

Ashurst

Enterprise bargaining in the age of Closing Loopholes

Bargaining Trends Survey Report

November 2024

Outpacing change



Executive Summary

Our 2024 Bargaining Trends Survey reveals that the *Secure Jobs, Better Pay* and *Closing Loopholes* reforms to enterprise bargaining are clearly having an impact – but the changes have not been as impactful for employers as they were predicted to be. As colloquial “loopholes” have closed, employers, unions and employees have cut their cloth to respond to the new regime.

Between 2023 and 2024, the Australian Government enacted a range of legislative reforms in enterprise bargaining. Among other things, the reforms introduced multi-employer bargaining (**MEB**), changed how and when the better-off overall test (**BOOT**) is to be considered, and granted the Fair Work Commission (**FWC**) increased intervention powers, in particular, where bargaining becomes intractable.

While significant concerns were raised about MEB in our 2023 Survey, 93% of respondents to our 2024 Survey reported they have not been approached about, nor are they considering, MEB. This demonstrates that the concerns raised by employers about MEB during consultation on the legislation and the results of our 2023 Survey echoing those concerns (with 51% of 2023 Survey respondents reporting they held a concern about MEB) have not (as yet) materialised.

The changes to the BOOT also went largely unnoticed. Our 2024 Survey results show only a small proportion of respondents noticing substantive changes to the FWC’s approach to the application of the BOOT and approval processes. However, 81.4% of respondents responded that they did not face difficulties in having their most recent enterprise agreement approved by the FWC, which reflects the highest proportion of respondents noting they had no difficulties in agreement approval since we commenced these Surveys in 2017. This likely reflects an

increasingly cautious approach being adopted by employers in light of the FWC’s historical practices, rather than the application of the changes in practice.

We were surprised that 58% of respondents indicated that they are not concerned about the FWC’s ability to re-assess the BOOT during the life of an enterprise agreement, however one respondent noted that;

“One of the most fundamental benefits of an enterprise agreement is the certainty it gives with respect to wages (and wage increases) during its term. Given the Commission’s focus on financial benefits when assessing the BOOT, the risk of having to reconsider wages is concerning.”

The prospect of FWC intervention in the case of intractable bargaining has, however, had an impact. Our 2024 Survey results indicate that 30% of respondents altered their bargaining approach due to the prospect of an intractable bargaining declaration being made – which is one of the significant changes to the bargaining regime. There has also been an appreciable increase in protected industrial action.

Finally, the newly established right to disconnect was perceived by most respondents as likely to have only minimal impact. 46.5% of respondents indicated that the changes would have no effect, while 34.9% of respondents reported that the right to disconnect was sought during bargaining, indicating it remains a focus for unions. It will be interesting to see how this reform develops in the next 12 months.

The Government has announced an [independent statutory review](#) of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. Stakeholder submissions are due by 29 November 2024. It will be interesting to see the extent to which the findings of that review align with our 2024 Survey results and impact policies for the 2025 Federal election.

We hope our 2024 Survey results assist you in navigating upcoming enterprise bargaining negotiations. We welcome any feedback regarding this report.



