

# *The Elusive Quest for Simplicity: Measuring and Assessing the Readability of Enterprise Agreements, 1993 to 2011*

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## *Abstract*

Since the early debates about the introduction of enterprise bargaining in the late 1980s, politicians and other policymakers have consistently argued that the bargaining process should produce ‘simple’ agreements. While a considerable body of empirical research has investigated the outcomes of enterprise bargaining, this work has largely focused on the policy goals of fairness and flexibility. The goal of simplifying workplace relations conditions via enterprise bargaining has received scant scholarly attention. To address this gap, this article empirically examines readability and the use of jargon in enterprise agreements made in the higher education and fast food sectors between 1993 and 2011. The outcomes of this study suggest that very little progress has been made over the course of this period in improving readability or reducing the use of jargon in agreements.

## **I Introduction**

In the late 1980s, decentralisation of Australia’s workplace relations system was the subject of intense debate. Within this debate, the complexity of the centralised system of awards was a recurring theme. Politicians and other policymakers argued that the introduction of formalised bargaining would lead to the creation of ‘simple’ enterprise agreements. In particular, they claimed that the full range of conditions of employment applying at a particular workplace could be set out in a single agreement, using language that was easy to understand. It was anticipated that replacing existing, overlapping industrial instruments with these ‘simple’ enterprise agreements would ameliorate some of the problems associated with Australia’s highly complex and densely regulated system of workplace relations.

Since the commencement of enterprise bargaining, legal scholars have written a great deal about the evolving legal framework and the changes that have

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been made to the institutional supervision of bargaining.<sup>1</sup> A considerable body of empirical research has also investigated the outcomes of enterprise bargaining, with a particular focus on the competing goals of fairness (for employees)<sup>2</sup> and flexibility (for employers).<sup>3</sup> However, the ancillary goal of simplifying workplace relations conditions via enterprise bargaining has received scant scholarly attention.<sup>4</sup>

This article aims to address this gap in the literature. It also provides a rare example of the use of empirical methods to assess the impact of labour law legislation.<sup>5</sup> The empirical study examines the readability of and the use of jargon

<sup>1</sup> See, eg, Ronald McCallum, 'Enhancing Federal Enterprise Bargaining: The *Industrial Relations (Legislation Amendment) Act 1992* (Cth)' (1993) 6 *Australian Journal of Labour Law* 63; Richard Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 147; Laura Bennett, 'Bargaining Away the Rights of the Weak: Non-union Agreements in the Federal Jurisdiction' in Paul Ronfeldt and Ronald McCallum (eds), *Enterprise Bargaining: Trade Unions and the Law* (Federation Press, 1995); Amanda Coulthard, 'Non-Union Bargaining: Enterprise Flexibility Agreements' (1996) 38 *Journal of Industrial Relations* 339, 355; Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; Sean Cooney, 'Command and Control in the Workplace: Agreement-making under Work Choices' (2006) 16 *Economic and Labour Relations Review* 147; Carolyn Sutherland, 'First Steps Forward (with Fairness): A Preliminary Examination of the Transition Legislation' (2008) 21 *Australian Journal of Labour Law* 137; Carolyn Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20 *Australian Journal of Labour Law* 245; Carolyn Sutherland, 'Making the 'BOOT' fit: Reforms to Agreement-making from Work Choices to Fair Work', in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 99; Amanda Coulthard, 'The Mechanics of Agreement Making under the *Fair Work Act 2009*: Promoting Good Faith Bargaining and Genuine Agreement' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 90.

<sup>2</sup> See, eg, Richard Mitchell et al, 'What's Going on with the "No Disadvantage Test"? An Analysis of Outcomes and Processes under the *Workplace Relations Act 1996* (Cwlth)' (2005) 47 *Journal of Industrial Relations* 393; Grant Cairncross and Jeremy Bultjens, 'Enterprise Bargaining under the *Workplace Relations Act 1996* in Construction and Hospitality Small Businesses: A Comparative Study' (2006) 48 *Journal of Industrial Relations* 475; Justine Evesson et al, *Lowering the Standards: From Awards to Work Choices in Retail and Hospitality Collective Agreements* (University of Sydney, Faculty of Economics and Business, 2007).

<sup>3</sup> See, eg, Peter Gahan et al, 'Regulating for Performance? Certified Agreements and the Diffusion of High Performance Work Practices' (Paper presented at the Australian Labour Law Association 2<sup>nd</sup> National Conference, Sydney Law School, 24–25 September 2004); Richard Mitchell and Joel Fetter, 'Human Resource Management and Individualisation in Australian Labour Law' (2003) 45 *Journal of Industrial Relations* 292; Paul Gollan, 'Australian Workplace Agreements: An Employer Response' (2004) 46 *Journal of Industrial Relations* 116.

<sup>4</sup> The only scholarship which addresses the complexity of Australian industrial instruments in any depth is Mark Bray and Peter Waring, "'Complexity" and "Congruence" in Australian Labour Regulation' (2005) 47 *Journal of Industrial Relations* 1; Joel Fetter and Richard Mitchell, 'The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces' (2004) 17 *Australian Journal of Labour Law* 276. For an analysis of the complexity of Australian workplace relations regulation more broadly, see Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210.

<sup>5</sup> There is very little labour law scholarship that uses empirical methods to assess the impact of labour law: see Chris Arup et al, *Assessing the Impact of Employment Legislation: The Coalition Government's Labour Law Programme 1996–2007 and the Challenge of Research* (Research Report, Workplace and Corporate Law Research Group, Department of Business Law and Taxation and Australian Centre for Research in Employment and Work, Department of Management, Monash University, 2009) 29. However, there are some indications that this may be changing: see,

in, enterprise agreements. These empirical findings form part of a larger study by the author that examines the complexity of enterprise agreements as a multidimensional phenomenon.<sup>6</sup> Drawing on data from enterprise agreements made in the higher education and fast food sectors between 1993 and 2011, the findings outlined in this article address three key questions. First, has the complexity of language in agreements changed during the period from 1993 to 2011? Second, is there any association between changes in the complexity of the language in agreements and changes to the legislative framework? That is to say, given that workplace relations reforms were at least partially justified by the need to create 'simple' agreements, are there any particular reforms that help to explain any variations in the readability of, and the use of jargon in, agreements over time? The answers to these questions will help to address a third, overarching question: to what extent have legislative reforms accomplished the goal of improving the simplicity of agreements so that they are easier to understand?

These questions will be addressed using automated content analysis techniques. Two techniques are used in the empirical study: the first is readability testing using the Flesch Reading Ease Formula and the Flesch-Kincaid Grade Level Formula; the second is a frequency analysis against a customised dictionary list of industrial relations and legal jargon.

