# Senate Education and Employment Legislation Committee

# Inquiry into the

# Incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009*

## Submission of the Department of Employment

## Table of Contents

## 1. Introduction

The Department of Employment (the Department) welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee inquiry into the incidence of and trends in corporate avoidance of the *Fair Work Act 2009* (the inquiry).

The terms of reference for the inquiry are broad and cover a significant range of issues. In providing a submission, the Department has sought to provide information and statistics in response to each of the individual terms of reference.

## 2. Responses to the Inquiry's terms of reference:

### *a) The use of labour hire and/or contracting arrangements that affect workers' pay and conditions*

The *Fair Work Act 2009* (Fair Work Act) does not operate so as to restrict employers from structuring their operations as best suits their needs, including commercial decisions about the mix of full-time, part-time, casual, labour hire or independent contractors engaged by a business. This is subject to complying with their statutory requirements including redundancy entitlements and the transfer of business provisions.

As such, the use of labour hire arrangements does not constitute avoidance of the Fair Work Act provided these obligations are complied with.

Labour hire companies must comply with the Fair Work Act which requires that all national system employers pay minimum wages and conditions set out in the relevant modern award or other industrial instrument, such as an enterprise agreement. The National Minimum Wage provides a safety net for award and agreement-free employees. The National Employment Standards (NES) act as a safety net for all national system employees.

It is unlawful to not meet any minimum conditions of employment because an employee is engaged under a labour hire arrangement.

### *b) Voting cohorts to approve agreements with a broad scope that affects workers' pay and conditions*

Before approving an enterprise agreement, the Fair Work Commission must be satisfied that the group of employees covered by the agreement was fairly chosen. In circumstances where an agreement does not cover all of the employees of the employer covered by the agreement (for example on a ship an employer may have separate agreements for engineers and crew), the Fair Work Commission in deciding whether the group of employees covered by the agreement was fairly chosen, must consider whether the group of employees is geographically, operationally, or organisationally distinct.

The issue of whether the group of employees covered by an agreement was fairly chosen was considered in *Construction, Forestry, Mining, and Energy Union v John Holland Pty Ltd* [2015] FCAFC 16. This case concerned an application to approve an enterprise agreement that was made with three employees, but that was expressed to cover a wider group of employees. In this case Buchannan J wrote that in determining whether a group of employees covered by an agreement was fairly chosen, the Fair Work Commission was required to ascertain 'the nature of the work to be regulated and rewarded by the agreement rather than how many employees may, in the years to come, carry out the work, or where' [64]. In such circumstances, it is not an avoidance of obligations under the Fair Work Act for an enterprise agreement to be approved by a cohort of employees that is smaller in number than the number of employees who may ultimately be covered by the agreement.

### *c) The use of agreement termination that affect workers' pay and conditions*

Under the Fair Work Act enterprise agreements have a nominal expiry date which can be up to four years. However, an agreement will continue to operate until replaced by a new agreement, or terminated by the Fair Work Commission.

#### *Agreement termination process*

An employer, employee or employee organisation covered by an enterprise agreement can unilaterally apply to the Fair Work Commission to terminate an enterprise agreement after it has passed its nominal expiry date. The Fair Work Commission must terminate an agreement if it is satisfied that it is not contrary to the public interest to do so and it considers that it is appropriate to terminate the agreement taking into account all the circumstances. This includes the views of the employer, the employees and their representatives, and the parties' circumstances, such as the likely effect of termination on each of them. The decision to terminate an agreement under the Fair Work Act ultimately rests with the Fair Work Commission.

In certain circumstances ongoing enterprise agreements that have passed their nominal expiry can prevent an employer from conducting its business productively and competitively.

