



ashurst

What are your enterprise bargaining priorities?

ASHURST BARGAINING SURVEY REPORT 2017

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Introduction

Last year an increasing number of employers struggled to implement new enterprise agreements. In some cases, employers could not get employee agreement. In others, the Fair Work Commission's strict approach to the interpretation of the Notice of Employee Representational Rights and Better Off Overall Test requirements meant that mutually agreed enterprise agreements were not approved and employers had to start the bargaining process again (See our [Employment Alert](#)).

Whatever the reasons, signals indicate that it is getting harder to get enterprise agreements agreed and approved. These signals are supported by data from the Department of Employment (Department). According to the Department's [Report on Enterprise Bargaining \(February 2017\)](#), the number of current agreements for the period 2006 to 2016 was at its highest in the fourth quarter of 2010. The number of current agreements then declined by 30.8% between 2014 and 2016.

“Exceptionally well-resourced employment group with an impressive reputation for large-scale industrial relations disputes and major company restructurings. Called upon by many of Australia’s largest mining and transport companies for its expertise in developing enterprise bargaining agreements.”

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In this landscape, many employers are also facing increasingly challenging market conditions, and looking to restructure or change their business model. In some cases, this has seen employers applying to terminate their enterprise agreements. The Commission reported in its [2015–2016 Annual Report](#) that there were 311 applications to terminate enterprise agreements lodged that year, representing a 486% increase on the 64 applications reported in the Commission's [2010–2011 Annual Report](#).

The enterprise bargaining regime has over the years come under attack for stifling productivity. The workplace relations system has been described recently by departing Vice President of the Commission, Graeme Watson, as a “danger zone” for business. The Productivity Commission's review of Australia's Workplace Relations Framework in late 2015 also found “several flaws in current arrangements” for enterprise bargaining.

Conscious of these challenges, we decided to conduct our first Bargaining Survey to help us identify employers' key bargaining priorities, and see how they are trying to achieve these. The results of our Bargaining Survey can be summarised in 12 key findings, as discussed in this report.

We hope our findings help you in managing your enterprise bargaining negotiations over the next 18 months and we welcome any feedback you have about our report.

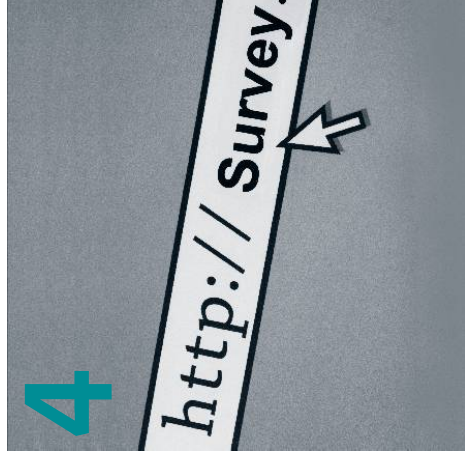
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Stephen Woodbury
Global Practice Head,
Employment
T: +61 2 9258 6444
stephen.woodbury
@ashurst.com

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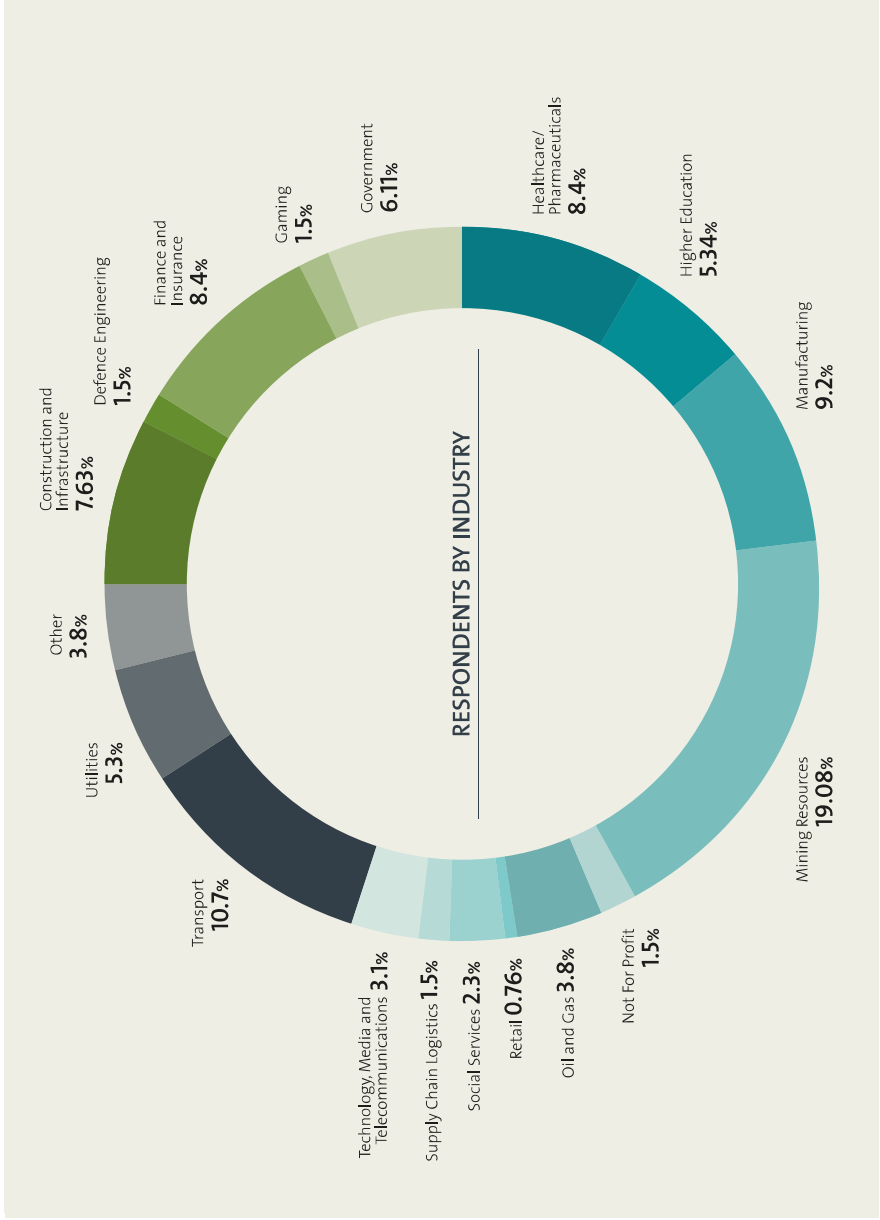
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About our survey

About our survey

We conducted our Bargaining Survey to help us identify employers' key bargaining priorities, and to see how they are trying to achieve these in the current industrial landscape and market conditions.