To provide the basis for the empirical findings, the next section (pt II) sets out the policy goal of creating 'simple' agreements that are easy to understand. This is followed by a discussion of the methodology used for the empirical study in pt III, including the techniques of computer-assisted content analysis, and the characteristics of the sample of agreements from the higher education and fast food sectors. The main body of the article (pt IV) sets out the findings from the study. Finally, pt V considers the policy implications of these findings. In particular, it outlines some of the reasons why those who draft agreements might resist using simple language, and proposes the development of plain language template agreements as a means of overcoming this resistance.

## II The Aim of Creating 'Simple Agreements'

In 1989, the Business Council of Australia published a report that provided the policy foundation for decentralisation of the industrial relations system.<sup>7</sup> That

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eg, Richard Mitchell et al, 'The Evolution of Labour Law in Australia: Measuring the Change' (2010) 23 *Australian Journal of Labour Law* 61.

<sup>6</sup> The larger study investigates four analytical constructs: technicality, density, uncertainty and differentiation. These constructs are drawn from Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42 *Duke Law Journal* 1, 5. See also Carolyn Sutherland, 'Mapping Complexity in Australian Enterprise Agreements: A Multi-Dimensional Approach' (2013) 26 *Australian Journal of Labour Law* 50.

<sup>7</sup> Fred Hilmer et al, *Enterprise-Based Bargaining Units: A Better Way of Working: Report to the Business Council of Australia by the Industrial Relations Study Commission* (Business Council of Australia, 1989). The report followed a period of intense criticism of Australia's centralised industrial relations system, commencing in the mid-1980s: Richard Mitchell and Richard Naughton, 'Australian Compulsory Arbitration: Will it Survive into the Twenty-First Century?' (1993) 31 *Osgoode Hall Law Journal* 265, 278–81; Richard Mitchell and Malcolm Rimmer, 'Labour Law, Deregulation and Flexibility in Australian Industrial Relations' (1990) 12 *Comparative Labor Law Journal* 1, 17. Around the same time that the Business Council of

report was highly influential in shaping the legal framework when enterprise bargaining was introduced, and subsequent legislative reforms to that framework.<sup>8</sup> While its central focus was the productivity gains that would flow from bargaining at the enterprise level, the report also highlighted the potential for complex industry awards to be replaced by agreements containing ‘simpler and easier-to-understand language’.<sup>9</sup>

The Business Council of Australia’s vision of enterprise-based bargaining was given legislative support via the Australian Labor Party (ALP) government’s *Industrial Relations Legislation Amendment Act 1992* (Cth). This legislation facilitated enterprise bargaining by amending the *Industrial Relations Act 1988* (Cth) (*IR Act*) to remove the barriers to certification that had resulted in very few agreements being made under the previous legislation.<sup>10</sup> Since then, there have been three major ‘waves’ of workplace relations reforms that have substantially altered the legal framework for agreement-making: the Coalition government’s *Workplace Relations Act 1996* (Cth) (*WR Act*) and its controversial ‘WorkChoices’ reforms of 2005,<sup>11</sup> and the ALP government’s *Fair Work Act 2009* (Cth) (*FW Act*). Each of these legislative upheavals was primarily justified by the perceived need to provide greater flexibility for business while acknowledging the competing need to protect employees’ working conditions.<sup>12</sup> However, the need to encourage the creation of simple agreements was also cited in support of these legislative reforms. For example, in foreshadowing and explaining the proposed legislative changes to the workplace relations system that would ultimately take the form of the *WR Act* in 1996, the Minister for Industrial Relations, Peter Reith, asserted that agreements under the new system would be ‘simple and flexible’.<sup>13</sup> Similarly, in 2005, Employment and Workplace Relations Minister Kevin Andrews claimed the ‘WorkChoices’ amendments would ‘promote the simple and

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Australia report was released, a report of an inquiry into the New South Wales industrial relations system similarly recommended reforms to restrict compulsory arbitration and encourage enterprise bargaining within the State system: John Niland, ‘Transforming Industrial Relations in New South Wales: A Green Paper, Volume 1’ (Report, New South Wales Government, 1989). Although there was generally widespread support for the shift to enterprise bargaining, there were also detractors, including the Metal Trades Industrial Association and women’s groups: Braham Dabscheck, *The Struggle for Australian Industrial Relations* (Oxford University Press, 1995) 80.

<sup>8</sup> See Duncan Macdonald, Iain Campbell and John Burgess, ‘Ten Years of Enterprise Bargaining in Australia: An Introduction’ (2001) 12 *Labour and Industry* 1; Nick Wailes and Russell Lansbury, ‘Flexibility vs Collective Bargaining?: Patterns of Australian Industrial Relations Reforms during the 1980s and 1990s’ (Working Paper No 49, Australian Centre for Industrial Relations Research and Teaching, 1997) 41.

<sup>9</sup> Hilmer et al, above n 7, 126.

<sup>10</sup> McCallum above n 1, 63–4.

<sup>11</sup> In this article, the *IR Act* as amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (*WROLA Act*) is referred to as the *WR Act*; and the *WR Act* as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) is referred to as the *Work Choices Act*.

<sup>12</sup> In relation to the *WR Act* and *Work Choices Act*, see Richard Mitchell et al, ‘Assessing the Impact of Employment Legislation: The Coalition Government’s Labour Law Program 1996–2007’ (2010) 23 *Australian Journal of Labour Law* 274, 275. In relation to the *FW Act*, see Sutherland, above n 1.

<sup>13</sup> Peter Reith, ‘Real Reform — The Government’s Industrial Relations Agenda’ (1996) 8 (3) *The Sydney Papers* 1, 8.

flexible workplace agreements that we need for our future prosperity'.<sup>14</sup> Subsequently, in its pre-election national platform in 2007, the ALP advocated the need for a 'fair and simple stream of workplace and enterprise agreements'.<sup>15</sup>

It is implicit in these policy statements that agreements were not yet as simple as they could be, and that each set of legislative reforms would encourage greater simplicity in the outcomes of enterprise bargaining. However, none of the versions of workplace relations legislation enacted between 1992 and 2011 included specific requirements that related to this policy goal.<sup>16</sup> This is despite the presence of legislative provisions that required *awards* to be 'simple' and 'easy to understand'<sup>17</sup> and *decisions* of the industrial tribunal to be stated in plain English and to be 'easy to understand in structure and content'.<sup>18</sup>

The only guidance offered by government representatives in relation to the creation of simple *agreements* is found in the guides for employers that have been produced by the government from time to time. For example, in a booklet published in 2001, *Building a Better Business: How Agreement Making Can Help*, the Coalition government urged employers to avoid using jargon in agreements.<sup>19</sup>

Extensive guidelines were also issued to employers over which the government has considerable influence. For example, the current ALP government's Employment Bargaining Framework for the Commonwealth public sector requires employers to ensure that enterprise agreements in the sector are 'clear, easy to read, and streamlined in order to maximize their accessibility for all (Australian Public Service) employees'.<sup>20</sup> This builds on earlier guidelines

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<sup>14</sup> Kevin Andrews, 'Workchoices: A New Workplace Relations System' (Speech delivered at the *Australian Financial Review* Conference, Melbourne, 25 October 2005).

