



POLICY
INFLUENCE
REFORM

ENTERPRISE BARGAINING

Concurrent Session Paper

THE AUSTRALIAN INDUSTRY GROUP
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OVERVIEW

This paper has been prepared for the Enterprise Bargaining Concurrent Session at Ai Group's 2022 Annual PIR Conference.

The paper considers the following current enterprise bargaining issues and developments:

- Enterprise bargaining is in a state of decline. Many employers continue with the process due to industrial pressures but often do not see value from a productivity perspective.
- The Labor Government is planning to introduce some reforms to enterprise bargaining laws.
- There have been a number of recent decisions of the Federal Court and the Fair Work Commission (**FWC**), concerning enterprise agreements, which have significant implications for employers.
- Average enterprise agreement wage outcomes are trending upwards.

Various questions are set out in this paper, for potential discussion at the PIR Enterprise Bargaining Concurrent Session.

DECLINE IN ENTERPRISE BARGAINING

Facts and figures pertaining to the state of enterprise bargaining

The appeal of enterprise bargaining for the average employer has decreased significantly since the bargaining system was established. Employers are now far less likely to make an application for approval of an enterprise agreement than in the past.

The Attorney-General's Department's *Trends in Federal Enterprise Bargaining Report* (March Qtr 2022) reveals that 24% fewer agreements were approved in the March quarter of 2022 than in the March quarter of 2019. Over that same period, the average duration for agreements approved in the March quarter dropped from 3 years to 2.4 years. Employees

covered also dropped by over 32% in comparison to the March quarter 2019.

Although current agreements (i.e. those that had not yet reached their nominal expiry date) increased from 10,577 at the end of the March quarter 2019 to 10,776 at the end of the March quarter 2022, the number of employees covered by such agreements dropped by over 20%.

The number of current agreements covering a union increased between the March quarter 2019 and the March quarter 2022, and the number of agreements with no union covered dropped over the same period.

The following table demonstrates the declining interest from employers in pursuing an enterprise agreement to cover their workforce. Reproduced below is the number of applications lodged under s.185 for a single-enterprise agreement in each FWC reporting period since 2010:

Reporting period	S. 185 Applications to approve a single-enterprise agreement
2010/11	6,493
2011/12	7,812
2012/13	6,333
2013/14	5,945
2014/15	5,449
2015/16	5,238
2016/17	5,474
2017/18	5,102
2018/19	4,694
2019/20	3,526
2020/21	3,419

The General Manager of the FWC’s recently released report into developments in making enterprise agreements under the FW Act for the 2018-21 reporting period further evidenced a decline in agreement making. The report noted:

In the current reporting period, there were fewer enterprise agreements approved (12,307 compared with 13,449) and employees covered (1,942,329 compared with 2,129,508) than the previous reporting period.

The General Manager’s report stated that there were fewer agreements approved across most industries in the 2018-21 reporting period than the previous reporting period and the number of employees covered by enterprise agreements declined in this reporting period for most industries.

The report noted that most agreements approved in the current reporting period were in construction and manufacturing industries, which accounted for 54.4 per cent of all agreements approved.

The following table has been extracted from the General Manager's Report:

Number of enterprise agreements approved per reporting period, by industry		
	2015–18	2018–21
Agriculture, forestry and fishing	143	162
Mining	322	358
Manufacturing	2,224	2,088
Electricity, gas, water and waste services	381	402
Construction	4,363	4,613
Wholesale trade	506	307
Retail trade	166	161
Accommodation and food services	235	94

Transport, postal and warehousing	1,059	1,185
Information media and telecommunications	85	72
Financial and insurance services	117	75
Rental, hiring and real estate services	194	81
Professional, scientific and technical services	333	158
Administrative and support services	414	246
Public administration and safety	579	435
Education and training	657	570
Health care and social assistance	1,161	930
Arts and recreation services	141	132
Other services	369	238
Total	13,449	12,307

Reasons expressed for withdrawing from the enterprise bargaining system

Employers deciding not to pursue applications for approval of enterprise agreements or declining to continue with existing applications may have multiple reasons. Some commentators have suggested the following common reasons:

- Employers are not finding any value in the enterprise bargaining process and prefer to strike appropriate bargains with individual employees.
- Employers have found the FWC's current approach to approving enterprise agreements to be technically onerous and there is the risk that an agreement will not be approved or will be appealed and overturned.

