

# Aged Care

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## Enterprise Bargaining Report 2015



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# Welcome to FCB Group's inaugural aged care industry enterprise bargaining report

As a workplace relations firm that specialises in enterprise bargaining, our clients tell us they particularly value our insights into what other employers put in their Enterprise Agreements (**EAs**) and how others approach the bargaining process. This has been especially true over the last few years, as businesses in all industries continue to grapple with the shift to a national workplace relations system under the *Fair Work Act 2009*, including the incremental introduction of Modern Awards and the evolving Good Faith Bargaining (**GFB**) rules it established.

## In aged care, an additional layer of industry-level disruption and regulatory change has complicated the workplace relations framework even further.

For example, uncertainty about the workforce supplement funding seemed to trigger a slip in 'traditional' three year bargaining cycles, with a number of leading providers deferring negotiations. Similarly, industry consolidation and privatisation has emerged as a trend which is both fragmenting and complicating agreement-making for many providers, with purchasers often inheriting a diversity of EAs from acquired homes.

Despite all this change (including economy-wide momentum to improve productivity in bargaining generally), our team was concerned that many aged care providers were falling behind. We observed many simply 'rolling-over' historical agreements containing inflexibilities or conditions unsuited to the modern industry. We saw others accept 'standard' claims without question (and often without appreciating the industrial or commercial implications of doing so).

This concern, as well as a lack of reliable and accessible data about EA negotiations, prompted our aged care team to embark upon this landmark research initiative, investigating current trends, attitudes and practices among aged care providers. Our evidence-based examination aims to arm providers with better information about bargaining in their own industry. In doing so, we hope to help aged care employers to align their workforce bargaining strategies with specific industry, organisational and workforce needs.

Our thanks to everyone who responded to our survey, or otherwise assisted with the development of this research. We are particularly grateful to Leading Aged Services Australia for supporting the initiative and Allity, for allowing its Chief Operations Officer, Glen Hurley, to co-present our findings at the LASA National Congress 2015. We hope you enjoy this report and look forward to your feedback!



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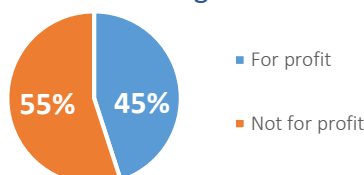
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# Report Overview

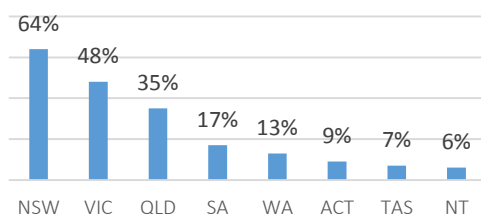
- ▶ This report reflects FCB's analysis of a variety of primary and secondary sources, including:
  - ❖ qualitative and quantitative assessment of EAs made by employers in the industry (principally those made in 2015, to the end of the September quarter)
  - ❖ FCB Group's 2015 survey of aged care providers and
  - ❖ specific feedback from a number of industry consultants and major providers.
- ▶ Our research captured a significant segment of the market, consisting of providers with approximately 45,000 residential aged care beds and between 60,000 – 70,000 employees in total.
- ▶ The survey data set also reflected a solid cross section of different provider profiles, as seen in the graphic below:

## Proportion of respondents whose organisation was:

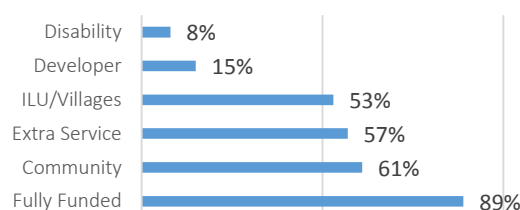
- ❖ for profit or not for profit:



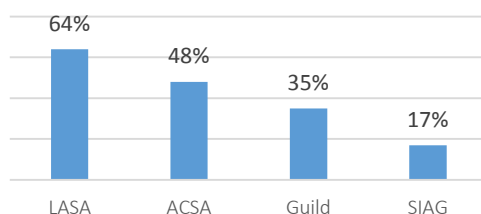
- ❖ operating in each of these locations



- ❖ operating in these service markets



- ❖ a member of these employer associations



- ▶ Survey respondents were generally in executive or senior management level roles, or human resources / industrial relations specialists with a significant level of bargaining experience. Less sophisticated employers that rely on associations to bargain for them were generally underrepresented.