<sup>15</sup> ALP, 'National Platform and Constitution 2007' (Adopted by the 44<sup>th</sup> National Conference, 27–29 April 2007) ch 7 cl 26.

<sup>16</sup> One short-lived exception was s 170NH of the *IR Act*, which was introduced into the legislation on 30 March 1994 by the *Industrial Relations Reform Act 1993* (Cth). This provision required agreements to be published in a way that ensured the contents were easy for employees to understand. However, the decisions of the tribunal that applied this provision focused on the need to ensure agreements were made available to employees. These decisions did not review the style, nor any other aspect of the agreement, to determine whether the agreement was easy to understand: see, eg, *Re Toys R Us Store Associate Enterprise Flexibility Partnership Agreement 1995* (Print M8047, Foggo C, 22 December 1995); *IOF Modular Offices (MFG) Pty Ltd Flexibility Agreement 1994* (Print L3367, Ross VP, 18 May 1994).

<sup>17</sup> *FW Act* s 134(1)(g). Earlier versions of this provision required awards 'to be framed so as best to express the decision of the Commission and avoid unnecessary technicalities': see *IR Act* and *WR Act* s 144; *Work Choices Act* s 570. There are similar examples in state legislation: eg, the *Fair Work Act 1994* (SA) s 93(1) requires that '[a]n award must be expressed in plain English and must avoid unnecessary technicality and excessive detail.'

<sup>18</sup> *FW Act* s 601(3). This provision was also contained the *WR Act* s143(2A), but there was no equivalent provision in the *IR Act* or the *Work Choices Act*.

<sup>19</sup> Department of Employment, Workplace Relations and Small Business, *Building a Better Business: How Agreement Making Can Help* (2001) 14.

<sup>20</sup> Australian Public Service Commission, 'Australian Government Employment Bargaining Framework — Supporting Guidance' (Report, January 2011) pt 1.7.2. This requirement extends to all agency documents containing terms and conditions of employment, including common law arrangements and workplace policies.

imposed by a Coalition Government that required public sector agreements to be 'simple, 'principles based' instruments'.<sup>21</sup>

Higher Education Providers were required to comply with similar guidelines as a condition of funding under the Higher Education Workplace Relations Requirements ('HEWRRs').<sup>22</sup> For a limited period from 30 November 2005<sup>23</sup> to 23 February 2008,<sup>24</sup> the HEWRRs required that higher education enterprise agreements be 'simple, flexible and principles-based documents which avoid excessive detail and prescription.'<sup>25</sup> However, for the purposes of assessing compliance with these guidelines, no further information was given to establish what a 'simple' agreement would look like.

There was also very little detailed articulation of the policy rationale for using simple language in agreements. In broad terms, it was argued that the creation of simple agreements would promote 'ease of communication and clarity of interpretation'.<sup>26</sup> It may be supposed that this was intended both to increase the level of employer compliance with industrial instruments<sup>27</sup> and to reduce the costs associated with compliance.<sup>28</sup> The use of simple language in agreements also supports an associated goal of enterprise bargaining: to increase the participation of ordinary workers in determining workplace conditions, rather than leaving bargaining to the 'Industrial Relations Club'<sup>29</sup> of employer associations, unions and tribunals.<sup>30</sup> If the language of agreements is inaccessible to workers, they are less likely to be involved in negotiating the terms of successive agreements.

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<sup>21</sup> Commonwealth of Australia, *Workplace Relations Policy Parameters for Agreement Making in the Australian Public Service* (April 2006).

<sup>22</sup> These requirements were released by the government on 29 April 2005: Brendan Nelson and Kevin Andrews, 'Modernising Workplace Relations in our Universities' (Joint Press Release, 29 April 2005). The requirements were subsequently included in the Commonwealth Grants Scheme Guidelines made under the *Higher Education Support Act 2003* (Cth) s 238.10: Amendment No 5 to the Commonwealth Grant Scheme Guidelines, F2005L03802 (26 November 2005) 7.25.

<sup>23</sup> To qualify for a funding increase in 2006, universities were required to have in place enterprise agreements which complied with the HEWRRs by 30 November 2005: Amendment No 5 to the Commonwealth Grants Scheme Guidelines, F2005L03802 (26 November, 2005).

<sup>24</sup> The HEWRRs were removed from the Commonwealth Grant Scheme on this date: Amendment No 2 to the Commonwealth Grants Scheme Guidelines No. 1, F2008L00559 (23 February 2008). Subsequently, references to the HEWRRs and National Governance Protocols were formally removed from the *Higher Education Support Act 2003* (Cth) with effect from 20 September 2008.

<sup>25</sup> Nelson and Andrews, above n 22.

<sup>26</sup> Peter Reith, 'Flexibilities Available in Agreement-Making' (Ministerial Discussion Paper, Department of Employment, Workplace Relations and Small Business, May 1998) 25.

<sup>27</sup> For a discussion of the relationship between complexity and non-compliance, see Schuck, above n 6, 23–4.

<sup>28</sup> This rationale has been provided for the use of plain language in legal documents: see Michèle M Asprey, *Plain Language for Lawyers*, (Federation Press, 3<sup>rd</sup> edition, 2003) 62; see also Gordon Mills and Mark Duckworth, *The Gains From Clarity: A Research Report on the Effects of Plain-language Documents* (Law Foundation of New South Wales, 1996).

<sup>29</sup> The term 'Industrial Relations Club' was coined by Gerard Henderson in 1983 to describe the dominant players in industrial relations in Australia at that time: Gerard Henderson, 'The Industrial Relations Club' (1983) 27(9) *Quadrant* 21; Paul Kelly, *The End of Certainty: The Story of the 1980s* (Allen and Unwin, 1992) 113–14.

<sup>30</sup> In the second reading speech to the Workplace Relations and Other Legislation Amendment Bill 1996 (Cth), the Minister for Workplace Relations, Peter Reith, stated that the Bill was designed 'to empower employers and employees to make decisions about relationships at work, including over wages and conditions, based on their appreciation of their own interests': Commonwealth,

The next section explains the methods used in this study to investigate whether any progress has been made in achieving this policy goal of simplicity in agreements made between 1993 and 2011.