- Enterprise bargaining has little to offer employers given the application of the Better Off Overall Test (**BOOT**) whereby no employee can be disadvantaged in comparison to the relevant modern award.
- Unions have more to gain from enterprise bargaining than employers, and employers have little incentive to bargain where a relevant union is not initiating the process.
- The cost of enterprise bargaining is prohibitive, particularly where it involves industrial action, requires technical expertise and/or is protracted.

Over the past couple of years, a number of major employers have elected not to proceed with enterprise agreement making. Examples of this include:

- In March 2020, Bunnings withdrew a proposed new enterprise agreement covering 37,000 staff after waiting almost a year for the Commission to approve it.
- In December 2019, McDonalds withdrew its proposed enterprise agreement and switched its 109,000 workers to the underpinning award ending a series of enterprise agreements with the Shop, Distributive and Allied Employees Association.
- In March 2018, Domino's Pizza decided not to pursue approval of a new enterprise agreement to cover its workforce and opted for its 18,000 strong workforce to remain on the *Fast Food Industry Award 2020*.

DISCUSSION QUESTIONS

- 1. Does your business see scope for productivity improvements through enterprise bargaining?**
- 2. Does your business only continue to engage in enterprise bargaining due to union pressure or expectations?**

THE IMPACT OF INFLATION ON BARGAINING PRACTICES AND OUTCOMES

High inflation and bargaining strategies

The latest CPI figures reveal a 6.1% change in CPI from June 2021 to June 2022. The most significant price rises were New dwelling purchases by owner-occupiers (+5.6%), Automotive fuel (+4.2%) and Furniture (+7.0%).

The lift in CPI coincides with a historically low unemployment rate which remained at 3.5% (seasonally adjusted) in June 2022 and an increase in the participation rate to 66.8% in the same month.

These conditions have commenced impacting upon union claims in the enterprise bargaining context. Several unions have announced wage claims of 5 to 6 per cent a year to 'prevent real wage cuts'.

Unusually high CPI figures have resulted in a jump in pay rates for those enterprise agreements that have linked annual increases to inflation. Similarly, those enterprise agreements which linked wage rises to the FWC's annual wage review decision have been hit by the substantial increase decided upon this year. Some agreements with wage increases pegged to CPI in a specified quarter or region have seen higher increases – for example, an agreement which tied wage rises to Perth's March quarter annual CPI saw increases of up to 8%.

Some unions are using the Commission's decade high minimum pay increase to justify substantial pay claims.

In response to commentary from the RBA regarding the risk of a 'wage price spiral', the Labor Government has accepted that workers may need to accept a real wage cut to prevent inflation from being entrenched. However, unions have rejected this idea and indicated that they will continue to push for annual pay rises of 5 to 6 percent in negotiations with employers.

Some employers are supplementing enterprise agreement wage increases with significant one-off payments to avoid locking in high wage rates for the future, particularly given that CPI is projected to fall next year.

Wage increases in the enterprise bargaining system

On 30 June, the Attorney-General's Department released its *Trends in Federal Enterprise Bargaining Report* for the March 2022 quarter. Average annualised wage increases (**AAWI**) for enterprise agreements approved in the quarter are summarised in the table below.