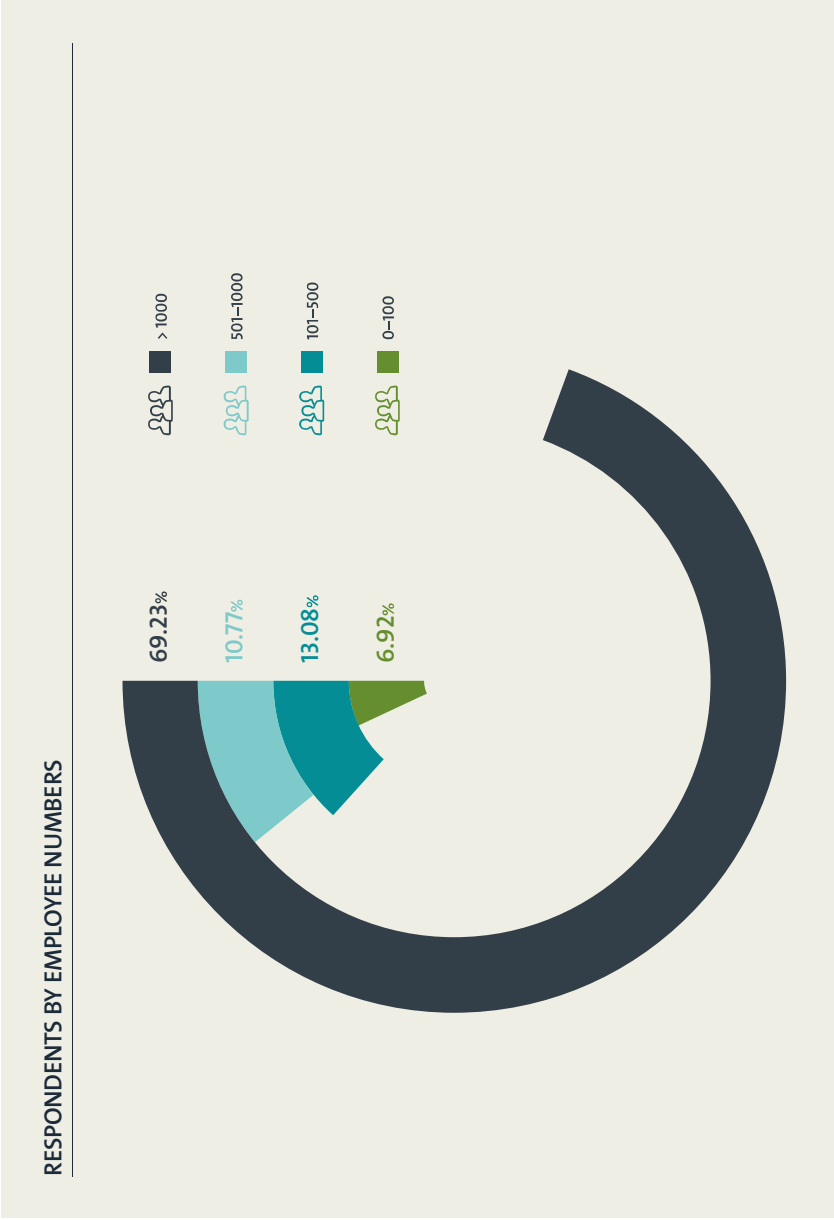


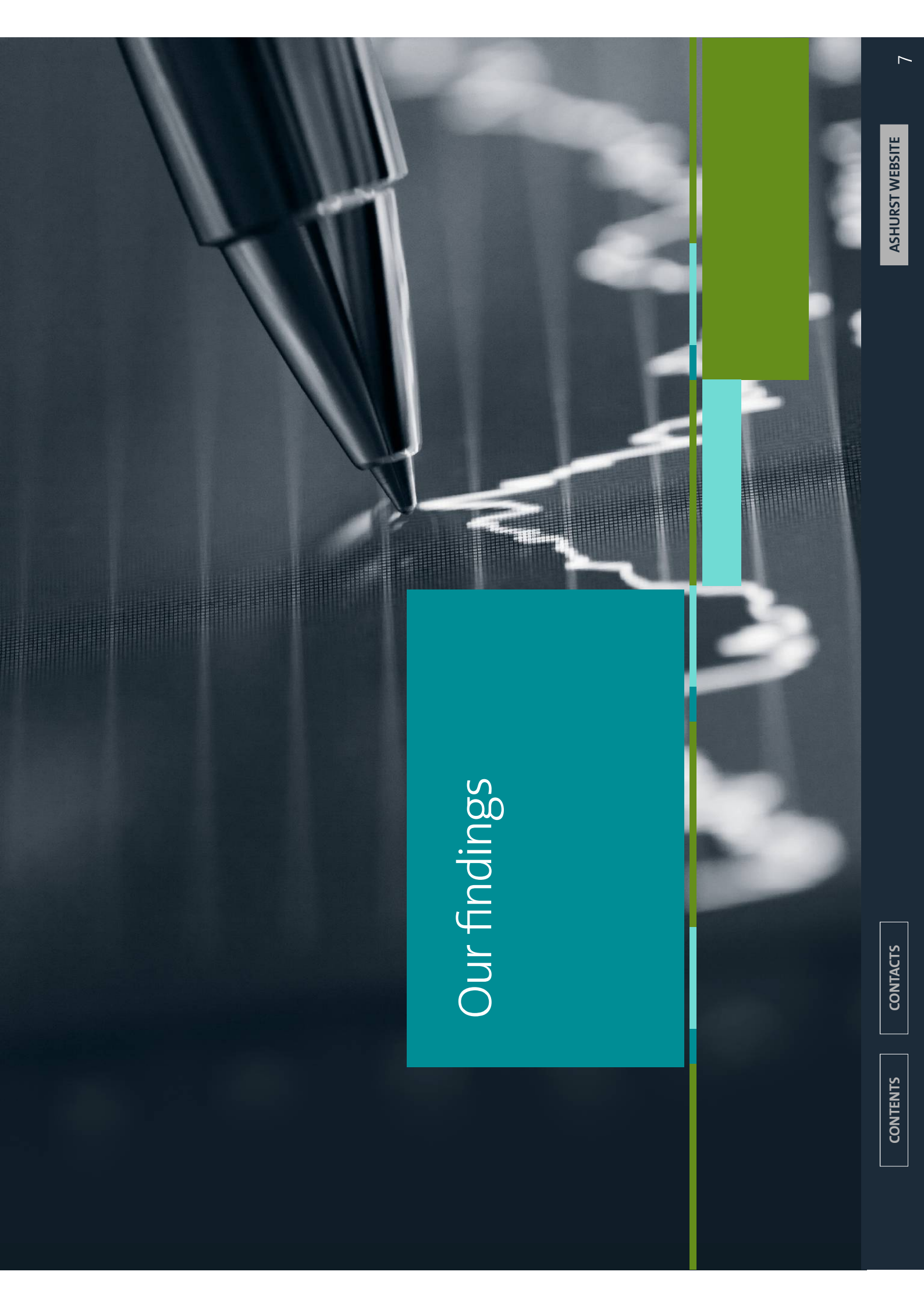
We asked 14 questions about each respondent's most recent bargaining experience with each of their enterprise agreements.