### III Methodology

#### A Automated Coding

The empirical study uses quantitative content analysis to measure the ‘readability’ of enterprise agreements, and to assess the use of jargon words in enterprise agreements in the higher education and fast food sectors between 1993 and 2011.

The assessment of the texts of enterprise agreements uses automated (computer-assisted) coding, which records the presence of the characteristics of interest in the text. This type of coding is considered ‘most appropriate for recurrent and repetitive tasks that can be conceptualized without uncertainty’.<sup>31</sup> It therefore lends itself well to assessments of readability and the use of jargon words, using the methods set out below. These methods have the benefit of being unobtrusive, since there is no need for anyone to be interviewed, surveyed or observed.<sup>32</sup> This reduces the potential for researcher bias to influence outcomes.<sup>33</sup> The methods are also cost-effective, since they draw on documents that are already in existence.<sup>34</sup> The government’s ‘Fair Work Online’ website<sup>35</sup> provides ready access to a large number of enterprise agreements.<sup>36</sup> Many of these agreements are very long (more than 100 pages). If the methodology relied exclusively on hand-coding these agreements, it would only be possible to code a much smaller sample of agreements than is possible with automated coding.

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*Parliamentary Debates*, House of Representatives, 23 May 1996, 1298 (P Reith). See further Stewart, above n 4, 218. Similarly, one of the reasons given by the Australian Council of Trade Unions for supporting the shift to enterprise bargaining was that the process would increase employee participation in workplace decision-making: Anne Hawke and Robert Drago, ‘The Impact of Enterprise Agreements: Evidence from the Australian Workplace Industrial Relations Survey’ in Robert Drago, Anne Hawke and Mark Wooden, ‘The Transformation of Australian Industrial Relations Project’ (Discussion Paper Series No 4, National Institute of Labour Studies, 1998) 3.

<sup>31</sup> Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology* (Thousand Oaks, 2<sup>nd</sup> ed, 2004) 261.

<sup>32</sup> Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Pearson, 5<sup>th</sup> ed, 2004) 287.

<sup>33</sup> Gary S Insch, Jo-Ellen Moore and Lisa D Murphy, ‘Content Analysis in Leadership Research: Examples, Procedures, and Suggestions for Future Use’ (1997) 8 *The Leadership Quarterly* 1, 2.

<sup>34</sup> Berg, above n 32, 287.

<sup>35</sup> See the agreements database: *Find an Agreement* Fair Work Commission <<http://www.fwc.gov.au/index.cfm?pagename=agreementsfind>>.

<sup>36</sup> For this study, Fair Work Australia ‘FWA’ provided a full list of enterprise agreements registered under workplace relations legislation from 1993 to 2011 in an Excel file. Most of these agreements were available to download from FWA’s online database. Where the agreements listed in the Excel file were not available online, they were subsequently uploaded by FWA staff in response to specific written requests for these agreements to be made available.

## B *Readability*

The use of readability tests will be discussed in this section in two parts: the first examines the merits of readability tests and the second explains the particular methods of readability testing used in this study.

### 1 *The Merits of Readability Tests*

There are many definitions of readability. One of the pioneers of readability testing, George Klare, defined readability as ‘ease of understanding or comprehension due to the style of writing’.<sup>37</sup>

To measure readability, numerous formulas have been developed. These provide ‘quantitative, objective estimates of the style difficulty of writing.’<sup>38</sup> The readability formulas were first used in the 1920s, and have been applied in more than 1000 studies.<sup>39</sup> Their use gained momentum in the 1960s, under the influence of the ‘plain language’ movement.<sup>40</sup> There is no single accepted definition of plain language. In a foundational report produced by Robert Eagleson for the Australian Government in 1990, plain language was defined as ‘clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction’.<sup>41</sup> Since then, many plain language scholars have broadened their approach to focus not only on the elements of the plain language, but also on outcomes.<sup>42</sup> Guided by this approach, the International Plain Language Working Group has recently proposed the following definition of plain language:

[a] communication is in plain language if it meets the needs of its audience—by using language, structure, and design so clearly and effectively that the audience has the best possible chance of readily finding what they need, understanding it, and using it.<sup>43</sup>

In the United States, the trend towards plain language led to the adoption of readability standards as a legislative requirement for certain public and commercial documents.<sup>44</sup> Legislation in 10 US states requires plain language to be used in consumer contracts.<sup>45</sup> For example, a New York law introduced in 1978 requires all residential leases and consumer contracts to be ‘written in a clear and coherent manner using words with common and every day meanings’ and ‘appropriately divided and captioned by its various sections’.<sup>46</sup> Connecticut’s plain language law

<sup>37</sup> George Klare, *The Measurement of Readability* (Iowa State University Press, 1963) 1.

<sup>38</sup> Klare, above n 37, 3.

<sup>39</sup> William H DuBay, *The Principles of Readability* (Impact Information, 2004) 2.

<sup>40</sup> *Ibid.*

<sup>41</sup> Robert Eagleson, *Writing in Plain English* (Australian Government Publishing Service, 1990) 4.

<sup>42</sup> Neil James, ‘Defining the Profession: Placing Plain Language in the Field of Communication’ (2009) 61 *Clarity* 33, 35; Annetta Cheek, ‘Defining Plain Language’ (2010) 64 *Clarity* 5; Lynda Harris, Susan Kleimann and Christine Mowat, ‘Setting Plain Language Standards’ (2010) 64 *Clarity* 16.

<sup>43</sup> Cheek, above n 42, 5.

<sup>44</sup> DuBay, above n 39, 2.

<sup>45</sup> Asprey, above n 28, 63.

<sup>46</sup> A creditor, seller or lessor who enters into an agreement which violates the provision may face a penalty of \$50 plus any damages actually sustained, unless the person has attempted to comply with



provides two alternative tests for assessing whether a legal document is 'plain'. One test relies on guidelines such as a requirement to use short words, sentences and paragraphs, and active verbs, and not to use technical legal terms or Latin and foreign words.<sup>47</sup> The alternative test uses 11 precise measures, such as 'the average number of words per sentence is less than twenty-two' and 'no sentence in the contract exceeds fifty words'.<sup>48</sup> A Florida law goes further, requiring insurance policies to meet a minimum score (of 45) using the Flesch Reading Ease Formula.<sup>49</sup>

The widespread use of readability tests has led some to challenge their efficacy in predicting text comprehensibility.<sup>50</sup> There are numerous studies that have tested the correlation between reading comprehension and readability formulas, drawing on independent comprehension tests. Klare's meta-analysis of these studies confirmed that, overall, they demonstrate a positive relationship between readability indices and comprehension.<sup>51</sup> For legal documents in particular, numerous studies have demonstrated that readers have an improved understanding of the contents of documents once they have been redrafted in plain language.<sup>52</sup>

Nevertheless, even those who advocate the use of readability formulas acknowledge their limitations, and particularly their failure to take into account the full range of factors that may influence reading comprehension. These factors include document design,<sup>53</sup> the complexity of concepts introduced by the document,<sup>54</sup> and the reader's interest in the material.<sup>55</sup>

These limitations are addressed in a number of ways. First, the results of readability assessments are presented in this article as 'rough guides' to readability rather than as 'highly accurate values',<sup>56</sup> illustrating the ways in which agreements

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the provision in good faith: *New York General Obligations Law*, 7 NY Law §5-702 (McKinney, 1978). See further Asprey, above n 28, 63.