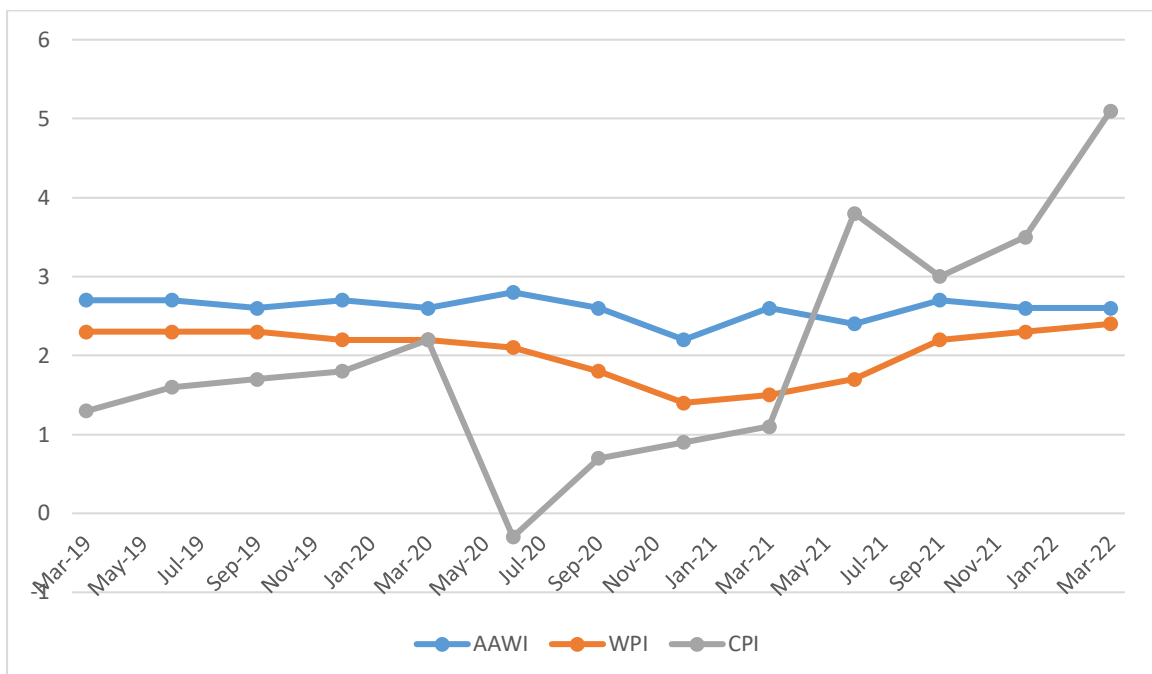
Industry Sector or Type of Agreement	AAWI (%) for agreements approved in the March 2022 Qtr	Change from December 2021 Qtr (%)
All sectors	2.6	Same
Private sector	2.7	Same
Public sector	2.5	Up 0.2
Manufacturing	2.7	Up 0.2
Metals manufacturing	2.9	Up 0.2
Non-metals manufacturing	2.7	Up 0.3
Construction	3.3	Down 0.7
Mining	2.5	Down 0.3
Wholesale trade	2.8	Up 0.3
Retail trade	2.5	Down 0.1
Accommodation and food services	2.4	Down 1.1
Transport, postal & warehousing	2.7	Up 0.4
Information media and telecommunications	2.9	Up 0.8
Professional, scientific and technical services	3.1	Up 0.8
Administrative and support services	4.7	Up 0.9
Health care and social assistance	2.6	Up 0.2

Single enterprise non-greenfields	2.6	Up 0.1
Single enterprise greenfields	3.9	Up 0.5
Union/s covered	2.6	Same
No Union/s covered	2.9	Up 0.2

It can be seen that the latest figures for the March 2022 quarter reveal relatively subdued AAWI for enterprise agreements in both the public and private sectors. The AAWI for enterprise agreements approved in the federal system in the March quarter 2022 was 2.6 per cent. It was also 2.6 per cent in the December quarter 2021, as well as the March quarter 2021.

For all current enterprise agreements as at 31 March 2022, the AAWI was 2.6%, unchanged from the March 2021 quarter and the December 2021 quarter.

The following table compares AAWI in approved agreements, ABS Wage Price Index (WPI) and CPI from the March qtr 2019 to the march qtr 2022:



As the table indicates, enterprise bargaining trends are yet to respond to the sudden spike in CPI.

DISCUSSION QUESTIONS

4. How have union bargaining claims changed since the recent increase in the CPI?
5. How has the CPI increase impacted employers' bargaining strategies?
6. What approach are businesses taking or considering regarding the structure of wage increases in enterprise agreements?

THE NEW GOVERNMENT'S PLANS TO REFORM THE ENTERPRISE BARGAINING SYSTEM

The Federal Government has announced that it is considering what changes should be made to Australia's enterprise bargaining laws, and this topic is likely to be discussed at the Jobs and Skills Summit which will be held on 1 and 2 September 2022.

At this stage, the Government has not identified what changes it proposes to the enterprise bargaining laws.

Labor's 'Same Job, Same Pay' policy will impact upon bargaining. Labor's *Secure Australian Jobs Plan* states:

A Labor government will uphold the principle that if you work the same job, you should get the same pay.

Labor will ensure that workers employed through labour hire companies receive no less than workers employed directly.

