaken an analysis of a sample of 200 current enterprise agreements comparing whether the agreement clauses are higher or lower than the relevant modern award clauses. In order to be approved by the Fair Work Commission, an enterprise agreement must meet the better off overall test, which requires the Fair Work Commission to be satisfied that each employee would be better off overall under the agreement than under the award (see section 193 of the Fair Work Act).<sup>6</sup> Table 3 below provides the data from the sample, showing the matters that are typically negotiated by employers and employees that are higher or lower than the underpinning modern award. The data is taken from the Fair Work Commission’s enterprise agreement approval form (for example the statutory declaration that must be completed by an employer Form F17), which requires the applicant to identify the conditions in the agreement which are higher or lower than the relevant modern award for the purposes of the better off overall test. The sample also takes into consideration any undertakings agreed to during the approval process for the agreements.

41. Table 3 shows that the significant majority of enterprise agreements sampled provided higher pay than the modern award, and a number provided for higher allowances, leave, hours of work and severance arrangements. More commonly occurring entitlements lower than the modern award included allowances, hours of work, overtime, breaks, leave and weekend penalty rates. The table gives an indication as to how the better off overall test for enterprise agreements operates, with employers and employees trading higher conditions in some areas for lower conditions in others. The better off overall test is an overall test rather than a line by line comparison across the two instruments. Accordingly, an enterprise agreement may provide specific conditions at a lower level than under the relevant modern award.

<sup>6</sup> Further information about the department’s sampling methodology is at **Appendix A**.

**Table 3: Comparison of enterprise agreement clauses with relevant modern award clauses – Sample agreements**

| Categories                     | Above award |                | Below award <sup>1</sup> |                |
|--------------------------------|-------------|----------------|--------------------------|----------------|
|                                | Agreements  | Agreements (%) | Agreements               | Agreements (%) |
| Pay                            | 185         | 92.5%          | 0                        | 0.0%           |
| Allowances                     | 114         | 57.0%          | 37                       | 18.5%          |
| Hours of Work                  | 45          | 22.5%          | 17                       | 8.5%           |
| Penalty rates (Weekend)        | 9           | 4.5%           | 11                       | 5.5%           |
| Shift loading                  | 19          | 9.5%           | 8                        | 4.0%           |
| Overtime rate                  | 17          | 8.5%           | 14                       | 7.0%           |
| Public holiday (Penalty rates) | 12          | 6.0%           | 3                        | 1.5%           |
| Breaks                         | 24          | 12.0%          | 13                       | 6.5%           |
| Leave <sup>2</sup>             | 85          | 42.5%          | 12                       | 6.0%           |
| Penalty rates (Weekday)        | 7           | 3.5%           | 3                        | 1.5%           |
| Casuals (Other)                | 13          | 6.5%           | 11                       | 5.5%           |
| Casuals loading                | 2           | 1.0%           | 6                        | 3.0%           |
| Part time                      | 9           | 4.5%           | 3                        | 1.5%           |
| Shift work                     | 9           | 4.5%           | 3                        | 1.5%           |
| Public holidays (Other)        | 23          | 11.5%          | 3                        | 1.5%           |
| Overtime (Other)               | 19          | 9.5%           | 13                       | 6.5%           |
| Severance                      | 78          | 39.0%          | 4                        | 2.0%           |
| Termination                    | 13          | 6.5%           | 4                        | 2.0%           |
| Union/Delegate                 | 12          | 6.0%           | 0                        | 0.0%           |
| Any other conditions           | 98          | 49.0%          | 25                       | 12.5%          |

<sup>1</sup> While some enterprise agreement clauses may be lower than the relevant modern award clauses, the Fair Work Act requires that each employee must be better off overall under the enterprise agreement than if the relevant modern award applied.

<sup>2</sup> The National Employment Standards of the Fair Work Act cannot be reduced or removed through an enterprise agreement, modern award or contract of employment. While an enterprise agreement may provide for less leave than the relevant modern award, some modern awards provide entitlements above the National Employment Standards. See also s 55(4). *Source: Department of Employment - sample of 200 enterprise agreement approval application forms to the Fair Work Commission*

### Time taken between the nominal expiry and approval of a new agreement

42. The following table provides data collected by the Workplace Agreements Database on the number of days between the nominal expiry of a collective agreement and the approval of a replacement agreement by the Fair Work Commission (or predecessor body).<sup>7</sup>

<sup>7</sup> The table only includes data on direct replacement agreements to avoid the complexity of measuring the time period where there is a consolidation of several agreements. The table also does not include collective agreements that have taken more than two years to replace as this unnecessarily skews the results due to the extended period taken to replace some agreements which may be due to complex reasons.

43. The data show a longer duration for direct replacement enterprise agreements to be made under the Fair Work Act compared to the predecessor legislative regimes when there is one year or less between the replacement of existing agreements. For agreements taking up to two years to replace there is a reasonable level of consistency in the time taken to make replacement agreements across the various legislative regimes; this may suggest the time taken to negotiate replacement agreements is a feature of these particular workplaces or their industry/sector.

**Table 4: Time taken between the expiry and approval of a new agreement by legislative regime – Direct replacement agreements**

| <b>One year or less between agreement</b>   | <b><i>Industrial Relations Act 1998</i><sup>1</sup></b> | <b><i>Workplace Relations Act 1996</i><sup>2</sup></b> | <b><i>Fair Work Act 2009</i><sup>3</sup></b> |
|---|---|--|--|
| New agreements                              | 309   | 16,862   | 12,422                                       |
| Employees                                   | 897,747   | 4,595,397  | 2,146,636                                    |
| Average days between agreements             | <b>142.3</b>  | <b>132.7</b>   | <b>152.9</b>                                 |
| <b>Two or fewer years between agreement</b> | <b><i>Industrial Relations Act 1998</i><sup>1</sup></b> | <b><i>Workplace Relations Act 1996</i><sup>2</sup></b> | <b><i>Fair Work Act 2009</i><sup>3</sup></b> |
| New agreements                              | 356   | 21,083   | 15,071                                       |
| Employees                                   | 1,077,388   | 5,724,544  | 2,739,022                                    |
| Average days between agreements             | <b>191.8</b>  | <b>214.9</b>   | <b>216.3</b>                                 |

<sup>1</sup> *Industrial Relations Act 1998* – agreements made from 1991 to 31 December 1996.

<sup>2</sup> *Workplace Relations Act 1996* – operation from 1 January 1997 to 30 June 2009.

<sup>3</sup> *Fair Work Act 2009* – operation from 1 July 2009. Data provided is as at 30 September 2014.