<sup>47</sup> Peter M Tiersma, *Legal Language* (University of Chicago Press, 1999) 224.

<sup>48</sup> *Ibid* 225.

<sup>49</sup> *Ibid*.

<sup>50</sup> See, eg, Martha Maxwell, 'Readability: Have We Gone Too Far?' (1978) 21 *Journal of Reading* 525; Jack Selzer, 'Readability is a Four-Letter Word' (1981) 18 *Journal of Business Communication* 23; Bob Lange, 'Readability Formulas: Second Looks, Second Thoughts' (1982) 35 *The Reading Teacher* 858, 860; Thomas M Duffy and Paula Kabance, 'Testing a Readable Writing Approach to Text Revision' (1982) 74 *Journal of Educational Psychology* 733; Janice C Redish and Jack Selzer, 'The Place of Readability Formulas in Technical Communication' (1985) 32 *Technical Communication* 46; Karen A Schriver, 'Readability Formulas in the New Millennium: What's the Use' (2000) 24 *ACM Journal of Computer Documentation* 138.

<sup>51</sup> Klare, above n 37, 132–5.

<sup>52</sup> Joseph Kimble, 'Answering the Critics of Plain Language' (1994) 5 *Scribes Journal of Legal Writing* 51, 62–5; Robert W Benson, 'The End of Legalese: The Game is Over' (1984–85) 13 *Review of Law and Social Change* 519, 547–58.

<sup>53</sup> John K Curtis, 'Annual Report Readability Variability: Tests of the Obfuscation Hypothesis' (1998) 11 *Accounting, Auditing and Accountability Journal* 459, 460.

<sup>54</sup> Margaret McKerchar, Kristen Meyer and Stewart Karlinsky, 'Making Progress in Tax Simplification: A Comparison of the United States, Australia, New Zealand and the United Kingdom' in Margaret McKerchar and Michael Walpole (eds), *Further Global Challenges in Tax Administration* (Fiscal Publications, 2006) 371.

<sup>55</sup> Klare, above n 37, 17; Curtis, above n 53, 460.

<sup>56</sup> George R Klare et al, 'Automation of the Flesch Reading Ease Readability Formula, with Various Options' (1969) 4 *Reading Research Quarterly* 550, 558.

have become more, or less, readable over time.<sup>57</sup> Second, readability tests are supplemented by a frequency analysis of the use of jargon in the present study, and by additional objective tests in a larger study of complexity in enterprise agreements.<sup>58</sup> Third, it is proposed that the findings of this study are supplemented by further research that moves beyond the features of the texts of agreements to focus on the effects of those texts on the reader.<sup>59</sup>

## 2 *The application of readability tests*

To assess readability, the Flesch Reading Ease Formula and the Flesch-Kincaid Grade Level Formula have been applied to the sample of agreements in the two industrial sectors examined in this study: higher education and fast food. More than one readability test has been used to improve the validity of the study. There are hundreds of different readability tests that could have been selected for this purpose.<sup>60</sup> The reading ease formula and grade level formula have been selected because they are readily accessible, and have been the most widely used for the assessment of readability of legal documents.<sup>61</sup> The Flesch Reading Ease Formula is considered useful for any kind of text.<sup>62</sup> The Flesch-Kincaid Grade Level Formula was originally developed for use on technical manuals by the United States Navy.<sup>63</sup> It is considered particularly well suited to technical documents.<sup>64</sup> Both tests use average sentence length and average number of syllables per word as key indicators of readability. However, these components are weighted slightly

<sup>57</sup> George R Klare, 'Readable Computer Documentation' (2000) 24 *ACM Journal of Computer Documentation* 148, 151.

<sup>58</sup> See above n 6.

<sup>59</sup> Drawing on cognitive psychology, Hagedoorn and Heslen supplemented objective tests of complexity in contracts with subjective tests that assessed the mental effort required for the parties to process the contract: John Hagedoorn and Geerte Heslen, 'Complexity and the Cognitive Load of R&D Alliance Contracts' (2009) 6 *Journal of Empirical Legal Studies* 818. Angela Colter similarly applied multiple methods (readability tests, expert review and usability tests) to assess the usability of credit card disclosure documents: Angela Colter, 'Assessing the Usability of Credit Card Disclosures' (2009) 62 *Clarity* 46. Comprehension tests have been used in a number of other studies to test the ability of non-lawyers to understand legal documents: see, eg, Michael E J Masson and Mary Anne Waldron, 'Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting' (1994) 8 *Applied Cognitive Psychology* 67; Edith Greene, Kethera Fogler and Sheri C Gibson, 'Do People Comprehend Legal Language in Wills?' (2012) 26 *Applied Cognitive Psychology* 500; Robert P Charrow and Veda R Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia Law Review* 1306.

<sup>60</sup> DuBay, above n 39, 2.

<sup>61</sup> Eg, in the United States, state legislation applies the Flesch Reading Ease Formula to assess whether consumer contracts meet a plain language standard: Asprey, above n 28, 63. Also in the United States, the Flesch-Kincaid Reading Grade Level Test has been adopted to assess whether health insurance policies meet a grade eight reading level: John Aloysius Cogan, 'Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies' (2010) 15 *Roger Williams University Law Review* 93, 118. For an example of academic research that assesses Miranda warnings using the Flesch Reading Ease Formula and Flesch-Kincaid Grade Level Formula: see Richard Rogers et al, 'The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis' (2008) 32 *Law and Human Behavior* 124.

<sup>62</sup> Mark Hochhauser, 'Some Pros and Cons of Readability Formulas' (1999) 44 *Clarity* 22, 24.

<sup>63</sup> DuBay, above n 39, 21.