In *Aurizon Operations Limited and others* [2015] FWCFB 540 the Fair Work Commission found that there was nothing 'inherently inconsistent' with the termination of an agreement that has passed its nominal expiry date and the continuation of collective bargaining for a new enterprise agreement. The Fair Work Commission also held that it could not be expected that an enterprise agreement which had passed its nominal expiry date would continue to apply unaltered in perpetuity. This confirmed that the termination of enterprise agreements is not contrary to the objective of the Fair Work Act of providing a framework of collective bargaining for the making of enterprise agreements that delivers productivity benefits. Following the termination of the enterprise agreements, Aurizon subsequently made new enterprise agreements covering each of the groups of employees affected by the terminations.

As such, there is no 'avoidance' of the Fair Work Act involved in exercising rights to apply to terminate agreements provided for under the Act.

#### *Data on agreement termination*

Termination of an enterprise agreement is relatively rare. The Workplace Agreements Database (WAD) contains data on the termination of enterprise agreements since 1 January 2014. Table 1 shows the quarterly rate of agreement termination over this period.

The number of agreements terminated has accelerated in recent quarters, but many of these agreements have been small agreements – so there has not been a commensurate increase in the number of employees covered by terminations.

**Table 1: Agreements terminated between 1 Jan 2014 and 30 Sept 2016, by period terminated**

| | Terminated | | Current | |
|---|---|---|---|---|
| **Period Terminated** | **Agreements** | **Employees** | **Agreements** | **Employees** |
| **2014 - Q1** | 33 | 1821 | 22436 | 2631812 |
| **2014 - Q2** | 40 | 6672 | 20766 | 2534228 |
| **2014 - Q3** | 43 | 14608 | 19063 | 2330886 |
| **2014 - Q4** | 40 | 2665 | 18960 | 2416505 |
| **2015 - Q1** | 43 | 2319 | 18867 | 2427957 |
| **2015 - Q2** | 79 | 21853 | 16367 | 2422719 |
| **2015 - Q3** | 81 | 4802 | 15234 | 2187011 |
| **2015 - Q4** | 72 | 27168 | 14594 | 2272758 |
| **2016 - Q1** | 112 | 17223 | 14297 | 2197934 |
| **2016 - Q2** | 185 | 7914 | 14460 | 2170242 |
| **2016 - Q3** | 119 | 8434 | 14298 | 2023206 |
| **Grand Total** | **847** | **115479** | **N/A** | **N/A** |

Looking at the breakdown of agreements by industry, around half are in the Construction and Manufacturing industries. This reflects the large number of agreements in these industries.

**Table 2: Agreements terminated between 1 Jan 2014 and 30 Sept 2016, by Industry**

| | Terminated | | Current (at 30 Sept 2016) | |
|---|---|---|---|---|
| **ANZSIC** | **Agreements** | **Employees** | **Agreements** | **Employees** |
| **Agriculture, Forestry and Fishing** | 11 | 493 | 136 | 8929 |
| **Mining** | 37 | 3621 | 428 | 50571 |
| **Manufacturing** | 106 | 7543 | 2287 | 146943 |
| **Electricity, Gas, Water and Waste Services** | 29 | 1549 | 399 | 46465 |
| **Construction** | 330 | 9436 | 4337 | 111479 |
| **Wholesale Trade** | 18 | 542 | 472 | 31768 |
| **Retail Trade** | 32 | 22429 | 240 | 62704 |
| **Accommodation and Food Services** | 26 | 2363 | 420 | 144205 |
| **Transport, Postal and Warehousing** | 40 | 7850 | 1171 | 172270 |
| **Information Media and Telecommunications** | 15 | 548 | 92 | 40933 |
| **Financial and Insurance Services** | 11 | 22135 | 124 | 129465 |
| **Rental, Hiring and Real Estate Services** | 14 | 263 | 272 | 8086 |
| **Professional, Scientific and Technical Services** | 24 | 1229 | 403 | 38022 |
| **Administrative and Support Services** | 34 | 1374 | 546 | 43566 |
| **Public Administration and Safety** | 21 | 1491 | 518 | 220845 |
| **Education and Training** | 18 | 10616 | 604 | 397645 |
| **Health Care and Social Assistance** | 59 | 20423 | 1338 | 288991 |
| **Arts and Recreation Services** | 3 | 375 | 139 | 36521 |
| **Other Services** | 19 | 1199 | 372 | 43733 |
| **Grand Total** | **847** | **115479** | 14298 | 2023206 |

Looking at agreement size, most terminated agreements covered fewer than 100 employees. However, agreement size is not a perfect proxy for business size, as some employers have multiple agreements covering different groups of staff.