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# The Legal & Industrial Framework

## The Fair Work Act

Australia's two-party political landscape makes our national IR laws highly politicised and frequently susceptible to electoral outcomes. In the last 10 years, the political pendulum has alternated starkly and painfully: firstly, the Coalition's 'WorkChoices' amendments of 2006 deregulated, arguably to the point of political overreach; then Labor's response, the *Fair Work Act 2009 (FW Act)* re-established a "stronger, fairer" safety net.

In 2015, although political fortunes have shifted again and more changes to the FW Act are likely,<sup>1</sup> we have generally reached a period of welcome and largely bipartisan regulatory stability. After a long and complex transition process, we now have an almost entirely nationalised workplace relations system, with a single set of fully operational Modern Awards at its base. Real structural reform has been achieved in the last decade and will not be unwound anytime soon, despite tinkering around the edges.

## Impact of Award Consolidation

In the aged care industry, the consolidation of industrial awards has been dramatic. Most residential providers are now aligned to just two instruments nationally, in all homes, no matter their 'for profit'/'not for profit' status.<sup>2</sup> The *Aged Care Modern Award 2010 (AC Award)* and the *Nurses Modern Award 2010 (Nurses Award)* are relatively short and simple documents that replaced dozens of lengthy, complex State and Territory based instruments. There remain challenges, particularly as barriers break down between residential, allied health and home care sectors (and their respective workforces). Yet the relative simplicity of the Modern Award safety net cannot be overstated. Given awards also set the Better Off Overall Test (**BOOT**) baseline and provide the legal alternative to EAs, this shift arguably reduces the commercial imperative to negotiate enterprise level agreements at all.

## Good Faith & Low-Paid Bargaining

Although the safety net has been simplified, bargaining processes are more complex and procedural under the FW Act, adding compliance costs and regulatory uncertainties to each transaction. Although good faith bargaining (**GFB**) does not *require* employers to make agreements, the burden it adds does heighten the practical value of agreements that provide 'industrial peace', even in an industry where strikes and other active industrial action are rare. Aged care also remains the only industry nationally in which a low-paid bargaining authorisation has been made, forcing a number of Queensland providers to bargain with United Voice for a multi-enterprise agreement in 2011.

## Unions & Representational Rights

Union membership nationally is at record lows, yet union representation still dominates aged care bargaining.<sup>3</sup> Certainly, the Health Services Union (**HSU**) has been weakened by corruption issues, but other unions, principally the Australian Nursing and Midwifery Federation (**ANMF**) and its State-based affiliates, generally offer active, professional and well-organised leadership. Although the FW Act now requires employers to allow employees non-union and self-representation in bargaining, take-up of these options is minimal. For most employers in aged care, the current representational rights settings virtually rule out direct, non-union bargaining as a practical option.

13.8%

mean average union rate  
membership nationally

20.5%

union membership rate in  
residential care services

<sup>1</sup> *Terms of Reference, Productivity Commission Review of the Workplace Relations Framework* (JB Hockey, Treasurer, 19/12/14).

<sup>2</sup> Other Health and Social Assistance Awards may be relevant to some providers, including, most notably, the *Health Professionals and Support Services Award 2010* (eg, for Diversional Therapists) and the *Social, Community, Home Care and Disability Services Industry Award 2010*.