<sup>64</sup> Hochhauser, above n 62, 23. The formula has been used by the United States Department of Defense to assess the readability of technical manuals since 1978: DuBay, above n 39, 50.

differently in the grade level formula to provide an estimate of the school grade (year level) of reading proficiency required by the reader to comprehend the document.<sup>65</sup>

To put it another way, these tests assume that documents containing longer words and sentences will be more difficult to read than documents containing shorter words and sentences. Of course, longer words will not always be more difficult to read since some long words are commonly used. However, in general, long words are used less frequently and are less familiar to the reader, and therefore more difficult to read.<sup>66</sup> Similarly, long sentences are not directly, but indirectly, linked to complexity and reading difficulty.<sup>67</sup> Long sentences are generally more difficult to read because they are more likely to contain more complex grammatical structures,<sup>68</sup> and put greater strain on working memory.<sup>69</sup>

A reading ease score and a grade level score have been calculated for each agreement, using a computer program called 'Readability Plus'.<sup>70</sup> The program analyses the text of the agreement to calculate the average sentence length and the average number of syllables per word in the agreement. One formula is used to convert these results into a reading ease score, and another (using slightly different weightings) is used to convert these results into a grade level score. The outcomes are generally inversely proportional: a low score using the reading ease formula translates into a high score using the reading grade level formula, and vice versa.

The reading ease formula provides a score on a scale from 0 to 100. A score between 0 and 30 indicates that the document is very difficult to read and a score between 90 and 100 indicates that the document is very easy to read.<sup>71</sup> In two separate studies that have investigated the readability of legal documents (Australian taxation legislation<sup>72</sup> and the annual reports of UK companies<sup>73</sup>), researchers have used the score range of 60 to 69 as the benchmark against which these texts have been measured. This range indicates an 'acceptable' level of readability using Flesch's descriptions.<sup>74</sup> Where US legislation has required consumer contracts to be 'readable', for reasons of practicability a much less stringent benchmark has been imposed, with a reading ease score of 45 as the

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<sup>65</sup> Krippendorff, above n 31, 58. The formula to obtain the Flesch reading ease score is  $206.835 - (1.015 \times \text{ASL}) - (84.6 \times \text{ASW})$  where ASL is the average sentence length and ASW is the average number of syllables per word. The formula to obtain the Flesch-Kincaid grade level is  $(0.39 \times \text{ASL}) + (11.8 \times \text{ASW}) - 15.59$ .

<sup>66</sup> George Klare, 'A Retrospective Look at Predicting and Producing Readable Computer Documentation' (2000) 24 *ACM Journal of Computer Documentation* 148, 158.

<sup>67</sup> Tiersma, above n 47, 226.

<sup>68</sup> Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers*, (Harper and Row, 1979) 22; Carmen Gomez Mandic et al, 'Readability of Special Education Procedural Safeguards' (2010) 45 *Journal of Special Education* 195, 196; Tiersma, above n 47, 226-7.

<sup>69</sup> Flesch, above n 688, 21-2; A Graesser, D McNamara and M Louwerse, 'Methods of Automated Text Analysis' in Michel L Kamil (ed), *Handbook of Reading Research: vol 4* (Routledge, 2011) 43-4.

<sup>70</sup> This is a computational linguistics program produced by Micro Power and Light.

<sup>71</sup> Rudolf Flesch, 'A New Readability Yardstick' (1948) 32 *Journal of Applied Psychology* 221, 230.

<sup>72</sup> David Smith and Grant Richardson, 'The Readability of Australia's Taxation Laws and Supplementary Materials: An Empirical Investigation' (1999) 20 *Fiscal Studies* 321.

<sup>73</sup> Philip M Linsley and Michael J Lawrence, 'Risk Reporting by the Largest UK Companies: Readability and Lack of Obfuscation' (2007) 20 *Accounting, Auditing & Accountability Journal* 620.

<sup>74</sup> Flesch, above n 71, 230.

minimum standard.<sup>75</sup> This score falls within the range 30 to 50, which is categorised by Flesch as ‘difficult’.<sup>76</sup>

In light of the policy goal that agreements should be ‘easy to read’, the ‘acceptable’ range of 60 to 69 using the reading ease formula is adopted as the minimum standard for this study, and the ‘fairly easy’ range of 70 to 79 is adopted as the aspirational goal. The equivalent benchmarks using the reading grade level formula are level eight as the ‘acceptable’ standard,<sup>77</sup> and level six as the aspirational goal.<sup>78</sup> Given that the outcomes of readability tests are best understood in relative terms, the ideal trend over time would be an improvement in the levels of readability.

A reading ease score of 60 to 70 (‘acceptable’) equates to a reading grade level between grades seven and eight.<sup>79</sup> Grade eight has also been used as the benchmark for readability of legal documents in a previous study.<sup>80</sup>

### C Frequency Analysis of Jargon Words

The most common form of automated content analysis is a frequency analysis against a standard or customised dictionary list of words. Typically, this requires the use of specialised software to analyse the text by counting words and phrases using a dictionary. Some software programs provide standard dictionaries. These dictionaries have the advantage that they have already been validated by other scholars. In the majority of cases, including the present study, the particular research requires a dictionary list to be developed to answer the specific research questions. The advantage of such a list is that it is customised to the particular concerns of the research. The fact that this customised list has not been validated by previous studies will be taken into account when evaluating the research findings.

A dictionary list of jargon words was devised for the purposes of the study. The list contains both industrial relations jargon and legalistic terms. Examples of industrial relations jargon include ‘blackban’, ‘grandparented’, ‘wildcat’ and ‘leapfrog’.<sup>81</sup> Legalistic terms include ‘derogate’, ‘privity’ and ‘justiciable’. In addition, the list includes individual words derived from Latin expressions such as ‘gratia’, ‘officio’, ‘partes’, ‘prima’ and ‘facie’. The list was developed by the

<sup>75</sup> For example, a Florida law deems insurance policies to be ‘readable’ if ‘the text achieves a minimum score of 45 on the Flesch reading ease test’: *Title XXXVII Insurance*, ch 627, § 627.4145, Fla Laws.

<sup>76</sup> Flesch, above n 71, 230 (1948) 32 *Journal of Applied Psychology* 221, 230.

<sup>77</sup> A reading ease score of 60 to 70 (‘acceptable’) equates to a grade eight reading level: DuBay, above n 39, 22–3. Grade eight has therefore been used as the relevant benchmark in an earlier study that assesses legal documents using the Reading Grade Level Formula: see John Aloysius Cogan, ‘Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies’ (2010) 15 *Roger Williams University Law Review* 93, 118.

<sup>78</sup> DuBay, above n 39, 23.

<sup>79</sup> *Ibid.*

<sup>80</sup> Cogan, above n 77, 118.