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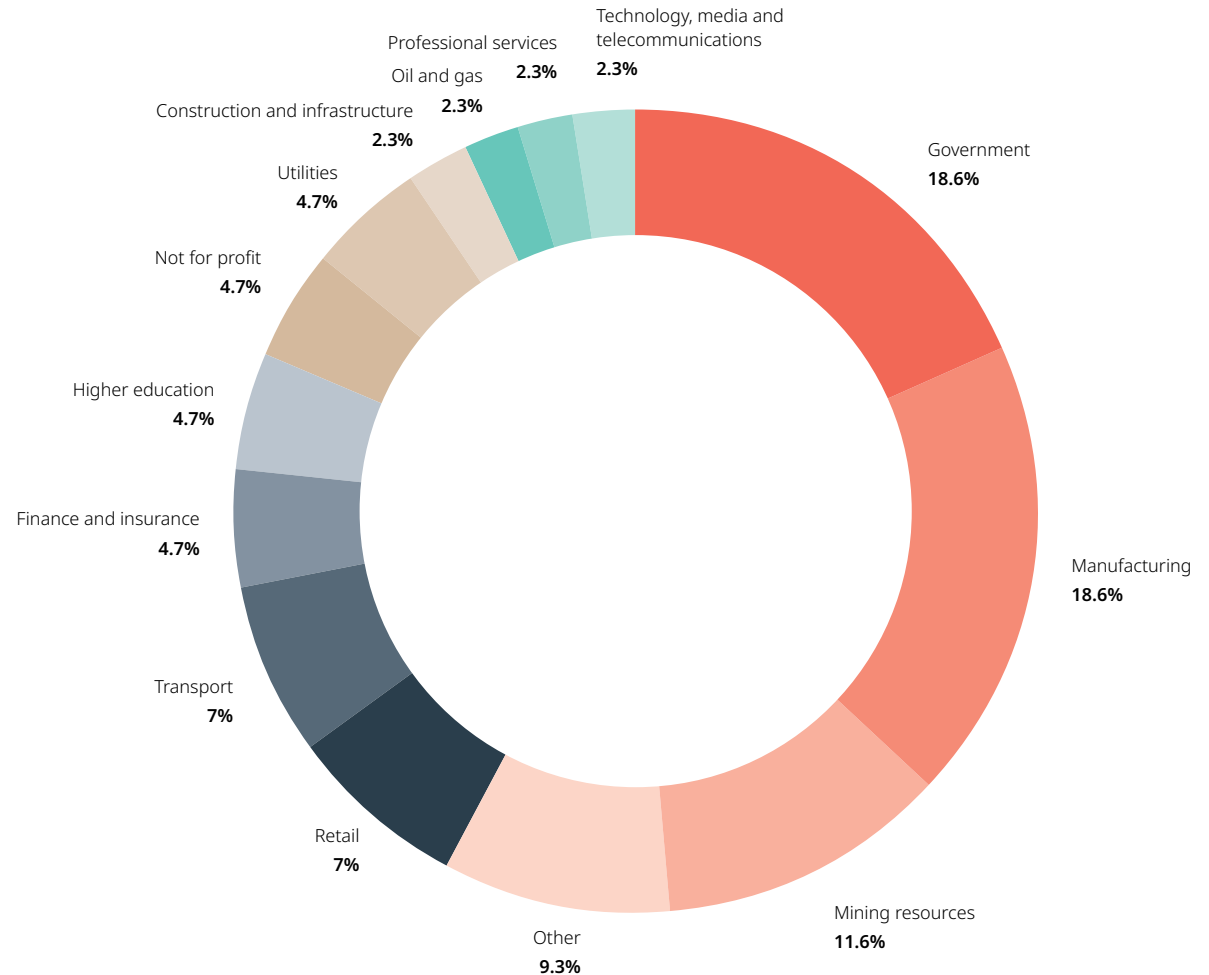


About our Survey

We conducted our 2024 Bargaining Trends Survey to identify key bargaining priorities among employers and understand their strategies in the current industrial landscape. We focused on gaining insights into the impacts of recent legislative reforms on bargaining and gathering our clients' perspectives on the impact of these changes.

The Survey included 44 questions regarding respondents' bargaining experiences with their most recent enterprise agreements and their views on legislative reforms introduced in 2023 and 2024.

Participants were invited from a diverse range of sectors, including construction and infrastructure, finance and insurance, government, healthcare, higher education, manufacturing, mining resources, oil and gas, retail, technology and media, transport, utilities, and not-for-profit organisations.



Our Survey respondents include Top 200 ASX listed companies and major government departments and agencies. Survey respondents range in size, with the majority employing more than 1000 employees. Most respondents are also managing more than one enterprise agreement in their workforce, with 40% of respondents managing more than five enterprise agreements.

Finding 1

Power to re-assess the BOOT during the life of an enterprise agreement is not a concern

The *Secure Jobs, Better Pay* reforms granted the FWC power to re-assess the BOOT during the life of an approved enterprise agreement. If the FWC has a concern that an enterprise agreement does not pass the BOOT, it may require employers to provide undertakings to address the concern or otherwise amend the enterprise agreement.

Despite the potentially significant impact this power may have on employers, our Survey results indicate that 58% of respondents are not concerned about this change.

