

On the Brink:

The Erosion of Enterprise Agreement Coverage in Australia's Private Sector

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PLEASE NOTE: *This version of the paper corrects a previous error arising from a data coding problem which resulted in an inaccurate allocation of approved enterprise agreements between new and renewal agreements.*

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Introduction and Summary

The proportion of national income paid to Australian workers has been eroding for the last 40 years: from over 58 per cent labour share of GDP in the mid-1970s, falling to a record post-war low of just 47 per cent in 2017 (Stanford 2018a). Ninety per cent of what labour has lost has been reflected in an increase in the corporate profit share. This observed experience is unravelling traditional expectations that a rising GDP inevitably increases labour incomes, and that labour incomes will automatically rise in step with real labour productivity. A key reason why growth, productivity and wages have been de-linked is the weakening of the redistributive institutions which Australia built during the long post-war expansion – when the country became known as the ‘land of a fair go.’ One of the most important dimensions of this institutional decline has been the dramatic retrenchment in the collective bargaining regime. Introduced in the 1990s as the main pay-setting mechanism for employees, the enterprise bargaining system is now on the brink of collapse. There are far fewer enterprise agreements (EAs), an upturn in employer-led EA terminations, and around 660,000 less workers covered by current EAs at June 2018 than at end-2013. The flip side of this coin has been a noted increase in the proportion of Australian workers whose pay and conditions are set according to the minimum standards of Modern Awards.

This report provides a detailed description of the erosion of enterprise bargaining: including its composition and dynamics, and its causes and consequences. It focuses attention on the private sector, where two-thirds of all EA-covered employees worked in 2018 – and where coverage decline has been dramatic. In the private sector the number of current EAs has almost halved, and the number of employees covered has dropped by 34 per cent since end-2013 (peak year), a decline of 662,461 employees. Only 12 per cent of Australians employed in the private sector are now covered by current EAs. Without urgent action to reverse the underlying factors driving down EA coverage, and rebuild a more viable and effective collective bargaining system, coverage could fall to below 2 per cent of private sector workers by 2030.

Some of the main findings of our analysis include:

- Almost all private sector industries experienced a significant decline in the number of current EAs since 2013. The most dramatic reductions were experienced in retail trade (-82%) and agriculture, forestry and fishing (-75%). The largest declines in employees covered by EAs were experienced in retail trade (-270,000), manufacturing (-150,000) and accommodation and food services (-133,000).

- Developments in enterprise bargaining in the retail and fast food sectors have been important to changes in EA coverage. Specifically, the Fair Work Commission's (FWC) 2016 decision to terminate the enterprise agreement at Coles Supermarkets for failing its 'Better Off Overall Test' (BOOT) triggered a wave of EA expiries among retail and fast food giants; that accounted for around half of the decline in total current private sector EA coverage since 2013. A renegotiated and approved EA has recently been implemented at Coles Supermarkets, leading to a notable bump in overall EA coverage.¹ The renegotiation and potential approval of revised EAs at Woolworths, several other major retailers, and some fast food chains will further lift EA coverage in the next couple of years. But a best-case scenario where all those expired EAs are renegotiated (and pass the BOOT) would reverse less than half of the EA coverage lost since 2013. While significant, that would not offset the broader and lasting decline in coverage observed since 2013; even if all expired retail and fast food EAs are eventually restored, there would still be 350,000 fewer private sector employees enjoying EA coverage than was the case in 2013 (and total employment has increased significantly since then).
- Most EAs are negotiated with the active participation of a trade union. However, the number of union EAs has declined steadily: with around 2,300 less union EAs approved in 2017 compared with 2013. Moreover, measuring the true impact of unions on EA-making is difficult due to the Fair Work Act's relaxed definition of what constitutes a 'union agreement.' A union no longer is required to have an active bargaining presence in order to be covered by an agreement (hence constituting that agreement as a 'union agreement'). This ambiguity has obscured a deeper deterioration in union bargaining capacity that lies behind the formal EA coverage data.
- Small EAs covering less than 20 employees experienced the most rapid decline in number of EAs approved since 2013, whereas the loss of a smaller number of large agreements (500+ workers) accounted for the majority of the decline in number of employees covered. The typical small-firm EA covers only 7 workers, indicating proportionately high administrative and maintenance burdens for both employers and unions. The likelihood of being paid under the terms of an EA increases with firm size; only 5 per cent of employees in firms with fewer than 20 employees are paid according to EAs. However, small firms have accounted for a disproportionate share of recent employment growth. This is another long-run threat posed to collective bargaining in the private sector.

¹ See Figure 8 below.

We find that the rapid decline in private sector EA coverage reflects a ‘perfect storm’ of several contributing factors. First, many existing agreements are not being renewed when they expire. Second, newly-negotiated agreements have fallen dramatically: from almost 5,000 new EAs in 2010 to under 1,000 in 2017. Third, there has been a massive acceleration in EA terminations. The combination of fewer renewals, more terminations, and a major decline in new agreements creates a dramatic negative trend for the number of EAs in effect:

- Terminated EAs rose tenfold from 50 terminated EAs in 2009 to a high of 511 in 2016; terminations have remained very high since then. As a percentage of approved private sector EAs, terminations have also risen exponentially: from 1.5 per cent in 2014 to 14.5 per cent in 2017. There have been more terminations in the last three years since the precedent-setting Aurizon decision in April 2015, than there were in the entire decade before that. Half of all terminations since 2015 have been in the construction and manufacturing sectors.
- The 2015 Aurizon decision by the FWC, to approve the termination of several EAs at the company during negotiations for replacement agreements, set a far-reaching precedent that employers have aggressively imitated in other industries. In some cases, threatened EA termination implies dramatic potential wage cuts for workers of as much as 60 per cent, in the event that compensation were to revert to Award minimums after termination.
- Most terminations result from uncontested, unilateral employer applications to terminate expired EAs. Many of these terminations are due to specific projects being completed (especially in construction), or due to gradual improvements in minimum standards which came to surpass the provisions in those EAs. However, the relatively smaller number of mid-bargaining terminations does not imply that the now-credible threat of termination does not have broader effects on the course of negotiations.

The consequences of the erosion of EA coverage are profound for workers, employers and the overall economy. It is clear that the rapid decline in EA coverage in the private sector has been a significant factor in the unprecedented deceleration of wages in Australia:

- Private sector wages growth has been significantly faster for workers covered by EAs than for private sector workers on average. EA provisions protected workers’ incomes during the economic downturn associated with the GFC, and have supported continued modest wage growth since (averaging over 3 per

cent per year since 2015, compared to overall private sector wage growth of under 2 per cent). But with fewer workers covered by EAs, the impact of this ‘union wage growth advantage’ on overall wage trends is muted; overall average wage increases are suppressed, and fewer workers can count on secure, above-inflation wage increases.

- Eroding EA coverage has contributed to a growing reliance on Modern Awards in pay-setting. A greater proportion of workers receives only the minimum ‘floor’ levels of pay (and other conditions), with a 5-percentage point increase in the share of private sector employees paid through Awards in just two years (2014-16).
- With far fewer private sector workers covered by an EA, their ability to use collective action to press for better wage increases has all but disappeared. Industrial action has become extremely rare, especially in private sector workplaces – and a rising share of those disputes which do occur are now employer-led lockouts (rather than strikes). EA erosion and the use of alternative pay-setting methods by employers (such as Awards and individual arrangements) compounds the impact of Australia’s restrictive strike laws in suppressing collective action in support of higher wages.

Our research has identified several contributing factors that explain the decline in private sector collective bargaining described in the report, including:

- Approval times for EAs submitted to the FWC have become much longer. In large part this reflects higher levels of scrutiny required to calculate offsets and obtain employer undertakings for EAs which ‘dance at the margins’ of Award minimums.
- Non-union EAs made during the WorkChoices era delivered below-Award pay and conditions, and many remained in operation under the FW Act – ‘polluting’ the inventory of EAs. While the FW Act reinstated the ‘no disadvantage’ principle, the Coles BOOT case was the first occasion that an EA was overturned on grounds that the BOOT must apply to *all* individual employees. Many employers are now moving to terminate old below-Award EAs.
- Unions are crucial institutions in any collective bargaining system, but deliberate and sustained attacks on the rights and legitimacy of unions through restrictions on workplace entry and organising, huge administrative burdens, intrusive measures to scrutinise and police union activity, and prohibitions of traditional membership preferences have cumulatively eroded unions’ capacity to undertake effective collective bargaining. Declining union membership has

been exacerbated by full legal protection for free-riding, which allows all employees to benefit from the benefits attained through collective bargaining by unions – with no requirement to contribute to the costs of representation, bargaining, and enforcement of EAs.

Revitalisation of a collective bargaining regime in Australia will be essential to arresting wage stagnation, limiting inequality, and supporting inclusive economic growth – by allowing workers to secure a stronger share of the national income they generate. The report concludes by outlining several broad policy responses to revive collective bargaining:

- Widening the scope of bargaining to occur at multi-firm or sector levels would extend the reach of collective bargaining to more workers. An industry-wide bargaining system would also better respond to changes in the size composition of Australian workplaces (97% of workplaces have fewer than 20 workers), and would help to address further fragmentation in employment patterns resulting from new technologies, digital business models, ‘gig’ jobs, and more.
- Other key measures that would help to sustain collective bargaining include prohibiting the termination of expired EAs during negotiations; lifting restrictions on union activity (including access to industrial action provisions); and the implementation of a timelier and more efficient umpire to enforce collective agreements.

The report is organised as follows: first, we provide a snapshot of the number of current enterprise agreements and employees covered by sector (public vs private), industry, and size of agreement. Second, the report describes the evolution of coverage since the introduction of enterprise bargaining in 1991, showing that the private sector has been the key source of declining coverage. 2013 is shown to be the point when private sector coverage began to plummet dramatically. The report then describes the composition of EA decline since 2013 within specific industries; particular attention is given to the effect of the large expired EAs across retail and fast food. The decline of coverage is further disaggregated according to agreement size (number of employees) and union and non-union status. Third, the report provides more detail on the dynamics of coverage erosion (including the cumulating impact of inadequate renewals, the decline in the number of new EAs, and the acceleration of terminations); that section also projects future decline in EA coverage in the private sector if those underlying trends are not arrested and reversed. We also provide a comprehensive assessment of agreement terminations within this section, including the industries where terminations are most prevalent, and the conditions in which terminations are

being approved by the FWC. Fourth, the report considers the consequences of Australia's weakened collective bargaining system for stagnant wages growth, the rise in workers paid according to Award minimums, the near disappearance of industrial action, and loss of employee workplace voice. After outlining the consequences of the decline in EA coverage, the report discusses some of the key factors that have contributed to EA coverage decline: deunionisation, unlimited legal protection for free-riding, longer approval times at the FWC, and a shift in employer attitudes to agreement-making. Finally, the implications of further EA erosion are discussed, and key policies are outlined that would help to sustain a more effective and viable collective bargaining system in Australia.

Acronyms

AAWI – Average annualised wage increase

BOOT – Better Off Overall Test

CA – collective agreement

EA – enterprise agreement

EEH – Employee, Earnings and Hours (ABS survey)

FW Act – *Fair Work Act 2009*

FW Amendment Act - *Fair Work Amendment Act 2013, 2015*

GDP – Gross Domestic Product

IA – individual arrangement

JSB – Commonwealth Department of Jobs and Small Business

RBA – Reserve Bank of Australia

WAD – Workplace Agreements Database

WorkChoices - *Workplace Relations Amendment (Workchoices) Act*

WR Act - *Workplace Relations Act 1996*

Methodology and Data Sources

This report describes the decline in enterprise agreement (EA) coverage in Australia's private sector. The primary source of data is an inventory of all federally registered enterprise agreements maintained by the Department of Jobs and Small Business (JSB), called the Workplace Agreements Database (WAD). The WAD includes records of every EA approved by relevant federal industrial authorities (since 2009, by the Fair Work Commission, and before that by the Australian Industrial Relations Commission) since the introduction of enterprise bargaining in October 1991.

This database allows for analysis of EAs by broad sector (public or private), as well as by several other identifiers such as industry, agreement size, and whether or not a union was engaged in making the agreement. In some cases (including overall EA and coverage data for the entire private sector, and for consolidated industries), we utilise data running up to the June quarter of 2018 (most recent available), as reported in the Department of JSB's quarterly *Trends in Federal Enterprise Bargaining*.² In other cases we use data up to the end of 2017, the most recent accessible for decomposing EA trends according to agreement size, firm size, and cross-distributions of sector (private versus public) and industry. Using date identifiers, we can also analyse agreements based on the year they were approved by the Fair Work Commission. 'Current' EAs are those that have commenced operating, and have neither expired nor been terminated.

The main limitation of the WAD is that it includes only those EAs that are within their formal year(s) of operation. Since agreements can continue to 'roll over' after formal expiry until a new EA is negotiated (or the agreement is terminated), the WAD misses some EAs which are expired but still have some continuing, partial effect.³ Most EAs will not provide for incremental wage increases after they expire – and the impact of declining EA coverage on wage growth in Australia's labour market is one of the most important reasons for concern with the erosion of EA coverage. However, other EA provisions (including working conditions, paid time off, representation, and other matters) may stay in effect even after an EA has expired, and hence the WAD data may

² Department of Jobs and Small Business, *Trends in Enterprise Bargaining*. Available at <https://docs.jobs.gov.au/documents/trends-federal-enterprise-bargaining-report-0>. Note that the industry data reported in the Trends publication includes both private- and public-sector employment within each broad industry category; see discussion below.

³ The WAD also excludes EAs which are still regulated by state industrial relations commissions; however, these consist mostly of public sector agreements and hence are not of significant concern for this report (given our focus on private sector collective bargaining).

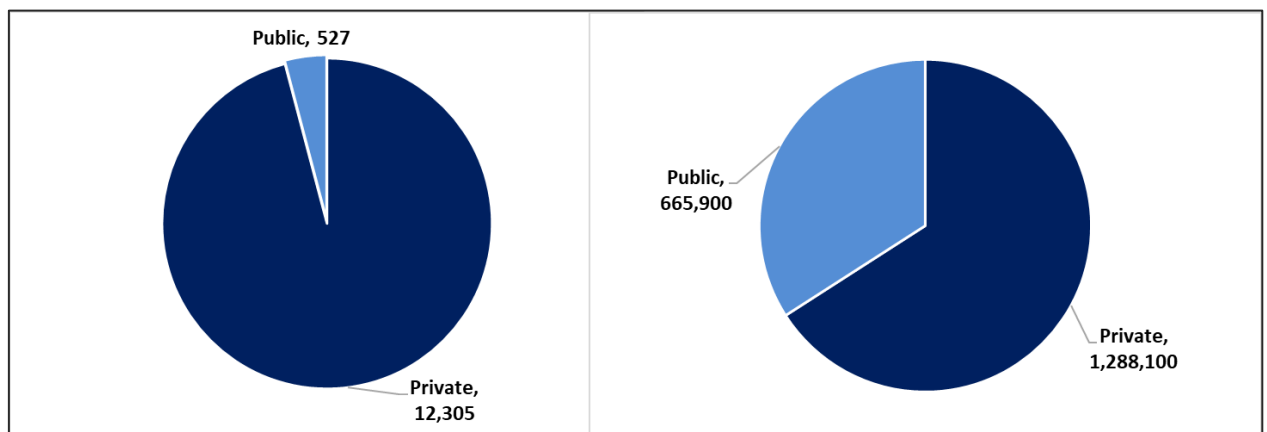
overstate both the extent of the decline in EA coverage and its consequences for workers.

To address this concern, this report also draws on a second data source regarding EA coverage: Australian Bureau of Statistics (ABS) data from its biennial Employee Earnings and Hours (EEH) survey. This survey provides estimates of pay-setting methods for workers (including data disaggregated by sector) every two years (the last survey was conducted 2016). The EEH data disaggregates workers into those whose pay is set according to collective agreements, Awards, or individual arrangements (such as individual contracts). This survey thus provides a second source of data on the extent of EA coverage; it does include workers who are covered by *expired* EAs, and hence will likely overestimate the true extent and effects of EA coverage.

The Current State of EA Coverage in Australia

There are significant differences in EA coverage between the private and public sectors of the economy. These differences reflect many factors, including firm and workplace size; the greater intensity of employer opposition to collective bargaining in the private sector; worker attitudes; and others. Figure 1 illustrates the number of current EAs in the public and private sectors, and the number of public and private sector employees covered by these EAs as at June quarter 2018. While the public sector accounts for only around 4 per cent of all EAs (527 current agreements), the much larger size of public sector workplaces and hence the greater number of employees covered by each EA, means that public sector EAs account for a much greater proportion of EA-covered employees: around one-third of EA-covered employees are in the public sector.⁴ The vast majority of current EAs are in the private sector: a total of 12,305 EAs were current in private sector workplaces as of June 2018, representing around 96 per cent of all current EAs. These agreements covered around 1.3 million workers, or 66 per cent of all EA-covered employees.

Figure 1. Current EAs and Employees Covered by Sector, June quarter 2018



Source: Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

⁴ And since the WAD excludes EAs regulated by state industrial relations commissions (almost all of which are also public sector), the public share of all enterprise bargaining in Australia is even higher.

There is considerable cross-industry variation in the number of employees covered by EAs. Table 1 presents industry data on the number of current EAs and number of employees covered by these EAs at June 2018. Data include both public- and private-

Table 1		
Number of Current EAs and Employees Covered by Industry		
Industry	Total employees covered by EAs	Number of EAs
Healthcare and community services	391,581	1,051
Public administration and safety	315,355	561
Education	267,400	496
Manufacturing	251,200	3,922
Transport, postal and warehousing	165,850	1019
Financial and insurance services	140,232	120
Retail trade	121,000	180
Construction	94,600	4,275
Information Media & Telecommunications	43,128	68
Arts and recreation services	40,300	136
Mining	40,100	355
Electricity, gas, water and waste services	39,300	353
Administrative and Support Services	37,700	440
Other services	30,500	330
Professional, scientific and technical services	28,900	358
Wholesale trade	27,000	460
Accommodation and food services	23,800	295
Agriculture, forestry and fishing employees	12,900	149
Rental, hiring and real estate services	8,700	225
Source: Department of JSB. <i>Trends in Federal Enterprise Bargaining Report</i> , June Quarter 2018.		

sector industries, organised in the table by number of employees covered. Healthcare and social assistance, Australia's largest (and fastest-growing) industry, has the highest number of employees covered by EAs – at around 390,000 employees. Other industries in which public sector investment plays a dominant role are also represented near the top of the table, including around 315,000 employees covered by EAs in public administration, and 270,000 in education.

Manufacturing, a primarily private-sector industry, has around 250,000 employees enjoying current EA coverage (slightly less than education). Transportation, finance, and construction are other sectors with relatively large numbers of EA-covered workers. At the bottom of Table 1, very few employees are covered by EAs in the rental, hiring and real estate sector (8,700 employees) and in agriculture, forestry and fishing (12,900 employees). Despite being the fourth-largest employing industry in Australia, professional, scientific and technical services has only 29,000 employees covered by current EAs. This represents only around 2.7 per cent of all employees in the industry.⁵ Similarly, the large accommodation and food services industry has only 23,800 employees covered by current EAs, which also represents just 2.7 per cent of total employment in the industry.⁶

Enterprise agreements by size

In addition to EA coverage differences by sector and industry, there is also great variation in EA coverage according to the size of the agreement.⁷ Employee data in the WAD reports on the size of all agreements (both public and private sector) approved within combined two-year periods (eg. 2013 and 2014; 2015 and 2016; etc.). Due to the structure and detail of the database, it was not possible to conduct analysis of agreement size for the stock of outstanding agreements, but it was possible to do so for the flow of approvals. Unlike earlier periods, the WAD data for 2017 covers only a single year (since 2017 is the first year of the next two-year aggregated data block). In Table 2, therefore, we present this 2017 data on the number of EAs approved that year by size of agreement, the total number of employees covered, and the average size of each EA. Small EAs covering less than 20 employees made up almost half of all EAs

⁵ *Labour Force, Australia, Detailed, Quarterly* (Cat. no. 6291.0.55.003). Table 4. Total employed at August 2018.

⁶ *Ibid.* As discussed in detail below, the coverage rate in accommodation and food services will rebound in coming months as some major expired agreements are renegotiated.

⁷ The WAD database used to generate these figures reports the size of each agreement – which does not necessarily correspond to the size of workplaces. The difference is particularly relevant in cases where one EA covers more than one workplace. The points we make below about the disproportionate administrative cost of maintaining very small EAs are even stronger when considering that the average size of workplaces may be even smaller than the average size of the agreement.

approved in 2017, with a total of 1,926 agreements approved, but covered only 14,227 employees (2 per cent of employees covered by approved EAs that year). The average number of employees covered per EA in small firms was just 7. EAs covering 20–49 employees were the second-largest EA size category, with 879 EAs approved covering 27,627 employees, for an average of 31 employees per EA. For the largest EAs covering more than 500 employees, just 164 were approved in 2017 (4 per cent of all approved EAs), yet those agreements covered a total of 436,303 employees (two-thirds of all employees covered by approved EAs). Among those large deals, an average of 2,660 workers were covered per EA.

Table 2
Number of EAs Approved in 2017 by Agreement Size

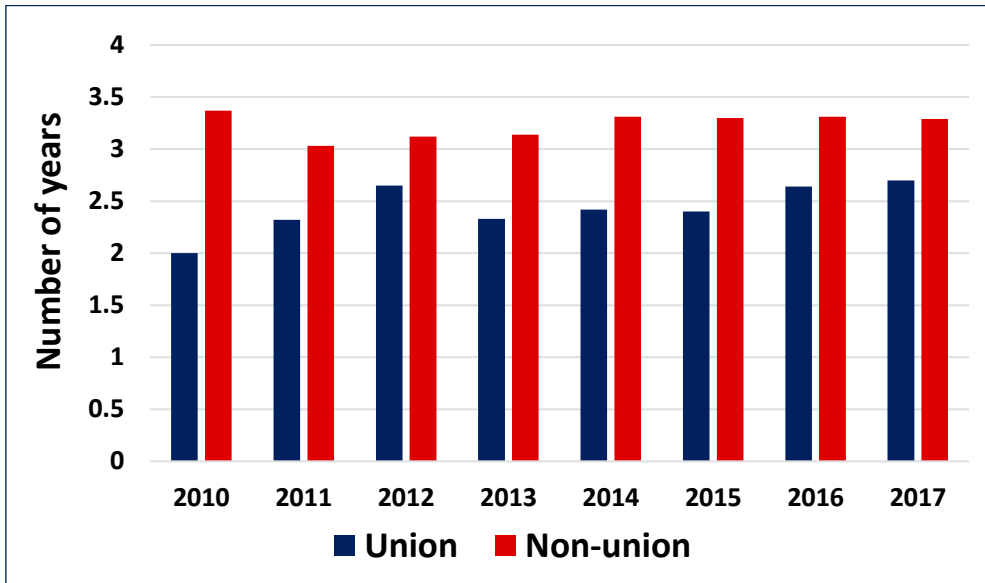
	Under 20	20–49	50–99	100–499	500+	TOTAL
EAs	1,926	879	544	627	164	4,140
Employees	14,227	27,627	38,441	126,234	436,303	642,832
Average number of employees per EA	7	31	71	201	2,660	594

Source: WAD. Figures include both private and public sectors. Due to the structure and detail of the database, it was not possible to conduct analysis of agreement size for the stock of outstanding agreements, but it was possible to do so for the flow of approvals in 2017 (most recent data available).