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

About our survey

Our survey respondents are amongst Australia’s Top 200 ASX listed companies. They range in size, with the majority of the 131 respondents employing more than 1000 employees.

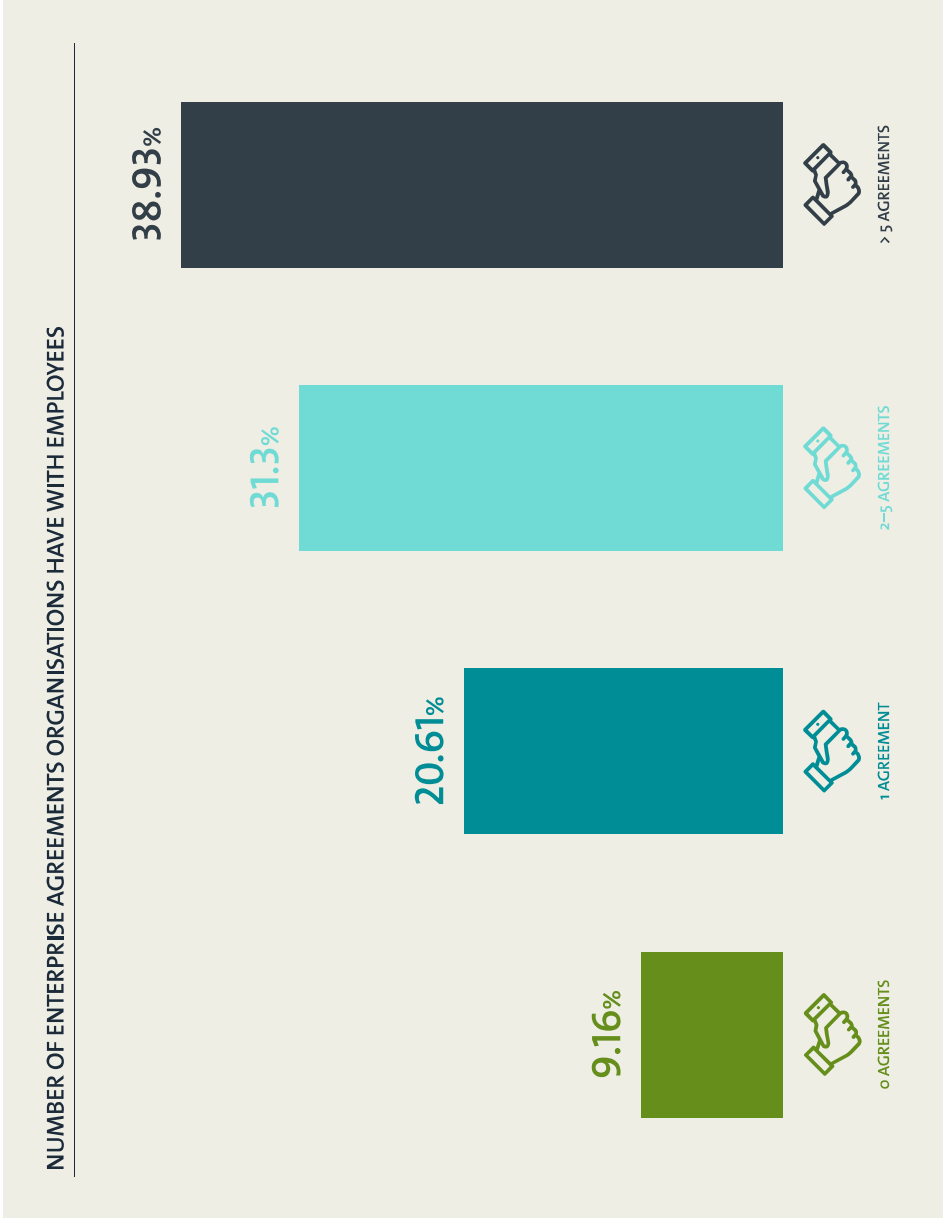




Our findings

Finding 1:

Most employers are managing more than one enterprise agreement across their workforce



Given the size of the respondents to our survey, we expected many to have more than one enterprise agreement. 31% of respondents have between 2 and 5 enterprise agreements and 39% have more than 5 enterprise agreements.

When read together with Finding 3 (the amount of time taken to negotiate enterprise agreements), and Finding 8 (that most employers do not expect to achieve productivity gains through enterprise bargaining) these findings highlight a key area of challenge, and possible diversion of management resources from more strategic planning.

Finding 2:

Some employers are achieving alternative methods of setting employment terms between common law contracts and enterprise agreements

9% of respondents reported that they did not have enterprise agreements in place. Of these respondents, the primary reason was that common law contracts are adequate or preferred. The next two reasons were the greater benefits offered by individual arrangements, and a preference not to be exposed to potential industrial action or collective disputes. A small number of respondents said that they are either in the early stages of preparing for an agreement or in dispute about union eligibility to represent their workers.

One respondent noted that they “prefer MOU agreements negotiated with staff and not certified”. This suggests that some employers are exploring and successfully achieving alternative methods of setting workplace terms and conditions that sit between the traditional dichotomy of individual common law contracts versus certified enterprise agreements. This is consistent with falling rates of union membership and employer efforts to stay agile, as discussed in our [*New Economy Alert*](#).

Similar results are reflected in the [*Australian Workplace Relations Study*](#) reported by the Commission in November 2015. This Study found that 19% of enterprises without enterprise agreements have not put one in place because they prefer to negotiate with individual employees or a collection of employees, and another 13% because they found the enterprise bargaining process too difficult to implement.