Source: Department of Employment - Workplace Agreements Database

44. The data should be treated with caution as there are a range of reasons for the time taken to replace an agreement. For example, the bargaining parties may not be proactively seeking a replacement agreement. Where they are bargaining, it may be acrimonious or complex leading to protracted negotiations, or one or both of the parties may be delaying bargaining for strategic reasons or to account for upcoming business restructures. The particular reasons can be numerous. The time taken will also extend in circumstances where the employer and employees have been happy to have their existing agreement remain as the base and agree to continue arrangements above that base through the ordinary interactions between an employer and its employees. It is also noted that replacement agreements may provide for backdated pay increases to take account of any delay in a replacement agreement being made.

### **Nominally expiring agreements versus agreement approvals**

45. The chart provided at **Appendix B** compares the number of agreements passing their nominal expiry date with the number of agreements approved by quarter since the commencement of enterprise bargaining in 1991. The information demonstrates the cyclical nature of bargaining,

where there may be large numbers of agreements expiring or being approved in a short period. The data can assist in predicting possible industrial disputation, which may increase following a spike in agreements passing their nominal expiry date.

### Independent contractors

46. The Productivity Commission has raised the issue of independent contractors in Issues Paper 5 and this section provides some data on clauses relating to independent contractors in enterprise agreements.

47. The Explanatory Memorandum to the Fair Work Bill 2008 notes whilst agreement terms that contain a general prohibition on engaging labour hire employees or contractors are not intended to be matters permitted to be included in an enterprise agreement, terms that place conditions on the engagement of labour hire employees or contractors will be permitted if the terms sufficiently relate to the employees' job security (paragraph 672-673).

48. A series of Tribunal and Court decisions have confirmed that a term that provides that contractors cannot be engaged on terms and conditions that are less favourable than those in the enterprise agreement and terms that place conditions around the numbers of independent contractors that the employer may engage are permitted to be included in an enterprise agreement.

49. The Workplace Agreements Database contains information on the use of 'contractor clauses', which is outlined in Table 5 below. The table shows that 31 per cent of agreements covering nearly 16 per cent of employees included a 'general contractor clause'. 'General contractor clauses' include any clause in an agreement relating to contractors and encompass 'restrictions on contractors' and 'rates of pay – contractors' clauses. 'Restrictions on contractors' clauses impose restrictions in relation to engaging contractors, such as a requirement to consult on their use, limitation on numbers in relation to full time employees, length of employment and number of hours. The data show that around 21 per cent of enterprise agreements covering 11.3 per cent of employees included a 'restrictions on contractors' clause. A further 11.2 per cent of enterprise agreements covering 5.7 per cent of employees included a 'rates of pay – contractors' clause, which provides a commitment to paying contractors the same wage rates as those in the agreement for full time employees.

**Table 5: Contractor clauses in current enterprise agreements as at 30 September 2014**

| Clause type                   | Agreements | Agreements (%) | Employees covered | Employees (%) |
|-------------------------------|------------|----------------|-------------------|---------------|
| General contractor clause     | 5,907      | 31.0%          | 367,050           | 15.8%         |
| • Restrictions on contractors | 4,023      | 21.1%          | 261,831           | 11.3%         |
| • Rates of pay – Contractors  | 2,140      | 11.2%          | 132,343           | 5.7%          |

Source: Department of Employment - Workplace Agreements Database

**Appendix C** provides more detailed data from the Workplace Agreements Database on the use of contractor clauses in enterprise agreements by industry as at 30 September 2014. The data show that the Construction industry has the highest percentage of agreements with contractor clauses, with around 55 per cent of agreements covering 45 per cent of employees including a general contractor clause. Other significant users of general contractor clauses are the Electricity, Gas, Water and Waste Services industry, with around 19 per cent of agreements covering 47.2 per cent of employees including general contractor clauses, and the Transport, Postal and Warehousing industry, where around 18 per cent of agreements covering almost 42 per cent of employees have general contractor clauses.

### 3. Fair Work Amendment Bills

50. As previously noted, *The Coalition's Policy to Improve the Fair Work Laws* includes a number of commitments to amend the Fair Work Act. The Fair Work Amendment Bill 2014 and the Fair Work Amendment (Bargaining Processes) Bill 2014 have been introduced into Parliament to implement these measures. All of the matters included in these Bills are briefly outlined below. Further detail on the more significant aspects of the Bills and data relevant to the operation of those provisions is also provided.

51. The department's submission to the Senate committee inquiry into the Fair Work Amendment Bill 2014 is available here:  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/Fair\\_Work\\_Amendment/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Work_Amendment/Submissions).

52. The department's submission to the Senate committee inquiry into the Fair Work Amendment (Bargaining Processes) Bill 2014 is available here:  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/fairwork/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/fairwork/Submissions).

#### Fair Work Amendment Bill 2014

53. The Fair Work Amendment Bill 2014 was introduced into Parliament on 27 February 2014 and passed the House of Representatives on 27 August 2014. It is currently before the Senate. The changes reflect the Government's election commitment to work with and improve the Fair Work laws and respond to a number of concerns raised in the Fair Work Review 2012. The Bill will amend the Fair Work Act to implement the Government's commitments in the following areas:

- Greenfields agreement making: the amendments address concerns in relation to the conduct and outcomes of bargaining and are discussed in more detail below. These concerns were also raised in the 2012 review of the Fair Work Act.
- Right of entry: the amendments seek to model the right of entry rules on the longstanding provisions in place under the various previous legislative schemes before the Fair Work Act. The changes are discussed further below.
- Underpaid workers: the Bill provides that workers rather than the Commonwealth will receive any interest accrued on underpaid workers' monies retrieved by the Fair Work Ombudsman, where the amount is at least \$100 and has been held for at least 6 months.
- The Bill also deals with a number of recommendations of the Fair Work Act Review 2012 that were not implemented by the previous government. The amendments:
  - provide that leave does not accrue and cannot be taken under the Fair Work Act while an employee is off work and in receipt of workers' compensation
  - require employers to give employees a reasonable opportunity to discuss requests for extended unpaid parental leave before a request can be refused
  - provide that annual leave loading is not payable on termination of employment unless a modern award or enterprise agreement expressly provides to that effect
  - include a range of measures in relation to individual flexibility arrangements

- provide that an application for a protected action ballot order cannot be made unless bargaining for an enterprise agreement has commenced
- provide that the transfer of business rules do not apply to workers who transfer on their own initiative between employers who are associated entities, and
- provide the Fair Work Commission with clearer powers to dismiss unfair dismissal proceedings without a hearing or convening a conference in certain circumstances, such as where an application is frivolous or vexatious or the applicant fails to comply with a Fair Work Commission direction or order.