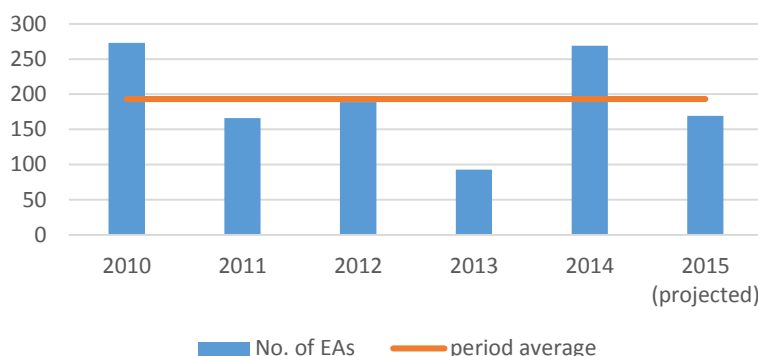
<sup>3</sup> 6333.0 - *Characteristics of Employment* (Australian Bureau of Statistics, 27/10/2015).

# Key Trends & Attitudes

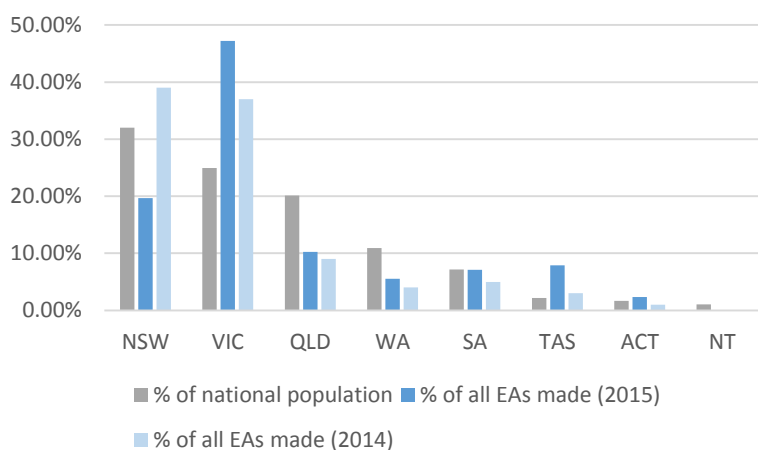
## Who's been bargaining?

- ▶ The aged care industry is consistently among the strongest agreement-making industries nationally. 98% of our survey respondents had EAs in place.
- ▶ Bargaining volumes are disproportionately higher than population in Victoria and Tasmania (in both 2014 & 2015), suggesting greater union traction in the South East.
- ▶ Bargaining rates do not differ discernibly between for profit and not for profit sectors.
- ▶ State-based union bargaining campaign cycles often influence bargaining peaks and troughs across industries. However, there was a significant dip *nationally* in 2013, coinciding with uncertainty about Workforce Supplement funding (which was conditional upon agreement making). Spikes over the reporting period also coincide with significant regulatory change and corrections (Modern Awards commencing in 2010 and redirection of the Workforce Supplement in 2014).

Aged care EAs made nationally  
(FWC reports)



Bargaining compared to population



## Duration of Agreements

2.3  
years

median nominal  
duration of EAs  
commencing in  
2015

49%

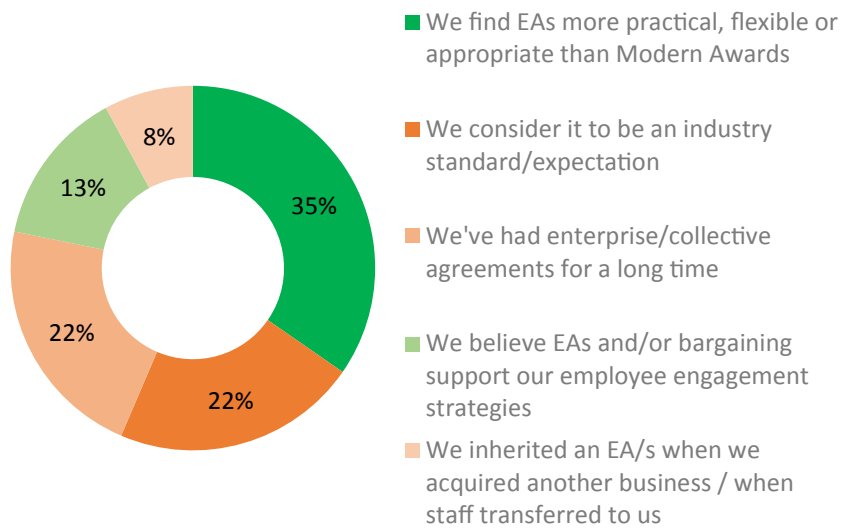
proportion of EAs  
commencing in  
2015 which  
backdated pay  
increases