“Prefer MOU agreements negotiated with staff and not certified”

SURVEY RESPONDENT

9%
of respondents reported that they did not have enterprise agreements in place.

Finding 3:

Negotiating single enterprise agreements is taking many employers more than 12 months

It is taking nearly 30% of respondents more than 12 months to negotiate a single enterprise agreement.



The dynamic nature of market conditions in most industries means bargaining priorities may well change over a 12 month period, as strategic direction changes. This may be both a hindrance and a help for employers, subject to circumstances and strategic decision-making. As noted in Finding 1, such a long negotiation period can divert management resources from other competing parties.

Finding 4:

Many employers are operating with enterprise agreements (in some cases 3 years) past their nominal expiry date

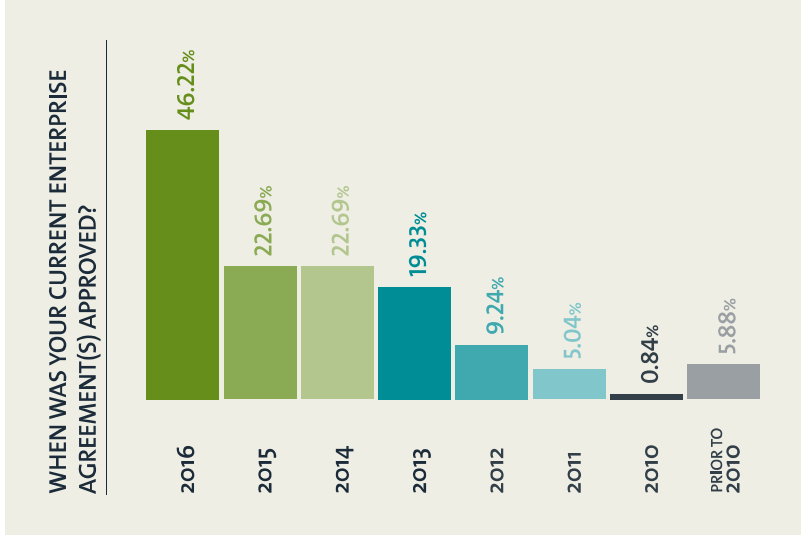
This finding was one of the biggest surprises for us in our survey results, and it is consistent with Department data.

The Department's *Report on Enterprise Bargaining (February 2017)* also shows a decrease in the number of agreements being replaced. From the third quarter in 2014 to the third quarter in 2015, only around 35% of current agreements were replaced in comparison to 50% of agreements being replaced in 2011.

Enterprise agreements nominally expire 4 years from their approval date. At least 21% of respondents are operating with agreements (in some cases 3 years) past their nominal expiry date. Agreements for at least a further 19% of respondents are also due to expire this year.

6% of respondents have enterprise agreements that expired prior to 2010.

The decrease in replacement agreements could be an indication of increased difficulty in negotiating agreements – the lack of perceived organisational benefit from reaching an agreement and/or issues when applying for approval.



This, together with the respondent comment in Finding 2, suggests that some employers have successfully used alternatives to enterprise agreements, or that in current market conditions they (and/or their employees) would prefer to stay with certain terms.

At least

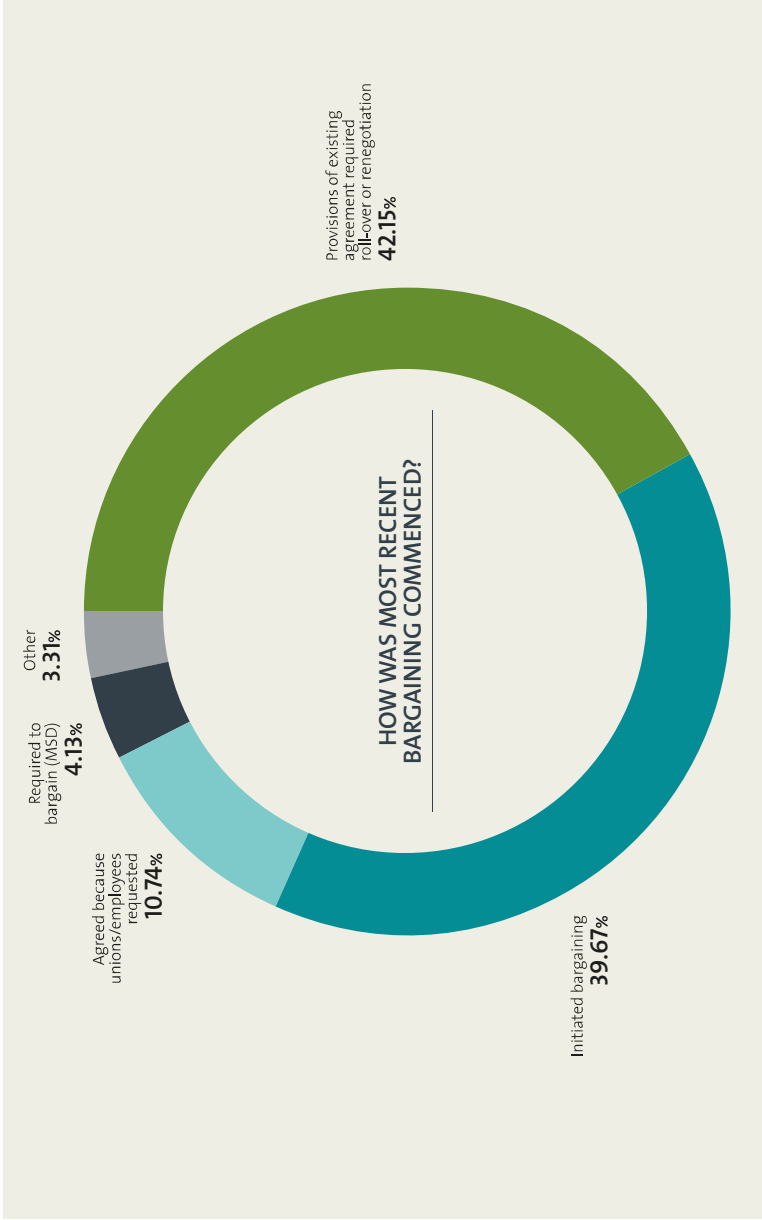
21%

of respondents are operating with agreements (in some cases 3 years) past their nominal expiry date.

Finding 5:

Most employers initiate bargaining, or bargain due to the terms of current enterprise agreements

Nearly 40% of respondents said their most recent bargaining was commenced by them initiating the process. A further 42% said they bargained because the provisions of existing agreements required roll-over or renegotiation.