### **Fair Work Amendment Bill 2014 – Greenfields agreements**

54. Greenfields agreements are the only type of enterprise agreement that is not made directly with employees under the Fair Work Act. Greenfields agreements are negotiated between an employer or employers and a union or unions and can only be made before the workers for a new enterprise have been employed. In addition to approval criteria that apply to all enterprise agreements, the Fair Work Commission must be satisfied that the union or unions to be covered by the agreement are entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement. Greenfields agreements are also subject to a public interest test.

55. Greenfields agreements provide increased certainty of labour costs for new enterprises and preclude the possibility of protected industrial action being taken during the often crucial set-up phase of new projects.

56. The Fair Work Amendment Bill 2014 includes amendments to the greenfields agreement provisions foreshadowed in *The Coalition's Policy to Improve the Fair Work Laws*. The Fair Work Act Review 2012 also identified the need for changes to the provisions to address concerns in relation to the conduct and outcomes of greenfields bargaining.

57. The Bill will apply good faith bargaining requirements at section 228 of the Fair Work Act to employers and unions negotiating for single enterprise greenfields agreements. The good faith bargaining requirements provide a framework for bargaining conduct and require bargaining representatives to, for example, attend and participate in meetings at reasonable times and consider and respond to each other's proposals in a timely manner.

58. In line with other forms of agreements, bargaining representatives will be able to seek bargaining orders from the Fair Work Commission under section 229 of the Fair Work Act if a party is not bargaining in good faith. The changes will also enable bargaining representatives for single enterprise greenfields agreements to apply for the assistance of the Fair Work Commission to deal with a bargaining dispute under section 240 of the Fair Work Act.

59. To address concerns that greenfields negotiations under the Fair Work Act have resulted in delays and inflated outcomes, the Bill includes a further amendment to the Fair Work Act to establish an optional three month negotiation timeframe for bargaining. If an employer wishes to utilise the three month timeframe, it will need to provide written notice to the relevant union or unions of the commencement of the notified negotiation period for the agreement. The employer

will be able to refer a proposed agreement to the Fair Work Commission for determination if agreement cannot be reached within the three month period after giving each union bargaining representative a reasonable opportunity to sign the agreement.

60. In cases where agreement is not reached during the three month negotiation period and an agreement is presented to the Commission, the Bill provides that the Commission must ensure the proposal provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work. A legislative note provides that the Fair Work Commission may have regard to prevailing pay and conditions for the industry in the relevant geographical area in applying this test.

61. Such agreements must also satisfy existing approval requirements for greenfields agreements, including the better off overall test, public interest test and that they must have been negotiated with the union or unions able to represent the industrial interests of a majority of the employees who will be covered by the agreement. When approving such agreements the Fair Work Commission will be required to note in its decision that the union or unions that were bargaining representatives for the negotiations will be covered by the agreement.

#### **Greenfields agreements - Data**

62. The following table provides a breakdown of greenfields agreements currently in operation from the department's Workplace Agreements Database. The data show that greenfields agreements are used in a broad range of industries but that the Construction industry is by far the biggest user of this type of agreement, with over 60 per cent of greenfields agreements being made in Construction<sup>8</sup>. Other larger users of greenfields agreements include Administrative and Support Services; Transport, Postal and Warehousing; Professional, Scientific and Technical Services; Manufacturing; and Mining.

63. The table shows that greenfields agreements in many industries provide more generous average annualised wage increases than for all enterprise agreements in the relevant industry. In a number of cases the difference is quite substantial, with greenfields agreements providing up to 1.7 per cent more than the average for all agreements.

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<sup>8</sup> Greenfield agreements account for approximately 16.7 per cent of current agreements in the Construction industry as at 30 September 2014.

**Table 6: Greenfields agreements wages outcomes by industry - 1 January 2011 to 30 September 2014**

| Industry  | Number of greenfields agreements | Percentage of greenfields agreements | Greenfields AAWI* | All agreements AAWI |
|---|----------------------------------|--------------------------------------|-------------------|---------------------|
| Construction                                    | 1,197                            | 63.5%                                | 4.8%              | 5.0%                |
| Administrative and Support Services             | 136                              | 7.2%                                 | 4.7%              | 4.0%                |
| Transport, Postal and Warehousing               | 114                              | 6.0%                                 | 4.6%              | 3.6%                |
| Professional, Scientific and Technical Services | 102                              | 5.4%                                 | 4.5%              | 4.0%                |
| Manufacturing                                   | 99                               | 5.3%                                 | 4.6%              | 3.4%                |
| Mining  | 73                               | 3.9%                                 | 4.3%              | 4.0%                |
| Rental, Hiring and Real Estate Services         | 45                               | 2.4%                                 | 4.6%              | 4.1%                |
| Other Services                                  | 35                               | 1.9%                                 | 4.9%              | 3.2%                |
| Wholesale Trade                                 | 22                               | 1.2%                                 | 4.8%              | 3.3%                |
| Electricity, Gas, Water and Waste Services      | 19                               | 1.0%                                 | 3.5%              | 3.5%                |
| Public Administration and Safety                | 14                               | 0.7%                                 | 4.3%              | 3.5%                |
| Accommodation and Food Services                 | 8                                | 0.4%                                 | 3.4%              | 2.9%                |
| Health Care and Social Assistance               | 6                                | 0.3%                                 | 2.9%              | 3.1%                |
| Information Media and Telecommunications        | 4                                | 0.2%                                 | 2.8%              | 3.3%                |
| Retail Trade                                    | 4                                | 0.2%                                 | 4.1%              | 3.0%                |
| Agriculture, Forestry and Fishing               | 3                                | 0.2%                                 | 3.3%              | 3.3%                |
| Arts and Recreation Services                    | 2                                | 0.1%                                 | 3.5%              | 3.2%                |
| Education and Training                          | 1                                | 0.1%                                 | -                 | 3.7%                |
| Financial and Insurance Services                | 1                                | 0.1%                                 | 4.6%              | 2.9%                |

\*Average annualised wage increase

Source: Department of Employment - Workplace Agreements Database

### Fair Work Amendment Bill 2014 – Right of entry

64. *The Coalition's Policy to Improve the Fair Laws* includes the commitment to make a number of amendments to the right of entry provisions, which are included in the Fair Work Amendment Bill 2014 and mainly seek to reflect the longstanding provisions in place in the various legislative schemes before the Fair Work Act commenced.