<sup>81</sup> These terms are ‘stemmed’ for the purpose of automated coding so that all versions of the word are detected. For example, the term ‘leap\*frog\*’ will pick up ‘leapfrog’, ‘leap frog’, ‘leap-frog’, ‘leap frogging’ and so on.

author, drawing on available glossaries of industrial relations terms,<sup>82</sup> lists of legal jargon<sup>83</sup> and the texts of enterprise agreements.

Modifications were made to the dictionary list of jargon words during the coding process, to rectify anomalies which became evident during coding, and to add new words to the list. It is a significant advantage of the automated method that these modifications can be made to the framework at any stage.<sup>84</sup> Before the final analysis was performed, the list was reviewed and modified by a panel of five expert legal academics and practitioners.<sup>85</sup>

The frequency analysis of the use of jargon words was performed using Yoshikoder software. This software reports on the proportion of jargon words in the agreement (that is, the number of jargon words as a percentage of the total number of words in the agreements).<sup>86</sup>

## D *The Sample of Agreements*

Empirical data has been collected from agreements made in two contrasting industrial sectors: the higher education sector and the fast food industry.

The higher education sector was included in the study for a number of reasons. First, because universities were ‘early adopters’ of enterprise bargaining, the longitudinal study could include agreements from as early as 1993. Second, the majority of agreements in the higher education sector were made between the dominant union in the sector (the National Tertiary Education Union) and large employers.<sup>87</sup> Over the entire period of bargaining, only 44 employers in total were

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<sup>82</sup> Paul Sutcliffe and Ron Callus, *Glossary of Australian Industrial Relations Terms* (Australian Centre for Industrial Relations Research & Teaching, 1994); Fair Work Online, *Glossary*, <<http://www.fairwork.gov.au/Footer/Pages/Glossary.aspx#abcc>>; Queensland Department of Justice and Attorney-General, *Glossary of Common Industrial Relations Terms*, <<http://www.wageline.qld.gov.au/glossary/index.html>>; Harold Roberts, *Roberts' Dictionary of Industrial Relations* (Bureau of National Affairs, 4<sup>th</sup> ed, 1994).

<sup>83</sup> Joseph Kimble, ‘Plain Words (Part 1)’ (2001) 80 *Michigan Bar Journal* 72; Sandeep Dave, *Plain Language in Law*, (18 November 2002) Law and Technology Resources for Legal Professionals <<http://www.llrx.com/features/plainlanguage.htm>>; Asprey, above n 28, 220–6.

<sup>84</sup> Philip Stone, ‘Thematic Text Analysis: New Agendas for Analyzing Text Content’ in Carl Roberts (ed), *Text Analysis for the Social Sciences: Methods for Drawing Statistical Inferences from Texts and Transcripts* (Lawrence Erlbaum Associates, 1997) 40.

<sup>85</sup> The author’s original list contained 372 terms, and this was revised in consultation with the expert panel to form a list of 139 words. This list may seem quite short, however, a much shorter list was used as part of a multidimensional study of the readability of financial disclosures. In that study, the list of legalese included 12 phrases and 48 words: see Tim Loughran and Bill McDonald, ‘Measuring Readability in Financial Text’, unpublished paper, University of Notre Dame, 17 September 2010 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1920411](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920411)> 12.

<sup>86</sup> The software was developed at Harvard University, and is available under a public licence at: Yoshikoder (11 April 2013) SourceForge <<http://sourceforge.net/projects/yoshikoder/>>. Another benefit of the Yoshikoder software is that there is no obligation under the licence for the researcher to provide the work which has been created using the software, such as the customised dictionaries, to the software developer. Some other licences for the academic use of free software do impose such conditions on the use of the software.

<sup>87</sup> Almost all (98 per cent) of enterprise agreements were made by large employers (defined as those who employ more than 500 employees) and the remaining 2 per cent of agreements were made by two higher education employers who employed between 100 and 500 employees (Australian

involved in bargaining. It was therefore anticipated that bargaining outcomes in this sector might be more homogenous than in sectors where the characteristics of the bargaining parties were more diverse. This made it more likely that clearer patterns would emerge in the data about the influence of legislative and other factors on complexity in agreements. Finally, as it receives considerable funding from the federal government, it was anticipated that government policy might be more influential in this sector than in sectors that are not subsidised.

In contrast, agreements in the fast food sector were made by employers of all sizes, including large franchisors such as McDonalds and Pizza Hut, and by small business employers. Only 17 per cent of agreements in the fast food sector were binding on unions.<sup>88</sup> Agreements in this sector were also characterised by the use of template agreements.<sup>89</sup> Eighty per cent of agreements in the Fast Food Agreements Database were identified as being substantially based on a template.<sup>90</sup> These characteristics of agreements in the fast food sector meant that comparisons could be made between union and non-union agreements, and between agreements based on different templates.

In addition, positions in the retail sector (which includes the fast food sector) are generally low-skilled,<sup>91</sup> low-paid,<sup>92</sup> and undertaken by workers with low educational qualifications.<sup>93</sup> This means that complexity in agreements is likely to be particularly problematic for employees in this sector. Retail employees also tend to be younger than the average employee,<sup>94</sup> and to have shorter tenure.<sup>95</sup> As a consequence, these employees generally have less bargaining power than higher education employees. It was therefore anticipated that bargaining outcomes in this sector would illustrate the impact of legislative reforms in different ways to those in the higher education sector.

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Maritime College and the Batchelor Institute of Indigenous Tertiary Education). Ninety-six per cent of agreements in the sector were binding on unions.

<sup>88</sup> Agreements in the Fast Food Agreements Database were manually coded according to whether they were designated as 'union agreements' at the certification or approval stage under the *IR Act*, *WR Act* and *Work Choices* legislative periods. Agreements made under the *FW Act* were designated as 'union agreements' where a union had sought to be 'covered' by the agreement in question, and the tribunal, Fair Work Australia, had granted this request at the certification stage.

<sup>89</sup> A study of 339 retail and hospitality agreements made during the *Work Choices* period found that 49 per cent of those agreements were based on some form of template: Evesson et al, above n 2, 24–5.

<sup>90</sup> To code for the use of templates, the first few pages of each fast food agreement were perused, and patterns were identified based on formatting, titles, tables of contents, types of clauses covered and other stylistic features. It is quite possible that templates were also used for higher education agreements. There were certainly substantial similarities between agreements made in this sector. However, whereas the use of templates was readily identified from the stylistic features of agreements in the fast food sample, there were no similar indicators of the presence of templates in the higher education sector.

<sup>91</sup> Jocelyn Pech et al, 'Retail Trade Industry Profile' (Research Report 7/09, Australian Fair Pay Commission, 2009) 20.