42%

said they bargained because the provisions of existing agreements required roll-over or renegotiation.

Finding 6:

Most employers negotiate for certainty, predictability and consistency

Unsurprisingly, the key reasons most employers gave for bargaining for enterprise agreements were for certainty of terms and conditions of employment (63%), predictability of wage increases and labour costs (58%) and consistency and transparency of terms and conditions (48%).



“It is apparent a significant number of respondents become ‘stuck’ in the enterprise bargaining system”

Taking into account public sector policy requirements, close to 25% of respondents also reported the prevalence of a unionised workforce, pressure from unions, industrial harmony, the threat of industrial action and a difficulty of moving away from historical agreements were reasons for engaging in negotiations. When considered together with Finding 5, it is apparent that a significant number of respondents become “stuck” in the enterprise bargaining system.

Finding 7:

Most employers negotiate with both unions and individual bargaining representatives

61% of respondents said that they negotiate with both unions and individual bargaining representatives. Only 30% of respondents indicated that they only negotiate with unions.

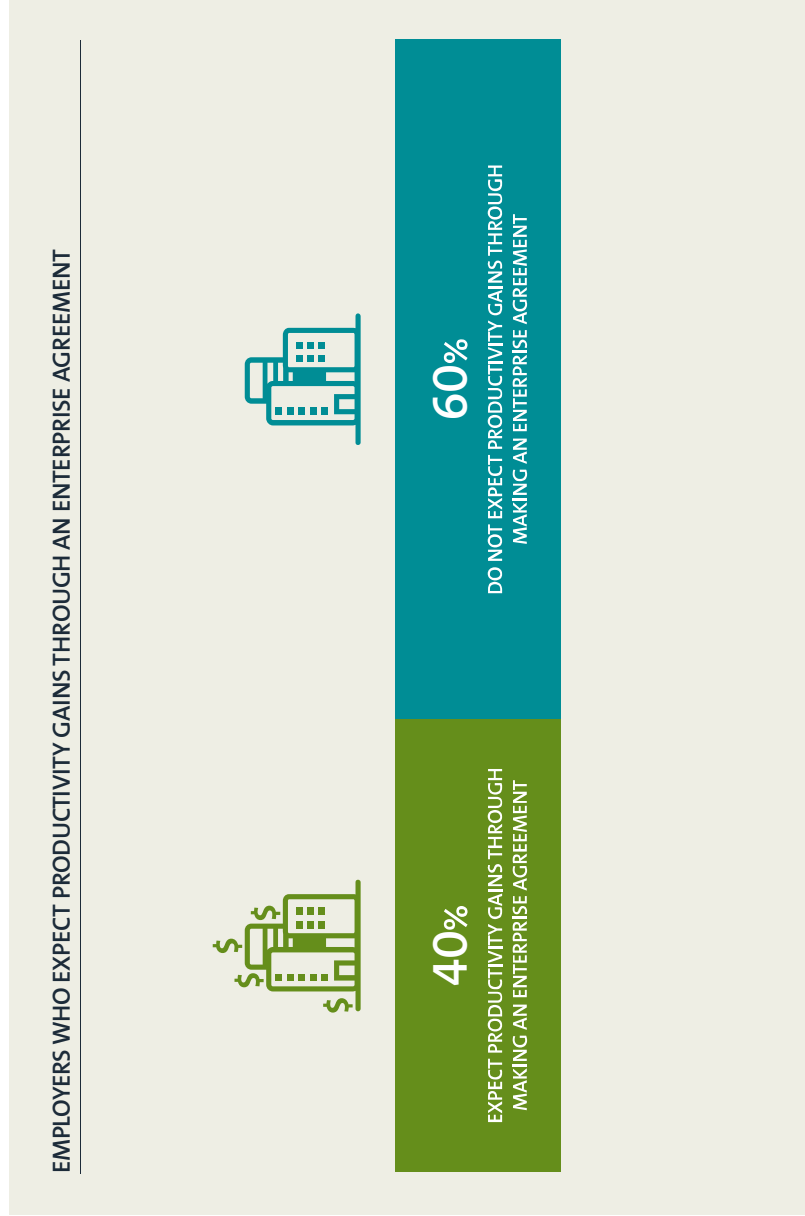


It is interesting to compare this with Department data. The Department's [*Report on Enterprise Bargaining \(February 2017\)*](#) shows that there was a decline between 2010 and 2014 in agreements under which unions are not covered. The figures have remained “reasonably stable” since then.

Finding 8:

Most employers do not expect to achieve productivity gains through making an enterprise agreement

This was another surprising finding from our survey results. Only 40% of respondents expect to achieve productivity gains through making an enterprise agreement.



“Avoiding further inefficiencies, not solving existing ones”

SURVEY RESPONDENT

Many respondents commented that productivity gains are achieved outside of the enterprise agreement process.

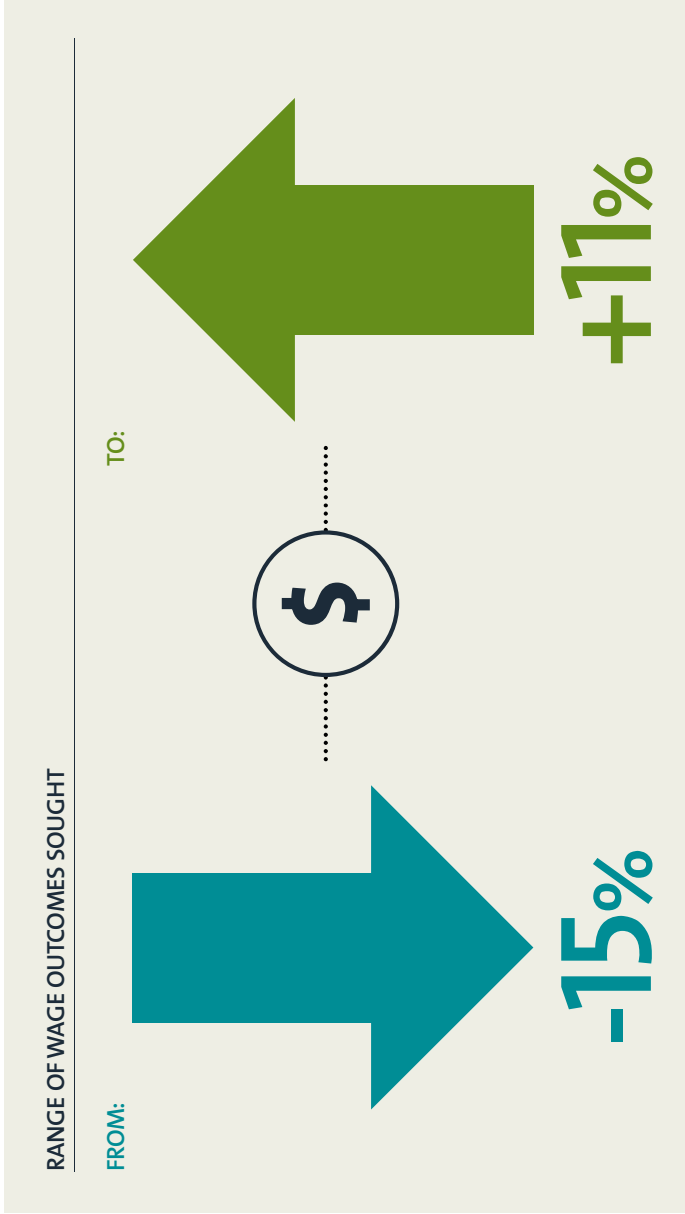
Respondents commented that bargaining is about “avoiding further inefficiencies, not solving existing ones” and “ensuring the EA Ts&Cs do not restrict the way work is performed and managed”.