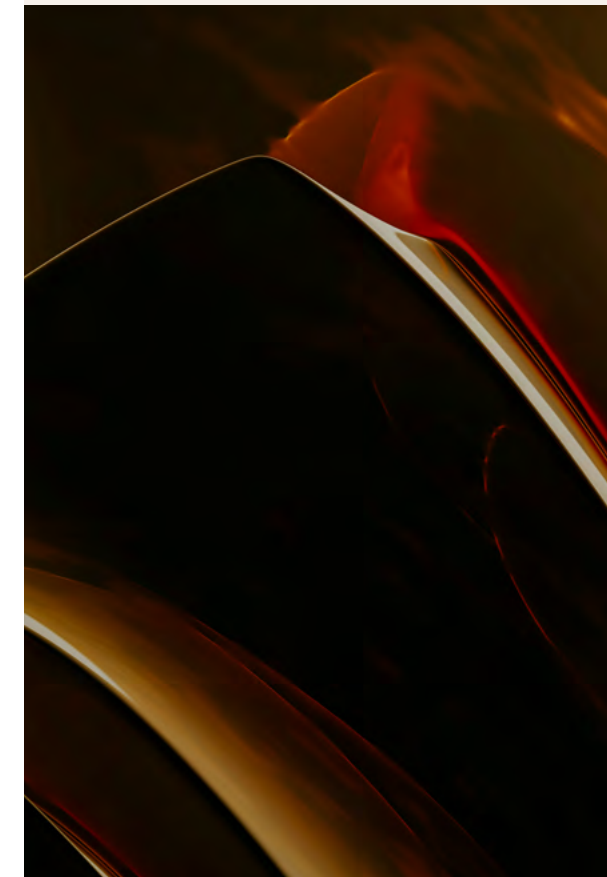
Interestingly, despite the apparent low level of concern about the FWC's power to re-assess the BOOT, the most frequently cited reasons for bargaining amongst our respondents were certainty of terms and conditions of employment (69.8% of respondents) and predictability of wage increases and labour costs (55.8%). This accords with employers' desire to achieve the stability that enterprise bargaining brings to industrial relations in the workplace.

The results may be explained by the fact that enterprise agreement entitlements typically exceed those of underlying awards, particularly with respect to remuneration.

We have not yet seen the ability for the FWC to re-assess the BOOT during the life of an agreement having a material impact. This may be because a re-assessment may only occur where there has been a change in the patterns or kinds of work, or types of employment, undertaken in the employer's enterprise which the FWC did not previously consider.

“All parties to our organisation’s Enterprise Agreements were well represented by capable and experienced representatives - these parties understand what is in the best respective interests and does not need any unnecessary intervention.”

58% of respondents are not concerned about this change

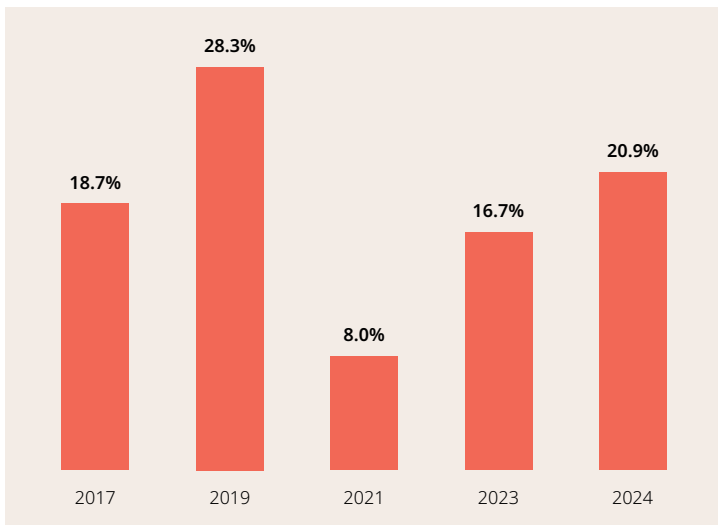


Finding 2

Protected industrial action is on the rise

In our 2023 Survey Report we highlighted the significant impact of COVID on protected industrial action (**PIA**). In our 2019 Survey, 28.3% of respondents reported experiencing PIA during their most recent bargaining. This fell to 8% of respondents in our 2021 Survey, then rose to 16.7% of respondents in our 2023 Survey. The upward trend has continued in this year's results, with 20.9% of 2024 respondents indicating that they experienced PIA in their most recent bargaining.