**Table 3: Agreements terminated between 1 Jan 2014 and 30 Sept 2016, by Agreement Size**

| | Terminated | | Current (at 30 Sept 2016) | |
|---|---|---|---|---|
| **Agreement Size** | **Agreements** | **Employees** | **Agreements** | **Employers** |
| **Large (100+ emps)** | 108 | 97694 | 2432 | 1733225 |
| **Medium (20 - 99 emps)** | 332 | 14121 | 5023 | 228680 |
| **Small (0 - 19 emps)** | 407 | 3664 | 6843 | 61236 |
| **Grand Total** | **847** | **115479** | **14298** | **2023206** |

Around 61 per cent of terminated agreements were union agreements.

**Table 4: Agreements terminated between 1 January 2014 and 30 September 2016, by union and non-union agreements**

| | Terminated | | Current (at 30 Sept 2016) | |
|---|---|---|---|---|
| **Union or non-union** | **Agreements** | **Employees** | **Agreements** | **Employees** |
| **Non Union** | 329 | 13652 | 5366 | 231920 |
| **Union** | 518 | 101827 | 8932 | 1791286 |
| **Grand Total** | **847** | **115479** | **14298** | **2023206** |

Table 5 shows all agreements terminated between 1 January 2014 and 30 September 2016, broken down by period of approval. The periods covered are:

- Pre-2006 (various legislation)
- 2006 to 2008 (Workplace Relations Act)
- 2008 to 2009 (Transition to Forward with Fairness)
- 2009 onwards (Fair Work Act)

Most agreements terminated since 1 January 2014 have been Fair Work Act agreements.

**Table 5: Agreements terminated between 1 Jan 2014 and 30 Sept 2016, by legislative period of approval**

| Legislative period approved | Agreements | Employees |
|---|---|---|
| **Pre-2006** | 119 | 41813 |
| **Workplace Relations Act** | 72 | 14232 |
| **Transition to Forward with Fairness** | 104 | 5595 |
| **Fair Work Act** | 552 | 53839 |
| **Grand Total** | **847** | **115479** |

The WAD does not include reliable data on terminations before 1 January 2014. As such, the Department is not in a position to assess the total number of terminated agreements from earlier periods, nor the total number of agreements still being used to set wages and conditions. Even if terminations and replacements data were available for the full period since 2006, this would still likely exaggerate coverage of 'legacy agreements', since some enterprise agreements would have been made for businesses that ceased to operate since 2006.

### *d) The effectiveness of Transfer of Business provisions in protecting workers' pay and conditions*

The transfer of business provisions in the Fair Work Act in Part 2-8 have operated unchanged since the Act's introduction and mean that an agreement or another type of 'transferable instrument' follows the transferring employee and becomes binding on the new employer when a business changes hands.

Under the Fair Work Act there are three basic elements that have to be satisfied for a transfer of business to occur. The first is that the employment of an employee with the old employer has terminated and that employee becomes employed within three months by the new employer. The second is that the work performed for the new employer is the same, or substantially the same, as the work performed for the old employer. The third is that there is a connection between the old employer and the new employer.

The situations where there is a connection between the new and old employer are set out at ss. 311(3)-(6), and include if:

- there has been a transfer of assets
- the old employer (or an associated entity) has outsourced the transferring work to the new employer (or an associated entity)
- the new employer (or an associated entity) ceases to outsource work to the old employer (or an associated entity) and instead employs an employee or employees to undertake the work who had performed the work for the old employer (insourcing) or

- the new employer is an associated entity of the old employer when the transferring employee begins employment.