65. Under the Fair Work Act a permit holder has the right to enter a workplace to hold discussions if the union is entitled to represent the industrial interests of the employees at the workplace. The Bill will amend the rules so that a permit holder can enter a workplace for discussion purposes if the permit holder's union is covered by a relevant enterprise agreement or if the union is invited to send a representative to the workplace by an employee. The union must be eligible to represent the industrial interests of the employees, as is currently the case.

66. In the event that an employer requests proof of an invitation to the workplace, the Bill includes the capacity for a union to apply to the Fair Work Commission for an ‘invitation certificate’ to allow employees to remain anonymous. The certificate is not required if the employee is willing to identify themselves as inviting the union to the workplace.

67. The Bill also improves the Fair Work Commission’s ability to make orders to deal with disputes about excessive right of entry visits under section 505A of the Fair Work Act. The Bill also will require the Commission to take into account the cumulative impact of entries by all union visits to the relevant workplace. The Commission will continue to be required to have regard to fairness between the employer/s and union/s in such disputes.

68. In addition the Bill reinstates the location of discussions rules for right of entry purposes which applied prior to the changes made in 2013 by the *Fair Work Amendment Act 2013*. Under these arrangements, unions have the right to hold discussions with employees in the meal or break room if agreement on another room cannot be reached with the employer. The Bill will reinstate the requirement for a permit holder to comply with any reasonable request by the occupier to hold discussions in a particular room or area of the premises, as had been the case since 2006. The Bill provides a non-exhaustive list of circumstances where a request might be considered unreasonable, including if it is made with the intention of intimidating or discouraging persons from participating in discussions, or if the room is not fit for purpose.

69. Finally the Bill repeals the right of entry provisions which require employers to provide transport and/or accommodation for union officials seeking right of entry to some remote sites. These provisions were also introduced by the *Fair Work Amendment Act 2013*.

### **Fair Work Amendment Bill 2014 – Industrial action**

70. *The Coalition’s Policy to Improve the Fair Work Laws* includes the commitment to ensure that industrial action cannot be taken before bargaining for an enterprise agreement has commenced. The amendment was recommended by the Fair Work Act Review 2012 and was in response to the decision of the Full Court of the Federal Court in *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53. In that case the Full Court found that bargaining did not need to have commenced in order for a protected action ballot order to be made, which is a precursor to protected industrial action.

71. The Fair Work Amendment Bill 2014 will amend the Fair Work Act to provide that a bargaining representative cannot apply for a protected action ballot order unless there has been a ‘notification time’ in relation to a proposed agreement. Subsection 173(2) of the Fair Work Act currently provides that the ‘notification time’ for a proposed agreement is the time when:

- the employer agrees to bargain, or initiates bargaining for the agreement, or
- a majority support determination in relation to the agreement comes into operation, or
- a scope order in relation to the agreement comes into operation, or
- a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

72. The effect of the amendment is that protected industrial action can only be taken if bargaining for a proposed agreement has commenced.

### Fair Work Amendment (Bargaining Processes) Bill 2014

73. The Fair Work Amendment (Bargaining Processes) Bill 2014 implements the balance of the Government's commitments in relation to bargaining and was introduced into the House of Representatives on 27 November 2014. It is currently before the Senate. The Bill amends the Fair Work Act to:

- include a new requirement that productivity improvements at the workplace must have been discussed during bargaining before an enterprise agreement can be approved by the Fair Work Commission
- provide guidance and greater transparency in relation to the genuinely trying to reach an agreement test, which must be satisfied before the Fair Work Commission can grant a protected action ballot order, to ensure the applicant has at least attempted to have genuine and meaningful discussions with the employer, and
- provide that the Fair Work Commission cannot make a protected action ballot order where it is satisfied that an applicant's bargaining claim or claims are manifestly excessive or, if acceded to, would have a significant adverse impact on productivity.

### Fair Work Amendment (Bargaining Processes) Bill 2014 – Productivity

74. The Fair Work Amendment (Bargaining Processes) Bill 2014 includes an amendment to implement the Government's commitment to ensure workers and management consider productivity improvements when bargaining for an enterprise agreement. The Government was concerned to ensure that workplace productivity was at least considered in the course of bargaining.

75. The amendment will insert a new subsection 187(1A) into the Fair Work Act to require that the Fair Work Commission must be satisfied that productivity improvements at the workplace were discussed in the course of bargaining before an enterprise agreement can be approved. The amendment will not require the parties to reach agreement about improving productivity, or to include specific productivity clauses in their agreements. Instead, the Fair Work Commission will simply need to be satisfied that a discussion about improvements to productivity at the workplace had taken place.

### Productivity clauses in enterprise agreements - Data

76. The Workplace Agreements Database codes for clauses in enterprise agreements specifically targeted to improving productivity. Accumulated analysis of these clauses reveals that performance pay, training programs and flexible arrangement of hours are matters commonly identified by parties as being productivity-related. The Workplace Agreements Database codes for agreement clauses providing a commitment of any kind to productivity and separately codes for 'specific productivity measures', which identify specific policies, procedures and/or practices to improve productivity. Examples of enterprise agreement clauses that have been coded as productivity improvement clauses by the Workplace Agreements Database are provided at **Appendix D**.

77. The table below provides the most recent data available from the Workplace Agreements Database. It shows that 53.4 per cent of enterprise agreements included one or more clauses indicating a commitment to improve productivity, covering around 50 per cent of employees covered by an enterprise agreement. About 35 per cent of all agreements included a clause on specific productivity measures, covering around 30 per cent of employees covered by an enterprise agreement.

**Table 7: Productivity clauses in enterprise agreements by number of employees - 1 January 2011 to 30 September 2014**

| Clause  | Agreements | Agreements (%) | Employees | Employees (%) |
|---|------------|----------------|-----------|---------------|
| Commitment to improve productivity (includes specific productivity clauses) | 13,809     | 53.4%          | 1,675,116 | 49.6%         |
| Specific productivity clauses   | 8,960      | 34.7%          | 1,026,957 | 30.4%         |

Source: Department of Employment: Workplace Agreements Database

#### **Fair Work Amendment (Bargaining Processes) Bill 2014 – Industrial action**

78. Currently under the Fair Work Act a bargaining representative must apply for and obtain a protected action ballot order before protected industrial action can be taken. The orders enable a ballot of employees to be conducted to determine if they wish to take protected industrial action. A requirement for making a protected action ballot order is that the Fair Work Commission must be satisfied that the applicant has been and is genuinely trying to reach an agreement.