Protected industrial action taken by respondents to our 2017–2024 Surveys



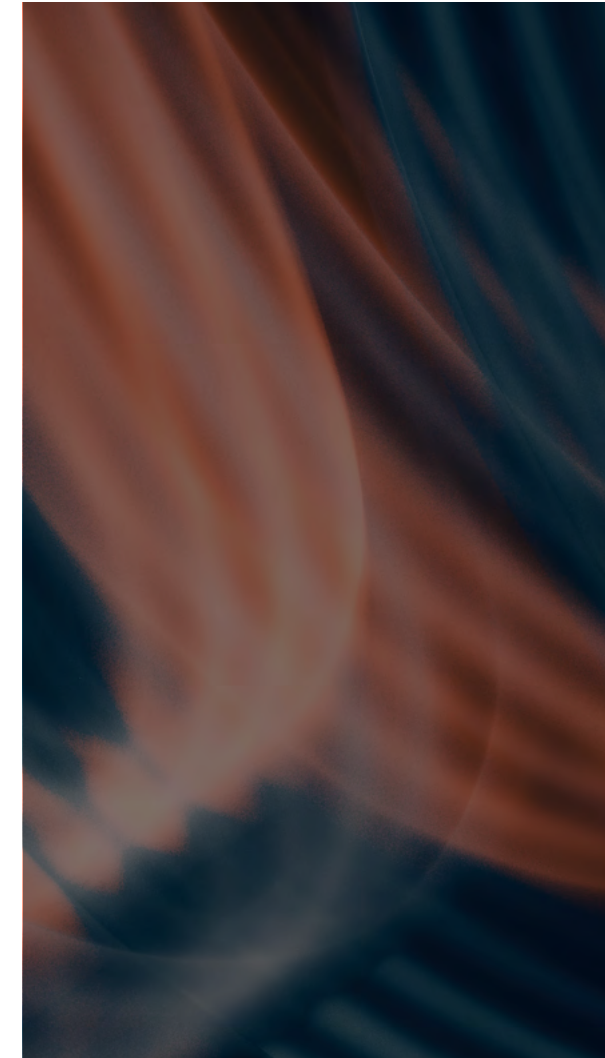
[Australian Bureau of Statistics data](#) for June 2024 reflects a similar trend. During the year ended June 2024 there were 120,000 working days lost due to industrial disputes, being 52,900 more working days than in the previous year.

This is consistent with the 23 September 2024 [Fair Work Commission Statistical report – Enterprise Agreements & Other Bargaining Data](#) which indicates that 538 PABO applications have been lodged with the FWC in 2024, representing an increase from the 5-year average of 423 for the same period.

In our 2024 Survey, the sectors most affected by PABOs and subsequent PIA were Manufacturing and Retail. It appears that bargaining representatives for employers in these sectors are now more likely to flex their industrial muscle to exert pressure during bargaining.

The FWC now also has the power to require bargaining representatives to attend a compulsory conference during a protected action ballot period and before industrial action will be authorised. In this year's Survey, we asked respondents about the outcome of these conferences. Of the Survey respondents who have attended such a conference, 80% reported that the conference had no impact on bargaining and only 10% considered the conferences were of utility and assisted to narrow the issues in dispute. Unfortunately one respondent noted that –

“We were getting close to agreement, and the [s 448A] conference in that setting actually set us back.”



Finding 3

Prospect of an intractable bargaining declaration is resulting in earlier bargaining

The *Secure Jobs, Better Pay* reforms expanded the FWC's authority to intervene and make declarations in cases of intractable bargaining. This change is already influencing respondents' approaches to bargaining, with all parties bargaining in the shadow of an intractable bargaining declaration (IBD). Our 2024 Survey results indicate that 30% of respondents altered their bargaining approach due to the prospect of an IBD. The Manufacturing and Mining sectors were the most concerned about IBDs. 30.8% of these respondents reported commencing bargaining earlier. Other respondents noted *"lowered expectations of gaining any benefits", "tak[ing] a less bullish approach",* the importance of a *"solid business case"* and being *"cautious about agreeing to any changes early in negotiations"*.

Before the FWC may make an IBD, it must hold a mandatory preliminary conference, referred to as a section 240 application. The 23 September 2024 [Fair Work Commission Statistical report – Enterprise Agreements & Other Bargaining Data](#) shows that 19 section 240 conference were lodged in August 2024 to deal with a bargaining dispute, up from a 5-year average of 15 for that month. This is consistent with the trend reflected in previous months in 2024.

While the number of section 240 applications is not an indication of the number of IBDs being issued, it does highlight a trend towards frustrated bargaining, suggesting the need for IBDs.

We expect to obtain more insights into the consequences of IBDs being made in the coming 12 months, as the number of workplace determinations made by the FWC following such declarations increases.

30% of respondents altered their bargaining approach due to the prospect of an IBD

Respondents noted *"lowered expectations of gaining any benefits", "tak[ing] a less bullish approach",* the importance of a *"solid business case"* and being *"cautious about agreeing to any changes early in negotiations"*.

Finding 4

Union rights are on the rise

Under the recent reforms, delegates' rights have expanded with new enterprise agreements now being required to include a delegates' rights term which provides delegates with greater access to workplaces, workplace facilities and employees.

The bargaining priorities of some unions also seem to be shifting in a similar direction. While workers' pay remains the top union priority (as experienced by 95.3% of respondents to our 2024 Survey), it is now closely followed by claims for the rights of union delegates (74.4% of respondents) and union training leave (69.8% of respondents). The responses to our 2024 Survey show a marked increase in the proportion of respondents who have received claims during bargaining for rights for union delegates and union training leave.