We have seen too many examples of companies across a variety of industries deliberately using labour hire to undercut the negotiated pay and conditions of workers who are employed directly.

For example, coal mine workers employed through labour hire being given full time 12-month rosters fixed in advance but employed as casuals on a fixed, all-inclusive hourly

rate. They work side by side with directly employed permanent full-time workers, doing the same work for the same hours, on the same roster with the same skills – but being paid around 30-40 percent less.

As casuals doing the same work with the same qualifications, they should have been paid more – the same hourly rate plus the 25 percent casual loading.

Labor will ensure that workers employed through labour hire or other employment arrangements such as outsourcing will not receive less pay than workers employed directly.

The Australian Labor Party's draft national platform has identified other policies which may potentially be implemented and have a significant impact on the enterprise bargaining system in Australia:

- Preventing the unilateral termination of enterprise agreements that reduce employees' entitlements.
- Termination of the remaining "WorkChoices agreements".
- A requirement that enterprise agreements are reached with a representative cohort of employees.
- Facilitating multi-employer collective bargaining, particularly for low paid employees.

Ai GROUP PROPOSALS TO ADDRESS ENTERPRISE BARGAINING PROBLEMS

In various policy documents, Ai Group has put forward proposals to address key problems with the current enterprise bargaining laws. Ai Group proposals include:

- Simplifying the BOOT by ensuring that hypothetical types and patterns of work, that are unlikely to be engaged in, are not taken into account.

- Simplifying the requirements for the FWC to be satisfied that genuine agreement has been reached.
- Simplifying the requirement for employers to explain the terms of a proposed enterprise agreement to employees prior to the vote.
- Clarifying the cohort of casual employees who are entitled to vote on a proposed agreement.

The above issues were all addressed in the former Government's IR Omnibus Bill. The enterprise bargaining provisions in the Bill were not passed by Parliament.

DISCUSSION QUESTIONS

- 7. What reforms to bargaining laws would be worthwhile?**
- 8. What would be the impact of the Government's 'same job, same pay' policy, including on bargaining?**

TERMINATION OF ENTERPRISE AGREEMENTS

The unions are pressing for the FW Act to be amended to remove an employer's ability to apply to the FWC for an enterprise agreement to be terminated after the nominal expiry date, other than in circumstances where all parties agree. The Labor Government has expressed interest in this issue.

It is important to understand the facts.

Nearly all applications made to terminate enterprise agreements are not contested. Also, of the contested matters, most applications are made by unions and employees, not employers.

In a submission made to a [Senate inquiry](#) in 2017, the FWC reported that less than 3% of applications made to terminate enterprise agreements in 2015/16 were contested by one or more parties (see paragraphs 75 and 76 of the submission).

Unions like to argue that applications by employers to terminate enterprise agreements are common, but this is not supported by the facts. Applications to terminate enterprise agreements have not increased over the past 6 years as demonstrated by the following table which includes data from the FWC’s annual reports. All of the s.222 applications relate to agreements terminated by consent between the parties. The number of applications under s.225 have fallen since 2015, and nearly all of these applications have not been contested.

Year	Type of application	Number of applications
2015-16	s.225	311
	s.222	92
2016-17	s.225	303
	s.222	97
2017-18	s.225	388
	s.222	130
2018-19	s.225	263
	s.222	221
2019-20	s.225	323
	s.222	57
2020-21	s.225	270
	s.222	60

There are a very small number of cases where enterprise agreements have been terminated by the FWC in contested proceedings but exceptional circumstances existed in each of these cases.

There have been a few recent applications, including the following, but it is not uncommon for applications to be withdrawn if agreement is reached with the relevant union/s on the terms of a new enterprise agreement:

- In January 2022, Qantas applied to the Commission to terminate its enterprise agreement for long-haul flight crew, after a new agreement had not been reached with more flexible roster controls.
- In March 2022, Victorian textile company Tuftmaster Carpets applied to terminate its enterprise agreement. The agreement reportedly provided 70-week redundancy entitlements and imposed hiring restrictions for casuals and fixed-term contracts.
- In October 2021, Patrick Terminals applied to terminate its MUA enterprise agreement which allowed the union to approve all new recruits.
- In January 2022, Svitzer – Australia’s largest tug boat operator – applied to terminate its enterprise agreement with the maritime unions. The agreement imposed various restrictions on rosters and recruitment.