- ▶ Although the FW Act allows EAs to have nominal expiry dates (**NEDs**) up to 4 years from commencement (after which parties may take industrial action to support a new agreement), for aged care EAs made in 2015 the median NED period is significantly shorter. Nearly 40% will expire in mid-2017, with another spike in mid-2018 (approx. 13%).
- ▶ Shorter NEDs are not unexpected in a depressed economy, with unions generally reluctant to lock in low annual increases for extended periods. However, a high proportion of aged care EAs also contain backdated pay increases (ie, increases calculated from dates well before the EA commencement date). This suggests the incidence of shorter NEDs may reflect a correction, flowing from reduced bargaining rates in 2013 (ie, with employers backdating the 'effective' commencement date to 2013/14).
- ▶ Backdated negotiation may also be a factor of industry consolidation, as purchasers delay renegotiation of EAs inherited from vendors, instead bringing acquired homes into line with the purchaser's general bargaining cycles.

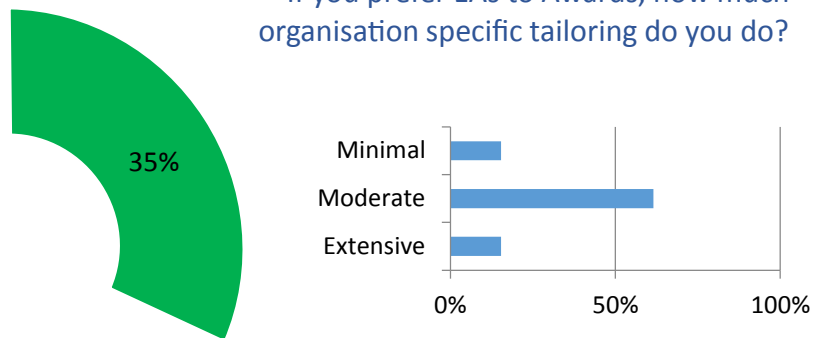
## Why do providers bargain?

- ▶ Respondents differed widely on *why* they bargain, with no apparent correlation between the reasons given and respondent profile (eg, profit status, staff numbers, association membership, etc).
- ▶ Although our respondent cohort could be characterised as highly engaged, 52% still reported a *passive* motivation for bargaining (those in orange); whereas 48% reported *proactive* motivations (those in green).
- ▶ Interestingly, it appears that even those with generally proactive motivations still adopt a fairly passive approach to bargaining itself. For example, of those who bargain because EAs are more practical, flexible or appropriate than Modern Awards, the strong majority only reported a “moderate” or “minimal” level of tailoring/innovative drafting/provisions negotiated specifically for their organisation.