Average duration

To report average duration of private sector agreements, we once again consider data on the annual flow of approvals, rather than the total stock of EAs, because it provides a dynamic ‘live’ view of EA-making trends. The average duration of a private sector EA has been rising since 2010, from 2.7 years to 3 years since 2016 – although the duration differs considerably depending on whether agreements are formed with union representation or without union representation. For EAs approved in 2017, the average duration of union EAs was 2.7 years. Interestingly, that was also the longest average duration for union EAs since 2010 – indicating that workers are more willing to ‘lock in’ current contract terms for longer periods of time, perhaps reflecting generally unfavourable bargaining conditions. In contrast, the average duration for non-union EAs in 2017 was 3.3 years. Non-union EAs approved have been longer in duration than union EAs every year since 2010, indicating a preference among employers for longer agreements (which reduce, or at least postpone, uncertainty associated with future contract renegotiations).

Figure 2. Average duration of private sector EAs approved by union and non-union



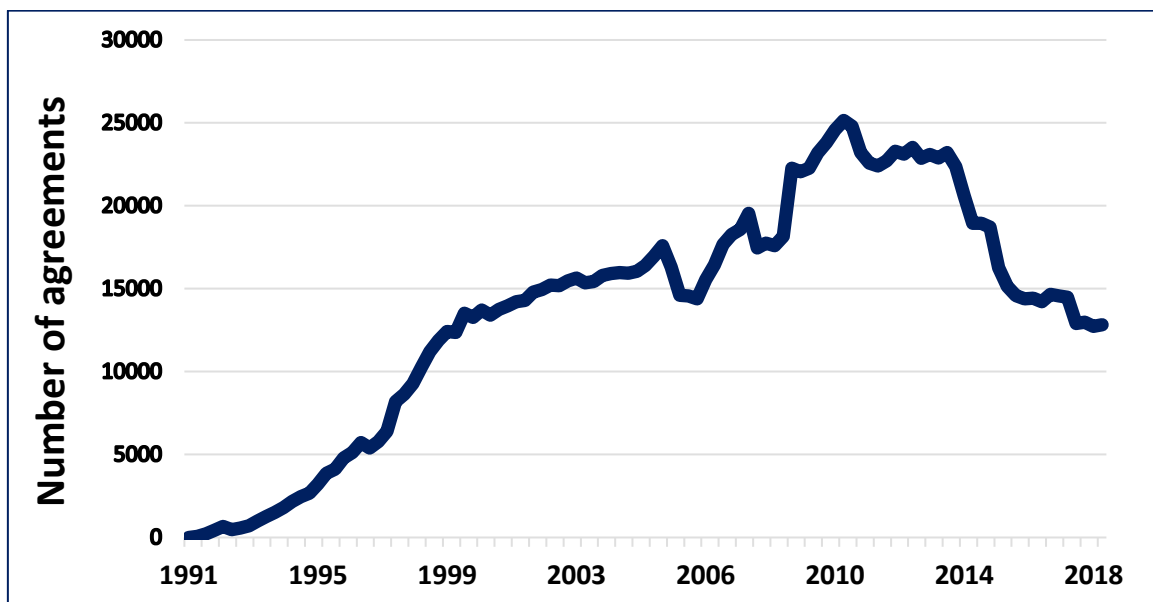
Source: WAD. Figures are for average duration of EAs approved in the private sector each year.

The Decline in EA Coverage

The number of current enterprise agreements (EAs) in operation across Australian workplaces has been noticeably declining since 2014. The WAD includes agreements within their formal periods of operation. In practice, the terms and conditions of employment reached in an EA can ‘roll over’ after their formal expiry date (although expired EAs do not usually specify ongoing wage increases); however, the WAD data only records non-expired, current EAs.

Figure 3 presents quarterly data on the total number of EAs current since the introduction of enterprise bargaining in 1991. EA-making rose consistently from the early 1990s, declining in 2005 with the introduction of the WorkChoices reforms⁸, before increasing again in 2009 and 2010. After almost two decades of growth, the number of current EAs then stagnated until 2013 at around 23,000 EAs, and then began to drop sharply. The number of current EAs in Australia plummeted after 2013, with total current agreements now at their lowest point since 1999. As of June quarter 2018 there were 12,832 current EAs in effect.

Figure 3. Total current EAs 1991–2018

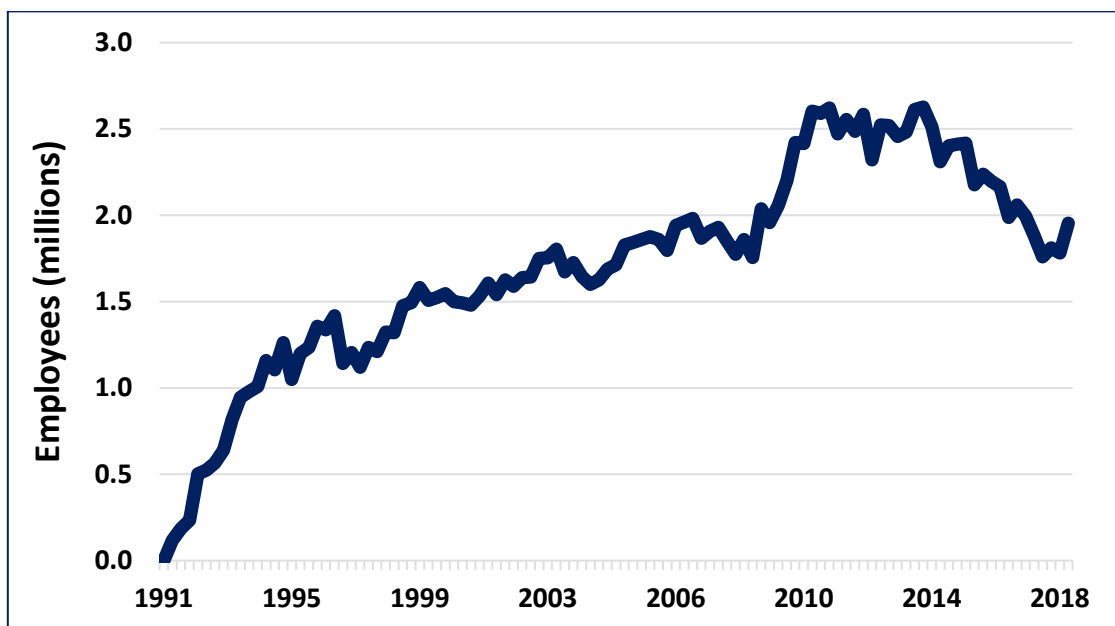


Data: Quarterly, both private and public sector. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

⁸ ‘WorkChoices’ refers to the legislative amendments to the *Workplace Relations Act 1996*, which were in operation from 1996 to the introduction of the *Fair Work Act* in 2009.

The marked decline in the number of EAs has naturally resulted in a decline in the number of employees covered by EAs (Figure 4). As more agreements were made throughout the 1990s, employee coverage under EAs rose consistently to 2009; coverage then spiked with the introduction of the FW Act in 2009, when around 800,000 more employees entered EA coverage. Total employee coverage plateaued at around 2.6 million from around 2010 to early 2014, and then began to steeply decline. Total employee EA coverage is now lower than it was when the FW Act was introduced, at around 2 million covered workers.

Figure 4. Total employees covered by current EAs 1991–2018



Data: Quarterly, both private and public sector. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

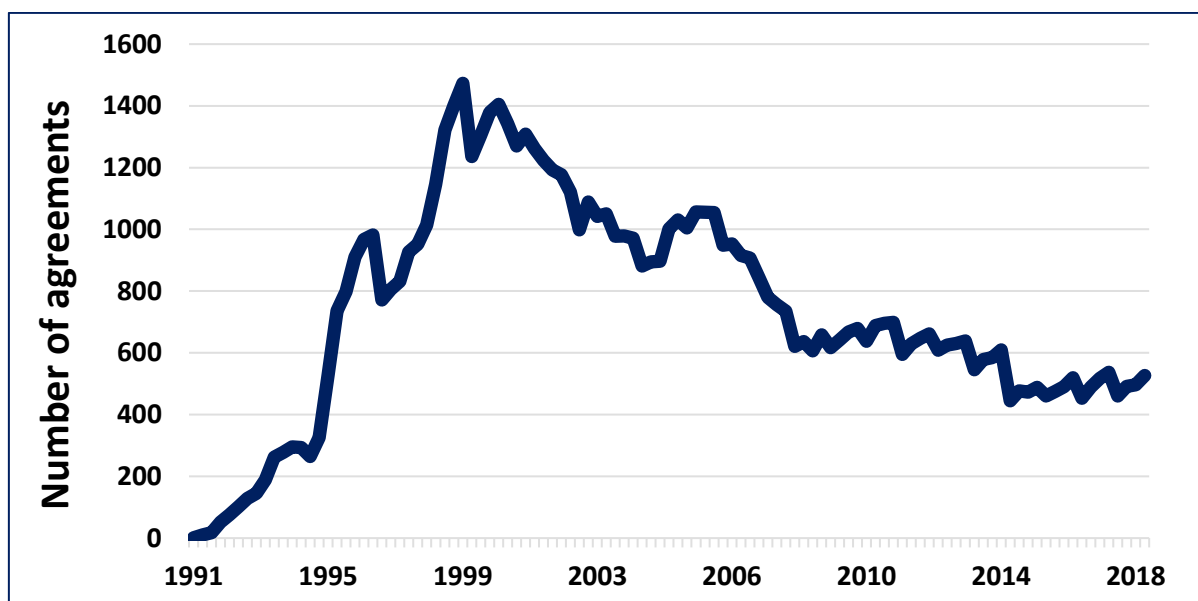
The rapid increase in coverage during the early years of the FW Act took place alongside the transferral of the majority of industrial relations powers by the States to the Commonwealth in 2009 (with the exception of Western Australia), and the creation of a single national industrial relations system. At this point, many State-based EAs were recorded in the WAD for the first time. However, it is not only a change in definition of what constitutes a ‘federal’ EA that explains the increasing number of employees covered by EAs at that time: new statutory mechanisms introduced in the FW Act also clearly improved unions’ ability to access bargaining, convince resistant employers to participate in bargaining, and hence increase EA

coverage.⁹ However, any momentum built in those early years was short-lived; total employee EA coverage plateaued by 2010, and then declined substantially beginning in 2014.

A PARTICULARLY PRIVATE SECTOR PROBLEM

If we compare EA trends in the public and private sectors, we see that the general decline described above is concentrated in the private sector. Figure 5 shows that the number of current EAs in the public sector rose with the introduction of enterprise bargaining to a high of 1,473 EAs in 1999, and then declined over the following two decades to around 500 EAs by 2018.¹⁰ However, this decline in the number of *agreements* was not reflected in any significant decline in the number of *employees* covered (Figure 6). Despite ongoing fluctuations, public sector employee coverage has been relatively stable. This suggests that the decline in the number of public-sector EAs is largely the result of restructuring and consolidation of EAs, rather than the disappearance of collective bargaining.

Figure 5. Public Sector EAs Current 1991–2018

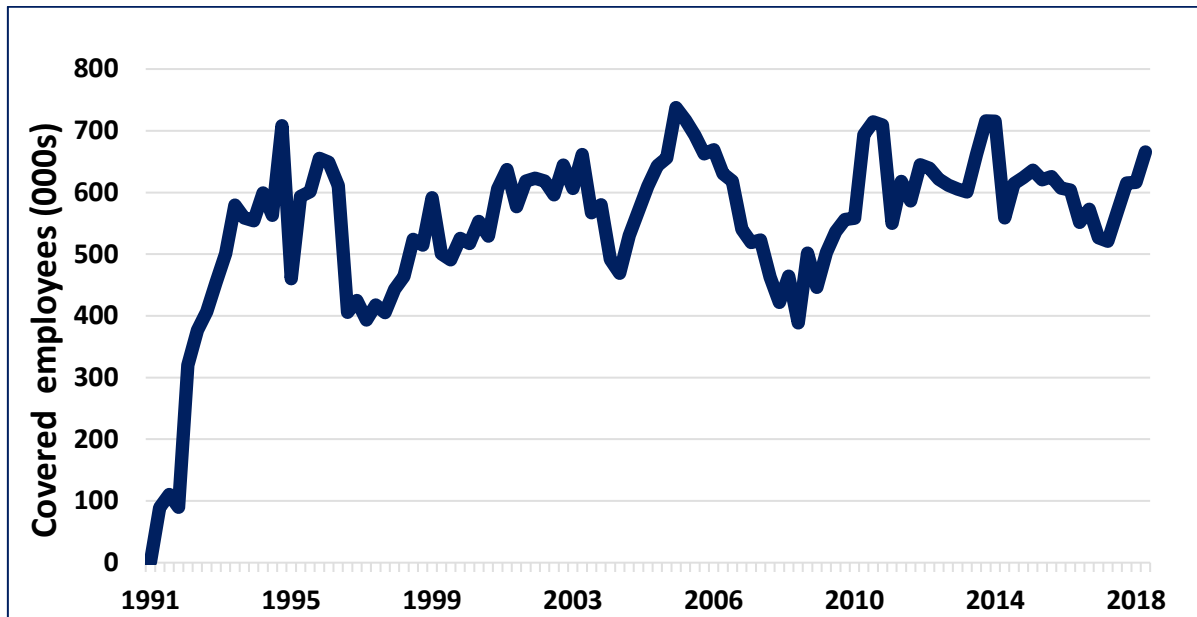


Data: Quarterly. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

⁹ Statutory mechanisms accessed by unions particularly in the early years of the FW Act included majority support determinations and bargaining orders under good faith bargaining requirements. See Creighton and Forsyth (2012) for assessment of collective bargaining in the initial years of the FW Act.

¹⁰ Keep in mind that the JSB data described here does not include enterprise agreements still regulated by state industrial relations commissions, and hence understates the total extent of public sector collective bargaining.

Figure 6. Public Sector Employees Covered by Current EAs 1991-2018



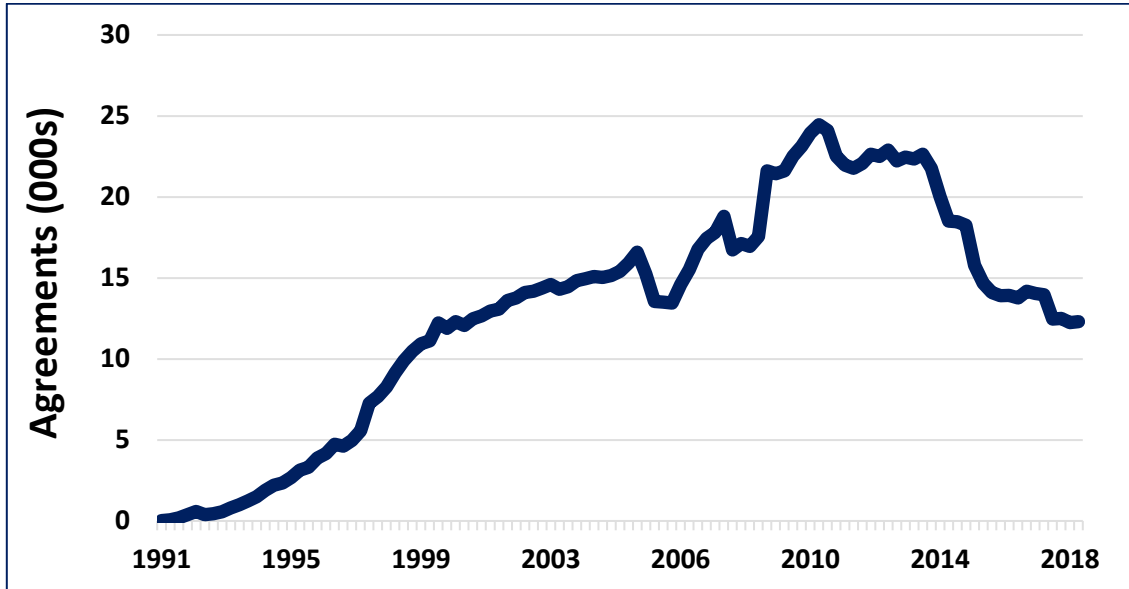
Data: Quarterly. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018, federally registered EAs only.

Conversely, in the private sector, the decline in the number of EAs has indeed been associated with a parallel decline in coverage. The number of current private sector EAs rose steadily from 1991 through 2005 as the enterprise bargaining system was introduced and consolidated. Two marked but temporary declines in the number of EAs occurred in 2006 and 2008: the former reflecting the tumult associated with the introduction of WorkChoices, the latter preceding the imminent introduction of the FW Act. Once the FW Act was in place, the number of EAs began to grow again, reaching a high of 24,459 current private sector EAs in 2010. Beginning in 2014, however, current EAs began to sharply decline, falling from around 22,500 EAs in 2013, to only 12,305 EAs in June 2018. In other words, the stock of current private sector EAs is now just half the size of its 2010 level.

This rapid decline in the number of current EAs in the private sector has been accompanied by an equally shocking decline in employee EA coverage. Figure 8 shows that the number of private sector employees covered by EAs gradually rose after the introduction of the new system in 1991, until around 2009. There was then a surge in employee coverage from 2009 to 2010 as the collective bargaining framework transitioned from WorkChoices into the FW Act. Coverage plateaued from 2010 through 2013. The sharp and sustained decline in coverage commenced after 2013.

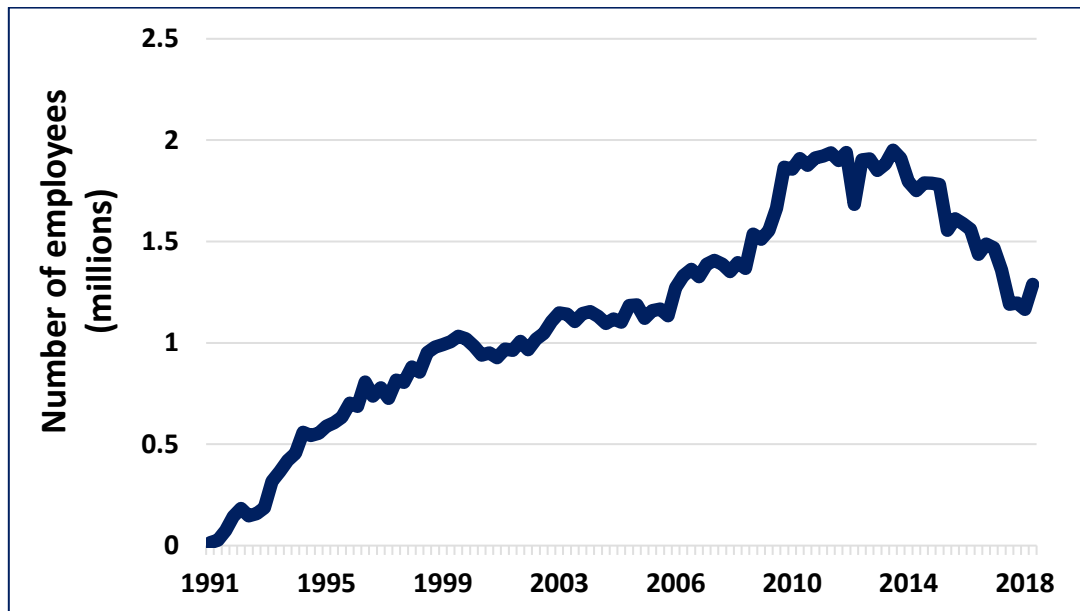
Since then coverage has fallen by one-third: from almost 2 million employees at end-2013, to under 1.3 million as of June 2018.¹¹

Figure 7. Private Sector EAs Current 1991–2018



Data: Quarterly. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

Figure 8. Private Sector Employees Covered by Current EAs 1991-2018



Data: Quarterly. Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June Quarter 2018.

¹¹ The small but noticeable rebound in coverage in the last data point covered by Figure 8 mostly reflects the implementation on April 30 2018 of a renegotiated and approved EA for workers at Coles Supermarkets; the impact of large retail agreements on this data is discussed in detail below.

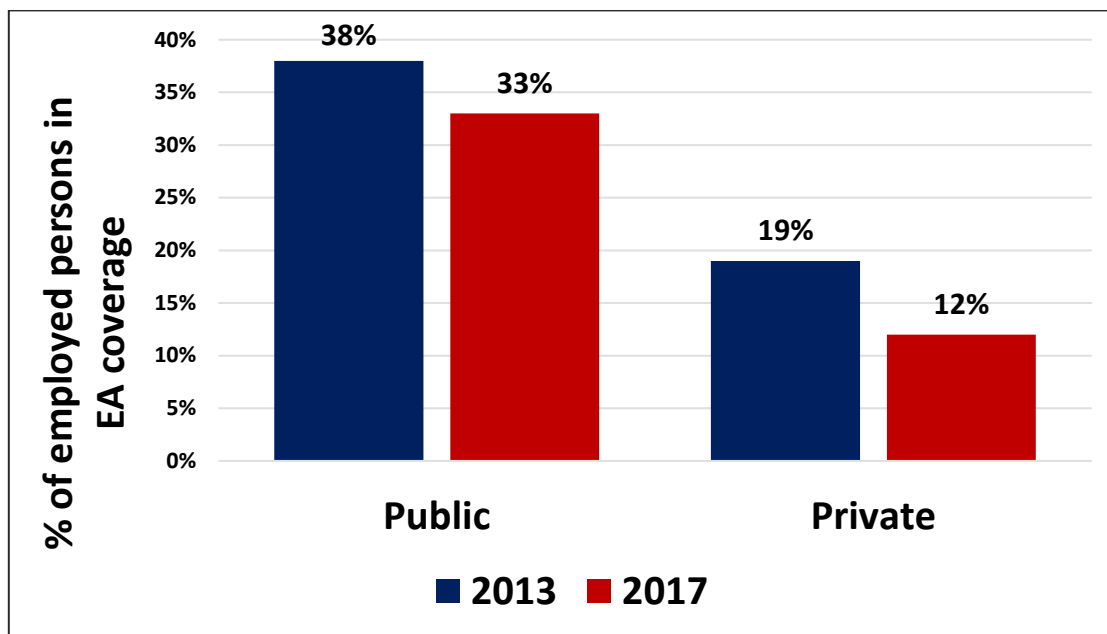
While 2010 was a peak year for the number of private sector *agreements*, 2013 was the peak year for total employee *coverage*. Indeed, the number of employees covered by the current stock of EAs is a stronger indicator of EA coverage than the number of EAs. As such, the following discussion considers the dynamics of private sector EA decline for the period from 2013, before the steep decline in employee coverage was set in motion, to the present.

To provide further detail on the dimensions of decline of private sector EA coverage, Table 3 summarises EA coverage trends by sector at 2013 and the percentage change to June 2018. In the public sector, the number of EAs declined by 51 agreements over this period, or around 9 per cent, with employee coverage increasing slightly by 4,061 workers (an increase of 0.6%). EA coverage decline has been concentrated in the private sector. There were 10,333 fewer agreements current in June 2018 than at end-2013 (a decline of 46 per cent). And between end-2013 and June 2018, the number of private sector workers covered by current EAs declined by a dramatic 662,461 workers (or 34 per cent).