DISCUSSION QUESTION

- 9. Are any changes needed to the provisions of the FW Act relating to the termination of enterprise agreements?**

UNION PROPOSALS FOR INDUSTRY BARGAINING

Unions often argue in support of an industry bargaining system which Ai Group has strongly and consistently opposed.

Overseas countries that have an industry bargaining system do not have an award system.

Australia’s modern award system provides a very comprehensive set of legally enforceable wage rates and conditions of employment at the industry level. Awards are constantly updated by the FWC, and the FW Act requires that awards remain fair and relevant. What would be the point of having an award in an industry if an industry agreement overrode that award for employers and employees throughout the industry?

In addition, the unions make no secret of the fact that they want the right to organise industrial action at the industry level, as part of their proposed industry bargaining system. If such a system was ever implemented, it would not be long before the Australian economy was crippled by strikes across the construction, maritime, mining, manufacturing, transport and other industries. These strikes would inflict widespread hardship on businesses, workers and the broader community.

The unions propose that industry agreements be negotiated at the industry level by unions and presumably some employer representatives. These days unions represent less than 10 per cent of employees in the private sector, and there are typically a number of employer groups with members in each industry. No union or group of employers has a legitimate mandate to negotiate a 'one-size-fits all' outcome to be imposed on thousands of employers and hundreds of thousands of employees.

Industry agreements impede innovation and best practice employee relations. They stifle productivity and competitiveness.

RECENT ENTERPRISE BARGAINING DECISIONS

Meaning of 'genuine new enterprise' for the purposes of a greenfields agreement:

Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2)
[2022] FCAFC 55

On 7 April 2022, the Full Court of the Federal Court overturned a decision of a Full Bench of the FWC which involved an application for a greenfields agreement that had been made between Busways and the Transport Workers' Union of Australia (**TWU**).

In this case, Busways had tendered to provide a bus service that had previously been provided by the State Transit Authority of NSW (**STA**). The Rail, Tram and Bus Industry Union (**RTBU**) contended that the Agreement did not relate to a 'genuine new enterprise' as the business, project, activity or undertaking of running passenger bus services was not new. The STA has been conducting those routes for many years.

The Full Bench of the FWC rejected the RTBU's argument. It said the simple fact that Busways was taking over the provision of bus services on the same routes as STA did not mean the agreement did not relate to a genuine new enterprise. The business of providing passenger bus services in the relevant regions was new to the employing entity that was party to the agreement. It was also distinct in that the privately owned and operated bus services that would be established by the successful tenderer would be bus services operating for profit. This was not the same case with STA.

The FWC Full Bench decision was overturned by the Federal Court in *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2)* [2022] FCAFC 55. The Court decided that the enterprise agreement sought by Busways did not relate to a 'genuine new enterprise'.

Bromberg J (in agreement with Wheelahan J) said that the word 'new', like most expressions, takes its colour from its surroundings. He said:

The context provided by s 172(2)(b) is that the adjective "new" is applied to an enterprise that a person or persons "are establishing or propose to establish". A "new" enterprise must therefore be an enterprise which is not established (i.e not in existence) but is in the process of being established or which is proposed to be established. That is, an enterprise that is being or will be put into existence. That context demonstrates that the word "new" is used in its sense of "[n]ot existing before; now made or existing for the first time"...

The text of s 172(2)(b) does not suggest that the proposed enterprise must only be new from the perspective of the person or persons establishing it. Given the meaning of the word "new" in the context in which it is used, the natural reading of the text of the provision is that the enterprise is new in the sense of being novel to persons generally, rather than merely new for the person or persons establishing or proposing to establish the enterprise.... Whether or not the activities of the proposed enterprise are new to its proponent is not determinative of whether the proposed enterprise is new in the sense of being generally novel, being the sense required by s 172(2)(b). Thus a project may be a "new" enterprise despite the fact that the same employer

also operates other projects with the same or similar activities.

Bromberg J said that whether what is proposed to be established is a 'genuine new enterprise' relative to that which has existed or exists will necessarily involve a comparison between what existed or exists and the enterprise which is being brought into existence.

Bromberg J said:

...it seems to me that where an existing enterprise exists or has existed with at least some similarity to an enterprise which is or is proposed to be established, an appropriate assessment as to whether or not the proposed enterprise is a "genuine new enterprise" will involve three fundamental steps:

(1) What is the character of the existing enterprise by reference to the essential characteristics which define it?