The enterprise bargaining regime has over the years come under attack for stifling productivity. The workplace relations system has been described recently by departing Vice President of the Commission, Graeme Watson, as a “danger zone” for business. The Productivity Commission’s review of Australia’s Workplace Relations Framework in late 2015 also found “several flaws in current arrangements” for enterprise bargaining.

Finding 9:

Desired wage outcomes varied significantly between -15% and 11% over the life of the agreement

The large disparity in wage outcomes sought during bargaining by respondents to our survey provides further evidence of the impact of difficult market conditions being experienced in some industry sectors.



“The most common wage increase sought was 2.5% or 3% (41% of respondents)”

The wage outcome sought by 52% of respondents was percentage increases over the life of the agreement. The most common wage increase sought was 2.5% or 3% (41% of respondents), slightly lower than Department data for last year. There were a spread of outcomes, however, from a 15% wage reduction, to wage freezes, and up to an 11% increase over the life of an agreement.

The Department’s *Trends in Enterprise Bargaining, September Quarter 2016* shows an average annualised wage increase of 3.4% in September 2016 (up from 3% in September 2015).

Finding 10:

Key issues most employers sought to bargain about were flexibility and management prerogative

Again unsurprisingly, the main issues the majority of respondents sought to bargain about related to flexibility; increased flexibility of rosters or roster changes/hours of work changes (70%), increased flexibility in hours of work (62%), increased management right to introduce change (48%) and increased flexibility of employment terms (43%).

Respondents reported particular needs to enhance productivity and maintain flexibility to respond to market demands and maintain competitiveness. They also highlighted the need for removal of restrictive work practices, increasing efficiency, labour productivity and utilisation, and reducing labour costs.

“Current EA is too restrictive and coverage impedes the continuous improvement of the business.”

SURVEY RESPONDENT

Penalty rates were another significant feature of bargaining. 41% of respondents had sought changes to weekend and public holiday penalty rates, or to shift allowances and penalties. This trend is a precursor to an expected focus on penalty rates, particularly in the retail, fast food and hospitality industries, following the Commission’s decision to reduce Sunday and Public holiday penalty rates in the modern awards for those industries. Penalty rates are clearly not an issue confined to those industries.

41%

of respondents sought changes to weekend and public holiday penalty rates or shift allowances and penalties

“Productivity gains will be made in areas outside the agreement through change management and restructuring initiatives”

SURVEY RESPONDENT

Finding 11:

Family/domestic violence leave was high on the employee/ union agenda

Another interesting finding was the proportion of respondents who said that employees/ unions have sought to bargain about family/domestic violence leave. Our survey results record this issue as the fourth highest ranking issue raised by employees/unions, with 55% of respondents saying this issue has been raised with them by employees/unions in bargaining.

This is consistent with the ACTU's current application before the Commission to have family/domestic leave included in all modern awards. So far, one member of the bench, former Vice President Watson, has rejected the application. The decisions of the other two members are pending.

Union related rights were also key items sought during bargaining, with 62% of respondents reporting claims for rights for union delegates, 58% for trade union training leave and close to 40% for employee/union meetings. It is clear that terms beyond those relating to just the employer-employee relationship are a key focus of bargaining.

TOP 10 ITEMS (OTHER THAN PAY INCREASES) RESPONDENTS SAY ARE SOUGHT BY EMPLOYEES/UNIONS IN BARGAINING

1	Rights for union delegates	61.86%
2	Union training leave	58.47%
3	Family/domestic violence leave	55.08%
4	Limitations on use of contractors, labour hire or other temporary labour	49.15%
5	Casual conversion of permanent employment	44.07%
6	Employee/union meetings	39.83%
7	Additional employer contributions to superannuation	34.75%
8	Compulsory arbitration of disputes	32.20%
9	Nomination of an industry superannuation fund	22.88%
10	Enhanced parental leave entitlements	22.03%

55%

of respondents said that family/domestic violence leave has been raised with them.

Finding 12:

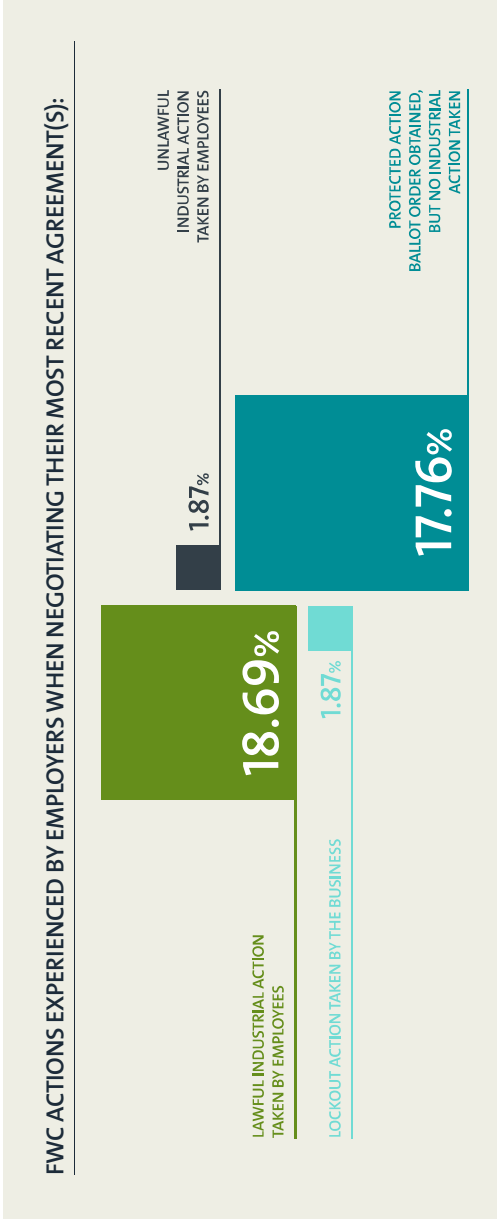
Most employers did not experience industrial action when negotiating their most recent agreement