Table 3								
Total Private and Public Sector Current EA Coverage, 2013–18								
	Public				Private			
	Dec. 2013	June 2018	Change	% change	Dec. 2013	June 2018	Change	% change
EAs	578	527	-51	-8.8%	22,638	12,305	-10,333	-45.6%
Workers Covered	661,839	665,900	+4,061	+0.6%	1,950,561	1,288,100	-662,461	-34.0%
Average EA size	1,145	1,264	+119	+10.4%	86	105	+19	+21.5%
Data: Department of JSB. <i>Trends in Federal Enterprise Bargaining</i> , December 2013 compared to June 2018.								

The WAD data presented thus far have described the sharp decline in the number of private sector EAs and employees covered since 2013. However, during this period the size of the Australian workforce has grown (thanks to population growth and an increasing rate of female workforce participation). This exacerbates the decline in the overall *proportion* of workers whose pay and conditions are determined by EAs in the private sector. Figure 9 presents EA coverage as a proportion of the total workforce by

Figure 9. EA Coverage Rates for Private and Public Sector Workers, 2013-17



Data: Workers covered by current EAs from Department of JSB’s Trends in Enterprise Bargaining Report data used for current number of EA-covered workers. Total employment by sector derived from ABS Catalogues 6291.0.55.003, Table 26a., 6248.0.55.002, Table 1. Annual averages.

sector, in 2013 and 2017.¹² Private sector current EA coverage declined by 7 percentage points during that period; only 12 per cent of all Australians employed in

¹² The calculation of coverage ratios for each sector requires consistent data regarding total employment in each sector, and this poses a challenge. The ABS does not publish a consistent time series for employment by broad sector (public/private); various partial series that are available utilise data from different samples (e.g. samples of households versus samples of employers) that are not compatible. Hence, estimates of public sector employment vary widely (from around 1.6 million to close to 2 million for 2018), depending on the specific source. We utilise the following methodology in estimating total employment by sector for purposes of calculating sector-specific coverage ratios. For 2017, we utilise annual average data from ABS Catalogue 6291.0.55.003, Table 26a. That series (based on a household survey) commenced in August 2014; moreover, the data on public sector employment in that series fluctuates considerably from quarter to quarter, suggesting sampling errors (likely arising from the fact that many individuals contacted in the survey may be uncertain which sector they work in). For 2013 data, we backcast the 6291.0.55.003 estimate of public sector employment based on the rate of growth of public sector employment between 2013 and 2017, as reported in ABS Catalogue 6248.0.55.002, Table 1. In terms of the level of public sector employment, that Catalogue suggests a higher level (close to 2 million employees in total); its methodology, based on surveys of employers, does not make it compatible with labour force survey sector data (as reported in Catalogue 6291.0.55.003). However, the trend over time reported in that employer survey is likely more reliable than the (rapidly fluctuating) series from the household survey, and hence we use it to develop a hybrid estimate of the change in total employment by sector between 2013 and 2017. Finally, note that we chose to include self-employed individuals in the estimate of total private sector employment (whereas some analysts prefer to compare union membership to employees only); in our judgment,

the private sector were covered by a current EA in 2017. For the public sector, we estimate that the percentage of employees covered by current EAs has declined by 5 percentage points, although from a much higher starting point: from 38 per cent coverage in 2013 to 33 per cent coverage in 2017.¹³

the growth of nominally independent contractors, marginal self-employed, and 'gig' workers is another dimension of the growing precarity of employment in Australia, and most of those workers are also effectively denied the opportunity to bargain collectively over wages and conditions; hence it is appropriate to contrast EA coverage with that broader base of total private sector employment.

¹³ Moreover, public sector coverage as reported by the JSB *Trends* data has grown significantly in the first half of 2019, by over 100,000 workers compared to the 2017 average depicted in Figure 9, suggesting that the public sector EA coverage ratio is rebounding. Recall that the JSB data includes only federally registered EAs, and hence excludes some public sector EAs regulated by state industrial relations commissions.

Composition of the Decline in EA Coverage

This section focuses on the composition of the decline in EA coverage since 2013 by industry, considering both the decline of agreements and the fall in number of employees covered. We have compared agreement coverage up until year-end 2017 because this is the most recent data available in the WAD for private sector EAs by industry. However, we also draw on the most recent release of the JSB's *Trends in Enterprise Bargaining Report* (June quarter 2018) to compare decline in employees covered by EAs by industry. This data does not identify employee coverage by *both* sector (public/private) and specific industry. As such, intra-industry changes in the number of employees covered cannot be linked precisely to the distinction between private and public sector bargaining described above – since each industry grouping includes a mixture of private- and public-sector activity. However, with the exception of the three largest public sector industries (healthcare, education, and public administration), the vast majority of employees in all other sectors work in the private sector.¹⁴ Hence we can interpret changes in the number of employees covered in those sectors as being reasonably reflective of changes in private sector collective bargaining (since *most* employment in those sectors is with private firms, and those sectors account for *most* private sector employment).

We also decompose analysis of the composition of EA decline between union and non-union EAs, and by firm size. Large retail and fast food EAs play an important role in this analysis: the expiration or termination of several large agreements in these sectors accounted for a large portion (around half) of total private sector coverage decline since end-2013. But even if those retail and fast food agreements are all replaced with new deals in coming months, that would not reverse the decline in total EA coverage (and it is not likely that all expired retail and fast food EAs will indeed be replaced). Annual approvals data from the WAD also helps to uncover the dynamic trends affecting EA-making; we find that a decline in the number of approved union EAs explains most of the decline in EAs approved since 2012. We also find firm size is a strong indicator of EA erosion: comparing 2013 to 2017, small EAs covering less than 20 employees experienced the most rapid decline in number of EAs approved. However, the small decline in the number of large agreements approved (500+

¹⁴ The only exception to that general rule is utilities (electricity, gas, water, and waste services), where public agencies account for a significant share of total employment.

workers) nevertheless accounted for the majority of the decline in number of employees covered.

EA decline by industry

Table 4 reports WAD data on the number of private sector EAs current within each industry in 2013 (when private sector employee coverage peaked) and in 2017 (most recent WAD data), and the percentage change over the period. We only consider private sector EAs; this includes private sector EAs within predominantly public sector industries (healthcare, education, and public administration and safety).¹⁵ Industries appear in the table in the order of largest proportionate decline in number of current EAs. Overall, the picture is startling: dramatic declines have occurred in the number of current EAs in the private sector across most industries. The greatest declines have been in retail trade and agriculture, forestry and fishing; the number of current private sector EAs in these sectors fell by 82 per cent and 75 per cent, respectively. ABS labour force statistics show more than 100,000 jobs were added to private sector healthcare from August 2014 (the earliest data point for that series) to end-2017,¹⁶ but despite this growth in private health employment, there was a dramatic decline in the number of EAs in private healthcare – falling by a massive 68 per cent from 1,784 EAs in 2013 to only 576 in 2017. Other industries where the number of current private sector EAs fell by more than half include accommodation and food services (-67%); arts and recreation services (-60%); information, media and telecommunications (-58%); and rental, hiring and real estate (-53%).

One important industry with a relatively small decline in EAs in the private sector was the utilities sector (including electricity, gas, water and waste services); it had 325 private sector EAs current in 2017, down just 16 per cent from 2013 (when 389 agreements were current). The number of wholesale trade EAs declined by 25 per cent, and manufacturing EAs by 35 per cent. ‘Other services’ (which covers a range of work including repair and maintenance, hairdressing and gardening services) experienced no significant change in current EAs.

By volume of agreements, the construction and manufacturing sectors currently administer the highest number of EAs in the private sector, with 4,231 and 1,969 in each industry, respectively. Those two sectors also experienced proportionately less

¹⁵ It may seem surprising that there are so many private sector agreements in industries that are typically considered in the public sector domain. Private sector EA data from the WAD thus provides a good indication of the growing extent of market delivery in these traditionally public-sector industries.

¹⁶ ABS (Cat. no. 6291.0.55.003), Table 27.

erosion in the number of current EAs compared to other industries. It is important to note that these two industries are projected by the Department of JSB's industry

Table 4			
Industry Composition of Decline in Private Sector EAs			
	Number of agreements current in 2013	Number of agreements current in 2017	% change
Retail trade	1,177	209	-82%
Agriculture, forestry and fishing	551	135	-75%
Healthcare and social assistance	1,784	576	-68%
Accommodation and food services	974	325	-67%
Arts and recreation services	300	121	-60%
Information, media and telecommunications	148	62	-58%
Rental, hiring and real estate services	519	242	-53%
Financial and insurance services	201	99	-51%
Administrative and support services	885	466	-47%
Professional, scientific and technical services	648	354	-45%
Public administration and safety	312	174	-44%
Education and training	667	374	-44%
Construction	7,530	4,231	-44%
Mining	631	359	-43%
Transport, postal and warehousing	1,569	972	-38%
Manufacturing	3,007	1,969	-35%
Wholesale trade	611	460	-25%
Electricity, gas, water and waste services	389	325	-16%
Other services	538	532	-1%
TOTAL	22,441	11,985	-47%

Source: WAD. 2017 most recent data available for private sector EAs by industry. This table presents data from only the private sector, even in predominantly public sector industries (such as education

and healthcare). 'Current' EAs defined as agreements that have commenced operating, but have not been terminated nor have expired at 31 December.

employment projections to experience among the highest employment growth in coming years (along with healthcare);¹⁷ hence the decline in EA-making has worrying implications for future coverage in these high-growth industries, despite their greater stability in the number of current EAs – since if total employment is growing, even a modest decline in absolute EA coverage can translate into a bigger decline in the coverage rate.

Table 4 reported the changes in the number of private sector agreements in each industry, using the WAD data (which codes for sector as well as industry). A similarly precise depiction of workers covered by EAs (distinguishing between private- and public-sector employees within each broad industry grouping) is not possible. Hence, Table 5 reports the breakdown of changes in the number of employees covered by EAs each entire industry since 2013, using the latest *JBS Trends in Enterprise Bargaining Report* data to June quarter 2018. As noted above, these data combine employees from both the private and public sectors within each industry; this still provides an overview of trends in private sector coverage, since most public sector workers are employed in three key industries (healthcare, education and public administration), and most workers in the other industries are employed in the private sector.

As shown in table 5, since 2013, the largest declines in the number of employees covered by current EAs were experienced in retail trade with around 270,000 less employees (a decline of 69 per cent), and accommodation and food services with 133,000 less employees (a decline of 85 per cent). Significant employee coverage declines also occurred in administrative and support services (-38%), manufacturing (-38%), and mining (-35%). The largely public-sector industries of education and healthcare were the only ones to experience an increase in coverage – and public administration and safety experienced only a small decline.

In total, employee EA coverage declined across the private sector since 2013 by 662,461 employees. The retail trade and accommodation and food service industries account for around 400,000 of those workers (or over half the total). In turn, most (but not all) of the loss of coverage in those two sectors (49.6 per cent) is due to the expiration of a few very large agreements in retail and fast food in the wake of the FWC's BOOT 2016 decision regarding the Coles Supermarkets EA (discussed further below). Other sectors which account for significant proportions of the total decline in

¹⁷ See Department of JSB, 2018e.

current EA coverage decline include approximately 150,000 fewer employees covered in manufacturing; 49,000 in construction; 32,000 in transport, postal and warehousing; and 21,000 in mining. In the case of manufacturing, the decline in the number of employees covered by EAs partly reflected the decline in total employment in the

Table 5
Industry Composition of Decline in EA Coverage by Industry

	Employees Covered		Change	% Change
	Dec. 2013	June 2018		
Accommodation and Food Services	156,900	23,800	-133,100	-85%
Retail trade	390,122	121,000	-269,122	-69%
Administrative & Support Services	60,600	37,700	-22,900	-38%
Manufacturing	402,600	251,200	-151,400	-38%
Mining	61,558	40,100	-21,458	-35%
Construction	143,776	94,600	-49,176	-34%
Electricity, Gas, Water, Waste	56,019	39,300	-16,719	-30%
Professional, Scientific, Technical	38,460	28,900	-9,560	-25%
Other services	40,536	30,500	-10,036	-25%
Information Media & Telecom.	52,600	43,128	-9,472	-18%
Rental, hiring & real estate services	10,500	8,700	-1,800	-17%
Arts and recreation services	48,300	40,300	-8,000	-17%
Transport, Postal, Warehousing	197,525	165,850	-31,675	-16%
Financial and insurance services	166,942	140,232	-26,710	-16%
Wholesale trade	31,500	27,000	-4,500	-14%
Public administration and safety*	328,100	315,355	-12,745	-4%
Agriculture, Forestry & Fishing	13,323	12,900	-423	-3%
Education*	252,600	267,400	14,800	6%
Healthcare & community services*	361,636	391,581	29,945	8%
TOTAL	2,813,597	2,079,546	-734,051	-26%

Source: Department of JSB. *Trends in Federal Enterprise Bargaining Report*, June 2018. Includes both private and public sector workers.

* Industries in which public employment comprises the majority of employment.

sector – which shrank by around 10 per cent from 2013 through 2015 (although it has rebounded more recently). In mining, construction, and transportation, however,

falling EA coverage occurred despite growth in total employment – thus leading to a two-pronged decline in the proportion of workers covered by EAs.¹⁸ This confirms that EAs have been displaced for other pay-setting methods in these industries.

The importance of large retail and fast food agreements

The especially large declines in employees covered by current EAs in retail trade (reported in Table 5) stem largely from the expiration or termination of several large EAs – including Coles and Woolworths (subsequently renegotiated), and Kmart, Bunnings, Myer, Target, Big W, Officeworks and BWS (with no replacement EAs negotiated yet). A new replacement EA for workers at Coles Supermarkets came into effect in April 2018; mostly due to this, retail industry EA coverage grew in the recent June quarter *Trends* data by around 80,000. Agreement-level data from the WAD indicates that the remaining eight large expired agreements (including Woolworths) account for around 77 per cent of the decline in employee EA coverage in retail trade between end-2013 and June 2018. Similarly, the expiration of EAs in three large fast-food firms – McDonald's, Dominos and Pizza Hut – explains almost all (91 per cent) of the employee coverage decline in the accommodation and food services industry since 2013. The number of EAs in these two large industries is small. EAs are rare in small and medium-sized retail and hospitality firms; EA coverage in these two sectors is mostly constrained to the largest firms.

As noted above, that handful of very large retail and fast food EAs has played a crucial role in the overall decline in EA coverage in the private sector -- accounting for around half of the decline since 2013. After 2016 when the FWC rejected the new Coles EA for failing the BOOT, retail and fast food EA-making fell into limbo for some years; large agreements expired without new EAs negotiated to replace them, and big retailers like Woolworths began lobbying strongly against the enterprise bargaining system as 'unworkable' (Marin-Guzman 2017). With employers facing significant increases in labour costs to become compliant with Award conditions (in light of the Coles decision), pressure became even more intense on the FWC to reduce penalty rates in these same sectors – reductions which it approved for Sunday and holiday work, effective 1 July 2017.

A replacement EA at Woolworths supermarket was supported by the workforce by majority vote in October 2018, but had not yet (at time of writing) been approved by the FWC.¹⁹ The addition of that renegotiated EA (assuming it is approved) will bring an

¹⁸ In other words, the ratio of EA-covered workers to total employment declined both due to a shrinking numerator and a growing denominator.

¹⁹ FWC approval of the Woolworth's EA is being delayed by its hearing of a termination application of Woolworths' 2012 EA by the Retail and Fast Food Workers' Union. See Marin-Guzman, 2018.

estimated 100,000 employees back under EA coverage, restoring around 15 per cent of the total private sector EA coverage that was lost since 2013. Using WAD agreement-level data to estimate the coverage that was lost in seven other major expired retail EAs (at Kmart, Target, Myer, Bunnings, Big W, Officeworks and BWS), we estimate coverage could regain a further 16 per cent of its post-2013 decline (pending renegotiation of all deals). In accommodation and food services, meanwhile, Dominos recently elected to cease its use of EAs and instead place employees on Award-based pay. We estimate that the McDonald's and Pizza Hut EAs, if renegotiated, would lift coverage by another 16 per cent of the post-2013 decline.

In the best-case scenario, therefore, if replacement agreements are reached and approved for all the large expired retail and fast food EAs (and pass the BOOT), total private EA coverage would recoup between 45 and 50 per cent of the coverage lost between end-2013 and June 2018. That would represent a substantial recovery from the current depressed levels of EA coverage. However, replacing those large expired EAs in these two industries will still fall short of reversing the total coverage decline in the private sector (and even fully repairing lost coverage in those two industries). EA coverage would still have declined by around 350,000 private sector employees (or around 18 per cent), compared with end-2013. And it is not a foregone conclusion that all of those retail and fast food agreements will indeed be successfully replaced. Some firms will experience protracted negotiations, some may still face rejection by the FWC for failing to pass the BOOT,²⁰ and others may follow the lead of Dominos and aim to avoid EAs altogether. Moreover, under the newly renegotiated EAs at Coles and Woolworths, future wage agreements are tied directly to increases in the national minimum wage; hence even in these workplaces, the restoration of EA coverage does not imply a full revival of enterprise-level wage negotiations as traditionally conceived. For all of these reasons, while the renegotiation of expired EAs in the retail and accommodation and food services sectors will certainly result in a partial and welcome rebound in EA coverage in coming years, it cannot be concluded that this will somehow repair the more general erosion of private sector bargaining and EA coverage described above.

Union vs. non-union agreements

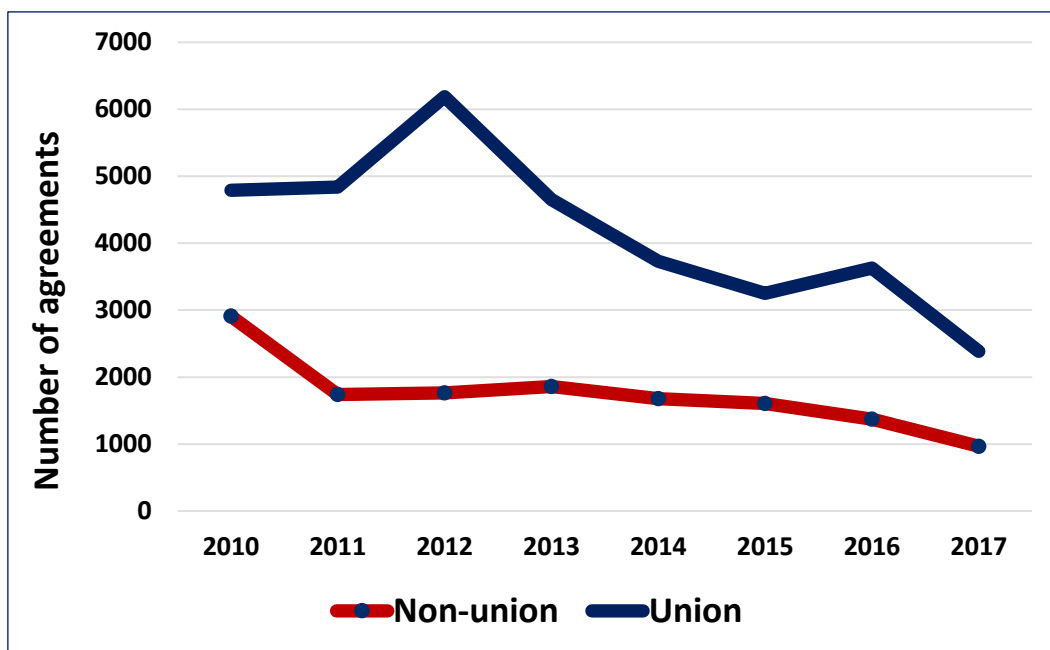
We now consider data on the distinction between private sector EAs approved with union representation (union agreements) and without unions (non-union agreements).

²⁰ For example, at time of writing a proposed non-union EA at fast food chain Guzman y Gomez was facing potential rejection by the FWC for potentially failing the BOOT. The FWC has also questioned why no unions were engaged to represent a predominantly migrant, English-as-second-language workforce. See Workplace Express, 2018e.

Once again, we utilise annual approvals data (rather than considering the total current stock of EAs), to gain more insight into the dynamic evolution of EA-making trends and union capacity. We compare approved EAs since 2010, so as to capture initial adjustments to the new statutory framework after the FW Act was introduced – including the transfer of state-based EAs into the federal system.

Most EAs are union agreements: that is, one or more unions have applied to the FWC to be ‘covered’ by the final agreement, hence giving them rights to participate in enforcing it. Australia is unique, however, in permitting EAs to be formulated and approved without any official union presence; non-union agreements have thus constituted a significant share of all approved agreements (between one quarter and one-third) throughout the FW Act period. Moreover, the FW Act’s basis for distinguishing between union and non-union EAs (namely, whether a union is *party* to the agreement) does not imply that a union was actively *involved* in its negotiation. Thus the number of union EAs may overestimate the role of unions in EA-making. 2010 was a high-point for non-union EAs: almost 3,000 non-union EAs were approved that year (close to 40 per cent of all EAs), compared to about 4,800 union EAs. After the full implementation of the FW Act, the number of approved union agreements increased, reaching a peak of almost 6,200 EAs (or 78 per cent of all EAs approved) in 2012. But beginning in 2013, the number of union EAs began to significantly decline. The rate of newly approved union EAs plunged by over 60 per cent between 2012 and 2017. In contrast, since 2012 non-union EA approvals have declined more gradually, falling by 45 per cent over the same period. Hence approved union EAs have shrunk as a share of total approvals (to just over 70 per cent in 2017).

Figure 10. Number of Union and Non-Union EAs Approved in the Private Sector



Source: WAD. Number of agreements approved each year.

Unions play a central role in EA-making. Indeed, every new (non-replacement) enterprise agreement implemented since 2011 has been a union agreement; no new non-union EAs are being implemented. Since non-union EAs allow employers to set terms and conditions of employment without union representation, employers may have voluntarily signed non-union EAs in the past as an active deunionisation strategy – or at least as a less overt ‘risk management’ approach to the potential of union presence. Non-union EAs have also been used to lower the labour costs entailed with meeting Award minimums, a practice set in motion under WorkChoices when the ‘no disadvantage’ test was removed; considerable evidence suggests that the practice of undercutting Award minimums has continued in many non-union EAs, despite the practice now being illegal. Employer motivation to sign non-union EAs may have abated in recent years due to declining fear of unionisation, the ease with which employers can avoid collective agreements, and increased diligence by the FWC since the Coles BOOT decision.

While all new EAs reached since 2011 have featured union involvement, the flow of new EAs has largely disappeared (as discussed in the next section). This suggests that unions have lost much of their ability to reach into new workplaces as they are being created. Moreover, the FW Act introduced a relaxed definition of a ‘union agreement,’ one that no longer required unions to have a bargaining presence in order to be covered by an agreement. Hence the number of ‘union’ EAs recorded in the WAD gives only imperfect insight into whether unions are actually engaging in a bargaining process, and hence whether the key objects of the FW Act—to encourage enterprise

bargaining (as distinct from *EA-making*)—are indeed being realised. It is plausible that unions have been restricted in their capacity to build more genuine representation structures that could underpin ongoing collective bargaining capacity (such as ongoing campaigns, delegate development and member recruitment), and hence have become limited in many cases to a more administrative process of being covered by agreements they did not actively negotiate. This leaves the whole process vulnerable to a shift in employer attitudes; if employers decide it is no longer in their interests to facilitate non-union EAs (or even nominally union EAs, in which the relevant unions were not practically involved in negotiations), then EA coverage could decline rapidly. The often-large gap between the minimum terms of Modern Awards and the prevailing wages in various industries (including those specified in EAs) now reinforces the incentive for employers to abandon EA-making altogether.