(2) What is the character of the proposed enterprise by reference to the essential characteristics which define it?

(3) Compare the two.

If the existing enterprise and the proposed enterprise substantially bear the same character, then it will usually be the case that the proposed enterprise is not a "genuine new enterprise".

With respect to the present case, Bromberg J said:

In relation to the kind of services produced or provided, in each case those services were or are proposed to be provided to Transport for New South Wales Those services, in each case, involve the management and delivery of the same transport services to the public in the same regions, utilising largely the same plant and equipment. In my view, the characterisation of the services needs to focus on the services provided to TfNSW (and not just the public) because it is services to that entity which the STA provides and the proposed enterprise will be contracted to provide.

...

...at best what is envisaged is an evolution or development of the same services rather than the provision of different services. Even if those services or some of them can be categorised as different, I would not regard them as or sufficiently different to deny a characterisation of the totality of the services as substantially the same as those provided by STA.

Bromberg J noted that in this case there was no distinction as to the skills or mix of occupations involved in the provision of services and stated that the proposed workforce was essentially (if not wholly) the same.

Snaden J arrived at the same conclusion via a different reasoning process.

What may be taken from the Full Court's decision with respect to enterprise agreements is that where a private business succeeds in carrying out work previously provided by a public entity, the simple fact that the type of work or the work itself is new to that company will not be sufficient to demonstrate that an agreement relates to a genuine new enterprise

BOOT considerations - *Application for approval of the Commonwealth Bank Group Enterprise Agreement 2020 [2021] FWCFB 3635*

This case involved an application by the Commonwealth Bank of Australia for approval of an enterprise agreement. The Financial Sector Union of Australia opposed the employer putting the agreement to a vote and ultimately objected to the approval application.

Under the Agreement, modelling showed that it is possible for employees to work in ways which would see them receive less pay under the Agreement than under the Award for particular weekly working arrangements. As such, the union submitted that the Commission should exercise caution in reaching a state of satisfaction that the Agreement passed the BOOT.

The Commission did not agree with the union's argument. It said:

The BOOT does not require employees to be better off under an agreement than under the relevant award in each pay period, or over any particular units of time. It requires that they be better off overall. In our view, the overall nature of the assessment may

bring into consideration temporal elements, such as fluctuations in pay. Although the test is conducted as at the ‘test time’, the Commission is required to consider the employee’s possible working arrangements under the Agreement over its life. (Plainly, the test is not confined to working arrangements on the day of lodgement of the application; as most applications are filed on a weekday, the Commission would then be precluded from considering weekend work.) The BOOT analysis, although anchored to the award as at the test time, looks to the working arrangements under the agreement generally, beyond the date of lodgement of the application, and beyond the pay cycle. There is no reason why an employee who earns less under an agreement than the award in one period, but more in another, may not be better off overall under the Agreement than the Award, subject to appropriate safeguards (for example, that a reconciliation is conducted if an employee ceases to be covered by the agreement, as is the case in the present instance).

The decision supports a practical application of the BOOT in circumstances where it is possible for employees to fall under the relevant award minima in some pay periods, but not others. The Full Bench has confirmed that the BOOT test does not require an employee to be ahead in each and every pay period.

Voting cohort for termination of an agreement – *Sphere Healthcare Pty Limited - Re Sphere Healthcare Pty Limited Enterprise Agreement 2018-2020* – [2021] FWC 2507

This case related to an application by Sphere Healthcare Pty Ltd to terminate its enterprise agreement after a fire which severely damaged its factory and rendered it non-operational resulted in the company’s remaining employees being made redundant. Sphere subsequently re-engaged five of its former employees for roughly six weeks to undertake decommissioning work at the damaged factory. These five employees voted to terminate the agreement.

The AWU notified the Commission that it opposed termination of the Agreement and submitted that if a ballot was to take place it should have included an extended definition of employees, being the entire workforce who had been employed prior to retrenchment.

The AWU’s argument succeeded.

Cross DP considered whether employees who had been made redundant between one and two months prior to a vote to terminate an EBA were ‘employees covered by the agreement’ for the purposes of s.220(1). Cross DP determined that at the time of the vote (21 October 2020), Sphere was the employer of all employees made redundant between 14 August 2020 and 25 September 2020. In reaching this decision, Cross DP said that as s.220(1) does not specify that such employees be “employed at the time,” there is no amendment to the definition of “national system employee” in s.13.