## What is your primary motivation to bargain?



## If you prefer EAs to Awards, how much organisation specific tailoring do you do?



## Does your organisation have any EAs operating now?

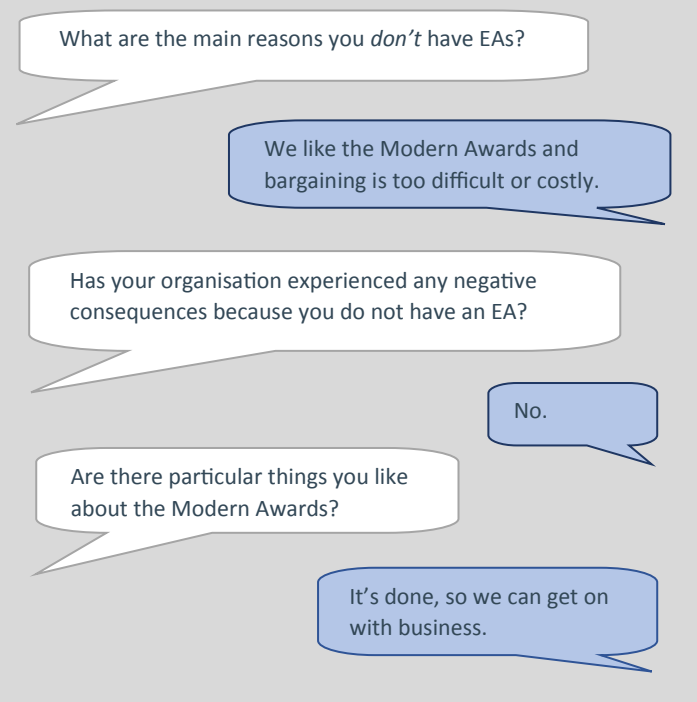
Yes	No
98%	2%

## Based on your organisation's current needs and strategies, would you *choose* to bargain for another EA/s (if not required to do so)?

No	Yes
58%	36%

Maybe  
6%

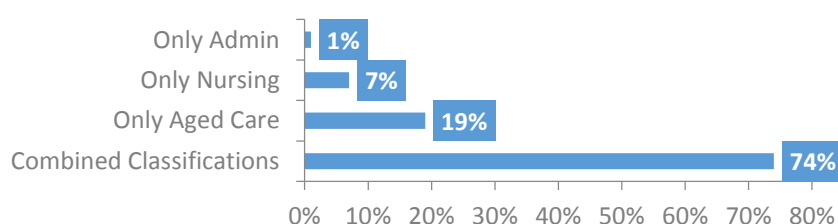
## What do providers *without* EAs say?



## *Despite its importance, many aged care EAs from 2015 remain vague or unclear about who they actually apply to*

### Scope of Coverage

- ▶ To ensure compliance (and alignment with ER/IR strategies) it is critical an employer, employees, unions and tribunals can all assess with clarity whether an EA applies to a particular employment relationship or not. The coverage provisions in an EA determine which employees the EA will *apply* to (versus those the Award will apply to/that will remain Award and EA free). Except in some transfer of business scenarios, they also determine which employer entities will be covered by the EA.
- ▶ Despite its importance, many aged care EAs from 2015 remain vague or unclear about who they actually apply to. Common issues include: imprecise description of the employer's identity (or which entities within a corporate group are included); poorly defined classification definitions; and failure to define the geographic limitation: that seem to have been intended. Some EAs even describe themselves as multi-enterprise agreements (covering more than one employer) when they are in fact single enterprise agreements (covering only one employing entity or related group).
- ▶ Where providers operate across State boundaries, most still enter into separate EAs for each State, even though Modern Awards no longer allow State based differences. This is likely to be driven primarily by market based considerations, or simply the legacy remaining from historical Awards and agreements, rather than significant operational differences between services in different States.
- ▶ There has been a significant shift in the scope of EA classifications. In the pre-WorkChoices era, the norm was to keep EAs for nurses separate from those covering other aged care employees. Employers could face considerable resistance if they sought to consolidate terms and conditions. However, the data from 2015 demonstrates just how far this trend has changed. This may be due in part to simplification of the statutory safety net (eg, the National Employment Standards). It also reflects the adoption by both unions and industry associations of template EAs that combine classifications.