The decline in the number of union EAs being approved (alongside the equally stark decline in total EA coverage) signals that the gradual erosion of union capacity has indeed caught up with EA-making. Hampered by many headwinds – including the small size of workplaces, employer resistance, a more hostile legal climate, and the ongoing financial burden of ‘free riding’ – the ability of unions to extend collective bargaining capacity into workplaces is increasingly hampered. The FW Act’s loose definition of union representation, with no statutory requirements for genuine negotiations (that is, bargaining supported with genuine workplace organising and representation), has partly masked this deterioration of union capacity in the WAD data.

Erosion of EAs by firm size

The size of EAs is another relevant factor that helps to understand the decline in private sector collective agreements. Using WAD data on the number of employees covered by each EA, we consider how the decline in the number of EAs approved from 2013 to 2017 is related to the size of agreements. Due to the structure and detail of the database available, it was not possible to conduct analysis of agreement size for the stock of outstanding agreements, but it was possible to do so for the flow of approvals.²¹ Employee data in the WAD reports the size of agreements approved within each successive two-year period; below we report annual averages of approvals for the 2013-2014 and 2015-2016 periods, along with single-year actuals for 2017.²² WAD data for agreement size do not distinguish between private and public sector

²¹ The WAD database reports the size of each agreement – which does not necessarily correspond to the size of workplaces. The difference is particularly relevant in cases where one EA covers more than one workplace. The points we make below about the disproportionate administrative cost of maintaining very small EAs are even stronger when considering that the average size of workplaces may be even smaller than the average size of the agreement.

²² Single-year data is available for 2017 since it is the first year of the next two-year period.

EAs. Recall that public sector EA coverage (as shown in Table 3 above) is concentrated overwhelmingly among large EAs (covering over 1000 workers per EA, on average). As shown below, the decline in EAs being approved has been disproportionately concentrated among smaller agreements. Hence, even with no breakdown of EA size between private and public sectors, we are confident that the story described below is primarily a story of private sector decline.

Table 6 shows that small EAs (covering less than 20 employees) experienced the most rapid decline in number of approvals between 2013-2014 and 2017: the number of small EAs approved per year was 43 per cent lower in 2017 than in 2013-2014. With EAs attracting significant transaction costs in negotiation and administration, the disproportionate decline in the number of very small agreements approved suggests that maintaining such a large number of small EAs was likely unsustainable for both unions and employers; as noted above, each of these very small agreements covers an average of only 7 employees. In contrast, the number of approved EAs covering between 20 and 50 workers declined by 29 per cent, while the number of very large EAs (covering over 500 employees) declined by 24 per cent. The number of EAs covering 50-500 workers approved in 2017 was around 15 per cent lower than in 2013. In other words, the rate of decline of EA approvals was greatest for very small and small EAs, and next greatest for very large EAs. Mid-sized EAs (covering 50-500 workers) experienced the most modest decline in number of approvals.

Small EAs experienced the fastest decline in number of EAs approved, comparing 2017 to 2013, and they also experienced the most rapid decline in the number of workers covered by those approved EAs. This comparison is also illustrated in Table 6. Workers covered by approved EAs covering less than 20 workers fell by 45 per cent, comparing 2017 to 2013. The decline in the number of workers covered by approved EAs in the other size categories was also broadly in line with the decline in number of EAs. 28 per cent fewer workers were covered by approved EAs covering 20 to 50 workers in 2017, and 23 per cent fewer workers were covered by approved EAs covering over 500 workers. Once again, the mid-sized EAs (especially, in this case, EAs covering 50-100 workers) showed the greatest resiliency: the number of workers covered by approved EAs in this size category declined by just 15 per cent.

Table 6						
Decline in EAs approved by agreement size 2013-17						
EA size		2013/14	2015/16	2017	Decline 2013-17	% Decline 2013-17
	<i>EAs</i>	3,373	3,155	1,926	-1,447	-43%

0-19 employees	<i>Employees</i>	25,864	24,197	14,227	-11,637	-45%
20-49 employees	<i>EAs</i>	1,234	1,191	879	-355	-29%
	<i>Employees</i>	38,544	37,144	27,627	-10,917	-28%
50-99 employees	<i>EAs</i>	641	619	544	-97	-15%
	<i>Employees</i>	45,090	42,950	38,441	-6,649	-15%
100-499 employees	<i>EAs</i>	733	690	627	-106	-14%
	<i>Employees</i>	155,034	139,558	126,234	-28,800	-19%
500+ employees	<i>EAs</i>	215	162	164	-51	-24%
	<i>Employees</i>	564,738	393,649	436,303	-128,435	-23%
TOTAL	<i>EAs</i>	6,195	5,816	4,140	-2,055	-33%
	<i>Employees</i>	829,269	637,497	642,832	-186,437	-22%

Source: WAD. Due to the structure and detail of the WAD, it was not possible to conduct analysis of agreement size for the stock of outstanding agreements; instead we analyse the flow of approvals. Annual averages were calculated for 2013/14 and 2015/16 since these years were available in two-yearly sets. Actuals were used for 2017 since single-year data was available for this year.

In terms of the absolute change in the number of workers covered by approved EAs, the very large EAs explain the greatest proportion of the decline in the number of employees covered: the loss of 51 of agreements bigger than 500 workers resulted in a decline of 128,435 employees in approved agreements (comparing 2017 to 2013). Once again, this partly reflects the important role played by very large expired EAs in the retail and fast food sectors. The decline in approved EAs covering 100–499 workers resulted in 28,800 fewer employees covered by the smaller number of approved agreements.

Insights from the ABS' Employee, Earnings and Hours survey

As an exhaustive catalogue of all federally regulated EAs, the WAD data provides the most comprehensive and accurate account of EA decline. However, the WAD is limited by the fact that it only captures EAs within their formal years of operation. Under the FW Act, the terms and conditions of employment in an EA can roll over after their expiry until a new agreement is negotiated or it is terminated. This means there could be workers for whom at least some terms and conditions of employment continue to be determined, or at least influenced, by expired agreements.

In this regard, the ABS' biennial Employee Earnings and Hours (EEH) survey (Catalogue 6306.0) is a useful supplement to the WAD. It provides information on enterprise agreement coverage and other pay-setting methods (individual agreements and

Awards) within Australian workplaces.²³ The EEH data do not differentiate between expired and current agreements, and hence its coverage estimates likely overshoot the number of employees whose pay and conditions are actually determined by EAs. Nevertheless, EEH data provides a useful secondary picture of how EA coverage has interacted with other pay-setting methods over time.

Using EEH data, Table 7 shows the percentage of all employees paid according to different pay-setting methods: EAs, Awards or individual arrangements (such as contracts). At 2016 (the most recent data available) 38.9 per cent of all employees were paid according to EAs, which represented the largest pay-setting method, followed closely by individual arrangements at 36.6 per cent and Awards comprising a substantial 24.5 per cent. Comparable data from the EEH series for 2014 shows pay-setting methods among employees evolved considerably in the short intervening two-year period: between 2014 and 2016, EA coverage declined by 4.6 percentage points, Awards increased by an almost-proportionate 4.1 percentage points, and the incidence of individual arrangements rose slightly by 0.5 percentage points.

The EEH also reports data disaggregated by firm size.²⁴ Table 7 presents pay-setting data by firm size in 2016, as well as the percentage change in pay-setting methods over the two years between 2014 and 2016. Consistent with WAD data showing a rapid decline in the number of small EAs being approved, the EEH survey confirms that the small business sector in Australia has virtually become a wasteland for EA coverage, with only 5.1 per cent of workers in firms under 20 workers covered by an EA. Instead, 60 per cent of workers in the smallest firms are paid through individual arrangements, and 35 per cent are paid through Awards—the highest representation among all firms for both non-EA pay-setting methods. The likelihood that a worker will be paid according to an EA increases with firm size, with around one-quarter of employees in firms with 50–99 employees covered by EAs, 48 per cent coverage in firms with 100–999 employees, and 70 per cent EA coverage in the largest firms (1000+ employees).

Table 7			
Pay-Setting Method by Firm Size, 2014–16			
Firm Size	Enterprise agreement	Award	Individual arrangement

²³ The EEH reports use the term collective agreement, rather than enterprise agreement, but for present purposes the two terms can be interpreted synonymously (due to the effective prohibition of multi-firm collective bargaining under existing Australian labour law).

²⁴ With EEH data we are now considering EA coverage by *firm* size, where the previous section (based on WAD data) reported *agreement size* (which does not necessarily correspond to the size of workplaces).

	2016	Change since 2014 (% points)	2016	Change since 2014 (% points)	2016	Change since 2014 (% points)
Under 20 employees	5.1	-0.9	35.4	+2.0	59.6	-1.2
20–49 employees	14.1	-3.4	32.7	+0.4	53.2	+2.9
50–99 employees	25.5	-2.7	28.1	+3.5	46.3	-0.8
100–999 employees	48.0	-4.2	17.0	+2.4	35.0	+1.9
1000+employees	70.2	-9.5	18.5	+9.0	11.3	+0.5
Total	38.9	-4.6	24.5	+4.1	36.6	+0.5

Source: ABS *Employee Earnings and Hours* (Cat. no. 6303.0). Figures for both public and private sector. 2016 figures for non-managerial employees, Table 7. The only comparable firm size data in the EEH was for 2014 and for all employees.

Over the two years from 2014 to 2016, EA coverage decreased across all firm sizes, with the relative change in the other pay-setting methods offsetting this decline varying. For instance, a 3.4 percentage point decrease in EA coverage in firms with 20–49 employees was offset almost entirely by an equal proportionate rise in individual arrangements; in contrast, the 4.2 percentage point decline in EA coverage among firms with 100–999 employees was offset by equal increases in both Awards coverage and individual arrangements (of approximately 2 percentage points in each). The substantial 9.5 percentage point decline in the proportion of employees in large firms of 1000+ employees paid through EAs, and the offsetting rise in Awards coverage in large workplaces, once again partly reflects the effect of large expired retail and fast food agreements.

The very low incidence of EAs among small firms, which comprise 97 per cent of all employing enterprises in Australia²⁵ and account for over 40 per cent of total employment,²⁶ shows that under the present system the benefits of EA coverage are effectively out of reach for a substantial and growing proportion of Australian workers. The firm size and pay-setting picture portrayed by both the WAD and ABS data indicates that enterprise bargaining is not compatible with an economy composed of increasingly smaller workplaces – to say nothing of the increased prevalence of labour hire and subcontracting practices. That the fastest decline in the number of approved

²⁵ For firms with less than 20 employees. ABS, *Counts of Australian Businesses including Entries and Exits*, Jun 2013 to Jun 2017 (Cat. no. 8165.0), Table 13. Figure for 2016–17.

²⁶ ABS, *Australian Industry* (Cat. no. 8155.0), Table 5.

EAs between 2013 and 2017 was experienced among firms with less than 20 employees, and with only 5 per cent EA coverage in this category of businesses, confirms that the shift toward smaller workplaces and a more fragmented or ‘fissured’ workplace (in the words of Weil, 2017) is exerting a powerful negative influence on collective bargaining. If EAs were ever a desirable pay-setting method for small businesses, a clear break has occurred in their pay-setting method preferences in recent years; and the already-low rate of EA coverage in the small business sector is poised to decline further and rapidly.

Dynamics of the Decline in Private Sector EA Coverage

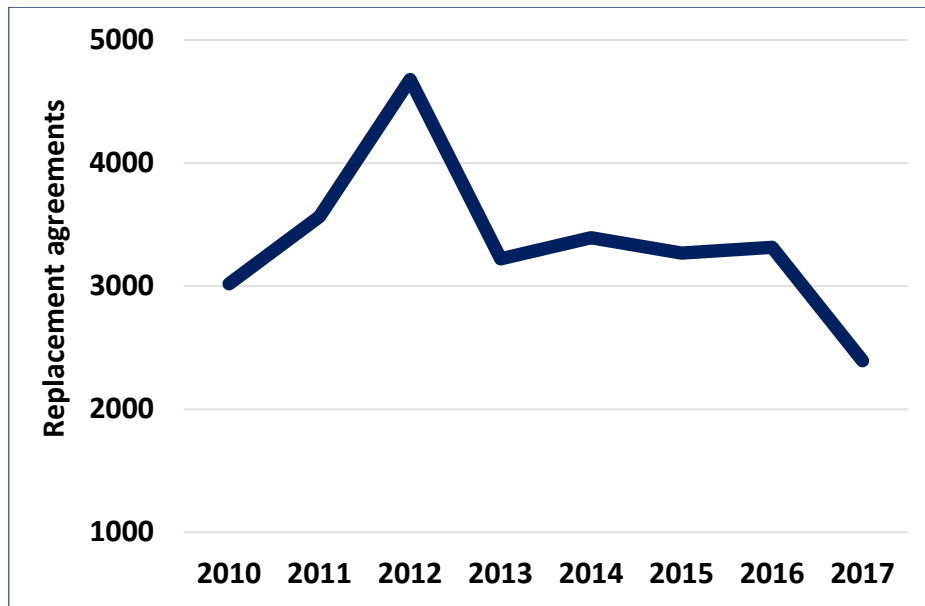
The rapid decline in EA coverage experienced in Australia’s private sector since 2013 reflects a ‘perfect storm’ of several contributing factors operating at once. Many existing agreements are not being renewed as they expire—and hence drop off the Department of JSB’s inventory of current agreements. At the same time, the flow of newly-negotiated agreements (including greenfield agreements) has fallen dramatically, so that new agreements now offset few of those non-renewed EAs. Meanwhile, the acceleration of EA terminations is reducing the stockpile of expired agreements—while dramatically altering the bargaining relationship between parties during renegotiation. Together, all these factors are cumulatively driving down both the number of EAs in the private sector, and the proportion of workers covered by them.

DECLINE IN REPLACEMENT AGREEMENTS

Certified and approved agreements that replace previous agreements are coded in the WAD as ‘replacement’ EAs; they typically take the place of a previous EA when it expires and is no longer in operation. The number of replacement EAs implemented increased from 2010 through 2012 (see Figure 11), consistent with the renewal of new agreements negotiated in the early years of the FW Act (at that time, the average duration of new EAs was 2.5 years). But after this first ‘batch’ of renewals, fewer and fewer EAs have been replaced. By 2017, barely half as many replacement EAs were being approved compared with 2012.

The decline in replacement EAs has been reinforced by the decline in the overall stock of EAs in effect at any point in time: with fewer EAs in place, the flow of EAs requiring renewal in any given year will naturally be smaller. We can calculate an approximate ‘renewal rate’ of EAs as the number of replacement EAs approved in any year as a proportion of the previous year’s end stock of agreements.

Figure 11. Decline in Private Sector Replacement Agreements

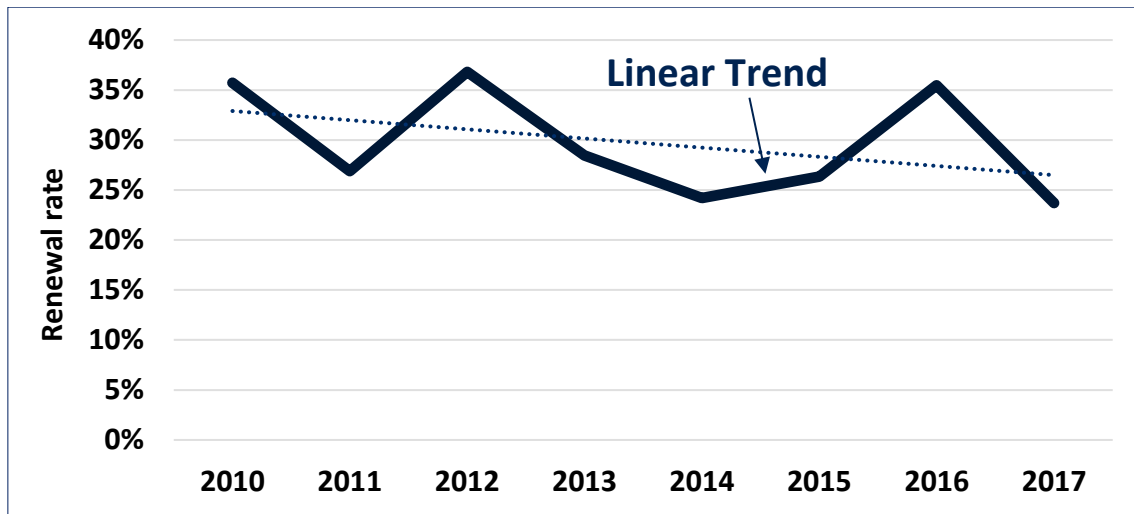


Data: WAD. Replacement agreements approved each year.

As illustrated in Figure 12, this estimated renewal rate shows a slight declining trend over time, falling from 30-35 per cent during the early years of the FW Act, to below 25 per cent by 2017.²⁷ The decline in the renewal rate suggests continuing erosion in both the proportion of expiring EAs being renewed, and a future continuing decline in the stock of current EAs remaining.

²⁷ Note that certain fluctuations in the renewal rate can occur simply because of unevenness in the distribution of expiry dates across EAs; if for historical reasons a larger proportion of existing EAs expire in a particular year (and are renewed), then the apparent renewal rate will be higher. A more precise formulation of the renewal rate would be calculated as the proportion of agreements coming due in a particular year that is successfully renewed; available data do not allow this to be calculated however.

Figure 12. Renewal Rate of Private Sector Agreements

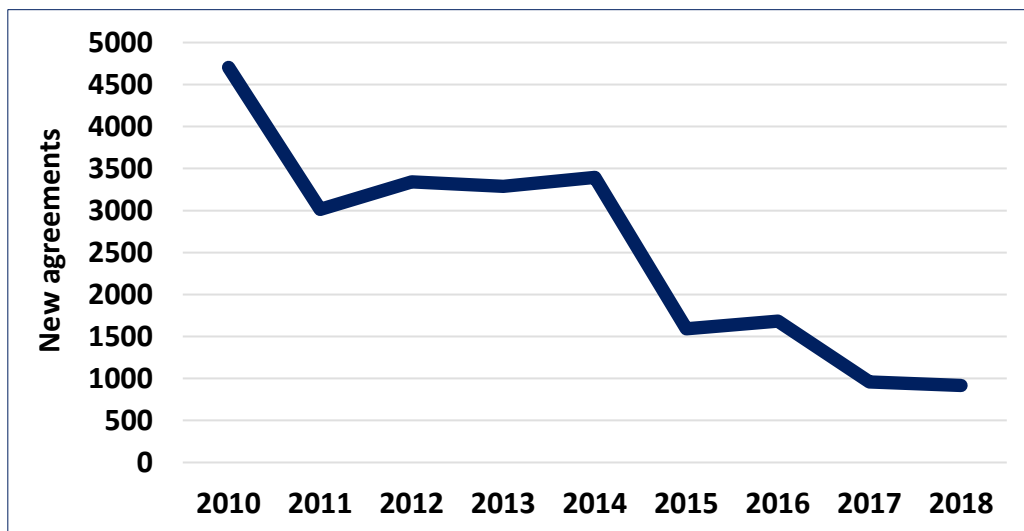


Data: WAD. Renewal rate represents replacement EAs approved each year as a percentage of total agreements current in private sector at previous year-end (December quarter).

FEWER NEW AGREEMENTS

The decline in enterprise agreement coverage in the private sector has been reinforced by a dramatic decline in the making of new enterprise agreements. As illustrated in Figure 13, from a rapid pace of new agreements in 2010, the pace of new agreement-making decelerated dramatically, and continues to fall.

Figure 13. Number of New Private Sector EAs Approved



Data: WAD. Agreements approved each year.

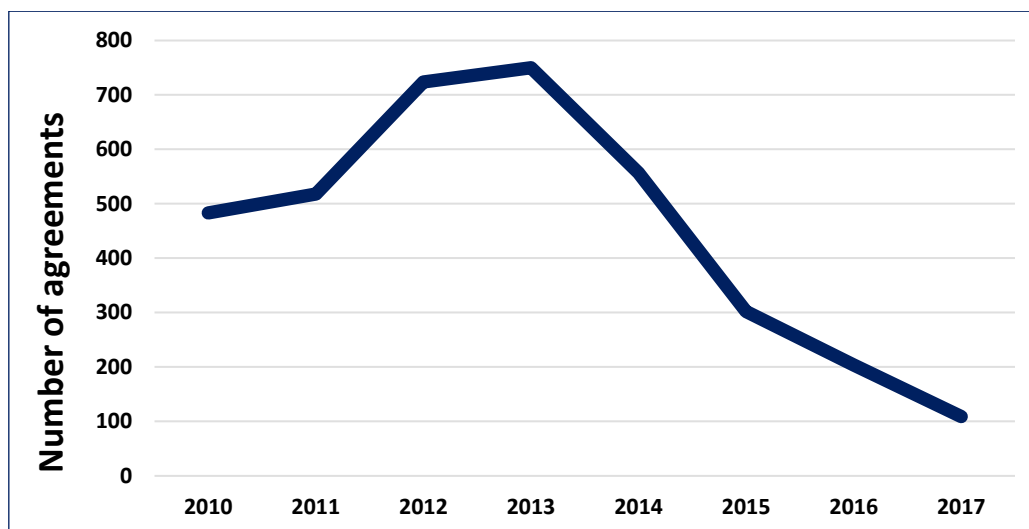
Almost 5,000 new EAs were formed in 2010, the first full year of the Fair Work Act's implementation. But new agreement-making plummeted by over one-third from 2011 through 2014 – with between 3,00 and 3,500 new deals being approved each year. The pace of new agreements fell by half again in 2015, and then plunged again: to below 1,000 new agreements approved in each of 2017 and 2018. This is one of the most worrisome signs that the existing enterprise bargaining system is failing: few new EAs are being negotiated (whether in new firms, or long-standing but previously EA-free workplaces). With an inadequate inflow of fresh coverage to offset the weak rate of EA renewal in other workplaces, EA coverage can only continue to decline.

DISAPPEARING GREENFIELDS

Another factor in the near-disappearance of new EAs has been a sharp decline in greenfields agreements for new enterprises. First introduced in the 1990s, greenfields are a class of agreement for employers establishing new enterprises; they are the only instrument under the FW Act requiring unions in the relevant industry to be party to the agreement.²⁸ Greenfields are most common in capital-intensive industries like construction where employers have an incentive to negotiate fixed and predictable labour costs in advance of commencing production, in part to prevent risk of industrial action over the course of a project. There were 483 greenfields approved in 2010 (72 per cent of these in construction), with an increase over the next three years, reaching a peak of 750 greenfields agreements in 2013. However, after 2013 the number of greenfields agreements approved each year began to decline sharply, with only 111 approved in 2017. Several factors have contributed to this downturn, including hardened employer attitudes, limited union capacity to initiate negotiations, and the post-2013 slowdown in resource investment projects (where greenfield agreements have been relatively more common).