The effect of a transfer of business is that certain industrial instruments that covered the old employer and employee transfer to the new employer and continue to cover the employee in the performance of transferring work until terminated or replaced. Transferring instruments also cover new non-transferring employees who perform the transferring work, unless there is another enterprise agreement or modern award that covers the employer and new employee for that work.

The Fair Work Act also contains provisions concerning the transfer of an employee's service. Generally, service with the old employer counts as service with the new employer where there is a transfer of employment. This is either because the employee is employed within 3 months by a new employer who is an associated entity of the old employer; or there is a transfer of business, the employee is a transferring employee and the new employer is not an associated entity of the old employer.

However, there are exceptions to this general principle. If the new employer is not an associated entity of the old employer, it may decide not to recognise an employee's previous service for the purposes of annual leave and redundancy accrued under the NES. In this case, the employee's entitlements to annual leave and redundancy must be paid out by the old employer on termination.

In certain circumstances, the Fair Work Commission has the power to order that a transferable instrument not cover the new employer, or to vary the instrument to ensure that it operates in an appropriate way for the new employer.

As such, there is no avoidance of the Fair Work Act involved in exercising rights, including rights to seek orders from the Fair Work Commission, that are provided for under the Act.

### *e) The avoidance of redundancy entitlements by labour hire companies*

Labour hire companies are subject to the same workplace relations requirements in relation to redundancy entitlements as other employers.

The NES set out the minimum entitlements in relation to notice of termination and redundancy pay for permanent employees, including those employed by labour hire companies. Employees are not covered by the notice of termination and redundancy pay entitlements if they are engaged for a specified period of time, for a specified task or a specified season, or engaged as a casual employee. Casual employees generally receive a 25 per cent loading on their hourly wage, to compensate for paid leave and redundancy pay entitlements.

The NES requires employers to provide notice of termination, which is based on the period of continuous service, or payment in lieu of notice. Continuous service is the length of time an employee is employed by the business and generally does not include unpaid leave.

Employees are entitled to redundancy pay if the employee's employment is terminated (a) at the employer's initiative because the work done by the employee no longer needs to be done by anyone, except where this is due to the ordinary and customary turnover of labour or (b) because of

insolvency or bankruptcy of the employer. Redundancy pay is based on the employee's continuous service with their employer.

Employers may apply to the Fair Work Commission to reduce the amount of redundancy pay payable if the employer obtains other acceptable employment for the employee or the employer cannot afford the full redundancy amount owing. Small businesses (defined as businesses employing fewer than 15 employees) are not liable for redundancy pay under the NES.

### *f) The effectiveness of any protections afforded to labour hire employees from unfair dismissal*

The unfair dismissal protections in the Fair Work Act apply to labour hire employees in the same way that they apply to more traditional employment relationships. While it will always depend on the particular factual circumstances, recent decisions of the Fair Work Commission demonstrate a general willingness to ensure that labour hire employees are afforded protection from unfair dismissal by a labour hire company.

The case of *Donald Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 (*Pettifer*) established that a labour hire employer who dismisses an employee following the exercise of a host entity's contractual right to have an employee removed from the host site cannot rely exclusively on the actions of that third party as their defence to a claim of unfair dismissal. Instead, the Fair Work Commission retains a broad discretion to decide whether the dismissal is unfair in all the circumstances. Relevant factors will include the terms of the contract between the labour hire employer and the host entity, the terms of the agreement between the employee and labour hire company, general procedural fairness throughout the process and the adequacy of attempts made by the labour hirer to find alternative employment for the employee. On the facts of this case, the Full Bench concluded that the labour hire company had a valid reason to terminate Mr Pettifer's employment because he was no longer capable of working for the host entity, as it had exercised a clear right to exclude him from the site, and his employer was genuinely unable to find alternative employment for him.