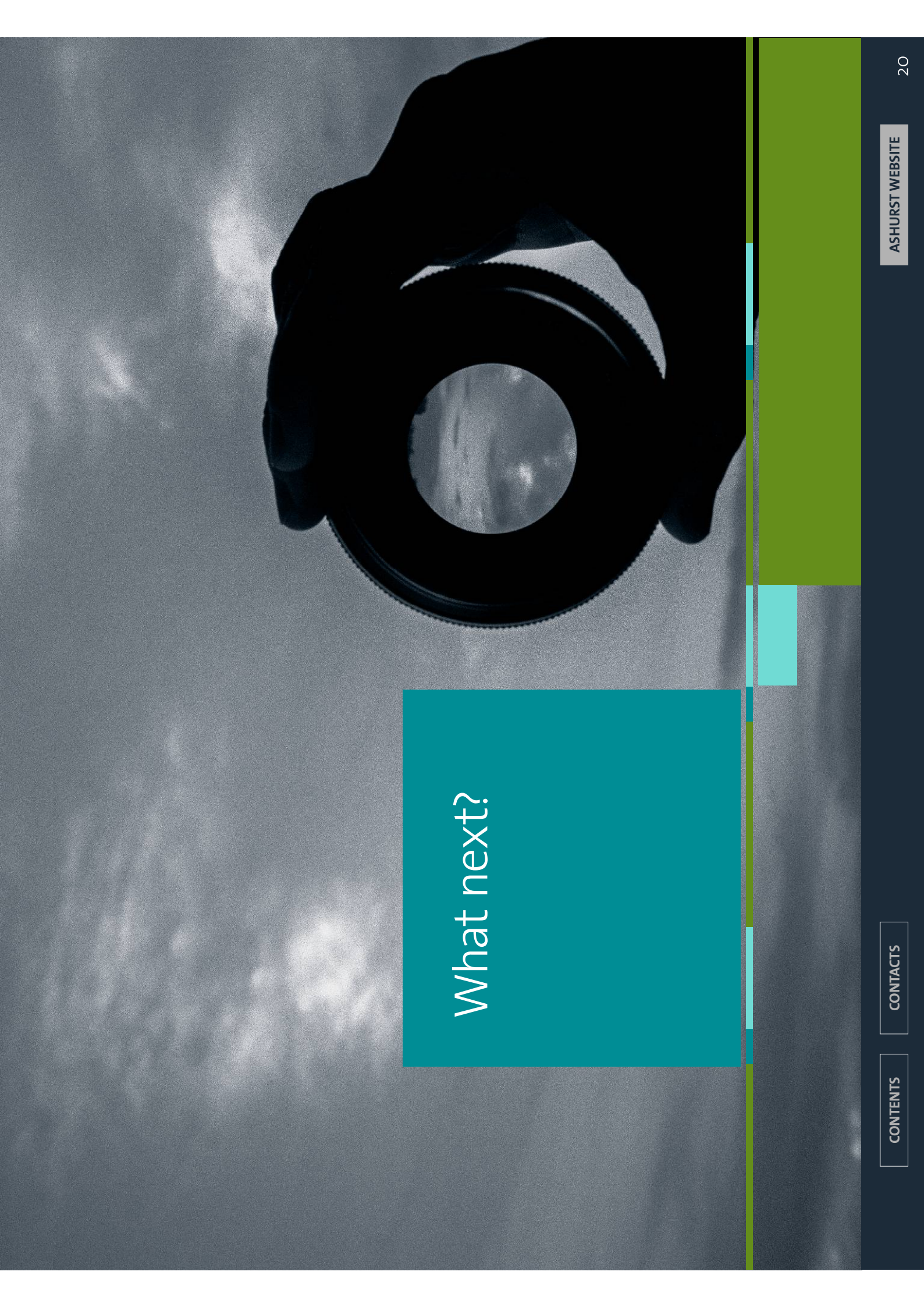
70% of respondents did not experience industrial action, or a Protected Action Ballot Order being sought, when conducting their most recent bargaining.

This experience is also reflected in long term data that the prevalence of strike action, and days lost to industrial action, has been on an historical decline since the 1980s. However, the most recent *ABS data* shows a slight upward trend in days lost to industrial disputes, which are at their highest since December 2013. The construction industry currently accounts for 42% of total working days lost.

Nevertheless, the experiences of respondents demonstrate that the spectre of industrial action through PABOs and the actual taking of action remains a feature of enterprise bargaining. The responses do not capture the potential threat of industrial action that might be used as a bargaining tactic, but do not result in an application for a PABO or actual action.

A number of responses also indicated applications for good faith bargaining orders or applications for the Commission to deal with a bargaining dispute.



A hand holding a camera lens against a cloudy sky background. The lens is held in the foreground, and the sky is visible through the lens and in the background. The sky is filled with soft, white clouds. The hand is dark, and the lens is black with a silver ring.

What next?

What next?

We expect that employers in industries impacted by the Commission's penalty rates decision will see increased pressure for wage increases to mitigate the effect of reductions in penalty rates for weekend workers.

However, some pressure should come off employers given that the Federal Government has introduced legislation to allow the Commission to approve agreements that do not meet the NERR requirements on technical grounds, provided the non-compliance does not disadvantage employees.

The Commission is also expected to soon hand down its decision on the ACTU's application to introduce family/domestic violence leave into all modern awards. If the earlier decision of former Vice President Watson is followed, this application is unlikely to succeed, and employers may continue to see demands for this leave entitlement included in enterprise negotiations.