²⁸ Union greenfields were first introduced in the *Workplace Relations Act 1996* (WR Act). A unilateral ability for employers to implement greenfields (i.e. based on involving employers striking 'deals' with themselves) was introduced under WorkChoices, but this non-union stream was subsequently abolished under the FW Act.

Figure 14. Number of Greenfield Agreements Approved



Data: WAD. Private sector. The vast majority of greenfields agreements are in the private sector, with an average of only 1 public sector greenfield approved each year for 2010–17.

Significant pressure has been exerted by business lobbyists to abolish the requirement that greenfields agreements must have a union as party to the EA, and also to constrain the process of negotiating them; this pressure is symptomatic of the ongoing hostility that unions have faced in operating as legitimate representatives of employees within the enterprise bargaining system. For instance, during the FW Act Review in 2012, employer groups including the Business Council of Australia lobbied for defined bargaining timeframes in greenfield situations on the basis that unions could delay capital-intensive projects and impose excessive wage claims. In response to the review, the FWC mandated maximum six-month negotiation periods in the *Fair Work Amendment Act 2015* (FW Amendment Act), with the provision for arbitration if no agreement was reached. A recent review of greenfields sponsored by the Department of JSB (2018c) has subsequently recommended further decreasing the bargaining period to only three months. It is not possible to establish direct causation between these restrictions and the decline in greenfields agreement-making. However, there are clear signs of a weakening in both the number of agreements and in wage outcomes reached. In fact, the proportion of greenfields approved without *any* clearly specified wage increases specified rose from 10 per cent of all greenfields in 2012, to almost half by 2016.

TERMINATED AGREEMENTS RISE

The growing trend of employers terminating EAs is another key factor at play in the overall erosion of EA coverage. EAs can be terminated under the FW Act by two methods:

- (1) All parties to the agreement can *consent* to termination before or after the nominal expiry date (as described in Sections 219–224 of the FW Act); or
- (2) Parties can *unilaterally* apply to the FWC for termination after the nominal expiry date (Sections 225–227).

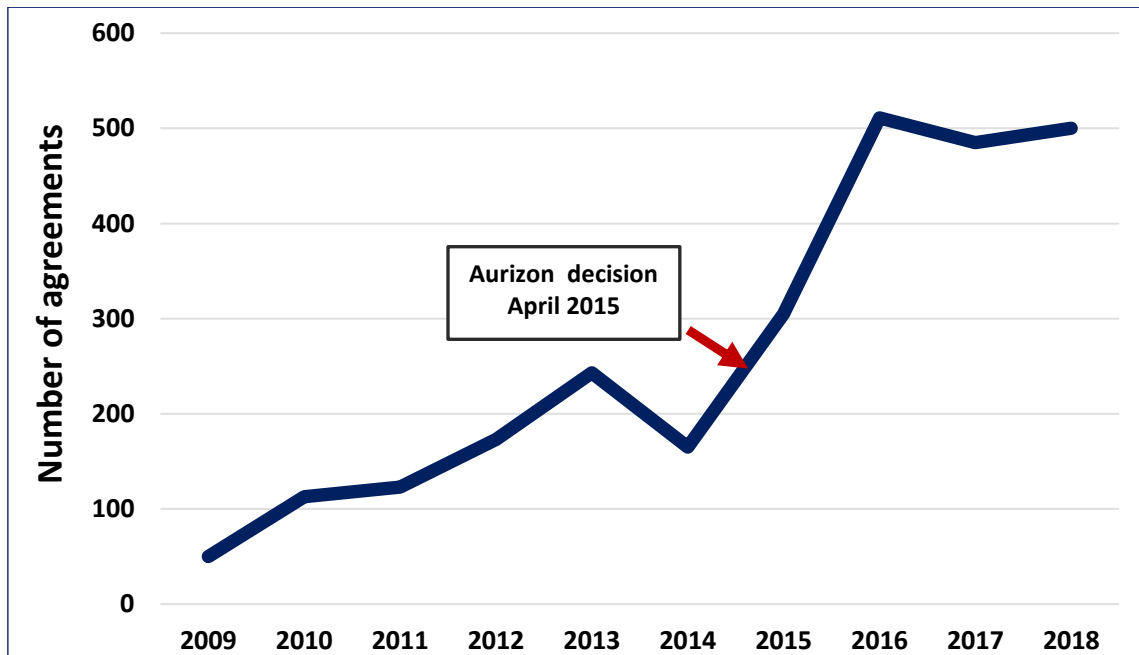
If the termination is by consent, the FWC must be satisfied that the employer or union gave sufficient notification to employees of a vote to terminate the EA, and that a valid majority then approved the termination. An application is approved if it is deemed appropriate by the FWC, after considering the views of the union/s covered by the EA. In the case of unilateral termination, the FWC will approve applications if it is not contrary to the public interest, and if the FWC considers it appropriate after considering the views of the employer, employees and employee representative organisations, their circumstances and the likely impact of termination on the different parties.²⁹

The number of terminated EAs has increased consistently since the introduction of the FW Act in 2009, but has accelerated dramatically in recent years. There was a temporary decline in the number of terminations in 2014 (coinciding with the Coalition government’s review of the FW Act), but the number of EA terminations then began to climb sharply from 165 in 2014, to 511 in 2016—more than tripling in just two years (see Figure 15). Indicated in Figure 15 is the point at which the FWC changed its approach with regard to the termination of expired EAs still under negotiation. In April 2015 it approved the termination of several EAs at Aurizon, setting a precedent that EAs could be terminated despite union opposition and even while the agreement was being renegotiated. Since this decision, a further 1,600 EAs have been approved for termination—more in the last three years than in the entire decade prior to the Aurizon decision. Based on data to October of 2018, EA terminations for the whole year are on track to maintain the pace of 500 terminations per year that has been experienced since 2016.³⁰

²⁹ *Fair Work Act 2009* - SECT 226.

³⁰ Fair Work Commission. 2018. *Terminated agreements*; 2018 total from 1 January to 2 October 2018 equalled 375.

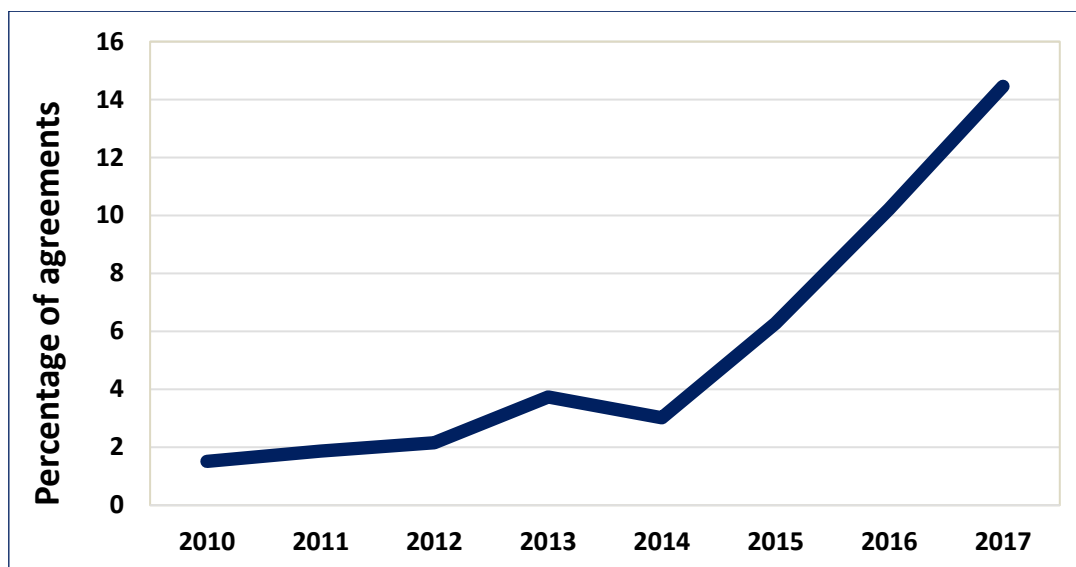
Figure 15. Number of EAs Terminated



Data: FWC, Terminated agreements. Report generated 2 October 2018; 2018 estimated total based on annualised data for first 9 months.

As the making of new and replacement EAs has declined, the surge in terminations paints a dramatic and gloomy picture for the future of EAs. Figure 16 presents the number of terminated agreements as a proportion of all EAs approved in the private sector per year. In 2010, terminations represented just 1.5 per cent of all approved EAs, but this ratio increased sharply beginning in 2015 – driven by both the spike in terminations and the slowdown in agreement approvals. By 2017, terminated EAs reached a record-high of 14.5 per cent of all approved EAs. The rapid growth in terminations relative to EA approvals ‘locks in’ the decline in the total number of EAs that results from simple expiration.

Figure 16. Terminated EAs as a Share of All EAs Approved in Private Sector



Data: WAD approved agreements annually; FWC, terminated agreements annually.

Using the FWC terminations data, termination information was allocated to ANZSIC industry codes as closely as possible to determine which industries have experienced the highest proportion of terminated EAs from 1 January 2015 (the year when EA terminations began to rapidly increase) through the first 9 months of 2018. Table 8 presents the results of this manual coding exercise; industries are ranked according to their shares of EA terminations. The highest percentage of terminated agreements in the period since 2015 was experienced in construction, which accounted for around one-third of all terminations (565 terminated EAs in total), followed by manufacturing with around 18 per cent of all terminations (300 terminated EAs). Electricity, gas, water and waste services accounted for 6.3 per cent of terminations, and mining for almost 6 per cent of all terminations (with around 100 EAs terminated in each of those two industries).

While construction and manufacturing have the highest number of current EAs of all private sector industries (and hence are more likely to experience a higher proportion of terminations), they are also experiencing growth in total employment – which, other things being equal, might imply *fewer* terminations. If the current terminations trend is indicative of employer pay-setting preferences and intentions, new jobs in these growing industries are likely to continue shifting to Awards or individual contracts.

Table 8
EA Terminations by Industry 2015 - 2018

	Total terminations since 2015	% of total
Construction	565	33.8
Manufacturing	300	17.9
Electricity, gas, water and waste services	105	6.3
Mining	99	5.9
Transport, postal and warehousing	80	4.8
Education and training	67	4.0
Wholesale and retail trade	100	6.0
Healthcare and social assistance	63	3.8
Accommodation and food services	55	3.3
Professional, scientific and technical services	39	2.3
Other services	60	3.6
Agriculture	9	0.5
Financial and insurance services	8	0.5
Information media and telecommunications	6	0.4
Not coded	118	7.0
TOTAL	1,674	100.0

Data: FWC 2018. Terminations from 1 January 2015 to 2 October 2018. Note: industries have been manually coded to ANZSIC industries where possible. Some categories combine industries such as 'wholesale and retail trade.' *Entries with insufficient information were excluded from coding.

The Aurizon decision

The surge in terminations described above occurred in the wake of a marked change in the FWC's approach to the treatment of expired EAs. In recent years, termination provisions in the FW Act have been invoked in the course of active bargaining, particularly in disputes that have reached a bargaining impasse. While not specifically defined as an arbitration mechanism, termination provisions have been used to 'resolve' deadlocked negotiations. Before 2015, terminations were expressly denied if they were determined an unfair strategy to strengthen the bargaining position of one side (generally the employer). So-called public interest aspects of the negotiation were not considered, since the continued operation of an expired EA until a new one was negotiated was considered the most efficient means of achieving the objects of the FW

Act—namely, to encourage and facilitate collective bargaining.³¹ However, in April 2015 the FWC decided in the case of Aurizon’s application to terminate 14 rail agreements during active bargaining; in that case the FWC determined that termination was appropriate and would, in fact, promote the objects of the Act (where an expired EA was judged to be detrimental to productivity).³² Here the FWC was clear that the role of the FW Act was only to guarantee the continuation of the minimum safety net, and *not* the specific terms and conditions of employment in expired EAs.³³

The FWC justified its decision to terminate the Aurizon agreements during renegotiation on the basis that some of the EA provisions in question were ‘not common in other enterprise agreements;’³⁴ this argument also sets an extraordinary and worrisome precedent, with the implication that unions should not hope to negotiate innovative provisions (since this would become grounds for abolishing entire agreements). That firm-specific EA clauses would now form the basis for termination is the culmination of a long-term erosion of the effectiveness and legitimacy of enterprise bargaining as the supposed best model for driving efficiency and productivity through firm-level flexibility. Since the Aurizon decision, the FWC has on repeated occasions decided that only one party to the agreement, the employer, is able to define whether particular clauses to an agreement are productivity-enhancing or not;³⁵ this approach is clearly inconsistent with the purported productivity-maximising aims of enterprise-level, good faith bargaining, where both parties are expected to bargain toward this common goal.

Employer strategy: terminations during bargaining

The Aurizon decision set a far-reaching precedent that other employers have been aggressively imitating ever since. Where negotiations for new EAs are still underway, the threatened termination of the expired EA grants significant power to employers seeking to gain an upper hand in bargaining. This is because workers could revert to wages and conditions specified in the minimum Award upon termination of their agreement. For example, a recently-approved employer termination of the EA at Port Kembla Coal Terminal shows how the FWC required an EA still under negotiation to demonstrate productivity benefits, or else the existing EA would be terminated. Here, the employer argued the work practices proposed by the union would raise labour

³¹ See *Tahmoor Coal Pty Ltd* [2010] 204 IR 243.

³² *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540.

³³ *Ibid*, s. 176.

³⁴ *Ibid*, s. 165.

³⁵ For example, termination of the Port Kembla Coal Terminal and Griffin Coal EAs were approved by the FWC on the basis that it would lead to productivity benefits.

costs, compromise profitability, and in turn compromise the public interest (Workplace Express 2018a). This identification of the public interest with the profitability of the employer is a telling indication of the biases now inherent in the FWC's approach to termination requests.

As well as allowing employers to unilaterally define what is 'productivity' enhancing and what is not over the course of bargaining, the termination of agreements (achieved or threatened) constitutes an especially dramatic form of wage suppression that can lead to substantial reductions in workers' incomes. Consider the recent case of Griffin Coal in Western Australia (WA), where the FWC approval to terminate the EA in 2016 resulted in workers' pay being cut by 43 per cent (reverting to wages specified in the 2010 Black Coal Mining Industry Award). Griffin Coal workers existed on the much lower Award wages for 12 months before another agreement was reached (The West Australian 2018). Other recent examples of this practice include Murdoch University in 2017, where workers faced the threat of a 39 per cent pay cut while negotiating a new agreement (Barry 2017). Last year a consumer boycott campaign placed significant pressure on Unilever after it sought termination of the Streets ice-cream EA for its western Sydney operation, which could have potentially resulted in a 46 per cent wage cut for its workforce (Hannan 2017). Some other recent high-profile termination applications include Alcoa and BP operations in WA. Around 1,600 workers at Alcoa's WA bauxite and aluminium smelters took 52 days of industrial action from August 2018 after 16 months of negotiations for a replacement EA; one month later, Alcoa made an application to terminate its 2014 EA, with an undertaking to maintain the pay and conditions of workers for just six months. Alcoa cited greater industry price volatility as the basis for the need to remove 'restrictive work practices' and for increased labour flexibility (Workplace Express 2018c). At time of writing, Alcoa employees have rejected the latest proposed EA, seeking to return to negotiations (McKnight 2017); but if the termination is approved by the FWC, workers' wages could fall by as much as 60 per cent. Following in Alcoa's footsteps, BP lodged an application to terminate its refinery and laboratory workers' EA in WA in October 2018, citing current restrictions on 'productivity, efficiency and flexibility' (Hastie 2018).

Where employers offer undertakings to maintain employees' pay and conditions for an agreed period after termination (to supposedly improve the chances of reaching a new agreement), the result is still potential termination of the agreement; this practice cannot be considered a measure that genuinely enhances the chance of a fairly bargained outcome being reached. When one party is able to markedly improve its bargaining position at the conclusion of a given timeframe, there is little incentive for that party to genuinely bargain within that period.

Sub-Award EAs being terminated: An analysis of FWC decisions

The examples above demonstrate how termination clauses have been utilised by employers to dampen union efforts to retain or extend pay and conditions in industries that have historically reached above-Award conditions in their EAs. However, the significant increase in the volume of terminations cannot be explained by these contested cases alone. In fact, the majority of termination cases are actually approved on an uncontested basis. We conducted an analysis of decisions from a sample of recent FWC termination decisions (running from 1 June 2018 through 2 October 2018) to investigate the most common factors behind recent termination decisions. We examined whether the EAs were current or expired, which parties submitted applications, and whether terminations were contested. There were a total of 146 terminations approved during this four-month sample; five decisions could not be accessed online and so those cases were removed, leaving a final sample of 141 cases. This was considered an adequate sample size for ascertaining current termination processes.

Table 9 presents summary statistics for these recent FWC termination decisions; it shows the majority, 73 per cent, were single-party unilateral applications where the EA had passed its nominal expiry date (as allowed under Section 225 of the FW Act). Almost all of these applications were made by employers (98 per cent). The remaining 27 per cent of terminations were by consent before or after the expiry date (Section 222), with 23 out of 38 of these applications made by employers (around 61 per cent) and the remaining 15 made by unions. A single application was made by a group of individual employees to terminate their expired EA. Among these most recent terminations, of 141 cases only five (or 3.5 per cent) were opposed.³⁶ There has also been a recent influx of union-led terminations of EAs before their expiry date, where majority employee endorsement for termination has been obtained. While unrecorded in decisions, this trend suggests unions have identified agreements where employees are better off on the Award than the present EA, or else may indicate new strategies being used by unions to obtain better outcomes in EAs for members using terminations clauses.

³⁶ This result of 3.5 per cent of terminations being contested is close to the AiG's recent estimation (based on a larger sample) of 3 per cent. See Dunckley et al. 2018.

Table 9 Summary Statistics for FWC Terminations 1 June–2 October 2018			
	Terminated by Consent - Section 222	Terminated Unilaterally After Expiry - Section 225	Total
Application party			
Employer	23	101	124
Union	15	1	16
Individual employees	0	1	1
Total terminations	38	103	141
Percentage of total	27%	72%	100%
Opposed	3	2	5
Authors' compilation from sample of FWC decisions, terminated agreements.			

Qualitative analysis of these FWC decisions indicates that when EAs are terminated after the expiry date, there are two main processes. In one process, employers submit through statutory declaration that there are no longer employees employed under the EA. In another process, where employees are still employed under the expired EA, the FWC directs employers to notify staff outlining intentions to terminate their agreement, and employees are asked to make submissions in the form of written statements to the FWC if they oppose the termination (with an average application period of 7–10 days). With some of these (expired) EAs having been negotiated over ten years prior, this exposes a glaring compliance burden issue: the present workforce is assumed to have awareness of and familiarity with an EA that was likely agreed to before they commenced employment, and there has likely been no workplace activity or participation involving renegotiation since. Requirements to provide written submissions place an unfair administrative burden on individual employees, who are assumed to have sufficient information and resources to compile written submissions for the FWC. This issue is all the more pertinent in cases of non-union EAs, where the affected workers have no organised representation to inform them about the EA, and participate in negotiations or FWC processes.

The decisions also confirm that minimum conditions in the Awards are now surpassing the pay and conditions in many expired EAs, and the FWC is approving terminations

when evidence to this effect is presented. In these cases, EAs may have been below-Award from the outset when introduced; alternatively, EAs may have expired many years prior, with Awards having since surpassed them. Where employers are terminating expired EAs, many have claimed the Awards now better reflect industry standards. Strikingly, many of these agreements had been in force for over 10 years, with some commencing as far back as 2006.

Terminations are being used to further individualise the employment relationship through facilitating use of common law contracts as ‘placeholders’ in the absence of replacement EAs. In one case, a firm merger was cited as a trigger for harmonising employee pay and conditions across multiple firms, and the group of workers who were on an expired EA were shifted onto common law contracts – purportedly to be consistent with the other employee cohort.³⁷ In another case, the CFMMEU disputed the method in which an employer had attained a majority vote from employees endorsing the termination, and opposed it on the basis that there was no replacement EA and hence employees’ pay and conditions would not be enforceable.³⁸ In response, the employer introduced common law contracts preserving conditions for a given period, but with no protection for employees’ incomes at the conclusion of this period and no process for renegotiation of a genuine EA. Evidencing the damaging impact of federal procurement rules that reward lowest-cost bids, this same employer stated the EA needed to be terminated in order to competitively bid for Commonwealth contracts.

But the fact that so many EAs are now below-Award quality, means that in some cases employees and unions may also have an interest in terminating these EAs; this implies further erosion of EA coverage in the future as more employees move to coverage by the Award. Established practice in particularly low-paid industries like retail previously involved ‘rolling up’ base rates to offset below-Award penalty and overtime rates specified in EAs. With that practice now prevented by the FWC’s more rigorous enforcement of the BOOT (starting with the Coles EA rejection in 2016), there is now a collateral mess to ‘mop up’ if and when these EAs are terminated. Employees on certain rosters (particularly weekday workers) are often advantaged over others. In these instances, the rise in EA terminations is increasing fragmentation in employment contracts, because the FWC has often ordered individual flexibility agreements (IFAs) be introduced for any employee who was better off on the previous agreement, in order to port over their prior conditions.

³⁷ Care Options Inc [2018] FWCA 4248

³⁸ Dexalaw Pty Ltd T/A Hanchard Crane Hire [2018] FWCA 2882.

Our analysis of FWC decisions indicates that employers cite a variety of reasons for terminating expired EAs. Administrative burden of maintaining multiple EAs is cited in the case of firms with multiple operations or projects (although this is contradicted by a subsequent embrace of individual common law contracts for entire workforces). Employers most often terminate expired EAs because a particular contract job ceases, with new EAs presumably established for each new project—a resource-intensive process, but one that allows employers to avoid the accumulation of gains through ongoing collective representation among a stable workforce. Other motivations for employers terminating EAs may include growing risk of exposure for non-compliance with minimum employment standards – for example, the risk that businesses may lose face with the public if shown to be paying their workers below the Award. In these cases, minor increases in labour costs to put employees back on the Award may be more palatable than risk to sales from bad publicity. A further motivation for employers to terminate EAs may be to mitigate against risk of future industrial action, since current strike laws require commencement of negotiations for an EA before any industrial action can occur. As outlined in recent research by Creighton (2018), the FW Act has only very weak provisions to facilitate parties coming to the table for bargaining, with the final decision to negotiate or not resting exclusively with the employer.

In sum, employer applications for termination of expired EAs during bargaining are in the minority of total termination cases. However, this threat is still strategically wielded in industries where union representation has built above-Award pay and conditions through collective bargaining over long periods of time. EA terminations have dramatically accelerated in recent years; and even though most of those terminations were not contested, it is plausible that the Aurizon decision signalled a realignment of the dynamics of bargaining under the FW Act, and further undermined the credibility of EAs as a mechanism for determining pay and conditions. Combined with the 2016 Coles BOOT decision which ‘lifted the lid’ on the prevalence of below-Award conditions among many expired EAs, this has reinforced an employer shift in pay-setting methods away from EAs toward Awards and individual contracts.