The subsequent case of *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925 was distinguished from *Pettifer* because the precise contractual terms between the host employer and labour hire company were not known. The applicant's unfair dismissal claim was upheld because the hire company, Adecco, had accepted without question or its own investigation the adverse conclusions about the employee's conduct that led to the termination of her work for the host, and a failure to satisfy the Fair Work Commission that there was a lack of alternative placements for the employee.

Depending on the circumstances, the general protections provisions in the Fair Work Act may also provide a remedy to a labour hire employee who is dismissed from employment. These provisions prohibit adverse action (including dismissal) by an employer against an employee for discriminatory reasons, including disability, sex and age or because of the employee's workplace rights or engagement in lawful industrial activities.

The Fair Work Act also includes protections to prevent 'sham contracting' and these protections also apply in the labour hire context. For example, employers (including labour hire employers) are

prohibited from knowingly or recklessly misrepresenting an employment relationship or proposed employment relationship as an independent contracting arrangement. An employer who contravenes the sham contracting provisions of the Fair Work Act may be liable for a fine of up to $10,800, or in the case of a constitutional corporation, $54,000.

### *g) The approval of enterprise agreements by workers not yet residing in Australia that affect workers' pay and conditions*

Under the Fair Work Act, enterprise agreements (that are not greenfields agreements) can only be made between one or more employers and at least two employees who are employed at the time the agreement is made and who will be covered by the agreement. Although the Fair Work Act can apply to certain individuals outside Australia, it does not appear that the Fair Work Commission or the courts have considered whether employees who reside overseas can validly vote to approve an enterprise agreement.

An employer may only request employees who are employed at the time and who will be covered by the agreement to vote to approve the agreement. Furthermore, the Fair Work Commission can only approve an enterprise agreement if it is satisfied that the group of employees covered by the agreement (which includes but is not limited to the group of employees who voted to approve the agreement) was 'fairly chosen' as outlined previously in this submission.

### *h) The extent to which companies avoid their obligations under the Fair Work Act 2009 by engaging workers on visas*

The Fair Work Act applies to all national system employers and employees regardless of an employee's citizenship, residency or visa status. All employers must comply with their obligations under the Fair Work Act and all employees are entitled to the minimum safety net and protections afforded by our workplace laws.

As such, the Fair Work Act cannot be avoided by employing workers on visas. Any such attempt at 'avoidance' would be unlawful.

Visa holders can be more vulnerable to exploitation by employers because of poorer English skills, lack of awareness of Australian workplace laws and fear of deportation. The Productivity Commission noted that temporary workers may not report an exploitative employer because of the fear that the Fair Work Ombudsman will refer their details to the Department of Immigration and Border Protection and they may face deportation.[1]

In 2015-16 the Fair Work Ombudsman assisted visa holders involved in 1,894 workplace disputes, which accounts for 13% of all dispute form lodgements. During that period the Fair Work Ombudsman recovered $3,087,133 in unpaid entitlements for visa workers. Of the dispute forms completed from visa holders, 45% (855) came from subclass 417 visa holders (working holiday makers), 13% (238) came from subclass 457 visa holders, and 9% (177) came from student visa holders.

[1] Productivity Commission (November 2015), Inquiry Report into the Workplace Relations Framework, Volume II, p. 931-932

Prior to the 2016 Federal election the Government announced its *Policy to Protect Vulnerable Workers.* The Policy recognises that existing penalties under the Fair Work Act do not act as an effective deterrent for rogue employers who systematically exploit vulnerable workers (including those on a visa).

### *Legislative Reform*

The Government's election commitment will strengthen enforcement provisions in the Fair Work Act by:

- Increasing the penalties that apply to employers who underpay workers and who fail to keep proper employment records. A new higher penalty category of 'serious contraventions' will be introduced, and will apply to any employer who has deliberately and systematically exploited workers.
- Introducing new provisions to make franchisors and holding companies responsible for underpayments by their franchisees or subsidiaries where they ought reasonably to have known of the contravention and failed to take reasonable steps to prevent it.
- Expressly prohibiting coercive behaviour such as 'cashback' arrangements where employers may pay the correct wage to an employee, but requests that the employee repay an amount.
- Strengthening the powers of the Fair Work Ombudsman and Fair Work Inspectors to more effectively deal with employers who intentionally exploit workers.