79. The Fair Work Amendment (Bargaining Processes) Bill 2014 inserts new subsection 443(1A) to provide a non-exhaustive list of matters that the Fair Work Commission must have regard to in determining whether employees are genuinely trying to reach an agreement before granting a protected action ballot order. The matters are:

- the steps taken by each applicant to try to reach an agreement
- the extent to which each applicant has communicated its claims in relation to the agreement
- whether each applicant has provided a considered response to proposals made by the employer, and
- the extent to which bargaining for the agreement has progressed.

80. The amendment will provide greater transparency as to what is needed to meet the genuinely trying to reach agreement test and is intended to help ensure that negotiations have progressed before the Fair Work Commission is able to make a protected action ballot order. Presently, applicants for protected action ballot orders (most often unions) provide the Commission with detailed witness statements that seek to establish its members are genuinely trying to reach agreement. The proposed amendments will provide guidance on which matters could be addressed in those statements to demonstrate ‘genuinely trying’.

81. The Bill further amends the Fair Work Act to provide a new requirement that the Fair Work Commission must not make a protected action ballot order if an employee claim is, or the claims

taken as a whole are, 'manifestly excessive, having regard to the conditions in the workplace and the industry in which the employer operates' or 'would have a significant adverse impact on productivity'.

## Appendix A: Note on enterprise agreement sampling methodology

The Workplace Agreements Database records around 250 data items against each agreement record.

Every year, the Workplace Agreements Database codes between 6,000-8,000 new agreements into the database. Where analysis uses only the already coded data items a census is used. However, where non-coded items are required for analysis, a sample is taken for a manual analysis of clauses.

Constructing a sample of agreements allows a much greater breadth of data to be produced, while directly addressing the exact concerns of stakeholders and still remaining mindful of department resources.

### Methodologies

When constructing a sample, at least 200 agreements are selected. When the relevant population is all current agreements (typically around 20,000 agreements), this accounts for 1% of agreements. This approach strikes a balance between a sample that is statistically valid, and the available staff resources.

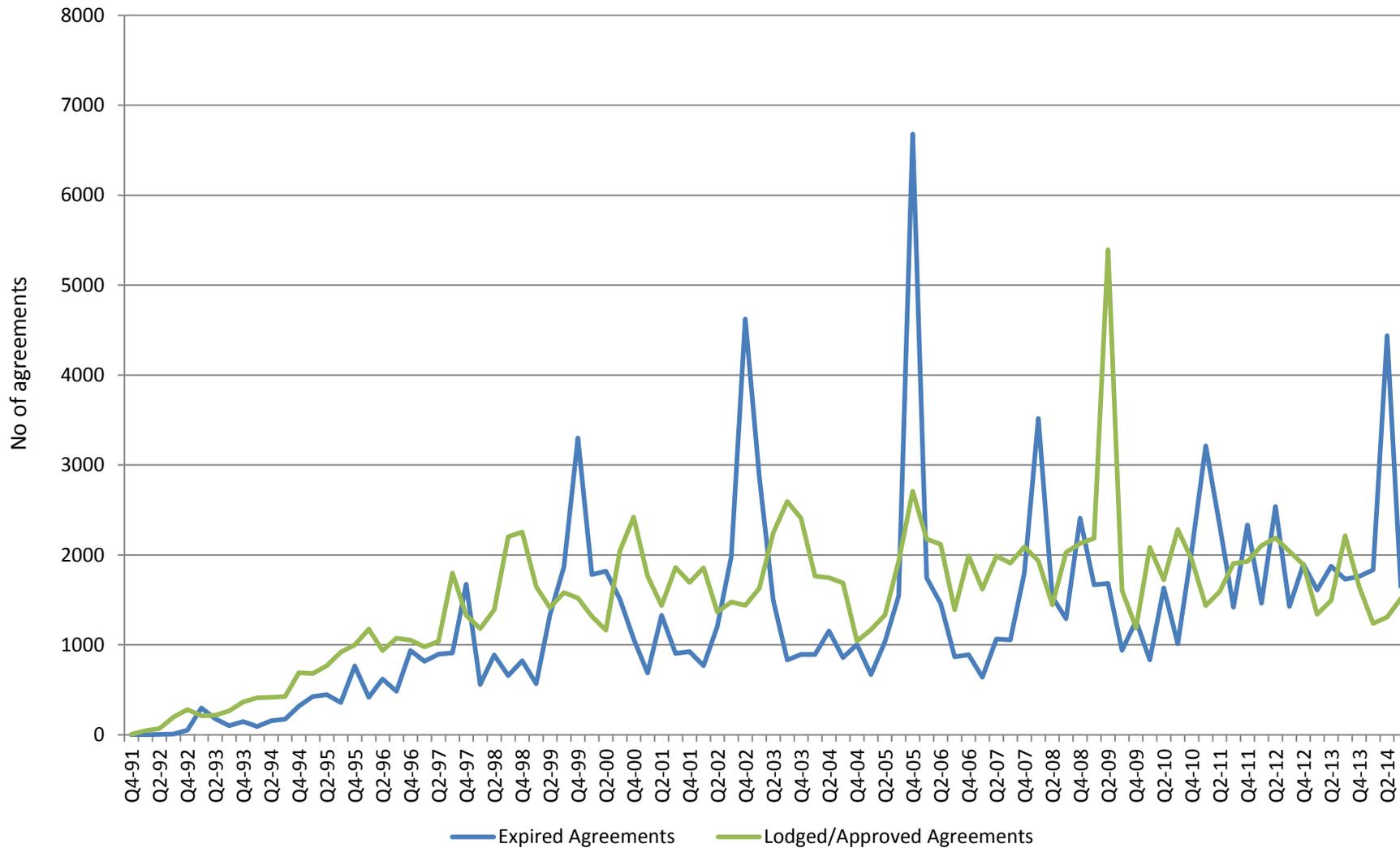
In general, stratified random sampling is undertaken. Industry and agreement size (in terms of employees covered) are considered to be two significant characteristics of agreements that can influence the analysis outcome. Agreements are divided into groups by industry and by agreement size. A proportionate sample is then randomly drawn from each subgroup. Progressive sampling is utilised when the analysis is undertaken over an extended period of time. The initial sample is drawn using stratified random sampling, and increases periodically to include new agreements. Progressive sampling enables the department to track trends over time, improve the efficacy and relevance of older data.