These are the highest proportions of respondents noting these claims since we commenced these Surveys in 2017, reflecting the resurgence of union influence in Australian workplaces.

Responses to our 2024 Survey indicate concerns with this trend, noting that *"We will be required to pay for union training etc whereas in the past we considered that was what union fees were for"* and *"We are now [being] forced to include the [workplace delegates' rights] term even where the union is not party to the EA... half of our EAs do not have unions as a party"*.

Union claims for new leave types are also on the rise, but at a much slower rate. In our 2024 Survey, 23.3% of respondents reported claims for each of mental health leave and menstruation leave, up from 11.11% and 5.56% respectively of respondents

to our 2023 Survey. Further, 32.6% of respondents to our 2024 Survey reported claims for a new leave type since 2023, reproductive leave.

These requests for new gendered leave types are consistent with recommendations from a recent report from the [Senate Standing Committee on Community Affairs](#) about the economic impacts of menopause and perimenopause in the workplace.

Indicative of a wider social focus, 60.5% of respondents reported claims being made for family and domestic violence leave (up from 36.11% of respondents to our 2023 Survey), despite new [National Employment Standard \(NES\)](#) provisions enshrining 10 days' paid family and domestic violence leave each year. This push has occurred despite a [Report](#) commissioned by the Department of the Prime Minister and Cabinet which found that only 13% of surveyed victim-survivors are utilising paid family and domestic violence leave, likely due to low awareness. However, the Report also found there had been a significant rise in claims for family and domestic violence leave since the NES provisions were introduced. The resulting [Independent review of the operation of the paid family and domestic violence leave entitlement in the Fair Work Act 2009](#), also released in August 2024, found that while the new NES provisions are *"appropriate and sufficient"*, poor awareness and evidentiary requirements are hindering its utilisation.

Of respondents to our 2024 Survey, the new leave types mentioned were most frequently sought in the Government sector.

Finding 5

Right to disconnect is not a significant concern for agreement covered employers

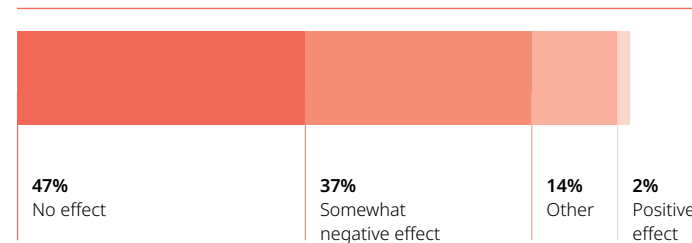
On 26 August 2024, the new right to disconnect came into effect as part of the *Closing Loopholes* reforms. This right addresses the growing trend of Australian workers being contacted or required to work beyond their scheduled hours in an era of flexible work and digital connectivity.

However, the reform has so far proven to be more symbolic than substantive. Almost half of our 2024 Survey respondents (46.5%) indicated that they do not think that the changes will have any effect. The sectors most represented amongst these respondents were Government, Manufacturing and Mining. These sectors may be the least concerned of our respondents because they have heavily regulated rostering arrangements. A further explanation may be that their enterprise agreements already have compensatory mechanisms for after hours work or an embedded right to disconnect.

37.2% of 2024 Survey respondents considered the right to disconnect will have a somewhat negative effect but no respondents considered it would have a significant negative effect. Only 2.33% of respondents felt the right to disconnect would have a positive effect on their organisation.

One respondent noted their concern that '*[as] a global business, there are regular engagements across time zones*'; but noted that they already encourage proactive management through flexibility and tailored working arrangements.

Extent to which the right to disconnect is perceived by respondents to impact their organisation



Respondents are addressing the right to disconnect predominantly by way of training, with 65.1% of respondents reporting changes to training obligations and 27.9% updating their work practices. This is likely to be the most effective way to deal with the new provisions, with the risks being managed by upskilling managers to understand how, and in what circumstances, outside of hours contact might be reasonable. Interestingly, of our 2024 Survey respondents, the sectors that have implemented the most training were those that believed this reform will have 'no effect'.

39.5% of Survey respondents reported changing the terms of employees' contractual arrangements to clarify their expectations. Practically, we anticipate this will involve ensuring that contracts include relevant provisions to make clear that employees are sufficiently compensated for the work their employer may require of them, including responding to contact after hours.

The right to disconnect is a significant focus for unions and bargaining representatives. This year's results highlight that 34.9% of respondents noticed employees and unions referencing the right to disconnect during bargaining. It will be important to continue tracking how this legislation finds its place in the Australian context and what level of prescription finds its way into enterprise agreements, especially in comparison to the enforcement standards in France, Ireland, Germany and Canada.