## State Based Differences

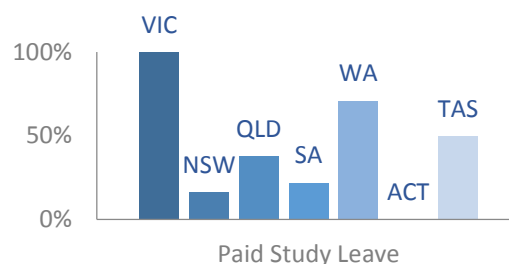
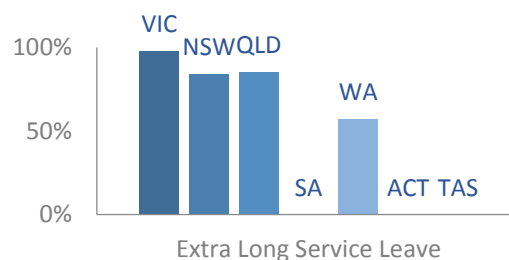
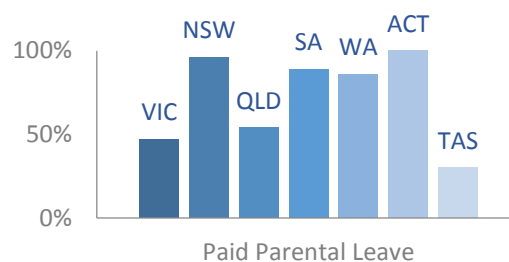
- ▶ Market forces tend to dictate differences in the price of labour between Australia's capital cities and between urban / regional locations. To some extent, different pay rates may explain why national providers continue to bargain at a State level, rather than adopting national EAs. Of course, market differences could also be managed by paying 'above-EA' base rates in particular markets when necessary.
- ▶ There is also a striking difference between States in relation to the 'above-Award' entitlements that are most common in aged care. For example, the graphs to the right show that employer funded paid parental leave is nearly twice as common in NSW as in Victoria, whereas paid study leave is much more prevalent in Victoria than in NSW. It seems likely this reflects the legacy of historical State based Awards and agreements, rather than strategic workplace planning considerations of the modern industry.



*From a workforce planning perspective, does it make sense for entitlements and incentives to differ so markedly between States, given industry consolidation and the more mobile, aged care workforce of the future?*

## Variation in Selected Entitlements

(% of EAs made in each State containing the entitlements below)



## Industry Growth, Mergers & Acquisitions

- ▶ Despite the significant level of industry consolidation we have witnessed in recent years (and the level of sophistication of the businesses represented in our respondent cohort), our survey suggests a high level of apathy and/or lack of understanding among aged care employers about the impact that EAs they negotiate could have on issues such as:
  - ❖ the attractiveness of their business to potential purchasers;
  - ❖ whether the scope of coverage will restrict a successor's business or workforce strategies;
  - ❖ how simple or complex it will be to transfer employees from vendor to purchaser;
  - ❖ the cost of retrenching employees who are made redundant because of a sale or restructure;
  - ❖ how well and easily newly constructed or acquired homes can be integrated into a provider's organisational systems and structures.
- ▶ Only a handful of respondents reported making one of the (relatively cheap and simple) applications available at the Fair Work Commission to smoothen a transfer of employment process by adjusting or clarifying an EA's operation.
- ▶ Some model EAs used by unions/associations now include 'boilerplate' provisions, intended to extend EA coverage automatically to new homes built by and/or new homes acquired by an operator after an EA is made. However, at times these clauses are inconsistent with (or misrepresent the complexity of) the FW Act, which governs whether and to what extent an employer is bound by a particular EA, including after a transfer of business.

## Pay trends

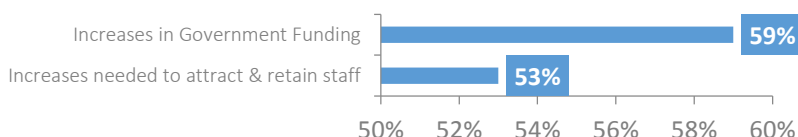
- Providers typically use EAs to set a standard pay rate for staff they cover, and the widespread use of EAs in the industry arguably drives a high level of wage level stability. Below management levels, there appears to be relatively little use of 'above EA' negotiated pay rates, for example based on market drivers or performance. Instead, pay levels within EAs typically remain low and close to Award rates for less skilled roles; whereas rates for RNs and other skilled or scarce workers are often much higher than the Award safety net. This can be expected to reflect labour market pressures and competition *at the time an EA is made*; but can leave providers exposed if market or funding conditions change.
- Wage increases in recent industry EAs remained relatively high, particularly when compared to increases in CPI and industry funding measures (like COPE) for the period.