### Summary of two samples

The table below shows details of the two samples noted in the submission, including sample size, methodology, and a brief description of the agreement population they represent.

| <b>Sample name</b>   | <b>Number of agreements</b> | <b>Methodology (progressive/random)</b>  | <b>Pool of agreements from which sample was derived</b>                       |
|--|-----------------------------|--|---|
| Penalty rates in enterprise agreements                       | 216                         | Stratified random sampling: controlled for industry spread and number of employees covered | Agreements current at 30 June 2014 (20,754 in total)                          |
| Variation from modern award clauses in enterprise agreements | 200                         | Stratified random sampling: controlled for industry spread                                 | Agreements approved in the June and September quarter 2014 (2,824 agreements) |

Appendix B: Number of agreements approved versus number of agreements expiring by quarter – December quarter 1991- September quarter 2014



Source: Department of Employment - Workplace Agreements Database

## Appendix C: Incidence of contractor clauses in enterprise agreements by industry - 30 September 2014

| Industry (ANZSIC)                               | General contractor clause |                            |                               |                |                           |                              |
|---|---------------------------|----------------------------|-------------------------------|----------------|---------------------------|------------------------------|
|   | Agreements                | Agreements in industry (%) | Agreements with provision (%) | Employees      | Employees in industry (%) | Employees with provision (%) |
| Agriculture, Forestry and Fishing               | 18                        | 12.4%                      | 0.3%                          | 1,185          | 18.8%                     | 0.3%                         |
| Mining  | 83                        | 16.0%                      | 1.4%                          | 15,500         | 26.3%                     | 4.2%                         |
| Manufacturing                                   | 694                       | 24.7%                      | 11.7%                         | 51,245         | 27.6%                     | 14.0%                        |
| Electricity, Gas, Water and Waste Services      | 71                        | 18.9%                      | 1.2%                          | 26,979         | 47.2%                     | 7.4%                         |
| Construction                                    | 3,978                     | 55.6%                      | 67.3%                         | 61,899         | 45.5%                     | 16.9%                        |
| Wholesale Trade                                 | 103                       | 19.1%                      | 1.7%                          | 4,724          | 14.7%                     | 1.3%                         |
| Retail Trade                                    | 46                        | 13.3%                      | 0.8%                          | 27,050         | 9.5%                      | 7.4%                         |
| Accommodation and Food Services                 | 9                         | 1.9%                       | 0.2%                          | 1,270          | 0.8%                      | 0.3%                         |
| Transport, Postal and Warehousing               | 237                       | 18.2%                      | 4.0%                          | 64,181         | 41.7%                     | 17.5%                        |
| Information Media and Telecommunications        | 7                         | 5.1%                       | 0.1%                          | 631            | 1.3%                      | 0.2%                         |
| Financial and Insurance Services                | 3                         | 2.0%                       | 0.1%                          | 1,134          | 0.8%                      | 0.3%                         |
| Rental, Hiring and Real Estate Services         | 103                       | 29.3%                      | 1.7%                          | 1,462          | 15.7%                     | 0.4%                         |
| Professional, Scientific and Technical Services | 129                       | 24.0%                      | 2.2%                          | 5,915          | 17.2%                     | 1.6%                         |
| Administrative and Support Services             | 234                       | 33.5%                      | 4.0%                          | 8,886          | 17.1%                     | 2.4%                         |
| Public Administration and Safety                | 71                        | 13.2%                      | 1.2%                          | 30,360         | 19.4%                     | 8.3%                         |
| Education and Training                          | 17                        | 2.6%                       | 0.3%                          | 49,117         | 14.0%                     | 13.4%                        |
| Health Care and Social Assistance               | 14                        | 0.8%                       | 0.2%                          | 7,126          | 1.9%                      | 1.9%                         |
| Arts and Recreation Services                    | 13                        | 8.5%                       | 0.2%                          | 5,145          | 13.0%                     | 1.4%                         |
| Other Services                                  | 77                        | 17.1%                      | 1.3%                          | 3,241          | 9.0%                      | 0.9%                         |
| <b>Total</b>                                    | <b>5,907</b>              | <b>31.0%</b>               | <b>100.0%</b>                 | <b>367,050</b> | <b>15.8%</b>              | <b>100.0%</b>                |

| Industry (ANZSIC)                               | Contractor clause – Rates of pay |                            |                               |                |                           |                              |
|---|----------------------------------|----------------------------|-------------------------------|----------------|---------------------------|------------------------------|
|   | Agreements                       | Agreements in industry (%) | Agreements with provision (%) | Employees      | Employees in industry (%) | Employees with provision (%) |
| Agriculture, Forestry and Fishing               | 7                                | 4.8%                       | 0.3%                          | 540            | 8.6%                      | 0.4%                         |
| Mining  | 21                               | 4.0%                       | 1.0%                          | 3,215          | 5.4%                      | 2.4%                         |
| Manufacturing                                   | 272                              | 9.7%                       | 12.7%                         | 21,446         | 11.5%                     | 16.2%                        |
| Electricity, Gas, Water and Waste Services      | 27                               | 7.2%                       | 1.3%                          | 10,261         | 17.9%                     | 7.8%                         |
| Construction                                    | 1,444                            | 20.2%                      | 67.5%                         | 26,230         | 19.3%                     | 19.8%                        |
| Wholesale Trade                                 | 32                               | 5.9%                       | 1.5%                          | 2,256          | 7.0%                      | 1.7%                         |
| Retail Trade                                    | 14                               | 4.1%                       | 0.7%                          | 277            | 0.1%                      | 0.2%                         |
| Accommodation and Food Services                 | 2                                | 0.4%                       | 0.1%                          | 449            | 0.3%                      | 0.3%                         |
| Transport, Postal and Warehousing               | 97                               | 7.5%                       | 4.5%                          | 50,710         | 33.0%                     | 38.3%                        |
| Information Media and Telecommunications        | 1                                | 0.7%                       | 0.0%                          | 13             | 0.0%                      | 0.0%                         |
| Financial and Insurance Services                | 2                                | 1.3%                       | 0.1%                          | 138            | 0.1%                      | 0.1%                         |
| Rental, Hiring and Real Estate Services         | 24                               | 6.8%                       | 1.1%                          | 374            | 4.0%                      | 0.3%                         |
| Professional, Scientific and Technical Services | 39                               | 7.2%                       | 1.8%                          | 1,576          | 4.6%                      | 1.2%                         |
| Administrative and Support Services             | 89                               | 12.8%                      | 4.2%                          | 3,184          | 6.1%                      | 2.4%                         |
| Public Administration and Safety                | 26                               | 4.8%                       | 1.2%                          | 8,023          | 5.1%                      | 6.1%                         |
| Education and Training                          | 3                                | 0.5%                       | 0.1%                          | 2,115          | 0.6%                      | 1.6%                         |
| Health Care and Social Assistance               | 3                                | 0.2%                       | 0.1%                          | 166            | 0.0%                      | 0.1%                         |
| Arts and Recreation Services                    | 2                                | 1.3%                       | 0.1%                          | 156            | 0.4%                      | 0.1%                         |
| Other Services                                  | 35                               | 7.8%                       | 1.6%                          | 1,214          | 3.4%                      | 0.9%                         |
| <b>Total</b>                                    | <b>2,140</b>                     | <b>11.2%</b>               | <b>100.0%</b>                 | <b>132,343</b> | <b>5.7%</b>               | <b>100.0%</b>                |