Changes respondents are making to address the right to disconnect



Finding 6

Multi-employer bargaining has not yet been realised

The *Secure Jobs, Better Pay Act* introduced MEB to address perceived shortcomings in the legal framework related to collective bargaining, and to generate wage growth. In our 2023 Survey Report, we noted that this would represent a significant change to the Australian bargaining regime, which raised concerns among respondents. In our 2023 Survey, 51% of respondents were concerned that MEB could create worse outcomes for their organisation.

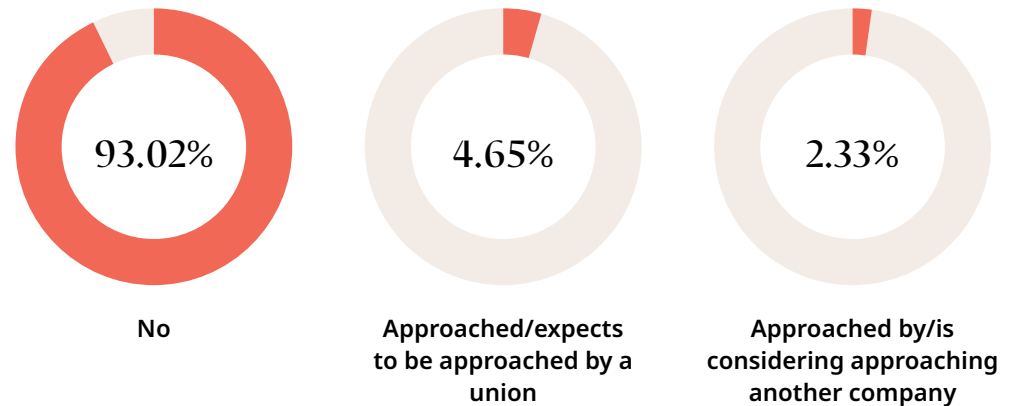
These concerns, however, have not yet materialised. Rather, this year's results indicate that only 7% of respondents have been approached, or are considering, MEB. Of our Survey respondents, the Manufacturing, Mining and Education sectors are the sectors most affected by multi-employer bargaining to date. The key unions reported to be seeking MEB with our Survey respondents included APESMA, AWMU, AWU and ETU.

To date there have been two successful authorisations of MEB; [APESMA v Great Southern Energy Pty Ltd T/A Delta Coal, Whitehaven Coal Mining Ltd, Peabody Energy Australia Coal Pty Ltd, Ulan Coal Mines Ltd \[2024\] FWCFB 253](#) and [IEU and UWU v Aberdare Pre School Inc and Others \[2024\] FWC 2583](#).



7% of employers have been approached, or are considering multi-employer bargaining

Respondents approached or considering engaging in multi-employer bargaining



While it is still early days in respect of MEB, employers will be conscious of taking steps to manage the risk of being brought into a multi-employer authorisation or multi-employer agreement (if one was made in their industry). The response received in the 2024 Survey likely reflects the fact that employers with existing enterprise agreements in place are less susceptible to MEB, and actively seeking to maintain an in-term agreement.

Finding 7

Changes to FWC processes have gone largely unnoticed

In assessing whether an enterprise agreement has been genuinely agreed, the FWC must now take into account the [Statement of Principles on Genuine Agreement](#). The changes to agreement approval were intended to simplify approval processes and assist employers to understand the steps necessary to ensure their employees were able to genuinely agree to an agreement. Interestingly however, this year's results indicate that only 30% of affected respondents noticed changes in the FWC's approach to pre-approval requirements, and most of those respondents did not notice substantive changes to the FWC's approval process itself.

The recent changes also include an amendment to the application of the BOOT, with an increased focus on it being a more 'global assessment'. This year's Survey results show that 9% of respondents noticed a change in the FWC's application of the BOOT. Of these respondents, some indicated experiencing more (rather than less) stringent assessment processes and increased scrutiny from the FWC.

In our 2023 Survey Report, we predicted that the shift toward a more global application of the BOOT would reduce the prevalence of BOOT issues being raised during the agreement approval stage. Our 2024 Survey results show that 81% of respondents did not encounter difficulties in having their most recent enterprise agreement approved by the FWC, highlighting an upward trend since 2019 when compared to our 2023 Survey results (70.9% of respondents), 2021 Survey results (55% of respondents) and 2019 Survey results (46.1% of respondents). In our experience, this is likely the result of an increasingly cautious approach being adopted to the BOOT by employers in light of the FWC's historical practices, rather than of the recent legislative changes playing out in practice.