The Government is currently consulting on these legislative changes, and expects to introduce amendments to the Fair Work Act in early 2017.

These measures are supported by $20 million of additional funding for the Fair Work Ombudsman.

### *Migrant Workers' Taskforce*

On 4 October 2016, the Minister for Employment announced the establishment of the Migrant Workers' Taskforce. The Taskforce is an integral part of the Government's *Policy to Protect Vulnerable Workers* and met for the first time on 21 October 2016. The Taskforce, led by Professor Allan Fels AO, works across government to provide expert advice on ways to deliver better protections for workers, including improvements in law, law enforcement and investigation. It also advises on practical measures to identify and rectify cases of migrant worker exploitation.

Under its Terms of Reference, the Taskforce is also required to assess labour hire practices for companies that employ migrant workers and consider particular industries or groups of vulnerable workers where there are systemic problems with exploitation and underpayment.

At its inaugural meeting, the Taskforce agreed to a program of action around four key priority areas:

- Better communication with visa holders so that they are aware of their workplace rights and who they can get assistance from.
- Stronger measures to prevent workplace exploitation and to ensure adequate redress when it occurs.

- More effective enforcement, including adherence by workers to visa restrictions, but particularly a greater emphasis on compliance by employers.
- Ensuring that policy frameworks and regulatory settings appropriately address the required objectives.

*Taskforce Cadena*

Taskforce Cadena was established in June 2015 as a joint agency initiative between the Department of Immigration and Border Protection, its operational arm the Australian Border Force (ABF), and the Fair Work Ombudsman. The Taskforce focuses on identifying and disrupting the criminals organising visa fraud, illegal work and the exploitation of foreign workers. The Taskforce draws on the collective powers of the ABF and the Fair Work Ombudsman, particularly those contained in the *Migration Act 1958* and the Fair Work Act.

Since its inception in 2015, the Taskforce has completed 11 operations, resulting in the arrest and charging of four people, the detention of 96 unlawful non-citizens and the execution of 30 warrants. Some of these matters are ongoing with ABF investigators preparing briefs of evidence for consideration by the Commonwealth Director of Public Prosecutions.

### *i) Whether the National Employment Standards and modern awards act as an effective 'floor' for wages and conditions and the extent to which companies enter into arrangements that avoid these obligations*

In the current legislative framework, the employment safety net or 'floor' is set by the Fair Work Act and includes the National Minimum Wage, the NES and modern awards. Modern awards set minimum pay and conditions by industry and occupation. The Fair Work Commission is responsible for setting minimum wages.

Before approving an enterprise agreement, the Fair Work Commission must ensure the agreement passes the better off overall test (BOOT). An enterprise agreement passes the BOOT if the Fair Work Commission is satisfied, as at the time of the test that each award covered employee, and each prospective award covered employee, under the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

If a registered agreement, including a pre-Fair Work Act agreement, is in place, modern awards do not apply but the base pay rate in the registered agreement cannot be less than the base pay rate in the relevant award. The NES also apply in these circumstances.

### *j) Legacy issues relating to WorkChoices and Australian Workplace Agreements*

The former Department of Education, Employment and Workplace Relations estimated that at most between 5 -7 per cent of Australian employees were covered by an AWA as of February 2008[2]. To the extent these legacy agreements are of concern, parties covered by the agreements may seek to terminate them.

[2] DEEWR submission to the inquiry of the Senate Standing Committee on Education, Employment and Workplace Relations into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, pp. 7–8. Cited in "Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation" 2012.