The Full Bench declined to grant permission to appeal against the decision but did not do so on the merits of Cross DP’s initial reasoning.

This is a controversial case but employers should be aware that the Commission may take a broad view of the cohort of employees that may be entitled to vote on termination of an enterprise agreement.

Undertakings to remedy issues with pre-approval steps – *Construction, Forestry, Maritime, Mining and Energy Union v Karijini Rail Pty Ltd* [2020] FWCFB 958

This case involved an application by Karijini Rail for approval of an enterprise agreement. The agreement was to cover certain rail workers engaged to perform work in connection with the Roy Hill iron ore mine in the Pilbara in Western Australia. Karijini’s employees drove trains hauling iron ore from the mine to the Port of Port Hedland.

In order to succeed in its application for approval of its agreement, Karijini DP proffered undertakings to assuage concerns that there had been a failure to take all reasonable steps to explain the terms of the enterprise agreement and their effect. Karijini claimed that the new pay entitlement provided via the undertaking effectively rendered the original base rates, penalties and loadings in the Agreement irrelevant in a practical sense, to an employee’s consideration of whether to approve the Agreement. Beaumont DP, at first instance, approved the agreement, having been satisfied that the undertaking remedied concerns regarding compliance with s.180(5).

The CFMMEU opposed the approval of the agreement on several grounds including that Beaumont DP, who had approved the agreement, had erred in law in finding that it was permissible to accept an undertaking under s.190 of the Act in order to overcome the employer's failure to comply with s.180(5).

The Full Bench upheld the appeal but nevertheless confirmed that an employer may remedy a failure to meet the requirements of s.180(5) by filing an undertaking. It said:

...a concern about whether an employer has complied with s.180(5) and therefore whether the agreement has been genuinely agreed to by the relevant employees, may as a matter of logic be remedied depending on the nature of the concern. It is accepted that in a number of cases concerns about genuine agreement will not be able to be met by an undertaking. But it is not the case, as a matter of logic, that any such concern could never be met. Why for example, could not a concern that an employer explained the effect of a term of the agreement as to shift work was that an afternoon shiftworker would receive a 15% loading under the agreement, when the agreement only provides for a 10% loading, be met by an undertaking that the employer would pay an afternoon shiftworker a loading of 15%? We consider that such an undertaking would remedy the concern since the agreement operating with the undertaking is consistent with the explanation given.

This Full Bench decision has been cited numerous times in later cases. Notably in *Construction, Forestry, Maritime, Mining and Energy Union v Mechanical Maintenance Solutions Pty Ltd* [2020] FWCFB 1918, the Full Bench said that Karijini is not authority for the proposition that any instance of non-compliance with s.180(5) is curable by undertakings.

The Full Bench said:

Clearly a wholesale failure to comply of the type dealt with in CFMEU v One Key Workforce Pty Ltd is not capable of rectification. But, for example, a concern arising from the making of a representation by the employer that a specific term of a proposed agreement is more beneficial than it actually is might, in some but not all circumstances, be addressed by an undertaking to apply the term in the more beneficial way represented by the employer.

This decision provides employers with some comfort that failure to meet the stringent requirements of s.180(5) may, in appropriate cases, be cured by way of an undertaking.

Usage of certain technical terms or phrases when explaining an enterprise agreement – *Construction, Forestry, Maritime, Mining and Energy Union and others v OS ACPM Pty Ltd and another* [2020] FWCFB 6089

This decision concerned appeals filed by the CFMMEU, the AWU, the CEPU and the AMWU against approval of an enterprise agreement, in part, because of non-compliance with s.180(5). Clause 5.2 of the Agreement provided:

Part time employees will receive pro rata leave and other entitlements on the basis of a 35 ordinary hour week.

The majority, finding that an explanation of this clause would have been necessary, stated that there was no basis that the meaning of the Latin term ‘pro rata’ is obvious or known to laypersons.

Colman DP issued a dissenting decision stating that he did not agree with the majority’s view. He said that pro rata is an English term of common vernacular and industrial usage which has a well-understood meaning.

This case indicates to employers that there is some risk in assuming that employees understand the meaning of particular technical terms or phrases used in an enterprise agreement.