*While there is certainly appetite among providers to increase remuneration levels for the aged care workforce generally, is it really sustainable to offer annual increases that exceed increases in key funding streams?*

- There is significant uniformity in the structure and nature of pay increases in the industry. Most EAs adhere to traditional patterns of annual percentage based increases, with all classifications receiving the same percentage based increases. Although 6 monthly incremental increases are becoming more common, other variations are rare. Only a handful of employers provided different increase levels to different staff, provided non-standard lump sum increases or tied EA increases to external measures (such as COPE, CPI or FWC's annual increase to Modern Awards).
- Overall, our survey found 2 clear primary drivers affecting employer pay increase offers, no matter whether the provider in question was for profit or not for profit:

Respondents who ranked these considerations in their top 3 pay offer drivers



- Key secondary considerations were CPI/cost of living increases and the increases/rates offered by competitors. Perhaps surprisingly, 'expected investor returns' ranked very low as a primary driver of increases, even within for profit organisations. To us, this suggests even for profit providers recognise that business success cannot be achieved at the expense of an appropriately remunerated aged care workforce.

## Comparing Annual Increases

3.26%

Median Increase in Aged Care EAs  
(future increase during EA's term)

2.7%

Public Sector Wage Increases  
(annual WPI, all industries, public sector)

2.1%

Private Sector Wage Increases  
(annual WPI, all industries, private sector)

1.5%

Consumer Price Index  
(headline inflation)

## Back-Pay Trends

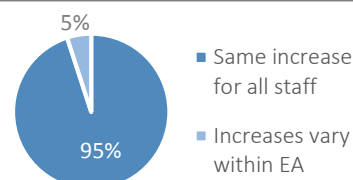
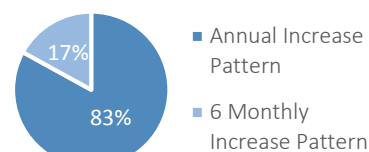
49%

Proportion of 2015 Aged Care EAs  
containing retrospective increases  
(taking effect 31/12/14)

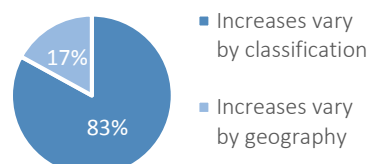
3.5%

Median Back Pay Increase  
(in Aged Care EAs that included  
retrospective increases)

## Nature of Increases



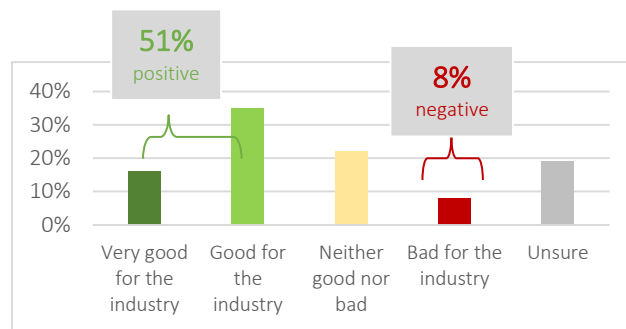
When increases vary...



## 76% of respondents said their EAs didn't contain any efficiency or innovation incentives.

### Industry templates

- ▶ Although EAs are a statutory instrument designed to facilitate employer *differentiation* from industry norms, there is a high level of adherence to industry 'model' or 'template' EAs that are advocated by unions or negotiated by industry associations. This is consistent with a significant volume of respondents indicating they bargain because they consider it an industry expectation.
- ▶ While some respondents reported feeling limited by industry standards and union/workforce expectations about template conditions, overall, most assessed the use of model/template EAs as positive for the industry. It is unclear whether this is driven by process or outcome considerations.