The termination of 'legacy' workplace instruments that were made under the old *Workplace Relations Act 1996* is dealt with by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the FW(TPCA) Act) which provides that:

- A collective agreement-based workplace instrument, such as a Work Choices-era workplace agreement or pre-Work Choices certified agreement, that has passed its nominal expiry date can be terminated by the Fair Work Commission in the same way as any enterprise agreement that has passed its nominal expiry date.
- Individual workplace agreements, such as AWAs, can be terminated in the following circumstances:
    - at any time, if the employer and the employee covered by the individual agreement agree in writing to terminate the agreement; or
    - after the agreement has passed its nominal expiry date, the employer or the employee covered by the individual workplace agreement may unilaterally declare that they want to terminate the agreement.

Furthermore, the Fair Work Commission can terminate an individual workplace agreement when it receives an application to terminate the agreement accompanying an application to approve an enterprise agreement made under the Fair Work Act that covers the employer and employee. An enterprise agreement will not apply to an employee to whom an individual workplace agreement continues to apply, that is, until the individual workplace agreement is terminated.

It should also be noted that according to the 'no detriment' rule of the FW(TPCA) Act, a term in an individual workplace agreement (or any other 'legacy' instrument) will have no effect to the extent that it is detrimental to an employee when compared to an entitlement under the NES. The Fair Work Commission can make a determination varying such an instrument to resolve any uncertainty or difficulty relating to the interaction between the instrument and the NES.

As is the case with enterprise agreements made under the Fair Work Act, the decision to terminate 'legacy' workplace agreements, including individual workplace agreements, ultimately rests with the Fair Work Commission.

### *k) The economic and fiscal impact of reducing wages and conditions across the economy*

Wages are continuing to grow across the economy. The ABS Wage Price Index shows wages increased by 1.9 per cent over the year to September 2016. This is above the overall inflation rate of 1.3 per cent and the 1.2 per cent increase in the ABS Employee Living Cost Index over the same period so, on average, employees are still realising wage growth that is higher than increases in their cost of living.

### *l) Related Matters:*

*Productivity Commission inquiry into the workplace relations framework*

The Productivity Commission recently conducted an inquiry into the workplace relations framework concluding that Australia's industrial relations system is not systematically dysfunctional and that it

needs repair not replacement. The Government is currently considering and consulting on the Productivity Commission's recommendations.

### *Corrupting benefits*

The Royal Commission into Trade Union Governance and Corruption (Royal Commission) examined the payment of corrupting benefits, or payments made by an employer to a union or a union official that can be described as bribes, secret commissions, blackmail money or payments for industrial peace.

The Royal Commission noted that such payments 'have a tendency to cause a union official to exercise improperly the official's duties and powers, or have a tendency to cause a union official to act unlawfully'.[3] For example, the case study involving the Victorian Branch of the Australian Workers' Union (AWU) and Cleanevent, identified that payments made by the employer to the union were in exchange for the AWU agreeing to extend the operation of a 'Workchoices-era' enterprise agreement that removed penalty rates which in turn saved Cleanevent at least $1 million per year. This arrangement was agreed to the detriment of Cleanevent's workers.[4]

The Royal Commission found that existing criminal laws do not deter the payment and receipt of corrupting benefits due to issues with the existing legal framework.[5] The Royal Commission consequently made three recommendations (recommendations 39-41) to prohibit the payment of corrupting benefits.

The Government has committed to adopt the Royal Commission recommendations to prohibit the payment of corrupting benefits.

### *Decline in enterprise bargaining*

Recent years have seen a decline in the number of federal enterprise agreements. There were 14,460 agreements current (not expired or terminated) at 30 June 2016, down by 42.6 per cent from a high of 25,193 agreements in December 2010. This decline has resulted primarily from a reduction in the flow of new enterprise agreements being made, rather than an increase in terminations.

This decline is driven primarily by a reduction in agreements covering small numbers of employees (a reasonable proxy for small business). While agreements have declined by 42.6 per cent since December 2010, employee coverage over this period has declined by 24.2 per cent.