| Industry (ANZSIC)                               | Contractor clause – Restrictions on contractors |                            |                               |                |                           |                              |
|---|---|----------------------------|-------------------------------|----------------|---------------------------|------------------------------|
|   | Agreements                                      | Agreements in industry (%) | Agreements with provision (%) | Employees      | Employees in industry (%) | Employees with provision (%) |
| Agriculture, Forestry and Fishing               | 9   | 6.2%                       | 0.2%                          | 583            | 9.2%                      | 0.2%                         |
| Mining  | 32  | 6.2%                       | 0.8%                          | 5,830          | 9.9%                      | 2.2%                         |
| Manufacturing                                   | 447   | 15.9%                      | 11.1%                         | 34,971         | 18.8%                     | 13.4%                        |
| Electricity, Gas, Water and Waste Services      | 48  | 12.8%                      | 1.2%                          | 20,855         | 36.5%                     | 8.0%                         |
| Construction                                    | 2,818   | 39.4%                      | 70.0%                         | 39,831         | 29.3%                     | 15.2%                        |
| Wholesale Trade                                 | 63  | 11.7%                      | 1.6%                          | 2,678          | 8.3%                      | 1.0%                         |
| Retail Trade                                    | 29  | 8.4%                       | 0.7%                          | 19,937         | 7.0%                      | 7.6%                         |
| Accommodation and Food Services                 | 1   | 0.2%                       | 0.0%                          | 438            | 0.3%                      | 0.2%                         |
| Transport, Postal and Warehousing               | 107   | 8.2%                       | 2.7%                          | 52,532         | 34.1%                     | 20.1%                        |
| Information Media and Telecommunications        | 5   | 3.6%                       | 0.1%                          | 287            | 0.6%                      | 0.1%                         |
| Financial and Insurance Services                | 1   | 0.7%                       | 0.0%                          | 98             | 0.1%                      | 0.0%                         |
| Rental, Hiring and Real Estate Services         | 93  | 26.4%                      | 2.3%                          | 1,300          | 14.0%                     | 0.5%                         |
| Professional, Scientific and Technical Services | 91  | 16.9%                      | 2.3%                          | 3,237          | 9.4%                      | 1.2%                         |
| Administrative and Support Services             | 168   | 24.1%                      | 4.2%                          | 4,953          | 9.6%                      | 1.9%                         |
| Public Administration and Safety                | 39  | 7.2%                       | 1.0%                          | 17,508         | 11.2%                     | 6.7%                         |
| Education and Training                          | 14  | 2.1%                       | 0.3%                          | 44,654         | 12.7%                     | 17.1%                        |
| Health Care and Social Assistance               | 6   | 0.4%                       | 0.1%                          | 6,062          | 1.6%                      | 2.3%                         |
| Arts and Recreation Services                    | 7   | 4.6%                       | 0.2%                          | 4,773          | 12.0%                     | 1.8%                         |
| Other Services                                  | 45  | 10.0%                      | 1.1%                          | 1,304          | 3.6%                      | 0.5%                         |
| <b>Total</b>                                    | <b>4,023</b>                                    | <b>21.1%</b>               | <b>100.0%</b>                 | <b>261,831</b> | <b>11.3%</b>              | <b>100.0%</b>                |

Source: Department of Employment – Workplace Agreements Database

## Appendix D: Examples of productivity clauses in enterprise agreements

### Examples of general productivity clauses in enterprise agreements (randomly selected)

#### **AE408222 - Compass Group - ESS Offshore Oil & Gas (Woodside Platforms) Enterprise Agreement 2013**

**Approval date:** 21/05/2014  
**Employees:** 70  
**Industry:** Accommodation and Food Services

#### **OBJECTIVES**

The principle objective of this Agreement is to continue to substantially improve the operation efficiency throughout the ESS operations on WEL's Goodwyn A, North Rankin hub and Angel offshore platforms. This requires a joint commitment of the Company and the Employees to achieve continual improvement to process and procedures and measurable gains in efficiency by the:

[...]

d) Development of a client focused working environment to ensure contractual standards are met, with the real involvement of Employees in improving efficiency and productivity, through ongoing mutual consultation and cooperation, and determining fair rewards for achievement of targets.

#### **AE408447 - Crescent Head Community Pre-School Employee Collective Agreement 2014**

**Approval date:** 03/06/2014  
**Employees:** 5  
**Industry:** Education

#### **Clause 7 Variation of the Agreement**

The parties may vary this Agreement by consent, in accordance with the relevant provisions of *Fair Work Act* to:

7.1 Ensure that the terms of this Agreement continue to be appropriate to meet operational requirements, the needs of clients and employees and are consistent with the delivery of optimum levels of productivity and service delivery.

#### **AE408464 - TransGrid Employees Agreement 2013**

**Approval date:** 06/06/2014  
**Employees:** 979  
**Industry:** Electricity, Gas, Water Supply and Waste Services

#### **5. Consultative Mechanism**

TransGrid employees, unions and employee representatives commit to supporting and contributing positively to workplace change and improvement and agree not to unduly delay or frustrate the process described within this clause.

TransGrid seeks to continually improve its work processes and where possible to adopt the best practice in terms of efficiency and productivity in all work areas. TransGrid's employees and their representatives commit to supporting and contributing positively to the process of workplace change and improvement and agree not to unduly delay or frustrate the process described within this clause.

Examples of specific productivity clauses in enterprise agreements (randomly selected)

**AE406752** - Publicis Loyalty Pty Ltd (Sydney) - Enterprise Bargaining Agreement (EBA), for Corporate Sales Teleservicing (CST) 2013

**Employees:** 30  
**Industry:** Administrative and Support Services  
**Approval Date:** 7/02/2014

In addition to the base salary increase provided for in clause 6.2, Employees may be eligible for an annual increase of a maximum 3% of base salary based on performance. Performance increases will be paid at the discretion of the Company and will be based on the Employee's performance against a set of agreed criteria. Employee's must have completed one month of full KPI's to be eligible and increase will be pro rata'd accordingly.