Interestingly, the [Fair Work Commission Bargaining Discovery Research Report](#) released in October 2024, which focused on inexperienced users and potential users of the FWC's bargaining process, found that the bargaining process is challenging, difficult to navigate, combative in nature, and time-consuming. The authors of the Bargaining Discovery Research Report noted that participants said that "*explaining the complexities of bargaining for an enterprise agreement to employees or colleagues was difficult and time consuming*" and "*described their experience of bargaining as combative in nature (adversarial) which constrained their ability to achieve positive outcomes*".

This suggests there is still room for improvement to make bargaining a more simple and attractive option for employers.

Finding 8

Enterprise agreements are still taking a lengthy period of time to negotiate

Our Survey results from 2017 to 2024 indicate a mixed trend in the duration of negotiations for current enterprise agreements. In 2017, 40.7% of respondents completed negotiations in less than six months. This percentage has declined over the years, dropping to 30.56% in 2019 and further to 30.34% in 2021. By 2023, the percentage had decreased to 21.05%, indicating a trend toward longer negotiation periods. However, in 2024, this figure rebounded to 33%, suggesting a potential shift back toward shorter negotiation times.

Conversely, negotiations lasting between 6 to 12 months have generally increased. In 2017, 38.14% of respondents indicated this timeframe. The percentage of respondents decreased to 33.33% in 2019, then rose significantly to 46.07% in 2021. By 2023, the percentage of respondents indicating negotiations lasting 6 to 12 months stabilised at 47.37%, before slightly decreasing to 42% in 2024.

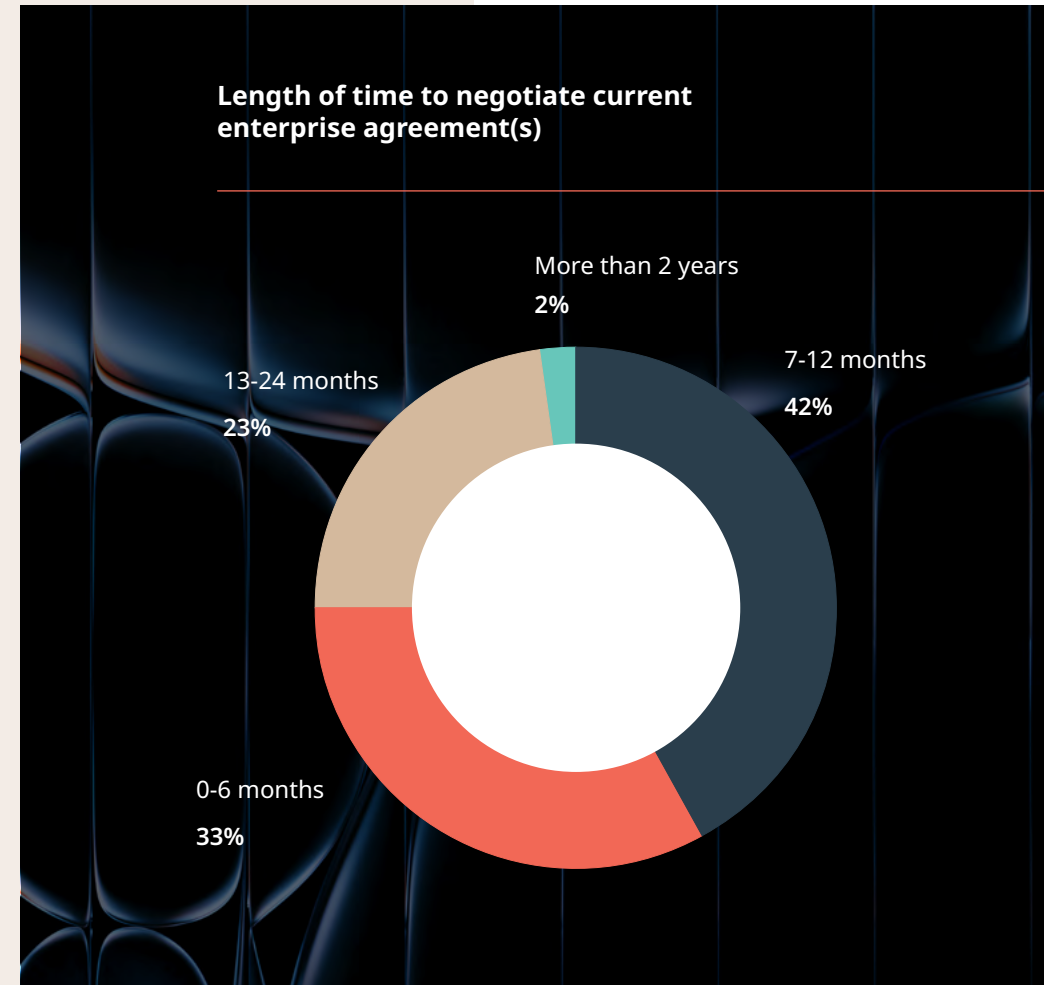
The percentage of negotiations lasting 12 to 24 months has fluctuated over the years. In 2017, 22.03% of respondents indicated this timeframe. The percentage of respondents increased to 24.31% in 2019 but then dropped significantly to 11.24% in 2021.