Despite this decline in new agreement making, particularly among small businesses, ABS data suggests that total coverage of enterprise agreements was still 41.1 per cent of employees in May 2014, down only slightly from the peak of 43.4 per cent in May 2010.

The ABS measure of coverage includes agreements which have expired but not been replaced, as well as agreements in state workplace relations systems, such as school and hospital agreements.

[3] Royal Commission into Trade Union Governance and Corruption (December 2015), Final Report, Volume Five, p. 244
[4] Royal Commission into Trade Union Governance and Corruption (December 2015), Final Report, Volume Four, pp. 325, 382 & 491)
[5] Royal Commission into Trade Union Governance and Corruption (December 2015), Final Report, Volume Five, pp. 253; 255-259

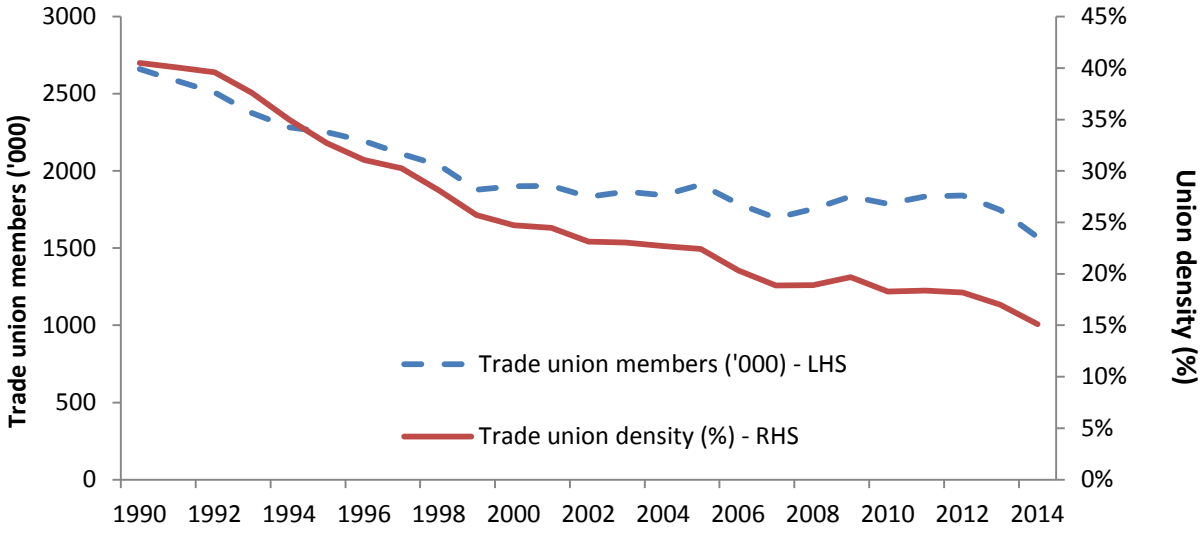
*Decline in trade union membership*

The number of employees and owner managers of incorporated enterprises who were trade union members in their main job declined by 10.1 per cent (or 177 200) to stand at 1 570 400 in August 2014.

The proportion of employees and owner managers of incorporated enterprises who were union members in their main job, that is union density, decreased from 17.0 per cent in August 2013 to 15.1 per cent in August 2014. This is the lowest level of recorded union density since 1990.

Over the last two decades there has been a gradual decline in both union membership and union density (see **Chart 1**).

**Chart 1: Number of union members ('000) and union membership density (%), 1990 to 2014**




In August 2014, 14.4 per cent of male employees and owner managers of incorporated enterprises were trade union members compared to 15.9 per cent of females.

Union density was higher in the public sector (39.5 per cent) compared to the private sector (11.1 per cent).

Union density was highest in the Education and Training industry (34.4 per cent) followed by the Public Administration and Safety industry (30.7 per cent) and the Electricity, Gas, Water and Waste Services industry (30.7 per cent).