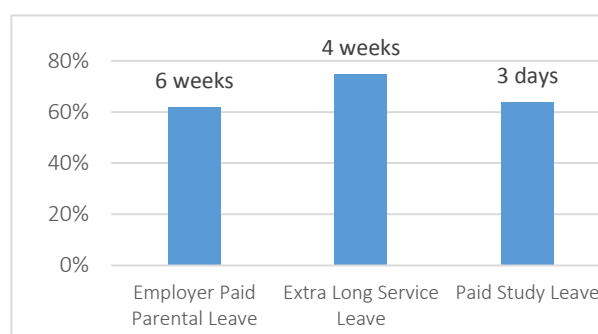
### Attitudes to efficiency and innovation

- ▶ Respondents were agreed that 'productivity' is a problematic concept when applied to aged care. However, despite political and economic pressure across all industries and sectors to 'work smarter' and 'do more with less', most aged care EAs don't include any *incentives* for efficiency or innovation. Consistent with the extensive use of templates, 64% of respondents said their EAs didn't include any *other* innovations either.
- ▶ 75% of respondents indicated 'union resistance' was a major barrier to innovation, followed by the cost/resources needed to bargain (47%), limitations on bargaining under the FW Act (39%), workforce expectations (28%) and a lack of IR expertise within their business (22%).

### Common benefits and entitlements

- ▶ The most significant benefits offered to aged care employees (that exceed NES or Award standards) are additional leave benefits, seemingly driven by workforce planning objectives to develop and attract/retain staff. While these are important objectives that the industry must engage with, we question whether the types of leave being provided are likely to achieve those objectives, or resonate with a younger, more mobile and flexible aged care workforce.

% of EAs made in 2015 containing these benefits (and the median amount provided)



# Unlocking the opportunities

The industry is growing, seeking to capture efficiencies through market consolidation and process improvement, and working hard to attract, develop and retain the workforce it needs for a sustainable future. Industrial instruments can either set a foundation that supports these priorities, or reinforce barriers that work against them.

Based on this research, agreement making and EA-related processes offer a significant opportunity for aged care providers to reconsider the alignment between their industrial instruments and their workforce strategies. If, however, the industry maintains a largely passive attitude to bargaining, this opportunity is likely to remain untapped.

We hope this report provides a helpful springboard to support providers and the leading industry associations develop bargaining strategies for the future. As part of this, we recommend a few key steps to help providers unlock the opportunities available:

- **Improve internal literacy about EAs, bargaining and entitlements**

Legal rules about EA coverage, bargaining processes and employee transfers are very complex; so developing management insight and confidence about risks and practical options can greatly improve business decision making. Raising general employment law literacy more broadly may also support trust-based people strategies that decouple the rigidity of the Award/EA ‘safety net’ from more flexible and adaptable ‘above-agreement’ policies, contracts and incentives.

- **Challenge assumptions about ‘standard’ industry benefits and expectations**

Industry standardisation can add efficiency through simplicity, and prevent overall labour costs being inflated by competition for staff. However, passive acceptance of historical norms can also leave providers exposed to anachronisms that don’t maximise value for employees, consumers, owners or funding bodies. Flexibility and adaptation are critical to future sustainability, so we challenge providers to actively evaluate whether giving more focus to EAs and bargaining could improve outcomes for all stakeholders.

- **Collaborate and strategise**

In the modern economy networks are everything, and employee relations is no exception. The best business outcomes will only be achieved by bringing subject matter experts, operational leaders and financial/M&A managers together; and approaching EA processes as strategic and value-creating, not merely expense-creating transactions.

*Agreement making  
and EA-related  
processes offer a  
significant  
opportunity for aged  
care providers to  
reconsider the  
alignment between  
their industrial  
instruments and  
their workforce  
strategies*



If you want to know more, please contact us

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