Simulating the Future Decline in Private Sector EAs³⁹

The decline in the replacement of EAs, the virtual disappearance of new EAs and the dramatic increase in EA terminations each serve to reduce the number of current EAs in effect. Together, however, their *combined* impact on private sector collective bargaining is dramatic and daunting. This section projects the future decline in both the number of current private sector EAs and the proportion of private-sector workers covered, based on trends in each of these components of EA coverage since 2013.

The evolution in the number of current EAs in any given year (EA_t) reflects a stock-flow relationship that depends on several key variables—all of which have been working to reduce EA coverage in recent years. This stock-flow process can be described with the following simple accounting identity:

$$EA_t = \text{Renewed EAs} + \text{Non-Expired EAs} + \text{New EAs}$$

The number of EAs in effect in any year is the sum of agreements which expired in the past year and were renewed, plus the ‘carry-over’ of previous year’s EAs which have not yet expired (and hence remain in effect), plus any new EAs negotiated and approved during the years.

The number of renewed EAs in turn can be described as the product of the number of EAs that expire during the year, times an average ‘renegotiation rate’: that is, the proportion of expiring EAs which are successfully renewed.⁴⁰ The number of expiring EAs equals the previous stock of EAs times an ‘expiry rate’: that is, the proportion of EAs which expire in a given year. That expiry rate will fluctuate from year to year, based on the specific timing of agreement negotiations and expirations.

Representing the previous year’s stock of EAs as EA_{t-1} , the expiry rate by e , and the renegotiation rate by r , provides a dynamic expression for the evolution of the number of EAs over time:

³⁹ The author acknowledges input from Jim Stanford in the preparation of this section of the report.

⁴⁰ Note that this ‘renegotiation rate’ differs from the approximate ‘renewal rate’ defined and described above, which equaled the number of renewals in any year as a proportion of the total stock of outstanding EAs at the previous year-end. The present discussion splits that renewal rate into two components: the proportion of agreements expiring in a given year, and the proportion of those expiring agreements successfully renegotiated.

$$EA_t = EA_{t-1} * e * r + EA_{t-1} * (1-e) + \text{New EAs}$$

Expired but non-renewed agreements represent the ‘decay’ in the stock of EAs. Some of those expired agreements remain nominally in effect (although they are no longer included within the WAD, and in most cases, they no longer specify annual wage increases). Some expired non-renewed agreements are terminated, and hence disappear entirely.⁴¹ For purposes of the ongoing count of current EAs, it does not matter whether an expired EA is terminated or not—although the distinction is clearly important regarding the impact on future bargaining opportunities. For that reason, the simulations below do not explicitly take account of the rising number of EA terminations.

The key variables which drive the dynamic evolution of the number of current EAs, as described in the preceding equation, thus include: the expiry rate, the renegotiation rate, and the number of new agreements (including greenfields agreements) negotiated in any year. The expiry rate fluctuates from year to year based on the specific timing of agreement negotiations and durations; agreements in specific industries may tend to be ‘clumped’ together in particular periods of time, in which case the expiry rate will rise during those periods and fall in others. In the medium-run, however, there is no reason to expect the expiry rate to vary systematically.⁴² In the simulations that follow, for simplicity we assume that one-third of EAs expire in any given year – consistent with an average duration of EAs of around three years.

The renegotiation rate for EAs has demonstrated a declining trend over time, and as discussed above this is the primary reason for the dramatic decline in the number of current EAs since 2013. On the assumption that one-third of EAs expire in any given year, the apparent renegotiation rate declined to around 50 per cent in 2017.

At the same time, as discussed above, the flow of new agreements—crucial for offsetting erosion in EA coverage from less-than-complete renewal of existing EAs—has also declined more dramatically. New agreements (including greenfields) fell from 3289 in 2013 to 960 in 2017: an annual rate of decline of 26.5 per cent per year.

On the assumption that both of these negative trends continue, the continuing decline in the stock of current EAs in Australia’s private sector can be simulated moving forward. We assume that the effective rate of renegotiation of expiring EAs stays at its 2017 level (just over 50 per cent). Meanwhile, at its current rate of decline, the flow of

⁴¹ It is possible to terminate an EA during its term with approval of all parties to it, but this is rare. As discussed above, most EA terminations are for agreements that have expired (in some cases, terminated even while the parties are trying to renegotiate a new one).

⁴² In essence the expiry rate is determined as the inverse of the average duration of agreements.

new EAs continues to fall, to below 100 new EAs per year after 2025. The inexorable combination of non-renegotiated but expired EAs (a growing proportion of which are eventually terminated outright) with the shrinking number of new EAs doubly suppresses the stock of current EAs.

If both these trends continue the same trajectories they have demonstrated since 2013, our simulations project that the number of current private sector EAs will fall by half again in the next five years: falling below 6,000 current EAs by the end of 2023.⁴³ That is on top of the 45 per cent decline in the number of current EAs already recorded between end-2012 and end-2017.

A final parameter of relevance is changes in the average number of employees covered by each EA. Total coverage will not decline as rapidly as the number of agreements, if the average size of each EA increases; this could reflect the consolidation of smaller EAs into larger ones, or the fact that small EAs (as discussed above) suffered the biggest proportionate decline since 2013. Since 2013, the average size of private sector agreements did increase somewhat: from an average of 85 workers per EA in 2013, to 98 workers per EA in 2017. That average size is likely to increase further in coming years, especially if some or all of the major expired retail and fast food EAs are successfully renegotiated and approved. That increase in the average size of EAs partly insulated overall EA coverage in the private sector (which fell 34 per cent between end-2013 and June 2018) from an even steeper fall (46 per cent) in the number of EAs.

We assume that the trend in the average size of EAs continues its post-2013 trend – growing at an annual average rate of 3.8 per cent.⁴⁴ Hence the number of workers covered by EAs declines more slowly (by close to 10 per cent per year over the next 5 years) than the number of EAs (which would fall about 13 per cent per year). As for the denominator of the EA coverage ratio, total private sector employment grew at an annual average rate of 1.85 per cent over the last four years.⁴⁵ We assume that overall private sector employment continues to grow at that medium-run rate. In the coming five years, therefore, this suggests that the private sector workforce will add over 1 million new positions.

⁴³ The potential renegotiation and approval of large retail and fast food EAs will not affect this decline in the total number of private sector EAs, because there are so few of these large agreements; it would, however, affect the average size of EAs, as discussed below.

⁴⁴ In this way our projection reflects the likely impact of successful renegotiation of some of the expired retail and fast food EAs. On this assumption, average EA size would rise to 160 workers per EA by 2030, nearly double its 2013 size.

⁴⁵ Author's calculations from ABS Catalogue 6291.0.55.003, Table 26a; four years ending August 2018. Private sector employment growth in the last year was actually much faster, at over 3 per cent – and hence our assumption is conservative.

During the same time, however, the number of private sector EAs would fall by over half (if underlying trends continue), and the number of private sector workers covered by one of those EAs declines by over 40 per cent (despite the assumed ongoing increase in the average size of the remaining EAs). This implies an ongoing double-edged reduction in the proportion of private sector employees covered by a current EA: driven lower by falling EA coverage contrasting with growing total employment. The rebound of EA coverage that could occur in the coming year due to the potential renegotiation of large EAs in retail and fast food only temporarily slows down the decline in the coverage rate;⁴⁶ it is overwhelmed by continued erosion in the other determinants of EA coverage. Our simulation indicates that, absent a marked increase in both renewals and new agreements, private sector EA coverage would fall to under 6 per cent by the end of 2023.⁴⁷

Matters will get worse in subsequent years if the underlying drivers of EA disappearance are still not reversed. If the underlying negative trends in agreement renewal and new agreements continue, less than 1800 private-sector EAs would remain current in 2030 – a decline of over 90 per cent from end-2013. And the proportion of private sector employees covered by a current EA would fall to just 2 per cent. In short, the destructive arithmetic implied by the failure to renew existing EAs with private employers, and the failure to negotiate new ones, will lead to the near disappearance of enterprise bargaining as a tool for determining wages and working conditions in Australian businesses.

⁴⁶ If most of the retail and fast food agreements are renegotiated by end-2019, and other EA parameters remained unchanged, then the total private sector coverage rate would rise to around 13.5 per cent from 2017's 12 per cent – but the other forces undermining EA coverage will in fact continue to be felt. Also, recall that the denominator of the coverage ratio (total private sector employment) continues to grow, so even restoring the same number of covered workers in retail and fast food only partly restores the coverage rate.

⁴⁷ The simulation incorporates at least partial restoration of the large retail and fast food agreements through the assumption of continued growth in average EA size.

Consequences of the Decline in EA Coverage

STAGNANT WAGES

One obvious consequence of the decline in EA coverage has been a slowdown in the growth of wages. Figure 18 shows wage trends in Australia’s private sector since 1998, looking at two main indicators: the Wage Price Index (WPI) covering the whole private sector, and the average annualised wage increase (AAWI) negotiated across current EAs in the sector. The WPI measures wage trends for a fixed ‘bundle’ of jobs over time; it has the benefit of capturing a ‘pure’ measure of inflation in the price of a given basket of labour, but has the disadvantage of missing effects of compositional change in the labour market and in hours worked. Specifically, a reduction in average incomes resulting from a shift toward part-time work or lower-wage jobs is not captured by this measure. Despite this limitation, the WPI is the most commonly-cited indicator of wages outcomes, and by reflecting wages across all pay-setting methods (including individual contracts, EAs and Awards), it allows for comparison with wage increases realised through EAs as a specific pay-setting mechanism.

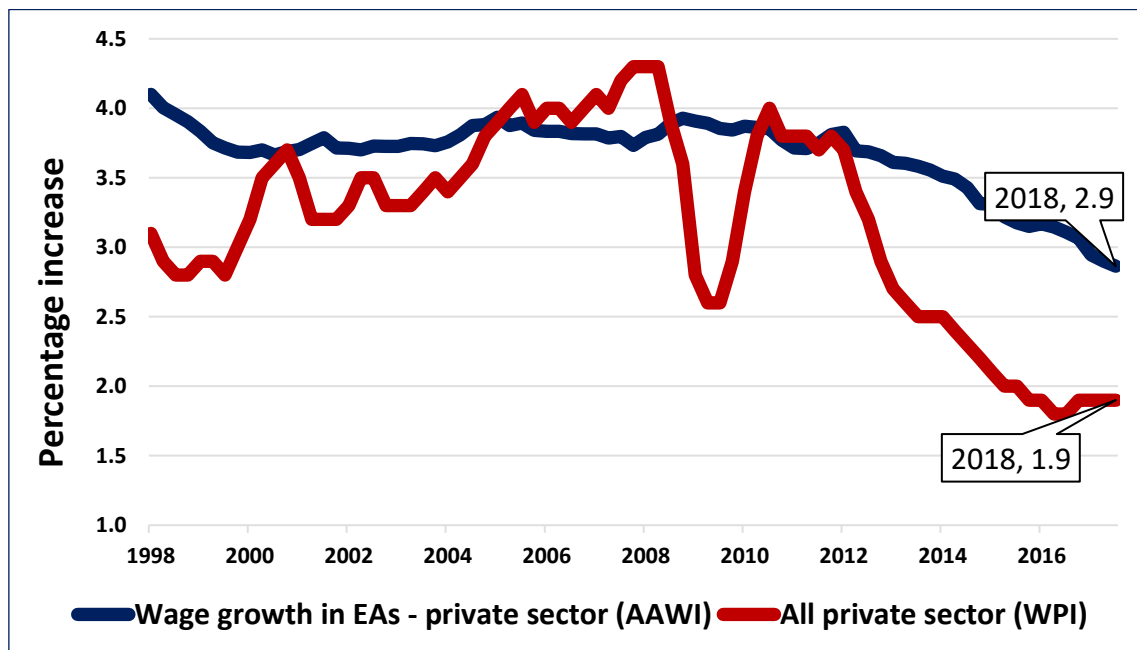
From 1998 through 2008, annual private sector wages as measured by the WPI rose gradually from around 3 per cent to over 4 per cent – driven up by the strong labour market conditions associated with the booming resource industry at the time. WPI growth was shocked temporarily during the GFC, falling to only 2.6 per cent in 2009; but it quickly recovered, as Australia’s macroeconomy stabilised,⁴⁸ to resume its pre-GFC average growth of around 4 per cent by the end of 2010. However, a more dramatic and sustained wage deceleration took hold from late-2012, with private-sector WPI plummeting to a low of only 1.8 per cent in 2016; private sector wage growth has remained at historically low levels since then, growing at an annual average rate of slightly under 2 per cent since 2015. Assessing this history, Figure 18 indicates that the scale of wage deceleration since 2012 has surpassed the wage adjustments that occurred during the GFC in 2008—despite the fact that Australia’s economy continued to expand throughout this period, and the unemployment has not been high. Further, where wages growth rapidly bounced back post-GFC, the WPI has shown no signs of recovery from its current malaise.

⁴⁸ In large part thanks to a quick and effective fiscal stimulus package implemented by the Commonwealth government; see, for example, Li and Spencer (2014).

In contrast, wage increases negotiated through EAs have shown far less volatility over the last 20 years. EA wage increases averaged around 3.8 per cent throughout the 2000s, similar to the average growth in the WPI but with less year-to-year variability. EA wage increases began to gradually decline after 2012 (alongside the decline in collective agreement coverage), falling to 2.9 per cent in the first half of 2018. With the exception of 2005–08 when the WPI rose more quickly due to particularly strong labour demand conditions, wage increases in EAs have been consistently higher than in the wider private sector since 1998. Notably, EA wage increases as measured in the AAWI did not significantly decline during the GFC -- with wage outcomes in late-2009 averaging more than one percentage point higher than the WPI. This shows the importance of EAs as a buffer during times of economic contraction, protecting workers' incomes despite macroeconomic volatility.

Since 2013, the wage growth premium enjoyed by workers covered by private sector EAs has widened substantially. While wage growth has decelerated for both the WPI and the AAWI, the slowdown in wages was markedly less severe for workers covered by an EA. Since 2014 annual wage increases specified in EAs have exceeded private sector wage growth measured by the WPI by about 1 per cent per year; this translates into billions of dollars of additional income for private sector workers who still enjoy EA coverage. However, due to the dramatic decline in private sector EA coverage, this wage growth premium can only exert a smaller impact on overall wage trends. Hence, the erosion of private sector EA coverage since 2013 has contributed importantly to the overall slowdown in wage growth since then.

Figure 17. Wage Increases in the Private Sector



Source: Average Annualised Wage Increase (AAWI) figures for current agreements from WAD. Wage Price Index trend figures from Wage Price Index, Australia (Cat. no. 6345.0), Table 1. Percentage change from corresponding quarter of previous year.

The impact of expired agreements on wages

Using WAD data on employees covered by current EAs and ABS private sector workforce data, we estimate that only 12 per cent of all private sector employees were covered by a current EA in 2017.⁴⁹ Collective agreement coverage estimates for 2016 from the most recent ABS Employee Earnings and Hours survey (which include expired agreements), however, are much higher: suggesting that over 30 per cent of all private sector employees have their wages set in accordance with an EA. The difference between WAD and EEH coverage estimates is largely due to the significant number of expired agreements in Australian workplaces. Since agreements that have expired are unlikely to require annual wage increases, it is possible that mass expirations may also be contributing to stagnant wages growth. Research from the RBA found that reduction in the frequency of wage increases contributed to one-third of the total decline in wages growth from 2012 through 2016, with lower increments in wage increases explaining the remaining two-thirds of total wages decline.⁵⁰ In explaining the slowing in the frequency of wage increases, a 2 percentage point increase in private sector employees under individual arrangements over 2014–16 (and a corresponding decline in EA coverage) is almost certainly contributing;⁵¹ greater individualisation of the employment relationship has led to less frequent wage adjustments. However, another contributing factor could be longer delays in the renegotiation of agreements; expired EAs do not require the employer continue to pay wage increases until another EA is introduced. In this case, without a ‘trigger’ for EA renewals through union workplace presence and/or a requirement for renewal in legislation, employers have no incentive to renegotiate EAs with their workers; instead, they are encouraged to reduce labour costs by delaying EA renegotiations.

A wage premium to union agreements

EA-covered workers in general have experienced much stronger wage growth since 2013 than those without such coverage. Moreover, agreements negotiated with union representation have secured better wage increases than those without union representation (non-union EAs). For the period 2010–17, the average wage increase in union private sector agreements was around 1 percentage point higher than in non-union agreements, with the largest difference being 1.6 percentage points in 2016 (see

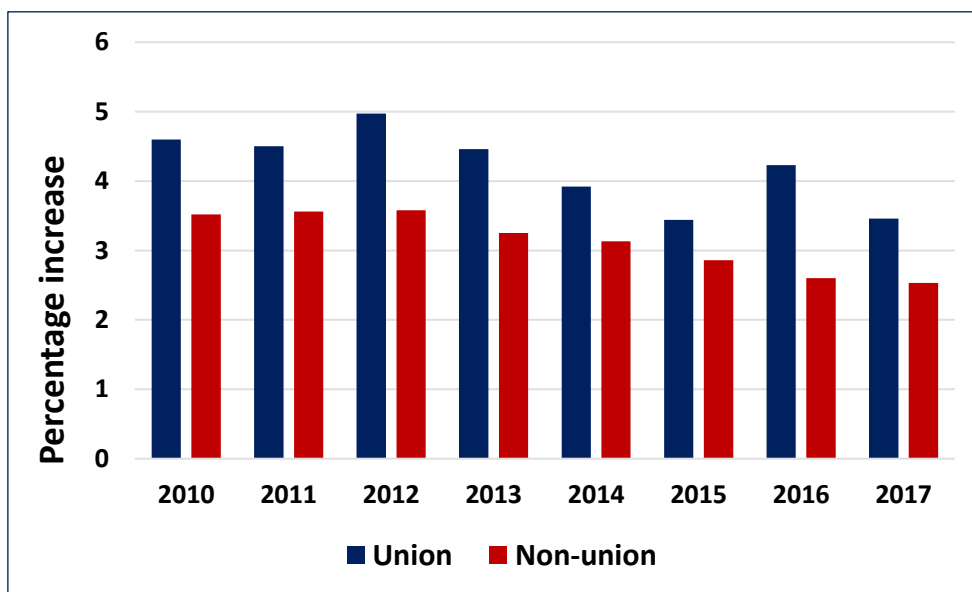
⁴⁹ See Figure 9 and associated discussion.

⁵⁰ See analysis for RBA by Bishop and Cassidy. 2017.

⁵¹ ABS, EEH, non-managerial employees

Figure 18). Further, the inferior pay increases recorded for non-union EAs only reflect the effect of a minority of non-union EAs; shockingly, 51 per cent of non-union EAs over this period did not even specify defined pay increases. If these agreements were included, then the average wage increases provided for by non-union EAs would be even worse. Higher wage outcomes in union agreements lift the private sector aggregate for EA wage outcomes, and hence overall wage growth.

Figure 18. Wage Increases in Union and Non-Union Private Sector EAs



Source: WAD. AAWI for agreements approved. Over 51 per cent of non-union EAs approved over 2010-17 did not have quantifiable wage increases and were thus excluded from the sample.

Union representation also impacts on the security and predictability of wage increases in EAs. The majority of non-union agreements have not had quantifiable wage increases since 2010. Over half of agreements finalised without a union for the period 2010–17 tied wages to non-legislated measures such as CPI, or to minimum wage decisions, or (most often) they were left to employer discretion.⁵² Conversely, 80 per cent of union agreements secured specified wage increases over the lifetime of the EA. As well as having lower wage increases, non-union agreements are longer in duration. For the period 2010–17, non-union agreements were on average eight months longer than union agreements – at 3.2 years duration compared to 2.4 years for union agreements. Longer EAs effectively lock in those lower (or non-existent) wage increases over a longer period of time.

For all these reasons, the erosion of EA coverage has been a significant factor in the unprecedented deceleration of wages in Australia. Private sector wage growth under

⁵² Authors calculations from WAD data.

EAs has been notably higher than for private sector workers on average. But with less workers covered by EAs, this wage advantage applies to a shrinking minority of workers, with the resulting impact on overall average wage increases suppressed accordingly. Few workers are able to obtain secure, above-inflation wage increases. Without effective collective bargaining opportunities for employees, lacklustre wages growth will almost certainly endure, with ongoing implications for growing inequality, future productivity growth, and inclusive economic growth.

GROWING RELIANCE ON AWARDS

A further consequence of the decline of EA coverage has been a growing reliance on Awards as the ‘floor’ for pay-setting in the private sector. Peetz and Yu (2017) found that since 2000, the percentage of employees covered by collective agreements and by Awards have moved in opposite directions, a correlation not visible between other pay-setting methods. Table 10 presents data from the ABS EEH survey showing the incidence of different pay-setting methods among private sector employees in 2016 (most recent data), and the percentage change over the period between 2014 and 2016. Over just two years, EA coverage declined by 7 percentage points, with a 5 percentage point increase in Awards, and a 2 percentage point increase in individual arrangements. The most common pay-setting method in the private sector is now individual arrangements (applying to around 45 per cent of all employees), followed by EAs at 31 per cent and Awards at around 24 per cent. The EEH data is produced only biennially; given the strong evidence (from the WAD data and other sources) of the erosion of private sector EA coverage in recent years, the proportion of private sector workers covered by EAs will almost certainly have fallen further when the next edition of EEH is published early in 2019.

Enterprise agreement		Award		Individual arrangement	
2016	Change from 2014 (% points)	2016	Change from 2014 (% points)	2016	Change from 2014 (% points)
30.7	-7.0	24.2	+5.0	45.1	+2.1

Data: ABS. *Employee Earnings and Hours, Australia* (Cat. no. 6306.0). Non-managerial employees only.

The growing gap between the pay and conditions outlined in Awards and in negotiated agreements incentivises employers to use the bargaining process to reduce labour costs. Since the current regulatory framework protects the minimum safety net but not the conditions of expired EAs, employees have little protection against employers pushing labour costs closer to the Award minimums when EAs expire. In some cases, employer applications to terminate an EA have been motivated by the inferior rates and conditions in Awards compared to those in the EA, as seen in the examples (discussed above) of Murdoch University, Port Kembla Coal Terminal, and Griffin Coal terminations.

The significance of the expansion of Award coverage is that more employees lose access to the ability to collectively negotiate improvements in the terms of their employment. Since Award rates and conditions bear little resemblance in many industries to real industry standards, a rise in Awards coverage places further downward pressure on already-stagnant wages growth, and creates further fractures in industry standards regarding qualifications, training and remuneration. Further, Award review cycles can take many years, and provide little ability for workers to contribute to the process.