By 2023, the percentage of respondents indicating negotiations lasting 12 to 24 months rose again to 17.54%, and in 2024 it increased to 23% of respondents.

The proportion of negotiations extending beyond two years decreased substantially amongst 2024 respondents, when compared to our previous Surveys.

The consistent theme since 2017 has been that a majority of respondents to our Surveys have reported that bargaining has taken longer than six months.

The overall trends appear to be that completing negotiations quickly to ensure certainty and minimise risk is a preference for most employers, but where bargaining is harder fought or not able to be concluded quickly, bargaining risks becoming drawn out. The shadow of an intractable bargaining declaration may mean we start seeing negotiations brought to an end before it becomes protracted.



Finding 9

Average reported wage increase exceeded CPI, with a median increase of 4% p.a.

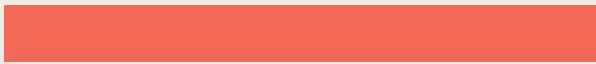
In our 2023 Survey Report, we found that the cost of living had significantly impacted the bargaining process, with 97% of 2023 respondents noting that cost-of-living pressures, particularly wage increases, were a top priority for unions and employees. While pay increases have remained the highest priority for employees and unions in this year's Survey, with 95.3% of respondents indicating that cost-of-living pressures are affecting bargaining, only 18.6% of respondents indicated that they had increased wages to reflect CPI/inflation.

In our 2024 Survey results, respondents reported wage increases ranging from 1% to 8%, with the highest reported increase being 19% over four years. Among our 2024 Survey responses, the average reported wage increase was 4.27%, with a median percentile increase of 4% per annum. With these wage increases, and [October 2024 marking inflation falling](#) to its lowest rate in more than three years, there is hope for some relief in cost-of-living pressures.

It is unsurprising that respondents are prioritising different wage outcomes in light of turbulent CPI trends, which peaked at 7.8% in December 2022. In the June 2024 quarter, the [Consumer Price Index, Australia, June 2024 | Australian Bureau of Statistics](#) reported a percentage change of 3.8%, while the [Wage Price Index, Australia, June 2024 | Australian Bureau of Statistics](#) indicated private wage growth had increased by 4.1%. The [Trends in Federal Enterprise Bargaining Report – June 2024 Quarter](#) also shows that for the 2024 year to date, the average annualised wage increase (**AAWI**) was 4.1%, with the latest June quarter reporting 4.0%.

Wages increases reported in the [Trends in Federal Enterprise Bargaining Report – June 2024 Quarter](#) for public sector agreements were slightly lower than for the private sector, at 3.9% for the June 2024 quarter.

Wages outcome sought by respondents during the bargaining process



56.16% Percentage increase over the life of the agreement

18.6% Increases to reflect CPI/inflation and the increased cost of living

16.28% Increases to be determined by factors such as productivity outcomes, business performance/profitability etc

9.3% Rollover of existing agreement

2.33% Increases to be determined for each individual employee based upon performance

2.33% Maintain current wages



What next?

Although the reforms to enterprise agreement approvals and MEB commenced over a year ago, the impact of these changes is still yet to be fully realised. As more matters are considered and determined by the FWC, we are likely to obtain a clearer picture of the impact of the reforms on employers.

Workplace reforms are also likely to be back in the spotlight in 2025.

2025 is a Federal Government election year and it is expected that workplace reforms will once again be one of the key policy areas of the major parties.

The Federal Government has commissioned a [review of the first tranche of reforms](#), with the review team due to provide its report to the Federal Government in January 2025. Noting the observations of the [Fair Work](#)

[Commission's Bargaining Discovery Research Report](#), the review currently underway, and the upcoming Federal election, it is unlikely that we have seen the end of the legislative changes affecting workplaces.

Please feel free to contact one of our national Employment team members to discuss our 2024 Bargaining Trends Survey results and their implications for your business strategy and bargaining approach.

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