**AE408047** - Bayside Fire Protection Pty Ltd and CEPU - Plumbing Division (Vic) Fire Protection Agreement Victoria 2011 – 2015

**Employees:** 2  
**Industry:** Construction  
**Approval Date:** 29/05/2014

While the schedule of RDO's prescribed will be observed, the Enterprise and the employee/s and the employee representative acknowledge that there may be occasions when a more flexible arrangement for the taking of RDO's may be appropriate. Such an occasion would be expected to improve productivity and enhance the employment prospects of the employees.

**AE406868** - WACO KWIKFORM LTD CERTIFIED AGREEMENT FOR YALLOURN POWER STATION AND OPENCUT MINE VICTORIA, 2012

**Employees:** 12  
**Industry:** Construction  
**Approval Date:** 13/02/2014

In order to increase efficiency and productivity, QA is seen as an area where the workforce can be given greater appreciation of client requirements. It will give greater appreciation of necessary standards for isolated tasks and confirm the purpose for what was otherwise seen as unnecessary requirements. Education in this area will be expanded where necessary. Specific training exercises will be implemented. Employees will be familiarised with the content of check lists, Job Cards, Inspection and Test Plans, Identification Tags and non-conformance reports. All classifications will be made responsible for inspecting their own work, and introducing self-assurance of quality control and sign off their own work accordingly.

**AE407468** - Atlas Services Group Australia Pty Ltd Offshore Construction Projects Agreement 2014

**Employees:** 8  
**Industry:** Administrative and Support Services  
**Approval Date:** 28/03/2014

As the Employer is a provider of on-hired labour to its clients, this roster is an indicative roster and may be changed or varied to align with the client's own roster system or to take in to account operational requirements of the Facility. The parties to this Agreement may change the work cycles

by agreement depending on the duration of the project for the best outcome productivity wise and economical outcome for that project.

**AE407964** - North West Commercial Industries (QLD) Pty Ltd / CFMEU Collective Agreement 2014 - 2017

**Employees:** 14  
**Industry:** Construction  
**Approval Date:** 6/05/2014

The parties recognise that in order to increase the efficiency and productivity of the Company a commitment to structured training and skill development is required. Accordingly the Company agrees to:

- a) Provide Employees with the paid opportunity to acquire additional skills through appropriately structured training based on nationally endorsed competency standards and curriculum and
- b) Encourage Employees to seek formal recognition of skills including recognition of prior learning (RPL).

**AE407202** - Olex Australia Victorian (Tottenham and Lilydale) Sites and National Union of Workers 2014 Collective Agreement

**Employees:** 323  
**Industry:** Manufacturing  
**Approval Date:** 7/03/2014

The parties to this Agreement recognise that in order to increase the efficiency, productivity and international competitiveness of industry, a greater commitment to training and skill development is required. Accordingly, the parties commit themselves to:

- developing a more highly skilled and flexible workforce;
- providing employees with career opportunities through appropriate training to acquire additional skills;
- removing barriers to the utilisation of skills acquired.

**AE407371** - iiNet Employee Partnership Agreement for Customer Service Staff (2014)

**Employees:** 1072  
**Industry:** Information Media and Telecommunications  
**Approval Date:** 21/03/2014

11.5 'At risk' remuneration - Performance Bonus

(a) Subject to the conditions outlined at clause 11.5(b), some Employees may be entitled to a performance bonus, based upon the Employee's performance against performance criteria determined by iiNet. Any performance bonus payable under this clause is in addition to the Employee's Remuneration payable under clause 11.2, but only where approved by iiNet in its absolute discretion.

(b) The following eligibility conditions apply for a performance bonus: The Employee must have been employed for the continuous period over which the performance criteria are measured and the performance bonus is payable; If the Employee only partially achieves the predetermined performance criteria, iiNet may at its discretion pay a partial performance bonus; and In the event that there is any dispute about the Employee's achievement of the predetermined performance

criteria, or about the amount of any performance bonus, the amount of the bonus will be negotiated in good faith but payment of any performance bonus will be at iiNet's discretion.

**AE406255 - St John of God Health Care - ANF - Registered Nurses' and Midwives' Agreement 2013**

**Employees:** 2159  
**Industry:** Health Care and Social Assistance  
**Approval Date:** 8/01/2014

The parties to this Agreement recognise that the wage increases and other benefits contained in this Agreement can only be sustained through improvements in productivity. Accordingly the Caregivers covered by this Agreement commit to actively cooperate in implementing changes in work and staffing practices designed to improve productivity (including matching staffing levels to patient needs), especially at the department, ward or unit level.

**AE406329 - GrainCorp Operations Ltd. (Sunshine, Portland & Geelong) and National Union of Workers Comprehensive Agreement 2013**

**Employees:** 153  
**Industry:** Transport, Postal and Warehousing  
**Approval Date:** 10/01/2014

11. CONTINUOUS IMPROVEMENT AND CONSULTATIVE PROCESS 11.1 The parties are committed to the implementation of continuous improvement in GrainCorp Operations Ltd for the life of the Agreement. Continuous improvement is a process of achieving and implementing incremental change by Agreement to improve the effectiveness and efficiency of the Company's operations. The Company would see this as providing flexibility, subject to Agreement to implement incremental changes in working arrangements that will help it deal with the contingencies of the market in which it operates. 11.2 The operation of this clause shall be given effect through the establishment of a consultative committee. The consultative committee will meet as required by either party, but not less than twice per year.

**AE406722 - Ray White Paddington Enterprise Agreement 2014**

**Employees:** 45  
**Industry:** Rental, Hiring and Real Estate Services  
**Approval Date:** 5/02/2014

Performance Review and Sales Targets

31.1 The Employer will provide the Employee with a position description that will detail expected key performance indicators (KPI's) for the role.

31.2 The KPI's will include set targets that the Employee is expected to achieve including but not limited to, prospecting activity, appraisals, listing presentations, listings, sales, vendor paid advertising and data base management and growth.

31.3 It is an expectation that the Employee will achieve all set KPI's as prescribed in clause 31.2 and any other performance targets the Employer deems reasonable for the position.

31.4 Performance will be monitored and managed by the Employers performance management systems and will be reviewed from time to time.

31.5 The Employer will provide the Employee with all required training to assist them in achieving set KPI's.