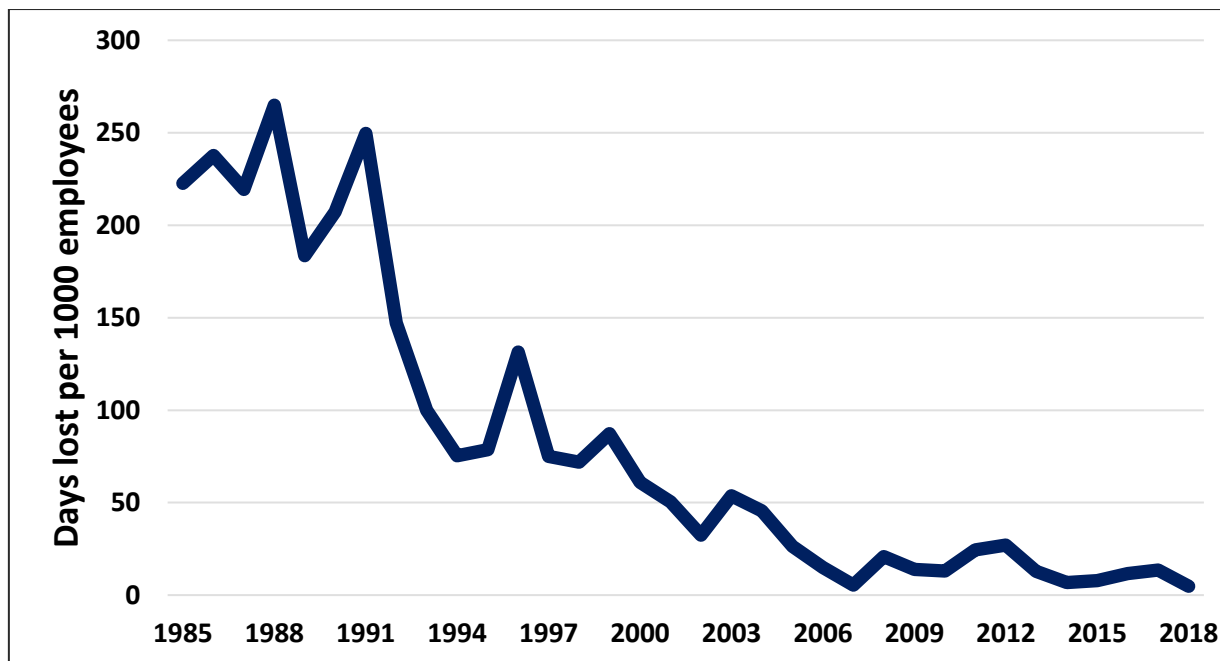
DISAPPEARANCE OF INDUSTRIAL ACTION

Since industrial action in Australia peaked in the 1970s, the frequency of industrial action (measured as working days lost per 1000 workers) has declined by over 95 per cent (Stanford 2018b). Strike frequency began declining in the 1980s with the introduction of the Accords; an even steeper decline was experienced in the early 1990s with the shift to enterprise bargaining. Figure 20 captures the trend in industrial action from 1985 to present. Working days lost to industrial disputes (including employer lockouts, which have become relatively more important in recent years) declined from around 250 days per 1000 workers per year in the early 1990s, to an average of 15 per 1000 workers per year in the present decade (see Figure 19). Working days lost have been highly concentrated in the construction and mining industries; strike action is scarce across the rest of the private sector.

The erosion of EA coverage has directly contributed to the near disappearance of industrial action in Australia. This is because restrictive laws regarding ‘protected’

industrial action (first introduced in 1993⁵³) only allow workers to withdraw their labour during the process of negotiations for an EA; with fewer workers under EA

Figure 19. Working Days Lost in Industrial Action



Source: ABS *Industrial disputes, Australia* (Cat. No. 6321.0.55.001). Annual totals. 2018 estimated annual total based on annualised data to June quarter.

coverage and engaged in collective bargaining (and fewer workers in unions), the effects of these restrictions are compounded. A key motivation for employers to negotiate EAs, in light of the laws governing industrial action, was precisely to protect against industrial action during the course of an agreement. However, the growing ease with which employers can avoid the entire mechanism which facilitates legal access to industrial action (namely, enterprise agreements), and the ease with which employers can place workers on minimum Awards or individual contracts instead, creates a two-fold downward pressure on both collective agreement coverage and industrial action.

Since unions are parties to the majority of EAs and are key to initiating negotiations, declining union membership and capacity has also impacted on falling EA coverage and the corresponding decline of industrial action – with the combined effect that employers’ incentive to negotiate EAs has largely disappeared. For workers, this has meant losing access to both the mechanism for bargaining effectively to improve

⁵³ Prior to 1993 the right to industrial action in Australia was not explicitly guaranteed in law, but was commonly exercised in practice, and employer legal action against workers and unions for industrial action (the ‘stick’ that now motivates compliance with the strictures of ‘protected’ action) was rare.

wages and conditions, and also to the ability to use collective action for promoting, securing and defending their economic and social interests.

Workers' declining access to industrial action should also be considered in relation to the implications of the rise in terminations. When terminations are approved, there is no legislative requirement on employers to introduce a replacement EA that would restore the capacity of employees to access industrial action provisions. Much attention is given to the use of terminations, or the threat of terminations, to undermine the bargaining position, wages and conditions of unionised workplaces. However, the consequences of accelerating terminations of expired, below-Award EAs in lower-paid industries also has a crucial and negative impact on workers' access to the right to take collective action. Consider the expanding healthcare and social services industry, for instance; it faces growing challenges in ensuring workers have adequate training and pay, and that high-quality services can be delivered (such as during the roll-out of the NDIS' market-based delivery model). Terminating expired EAs in this case contributes to the erosion of the current and future EA base of the industry; this will limit the future capacity of healthcare and social service workers to take industrial action to address their workforce challenges. Further, the practice of creating EAs for specific contracts or projects, as widely practiced by head contractors in the construction industry, and the high rate of EA termination at the conclusion of these jobs, suggests employers understand the benefits of prohibiting industrial action when an EA is in effect. However, under this process of repeated 'flipping' of project-based EAs, workers are denied both the security of a long-term employment relationship, and an opportunity to improve the terms and conditions of their employment over time (including through industrial action).

LOSS OF EMPLOYEE VOICE

While much of the impact of EA coverage decline is visible in a decline in wages growth, there are other consequences of the inability of workers to collectively bargain, including loss of employee voice in the workplace. Employee voice is regarded as an alternative to employee exit: a means of channelling discontent and reducing turnover through mechanisms that allow employees to raise dissatisfaction and reach acceptable outcomes (without leaving the organisation). Economic and human resources research confirms that employee voice mechanisms are linked to a decrease in turnover, higher job satisfaction, and higher firm productivity.⁵⁴ 'Inside voice' carries

⁵⁴ See, for instance, Wilkinson et al. 2014; Blinder. 1990; Boxall et al. 2007.

other wide-ranging benefits to organisations through stronger employee engagement in day-to-day operations and workplace decision-making.

Collective bargaining is a key vehicle for supporting employee voice and representation in the workplace. The process of negotiating and voting on proposals allows employees to engage in workplace matters through a consideration of their own working conditions, those of their colleagues, and the aims and objectives of the organisation. These collective mechanisms flow on to strengthen employee voice in the firm more broadly, supporting staff engagement with the organisation's aims, its policies and procedures, and the safety and wellbeing of other colleagues. The erosion of EA coverage and an increase in the individualisation of the employment relationship in Australia's private sector thus also represents an erosion of employee voice.

Managers have increasingly instituted one-sided employee voice schemes within their organisations, often integrated into their own human resources agendas; these schemes are sometimes implemented in direct challenge to union representation, but also where union mechanisms do not exist. However, unions provide a more efficient and legitimate instrument of employee voice due to their independence from the employer—an independence that is crucial for representing and promoting the economic and social interests of employees, including obtaining adequate wage increases. The dramatic decline in EA coverage in the private sector is thus both a cause and a consequence of the erosion of employees' capacity to influence their working environments.

Causes of the Decline in EA Coverage

Several factors have contributed to the erosion of collective bargaining and EA coverage in private sector workplaces in Australia. This section of the report will review several of the most important.

DEUNIONISATION

Decline in union membership among Australian workers is clearly associated with the decline in EA coverage. Fewer workers in unions means diminishing resources for union representation, and no pressure to push employers to negotiate new enterprise agreements. Union membership has been declining for several decades; union members accounted for over 50 per cent of all employees in the 1970s, falling to just under 15 per cent in 2017. It is important to note that union density is significantly lower in the private sector (at under 10 per cent of all employees, compared to close to 40 per cent for public sector employees).⁵⁵ The decline in union membership has been visible across most OECD countries (but not all); research for the IMF has ascribed as much as one-half of the rise in inequality in net incomes since 1980 to deunionisation.⁵⁶

In turn, deliberate and sustained attacks on union rights and activities by a retinue of government laws and policies are certainly a key cause of the decline in union membership in Australia. Australia's restrictions on union activity are uniquely severe among OECD countries, and include strict limits upon union entry and activity in the workplace, and unusual limits on rights to industrial action. Governments' present industrial action laws restrict industrial action only to periods of EA negotiations, and incorporate a high degree of bureaucratic complexity, putting Australia out of step with internationally recognised rights of assembly and to strike. More recently, the Coalition government has introduced new government bodies created to police unions and target particular unions in more organised industries – such as the Registered Organisations Commission, and the reinstatement of the Australian Building and Construction Commission.

⁵⁵ ABS *Employment Benefits and Trade Union Membership* (Cat. No. 6310.0), and *Characteristics of Employment, Australia* (Cat. no. 6333.0).

⁵⁶ See Jaumotte and Builtron, 2015.

Structural changes in the labour market since the 1980s have also interacted with government policies to curtail the capacity of unions, bringing about a shift from traditionally unionised industries such as manufacturing, towards new services industries with more precarious and fragmented jobs, high levels of job insecurity, and consequently lower union density. These changes have led to the erosion of employment forms linked traditionally to unionism and collective bargaining; research by Carney and Stanford (2018) shows that today, less than half of all employed Australians fill a traditional standard full-time paid position with normal entitlements such as sick leave and superannuation.

Australia is unique among industrial countries in permitting EAs to be implemented without any participation by a trade union, so in theory the decline of union membership and capacity might still permit continued EA coverage. In practice, however, it is clear that meaningful collective bargaining requires democratic representation for workers throughout the process, and this in turn requires unions with standing, resources, and capacity. Genuine enterprise bargaining is not possible without ongoing participation by unions, which must be supported so they can build membership, resource collective bargaining and develop organisational strategies to reflect changing economic realities.

LEGAL PROTECTION FOR FREE-RIDING

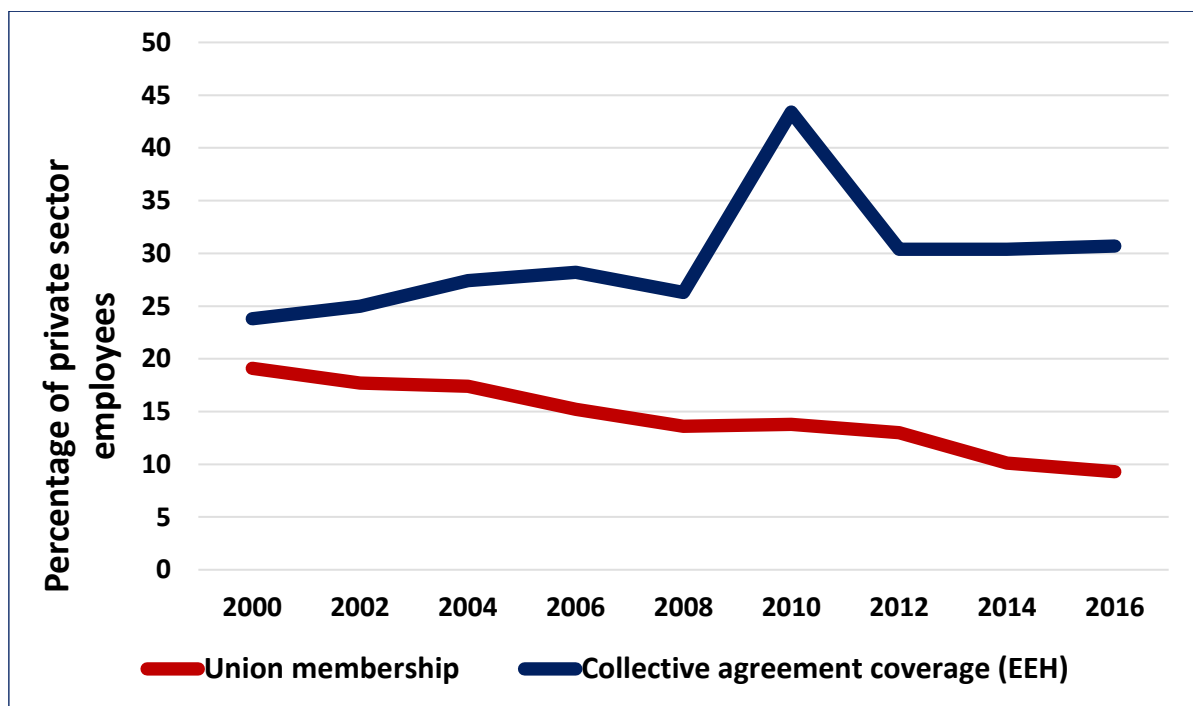
There is no doubt that the decline in union membership has diminished union capacity to engage in effective enterprise bargaining. Australia's practice of providing full legal protection for 'free-riding' is another institutional feature of the existing industrial laws that has clearly accelerated this trend. Free riding refers to the ability of workers who are not union members, and make no contribution toward the cost of negotiating and administering EAs, to nevertheless access the full benefits of and protections provided by an EA in their workplace. Economic theory indicates that when institutional barriers prevent the supplier of a service from charging consumers of that service for the cost of production (as in cases of 'market failure' or 'public goods'), the supply of the good or service in question will become financially unsustainable, and not enough of it will be provided. Many different solutions to this free-rider problem can be invoked in different situations, including expanded property rights, taxes and subsidies, and direct public provision.⁵⁷ The unsustainability of service provision in a free-rider context is obvious in the case of Australian industrial relations: a shrinking minority of union

⁵⁷ See Atkinson and Stiglitz, 1980, for a classic review of the economic theory of the free rider problem.

members is left to marshal resources to pay for the ‘public good’ of collective agreement-making, a process that benefits all workers.

Figure 20 compares the percentage of private sector employees who are union members, with the percentage of private sector employees covered by EAs from 2000 through 2016. EA coverage is as reported in the biennial EEH survey; recall, the EEH measure includes expired as well as current agreements. Union membership was more closely linked with EA coverage at 2000, but since then these ratios have increasingly diverged. In 2016, with only 9.5 per cent of private sector workers holding union membership, over three times as many (30.7 per cent of employees) were covered by EAs.⁵⁸

Figure 20. Private sector union membership and private sector collective agreement coverage diverge



Source: CA coverage data from EEH (Cat. no. 6306.0) for all employees. Figures for 2000–08 combine registered and unregistered CAs. Union membership figures for private sector. 2000–2012 figures from *Employment Benefits and Trade Union Membership* (Cat. no. 6310.0). 2014 data from Table 11.1, 2016 figure from Table 18.1 of *Characteristics of Employment, Australia* (Cat. no. 6333.0). Excludes owner managers.

That EAs can be made without union representation explains some of the union membership–EA coverage divergence. However, as non-union EAs have been linked to

⁵⁸ Each of these two series is derived from different population estimates, and hence this comparison should be seen only as representative of broader trends.

sub-standard wage and conditions outcomes, the resourcing of union representation is nevertheless key – even if non-union EAs have helped to support the overall EA coverage rate. Free-riding enables all employees to benefit from the broader societal and individual benefits provided through union activity, including notably the higher incomes achieved through EAs (especially, as we have seen, union EAs). But by doing so, the current system disincentivises union membership and hence weakens collective representation – depriving both union and non-union members of the benefits of collective bargaining. For example, a study by Teicher et al. (2006) surveyed employees who were covered by an EA, but not members of their relevant union; the main reason given for not belonging was because workers could receive the benefits of representation anyway. The collapse in EA approvals we have seen in recent years indicates this divergence between union membership and EA coverage is unsustainable, and that EA-making has become unviable in many contexts.

An interrelated problem with free-riding is that the FW Act does not require unions to obtain majority union coverage to bargain in a workplace. This means it is not clear whether the key object of the FW Act, namely to encourage enterprise *bargaining*, is being realised. Unions may face a painful choice between accepting a relatively passive role in EA-making (without actively participating in genuine bargaining), or else seeing workers left with no EA coverage at all. In this context, it is plausible that unions have tried to extend their reach beyond what their shrinking resources reasonably allow – accepting non-union EAs or signing onto nominally ‘union’ EAs (under the relaxed definition of the FWC) in which they played no genuine role.

APPROVAL DELAYS AT THE FAIR WORK COMMISSION

Another contributing cause to the decline in both the number of EAs and the number of workers covered by them may have been the considerable approval backlog that EAs face once they are submitted to the FWC. The median number of days taken by the FWC to approve 90 per cent of single enterprise agreements rose from 50 days in 2013/14, to 71 days in 2016/17. During this same period, the percentage of agreements approved from all those lodged declined from around 95 per cent to 85 per cent – a decline in the clearance rate of 10 percentage points. Both the decline in the clearance rate, and the administrative backlog in the approvals process, provide some insight into the dysfunctionality of the current EA system.

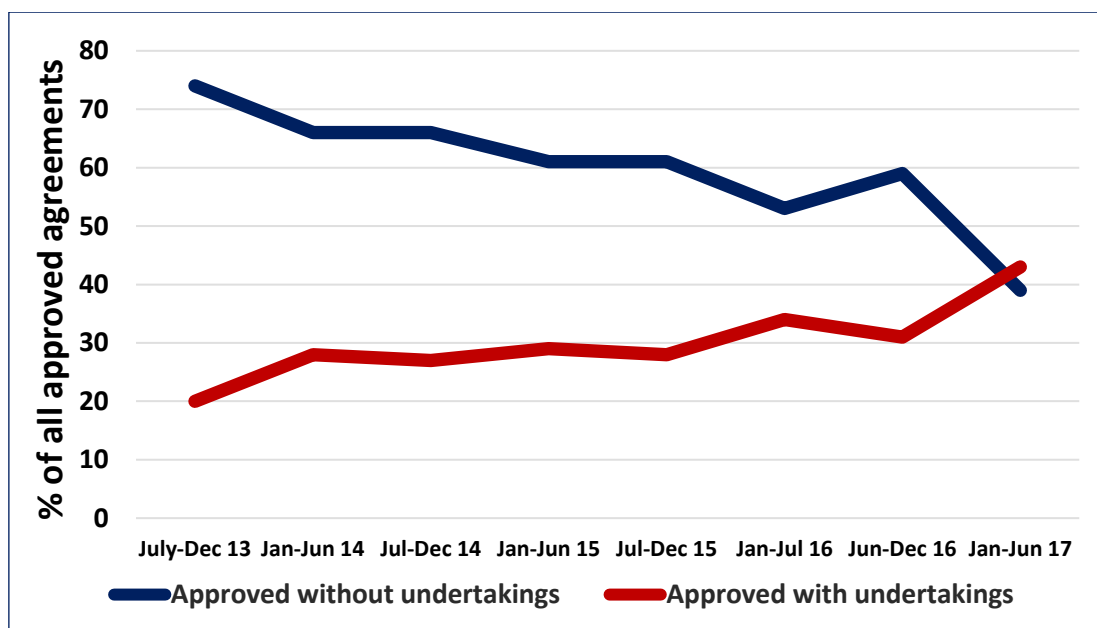
Lengthening FWC approval timelines appear related to the rise in the proportion of agreements requiring employer undertakings before approval. Undertakings are employer written statements that an EA’s non-compliance with some aspect of the FW

Act will not result in any employee being worse off (as per the BOOT); these undertakings are then treated as clauses of the EA. Figure 21 presents data on agreements approved with undertakings as a percentage of all approved agreements.

Table 11					
Agreement Backlog at the FWC					
	2012/13	2013/14	2014/15	2015/16	2016/17
Approval time*	54 days	50 days	56 days	49 days	71 days
Total lodged	7087	6754	5922	5529	5698
Total approved	6772	6403	5481	4801	4858
% EAs approved	95.3	94.5	92.3	86.8	85.3

Data: Fair Work Commission 2015/16 and 2016/17 annual reports. Figures for financial years.
 *Rate for 90% of single-enterprise agreements, which form the vast majority of all agreements

Figure 21. The Rise of FWC-Approved Agreements with Undertakings



Data: FWC Annual Report 2016–17

It shows that undertakings have become more common since 2013, rising from 20 per cent to 43 per cent of all agreements. EAs with undertakings now outnumber those agreements deemed clearly compliant -- which declined from 74 per cent in 2013 to only 39 per cent of all agreements by 2017. The remaining 18 per cent of agreement

applications in 2017 were comprised of applicant withdrawals (17 per cent) or dismissals (1 per cent).⁵⁹

The rise in employer undertakings can be explained by several interacting factors, including:

- Rising complexity in the EAs submitted for approval, with more that ‘dance at the margins’ of National Employment Standards (NES) and Award minimum conditions, and hence require more careful and time-consuming analysis.
- The Coles BOOT decision leading to higher scrutiny over EA approvals.
- A new ‘triage’ team introduced at the FWC in 2015 to assess EAs in hopes of improving timeliness and compliance; despite those good intentions, the new system saw an increase in approval times in the year after its introduction (despite the ongoing decline in the number of agreements submitted for approval in the first place).

The FWC has recently proposed that employers insert new ‘NES precedence terms’ to reduce the undertakings burden. These terms would indicate that NES conditions will prevail whenever there are inconsistencies between those minimum standards and the provisions of EAs. Lengthy, extended negotiations have already taken place before an EA is submitted to the FWC for approval; an approvals backlog then extends the period of time workers wait before receiving pay increases. As the final administrative stage of an often-lengthy agreement-making process, inadequate resourcing of the FWC is clearly undermining its ability to swiftly approve EAs. This, in turn, further compromises the legitimacy of the enterprise bargaining system, leading many on both sides of the table to question its worth.

CHANGING EMPLOYER ATTITUDES

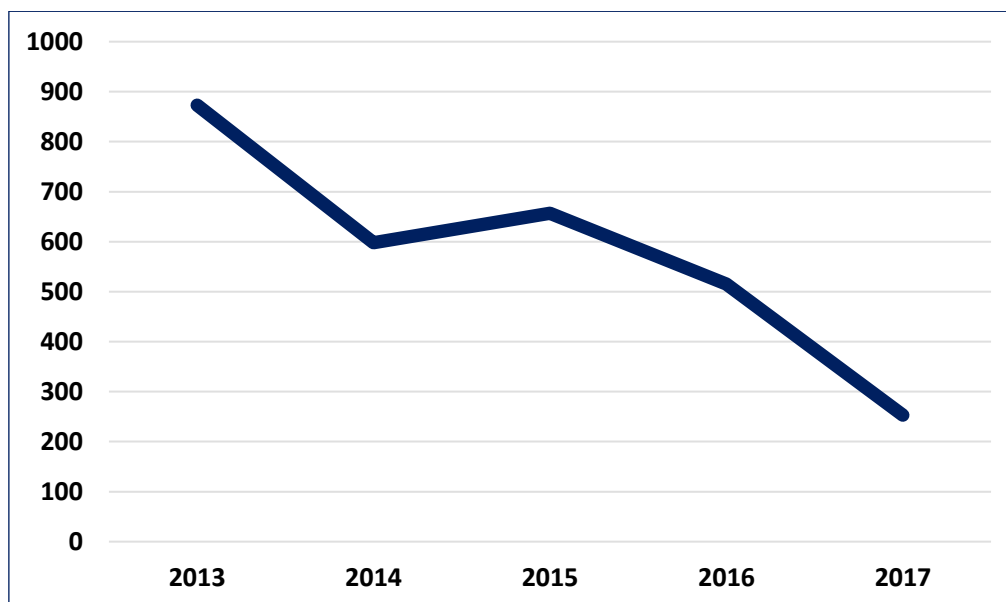
The FWC’s decision in 2016 to approve the termination of the large retail EA at Coles Supermarkets on the basis that it did not pass the BOOT marked a key turning point for Australia’s enterprise bargaining system, by highlighting the problem of below-Award provisions in many EAs. The FWC based its decision on a more rigorous interpretation of the BOOT – namely, that *all* employees under an agreement had to be better off on the EA than on the relevant Award, rather than just *most* employees as contested by Coles. This challenged several long-standing practices in some EAs, such as ‘rolling up’

⁵⁹ See Appendix D, Table D5 of *FWC Annual Report 2016-17*.

base rates to offset below-Award penalty and overtime rates, and treating part-time workers as ‘quasi-casuals’ through hours precarity in rostering.⁶⁰

It is clear that the FWC’s 2016 decision in the Coles case has led to a change in attitudes toward EA-making on the part of employers. Employer lobbyists have decried the FWC’s interpretation of the BOOT as an unreasonable ‘theoretical’ hindrance to agreement-making.⁶¹ That firms are reluctant to negotiate EAs in this new climate is unsurprising, given that the door has now been closed to attaining *lower* labour costs through below-Award provisions in EAs (especially non-union EAs). A survey of Award-reliant firms undertaken in 2013 also confirmed that employers had used EAs primarily to avoid perceived ‘inflexibilities’ in Award conditions.⁶²

Figure 22. Number of Award-mirrored EAs approved



Data: WAD. Note: ‘Award-mirrored’ EAs defined as those with both no quantifiable AAWI, and linked to minimum wage decisions by the FWC. Private sector only.