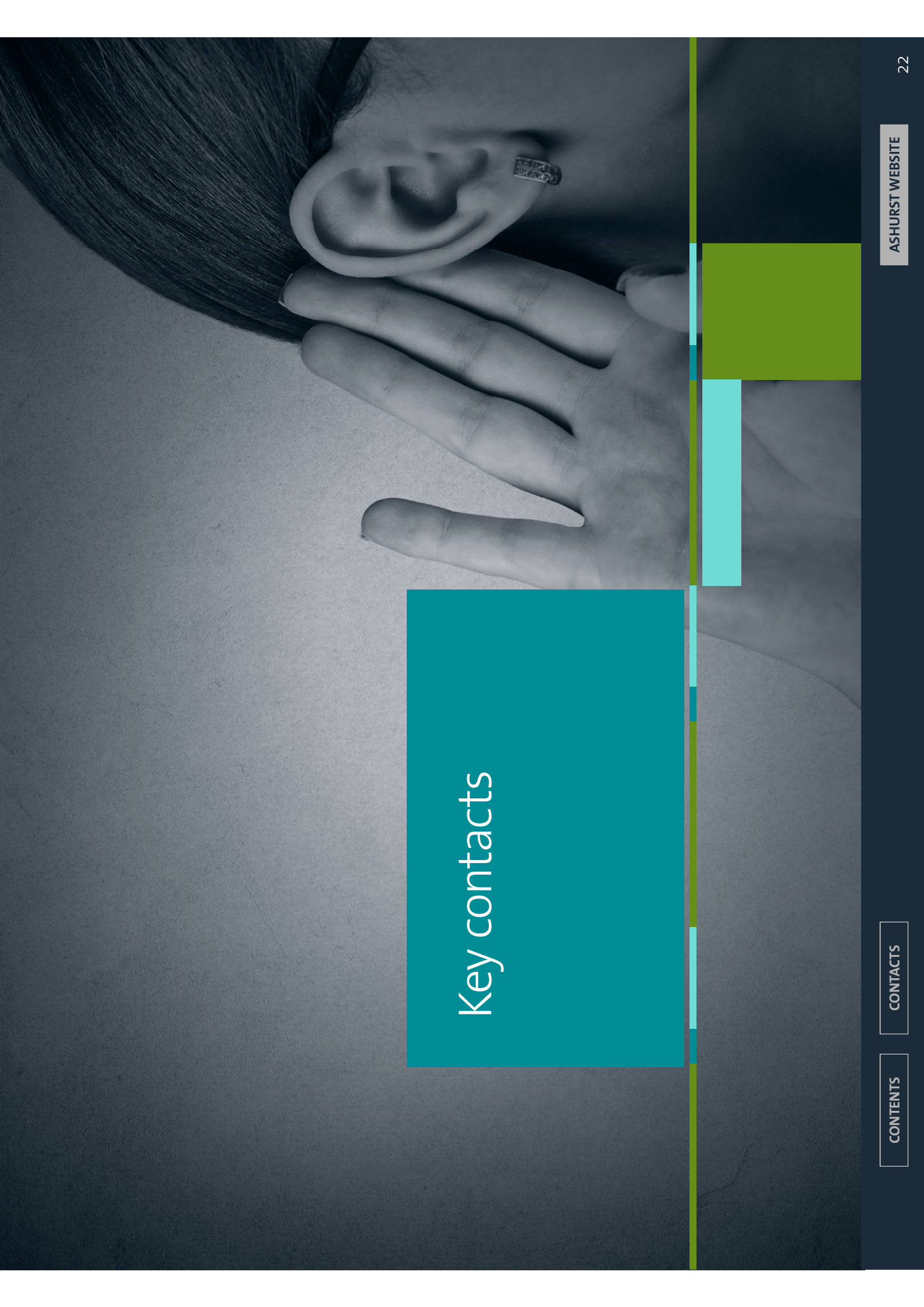
Please feel free to contact one of our national Employment team members to discuss our Bargaining Survey and its implications for your business strategy and bargaining approach.

"It is important to the business to be able to respond to current market volatility. Having the ability to make change is therefore an important element of the outcomes sought in bargaining."

SURVEY RESPONDENT

Ranked Band 1 in Employment

CHAMBERS ASIA-PACIFIC 2017



Key contacts

Key contacts

BRISBANE

James Hall	Partner	T +61 7 3259 7088	james.hall@ashurst.com
Ian Humphreys	Partner	T +61 7 3259 7180	ian.humphreys@ashurst.com
Vince Rogers	Partner	T +61 7 3259 7285	vince.rogers@ashurst.com

CANBERRA

Jon Lovell	Partner	T +61 2 6234 4157	jon.lovell@ashurst.com
Paul Vane-Tempest	Partner	T +61 2 6234 4111	paul.vane-tempest@ashurst.com
Barbara Deegan	Consultant	T +61 2 6234 4042	barbara.deegan@ashurst.com

MELBOURNE

Steven Amendola	Partner	T +61 3 9679 3628	steven.amendola@ashurst.com
Richard Bunting	Partner	T +61 3 9679 3597	richard.bunting@ashurst.com
George Cooper	Partner	T +61 3 9679 3776	george.cooper@ashurst.com
Jane Harvey	Partner	T +61 3 9679 3054	jane.harvey@ashurst.com
Geoffrey Giudice	Consultant	T +61 3 9679 3636	geoffrey.giudice@ashurst.com

PERTH

Marie-Claire Foley	Partner	T +61 8 9366 8734	marie-claire.foley@ashurst.com
Rob Lilburne	Partner	T +61 8 9366 8712	rob.lilburne@ashurst.com
Rayn Wade	Consultant	T +61 8 9366 8148	rayn.wade@ashurst.com

SYDNEY

Lea Constantine	Partner	T +61 2 9258 6446	lea.constantine@ashurst.com
Jennie Mansfield	Partner	T +61 2 9258 6400	jennie.mansfield@ashurst.com
Stephen Nettleton	Partner	T +61 2 9258 6026	stephen.nettleton@ashurst.com
Stephen Woodbury	Partner	T +61 2 9258 6444	stephen.woodbury@ashurst.com
Helen McKenzie	Senior Consultant	T +61 2 9258 6096	helen.mckenzie@ashurst.com
Adrian Morris	Senior Consultant	T +61 2 9258 6025	adrian.morris@ashurst.com
Trent Sebbens	Counsel	T +61 2 9258 6313	trent.sebbens@ashurst.com
Kathy Srdanovic	Counsel	T +61 2 9258 6171	kathysrdanovic@ashurst.com
Julia Sutherland	Counsel	T +61 2 9258 6532	julia.sutherland@ashurst.com



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