Another group of EAs identified within the WAD do not have specified wage increases in the agreement (no AAWI); instead, they include clauses that wage increases will be conditional on Annual Wage Review decisions by the FWC. But even these indirect increases are not always automatic when minimum wage decisions are made; alternatively, they may contain clauses stating that wages will not fall below a specified minimum, or they may cap which portion of the national minimum wage increase is

⁶⁰ The EA at food chain Guzman y Gomez, covering 1,700 workers, is the latest to be terminated by the FWC due to failure to pass the BOOT. See Workplace Express. 2018e.

⁶¹ See Australian Industry Group. 2017.

⁶² For discussion of survey of Award reliance see Buchanan et al. 2013.

passed onto employees. We term agreements that both lack any specified AAWI and include links to FWC minimum wage decisions ‘Award-mirrored EAs’; the number of such EAs approved by the FWC can be estimated through analysis of WAD data. Figure 22 presents the number of Award-mirrored EAs approved in the private sector for 2013–17. Award-mirrored EAs were more popular in 2013 (with 873 EAs approved), but then began to become much less common – with only 253 approved in 2017. Since the Coles decision, the use of ‘rolling up’ pay rates to mask labour cost reductions elsewhere (such as lower weekend penalty rates mandated by Awards) has been restricted; the new Coles Supermarkets EA, approved by the FWC and endorsed by workers, is an example of an Award-mirrored EA since its future wage increases are tied to FWC minimum wage decisions. This suggests we may see an increase in these Award-mirrored EAs as a response to the FWC’s stricter interpretation of the BOOT requirements.

SUB-STANDARD NON-UNION ‘DEALS’

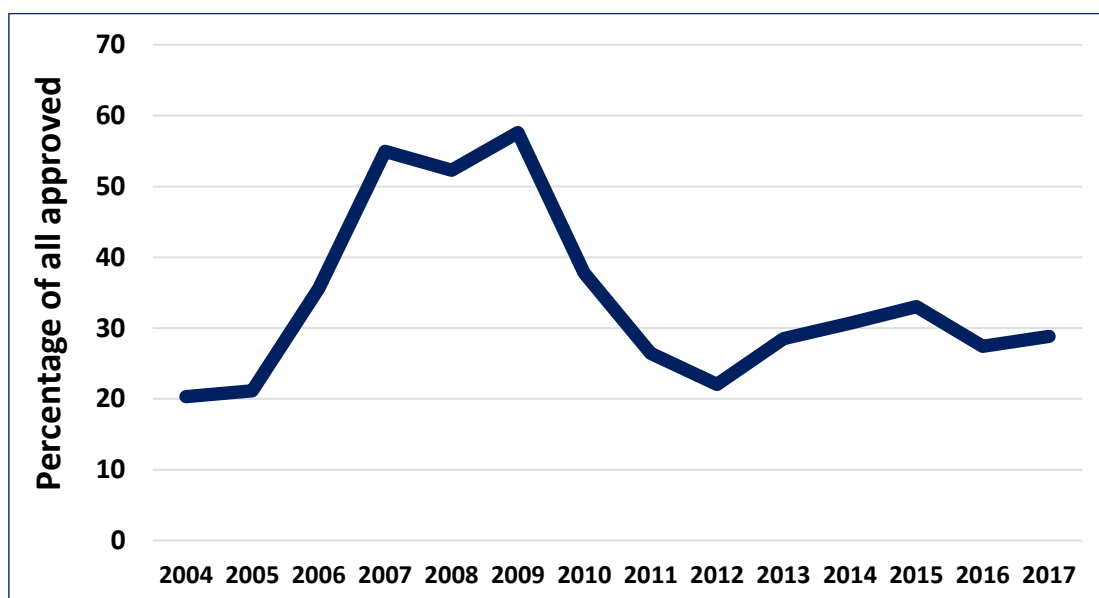
The prevalence of non-union WorkChoices-era EAs being brought forward for termination recently, on the basis that the relevant Award had surpassed the pay and conditions specified in those expired agreements, points to ongoing after-effects from WorkChoices policies on the enterprise bargaining system today. The years of non-union EA-making prior to the introduction of the FW Act cannot be directly responsible for the erosion of private sector EA coverage since 2013, as these early agreements would have expired and hence reduced EA coverage as measured by the WAD earlier. Nevertheless, the WorkChoices period still provides important clues for understanding the unravelling of EA-making that has become apparent in recent years.

Employers have utilised various strategies to avoid commitments and costs required under EAs and to avoid genuine employee representation. Australian Workplace Agreements (AWAs), introduced under WorkChoices, sparked widespread opposition (including through the union movement’s ‘Your Rights at Work’ campaign). They were later abolished under the FW Act. However, the possibility of implementing non-union EAs existed before AWAs; in fact, the practice was first introduced in the form of ‘Enterprise Flexibility Agreements’ beginning in 1993, which allowed employers to unilaterally present EA proposals to employees for approval without any need for bargaining to take place - a practice unique to Australia.⁶³ Under WorkChoices, the ‘no

⁶³ When WorkChoices was introduced in 2005, the employee consent model was ported over as the genesis of AWAs, and the requirement for union notification was removed.

disadvantage test' for EAs was removed;⁶⁴ this was swiftly exploited by employers, resulting in a surge in the number of non-union EAs approved. Figure 23 indicates that non-union EAs comprised around 20 per cent of all private sector agreements in 2004–05, rising to 55 per cent of all agreements in 2007 (after the no disadvantage test was abolished), with another surge occurring in 2009 right before the introduction of the FW Act. In 2009, non-union EAs comprised a record 58 per cent of all EAs approved in the private sector. The number of non-union EAs then drastically declined during the early years of the FW Act, when the no-disadvantage test was reinstated. Nevertheless, since 2012 non-union EAs have still accounted for an average of around 30 per cent of all private sector EAs.

Figure 23. Non-Union EAs as Share of All Approved EAs



Data: WAD. Approved agreements each year.

The pattern of growth and decline in non-union EA approvals paints a sobering picture of how EA-making has transpired under the FW Act, whereby an initial inability to ensure that all EAs produced conditions superior to Awards placed several ‘trip wires’ into the whole EA system. First, the removal under WorkChoices of the need for EAs to ensure that no employee would be worse off than the Award, meant that much of the existing stock of EAs coming into the FW Act period was likely of below-Award quality from the outset. Second, those employers that implemented below-Award, non-union EAs leading into the FW Act are likely those that did not renew agreements after their expiry; these EAs have certainly contributed to the recent rise in both non-renewed

⁶⁴ The ‘no disadvantage’ test was a requirement that employees be no worse off than the relevant Award. WorkChoices eliminated this test, replacing it with five minimum entitlements.

agreements and terminations (routinely approved by the FWC on the basis that Award minimums have either surpassed the pay and conditions of expired EAs, or that the EAs were below minimum standards from the outset). It follows that the significant number of non-union EAs implemented during this WorkChoices 'surge' suggests that there are still many more expired EAs nominally in place that are not meeting minimum standards. Finally, while the FW Act re-introduced a requirement that EAs not undercut minimum standards, the BOOT had not been truly tested until the Coles decision in 2016; by that time, the FWC was confronting an established practice of over 10 years of undercutting minimum standards through EAs.

While WorkChoices-era substandard agreements are being exposed and terminated at an increasing rate, the high number in place from the outset suggests we will continue to see more terminations in the future, as these sub-standard agreements are gradually eradicated from the EA stock. EA coverage may thus continue to decline according to the EEH measure (since expired EAs have already disappeared from the WAD), as more employees lose 'coverage' from expired EAs, and subsequently are transferred to Award or individual arrangements for pay-setting.

The shift in employer attitudes evidenced over the transition from WorkChoices to the FW Act and the BOOT decision demonstrates that employers' voluntary engagement in the process of EA-making is currently crucial to sustaining the whole enterprise bargaining system. The fact that long-expired EAs have remained in force (some for up to 10 years) demonstrates that the FW Act is failing to facilitate the replacement of agreements needed to deliver clear wage increases, once employers' attitudes to EAs have hardened. This is associated with the lack of support for union capacity, generally required to 'trigger' negotiations when agreements are reaching expiry. A collective bargaining system that depends on luring employers into the system with economic incentives, rather than requiring their participation as a matter of normal practice, is unlikely to be one where workers are adequately represented and can achieve good outcomes.

Implications and Policy Responses

THE DISAPPEARANCE OF PRIVATE SECTOR ENTERPRISE BARGAINING?

The erosion of EA coverage in the private sector reflects a severe and sustained weakening of Australia's enterprise bargaining regime. Under the current rules, collective bargaining mechanisms are effectively unreachable for much of the workforce, with resulting impacts including stagnating wages and increasing individualisation of employment contracts. Unions' capacity to initiate and resource negotiations, and to meaningfully represent employees, has been badly eroded. Many of the EAs that are nominally 'on the books' did not involve true negotiations, and in many cases were premised precisely on employers' desire to avoid statutory minimum provisions. The failure to renew existing EAs with private employers, the failure to negotiate new ones, and an acceleration of EA terminations are cumulatively driving down the number of current EAs in the private sector. We find that without far-reaching changes to revitalise more genuine collective bargaining across the private sector, the number of current private sector EAs could fall below 2,000 agreements by 2030, and the proportion of private sector employees covered by a current EA could fall to 2 per cent. If the underlying drivers of collective agreement erosion are not reversed, collective bargaining will largely disappear as a tool for lifting wages and working conditions in Australian firms.

POLICY REFORMS FOR VIABLE COLLECTIVE BARGAINING

The revitalisation of a more genuine and sustainable collective bargaining regime in Australia will be essential to arrest wages decline, improve equality, and support inclusive economic growth. While union membership and activity are under pressure in many countries, it is important to note that declining collective bargaining coverage is certainly not a universal trend across other advanced economies. For example, industry and sector-level bargaining systems are utilised in many OECD countries – including over one-third of European economies, which sustained high collective agreement coverage at around 80 per cent of all employees over the past decade

(despite the impacts of the GFC).⁶⁵ The analysis above suggests that a range of policy reforms could help to sustain a viable and genuine collective bargaining system in Australia: widening the scope of bargaining beyond single enterprises (to allow bargaining at the multi-firm or sector level); prohibiting termination of expired EAs during negotiations for renewal; lifting restrictions on union activity, including access to industrial action provisions; implementing a timelier and more efficient umpire to enforce collective agreements and hence enhance their legitimacy in the eyes of all parties; and considering more sustainable methods for financing collective bargaining and representation. While it is not the purpose of this paper to describe these potential policy reforms in comprehensive detail, it is important to note that the dramatic erosion of collective bargaining in private sector workplaces in Australia is the clear and predictable outcome of a particular set of rules and laws. Equally clearly, those rules and laws can be changed.

Industry bargaining

The scale of EA erosion in the private sector confirms that enterprise-level EA-making is failing to provide collective bargaining opportunities to most private sector workers. A large number of small workplaces and the increasing fragmentation of work make it very hard for unions to ‘get to the table;’ their resources are inadequate to undertake enterprise-level bargaining across the whole economy. Recent OECD research found that decentralised systems with weak collective bargaining are associated with higher unemployment, underemployment and income inequality compared to more coordinated bargaining systems.⁶⁶ Industry-level bargaining offers an institutional mechanism to restore collective bargaining and support more redistributive functions that promote wages growth, greater fairness, and equality in pay outcomes. Many industrial relations experts, academic researchers, and policy-makers have identified benefits from sector-wide collective bargaining processes across numerous economic indicators: including employment, real wage growth, and wage equality. Published research has confirmed that more coordination in collective bargaining (across firms and entire industries) permits a better match between real wage growth and productivity trends, reduces industrial conflict, and ensures better gain-sharing between workers and employers.⁶⁷

⁶⁵ See Eurofound. 2018. See also OECD 2018 for more detail on the use of differing collective bargaining systems in various industrial countries, and their impact on overall economic performance.

⁶⁶ OECD 2018; OECD and ILO. 2018. The OECD research terms Australia’s system decentralised and ‘weakly coordinated,’ on the basis of the role of the Awards system in establishing some sector-wide commonality in pay and conditions.

⁶⁷ See, for example, Aidt and Tzannatos 2002; Blanchard 2006; Ewing et al. 2016; and Isaac 2018.

Industry bargaining would set a common standard for employers, reducing their scope for competing with each other on the basis of lower labour costs; less efficient firms would be compelled to invest in genuine productivity-raising measures (such as skills and training schemes, advanced technology, or improvements in product design) rather than suppressing wages.

The proportionately high transaction costs for smaller firms of negotiating and maintaining EAs is a major barrier to collective agreements among small businesses. As a result of this disincentive, small firms (with less than 20 employees) have experienced the fastest decline in both EAs and EA coverage – both falling by about 45 per cent since 2013. Unions have a diminishing capacity to organise workers in small firms, given these high levels of workplace fragmentation. Increasing the scope of collective bargaining is thus needed to reach workers in small firms, and give them access to collective bargaining power with which they could improve their wages and conditions. For those small-firm EAs which remain in force, these may be more efficiently integrated into multi-employer, industry-wide, or template agreements. Increasing the scope of bargaining will also enhance opportunities for businesses and workers alike to prepare for new technologies, new skills, and new business models in ways that enhance productivity and working conditions, rather than undermining them.

Termination of EAs while in bargaining

Termination provisions are being exploited by employers as a strategy for gaining an upper hand during collective bargaining, through the threat of imposing significant wage cuts on workers. The ability of employers to terminate expired EAs when negotiations are taking place for their replacements is a particularly unfair arrangement for workers and their representatives. The current termination provisions are particularly pernicious considering the FW Act has only very weak provisions for unions to press employers to participate in bargaining at all, with the final decision to negotiate or not resting exclusively with the employer. EAs reflect the cumulative collective representation and efforts of a workforce over long periods of time; that historical legacy must be protected, rather than providing employers with an opportunity to erase the years of gradual progress that are embodied in a current EA. The termination of expired EAs during negotiations for their replacement should be prohibited; the continued operation of an expired EA should be considered as the most efficient means of encouraging all parties to engage in collective bargaining.

The terminations data analysed in this research report suggests there are likely a significant number of below-Award expired EAs approved in the WorkChoices era still

in force. Employees should continue to have unilateral access to application to terminate EAs in cases where they do not provide above-Award pay and conditions.

Lift restrictions on union activity

Union representatives require access to workplaces in order to organise and advocate for their members and other workers. Tight restrictions on the rights of union representatives to visit workplaces have hamstrung collective bargaining by inhibiting unions' ability to recruit, organise and represent new members. These restrictions (including a permit system, a limited list of permissible reasons for entry, and 24-hour notice periods to employers) have also undermined unions' traditional role in ensuring pay and working conditions are compliant with EAs, Awards, and National Employment Standards. The authority of unions to play a larger role in compliance inspection should be restored, particularly in light of repeated revelations of widespread sub-Award conditions and wage theft across Australia.

Restrictions on the right of unions to take industrial action must also be relaxed to bring Australia into compliance with international labour law. Limiting strike action to an enterprise negotiation period, and requiring unions to traverse an incredibly lengthy, complex and fraught administrative process (which includes informing the employer of precise actions being planned), limits workers' ability to take collective action in support of their economic and social interests. Extending the right to industrial action into an industry bargaining regime will promote a more even balance of power between workers and employers, in particular by enhancing prospects for union activity within smaller enterprises.

Implement effective and timelier umpire system

One consequence of the collapse of collective bargaining in Australia is that problems in most workplaces cannot be resolved by collective negotiation. In the absence of easy-access mechanisms to pursue grievances and resolve employment problems, workers' only real options are to resort to costly individual legal challenge, or else to exit their employment entirely. Access to courts is expensive, decision timelines are lengthy, and the outcomes are unpredictable; moreover, individual workers can be exposed to risks of retribution when confronting the disproportionate power and resources of employers.

Similarly, unions seeking redress for breaches of collective agreements must also invest significant resources (mobilised from a diminishing membership base) to pursue litigation.

Workers and their unions need a more effective and timelier umpire system to enforce collective agreement conditions, as well as minimum Award conditions and National Employment Standards. Specialised procedures easily accessible to workers and unions should be introduced to facilitate timely treatment of issues such as underpayment and unfair dismissal. This would enable disputes to be resolved early, and redress delivered to workers swiftly. Furthermore, the establishment through precedent of new employer behavioural standards with regard to adherence to employment law and legislated minimum standards has spillover benefits in clarifying for other employers their responsibilities – and the likely sanctions for failure to live up to those responsibilities.

Conversion or phase-out of non-union EAs

Australia's provisions allowing for enterprise agreements without any meaningful union participation or independent representative structures are both an international anomaly and a travesty of workplace democracy. With no organised and consistent representative structure through which workers can advance their claims and take action in support of them, non-union EAs are subject to unilateral influence and immense manipulation by employers. In practice employers can dictate the terms of the agreement; there is no process through which genuine negotiation can occur. As noted above, the terms of non-union EAs (including agreement duration, the level of wage increases, and even whether wage increases are specified at all) are consistently inferior to those that involve union participation. By forestalling genuine collective representation and imposing inferior terms and conditions, non-union EAs serve as a barrier to true collective bargaining – not a path to it.

The legitimacy and effectiveness of enterprise bargaining would thus be enhanced by the eventual elimination of the non-union stream of EA-making. Rather than simply dismantling these EAs outright (leaving affected workers with no protection other than the minimum terms of Awards), a preferable approach would be to establish a supported process for the potential conversion of non-union EAs into more genuine agreements, featuring democratic representation for affected workers and actual negotiations on their behalf. This transition process would require notification of EA expirations; a process by which relevant unions could initiate consultations with affected employees and negotiations with employers; a timeline for bargaining; and facilitation services provided by the FWC to assist workplaces in achieving, for the first time, a more genuine enterprise agreement.

A sustainable method of financing collective bargaining

Finally, an accessible and effective collective bargaining system will never be sustainably financed on the basis of voluntary individual contributions from a diminishing number of union members. A more sustainable method of financing collective bargaining would build on a recognition of the public benefits that collective agreements and representation provide to all workers (and to broader society). Research by Peetz (2005) indicates that declining union density in Australia is not due to a decline in underlying co-operative values, but rather to the current industrial relations system that disincentivises and discourages union membership. Full legal protection and endorsement of free-riding dilutes the effectiveness of collective representation and gains achieved. Other industrial countries utilise a range of different approaches to sustainably financing the process and structures of collective bargaining – ranging from public subsidies for bargaining, to representation and bargaining levies paid by all workers covered by an agreement, to institutional ties between unions and social service delivery. Considering options to Australia's present system will require extensive discussion and dialogue; what is clear, however, is that the current system (based on full protection of free-riding and its resulting impact in defunding collective bargaining for all workers, union or non-union) is not sustainable.

Conclusion

Collective bargaining is a pre-condition for inclusive growth. No society has attained true mass prosperity without strong collective bargaining systems to ensure that the benefits of economic growth are broadly shared. There is growing consensus among researchers that the decline in collective bargaining has contributed to poor wages growth and rising inequality, so evident in Australia and several other industrial economies. The benefits of collectively agreed pay and conditions at work are shared not just among union members; rather, the beneficial effects of collective bargaining spill over to all workers, and society as a whole, in the form of higher incomes, stronger government revenues, enhanced social spending, and a more equal society. But Australia's collective bargaining regime has been eroding for many years – and since 2013, this gradual decline has turned into a more dramatic collapse. This report has documented the rapid decline in EA coverage in the private sector: some 662,000 workers have lost EA coverage, and the number of current EAs has dropped by 46 per cent, since 2013. Australian policy-makers need to urgently address and reverse this problem.

One obvious opportunity for reversing the erosion of private sector collective bargaining is through industry or sector-wide bargaining, which is common in most other advanced economies – and is now being considered in still more countries where enterprise bargaining is also proving inadequate for extending collective bargaining rights to all workers.⁶⁸ Sector-wide bargaining can allow workers who would otherwise lack bargaining power in the present atomised labour market to aggregate their influence, and work collectively to secure a fair share of the wealth they help generate. A collective bargaining regime with strong extension mechanisms across industries would also help to deliver wages growth for workers across small firms who presently have little access to collective bargaining. In a labour market marred by rising precarity, and where half of all workers now experience some dimension of precarity in their jobs, sector-wide bargaining could improve the pay and conditions of work, and take workers' incomes out of the 'firing line' of competition. It would also help to future-proof the Australian workforce in the face of powerful trends in automation and digital platforms that are likely to displace and further fragment labour, and intensify downward pressure on wages.

⁶⁸ For example, New Zealand is planning to introduce industry bargaining through 'Fair Pay Agreements', which would enable unions and employers to set minimum terms and conditions across industries and occupations; see Ministry of Business, Innovation and Employment, 2018.

Other opportunities for policy reform include eliminating the ability of employers to use threatened termination of EAs as a weapon during renewal negotiations, establishing a faster and more effective umpire system to ensure that EA provisions are accurately and fairly enforced, and relaxing restrictions on union activity (including access to workplaces and industrial activity).

Unions play an essential role aggregating the bargaining power of individual workers to collectively negotiate the terms and conditions of work. However, they are increasingly unable to fulfil this role in Australia – due to decades of hostile laws restricting their rights and capacities, intense employer opposition, and unfavourable shifts in the broader economy (including the relative shift of employment to smaller workplaces, and the development of more fragmented forms of employment). These pressures have been building up for years, but now seem to have reached a tipping point that is starkly visible in Australia’s private sector. Urgent action is needed to address and reverse the decline in collective bargaining in Australia to ensure that ongoing economic and productivity growth translates into rising living standards for all.

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