<sup>92</sup> The retail sector has been identified as having one of the highest concentrations of employers of the low-paid in Australia: Seamus McGuinness, Elizabeth Webster and Kostas Mavromaras, 'What Are the Characteristics of the Employers of the Low Paid in Australia?' (2012) 38 *Australian Bulletin of Labour* 26, 35.

<sup>93</sup> Pech et al, above n 91, 19.

<sup>94</sup> *Ibid* 17.

<sup>95</sup> *Ibid* 21.

To illustrate changes over time, and in the context of the evolving legislative framework, the study examines agreements in these sectors made from the time formalised enterprise bargaining commenced under the *IR Act* on 23 July 1992, up to and including agreements made under the *FW Act*.

The higher education sample consists of all enterprise agreements made by higher education institutions between 28 April 1993 and 30 September 2011.<sup>96</sup> The sample includes a total of 410 agreements (Higher Education Agreements Database). The fast food sample consists of all enterprise agreements made in the fast food sector from between 28 April 1993 and 8 March 2011 (Fast Food Agreements Database), a total of 758 agreements.<sup>97</sup>

Table 1 shows the distribution of agreements within each of the databases, where agreements are grouped according to the year the agreements commenced operating.

**Table 1: Distribution of Agreements, By Year of Commencement, 1993–2011**

Year	Number of Agreements Commencing to Operate	
	<i>Higher Education Agreements Database</i>	<i>Fast Food Agreements Database</i>
1993	26	0
1994	10	3
1995	16	3
1996	38	2
1997	53	9
1998	12	50
1999	6	22
2000	26	8
2001	34	42
2002	9	14
2003	11	36
2004	15	87
2005	58	115
2006	40	96
2007	3	48
2008	1	22
2009	9	76
2010	33	111
2011	10	14
<b>Total</b>	<b>410</b>	<b>758</b>

**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Table 1 shows the distribution of agreements within each database, where agreements are grouped according to the year that agreements commence operation.

<sup>96</sup> The first enterprise agreement made in the higher education sector under the *IR Act* (as amended by the *Industrial Relations Legislation Amendment Act 1992* (Cth)) commenced operating on 28 April 1993, and the sample includes all agreements made by higher education institutions registered up to 30 September 2011.

<sup>97</sup> The first enterprise agreement made in the fast food sector commenced operating on 3 May 1994. An earlier end date of 8 March 2011 was selected for this sector since this allowed a sufficient number of agreements to be coded for the year 2011 (14 agreements in total), and for the period of the *FW Act* (189 agreements). In contrast, the end date needed to be extended to 30 September 2011 in the higher education sector in order to obtain a sufficient number of agreements for each of these categories.

One of the purposes of this study is to identify any association between changes in the complexity of agreements and reforms to federal workplace relations legislation. These reforms have been grouped into four broad categories to reflect major amendments over time. These categories are: the period of operation of the *Industrial Relations Act 1988* (Cth), as amended by the *Industrial Relations Legislation Amendment Act 1992* (Cth) and the *Industrial Relations Reform Act 1993* (Cth), referred to collectively in the charts which follow as the *IR Act* (23 July 1992 to 31 December 1996); *WR Act* (1 January 1997 to 25 March 2006), the ‘Work Choices period’ (26 March 2006 to 30 June 2009), and the *FW Act* (1 July 2009 onwards). The ‘Work Choices period’ is used as short-hand to describe the period commencing with the Work Choices Act and includes the subsequent amendments made by the *Stronger Safety Net Act 2007* (Cth) (commencing on 7 May 2007) and the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) (commencing 28 March 2008).

Table 2 shows the distribution of agreements where agreements are grouped according to the legislative period in operation at the time the agreements commenced operating.

**Table 2: Distribution of Agreements, By Legislative Period, 1993–2011**

Legislative period	Number of Agreements Commencing to Operate	
	<i>Higher Education Agreements Database</i>	<i>Fast Food Agreements Database</i>
IR Act	91	8
WR Act	222	420
Work Choices	47	141
FW Act	50	189
Total	<b>410</b>	<b>758</b>

**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database 1 (n=758).

**Note:** Table 2 shows the distribution of agreements within each database, where agreements are grouped according to the legislative period in which agreements commenced operation.

Whether the agreements are grouped by year or by legislative period, in most cases the number of agreements falling into each category is substantial enough to provide reliable findings. Where a small number of agreements are found in a category, this will be taken into account in the discussion of the empirical findings in the following part of the article.

## IV Results of the Empirical Study

The first section of this part presents the empirical findings about the readability of enterprise agreements over time, followed by a brief discussion of any legislative changes that may help to explain any changes in the use of complex language over time. The second section presents the findings about use of jargon words in agreements, using the list developed for this study.



## A *Findings about Readability*

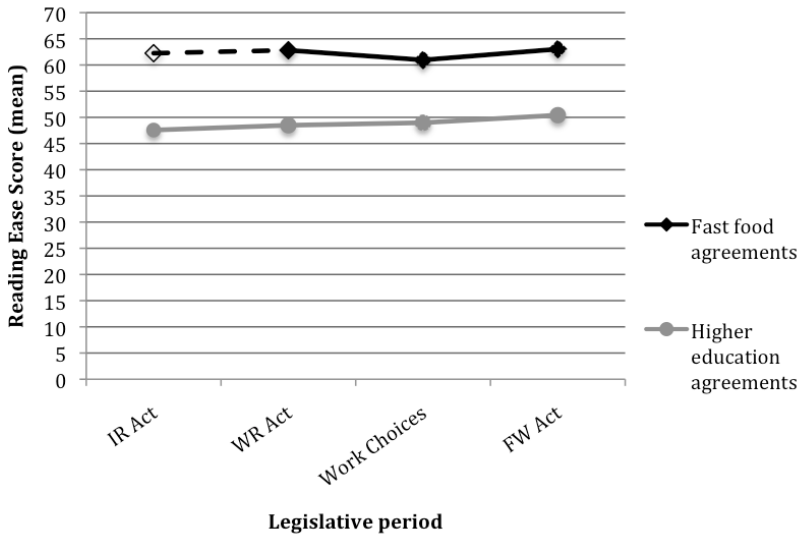
A Flesch reading ease score and a Flesch-Kincaid grade level have been calculated for each agreement. The results are inversely proportional: a low score on the reading ease test translates into a high score on the reading grade level test, and vice versa.

### 1 *Findings based on the Flesch Reading Ease Formula*

Before considering these results, it is important to note that, in Figure 1 (and subsequent figures), an unfilled circle is used to represent fast food agreements made during the period of the *IR Act*. This unfilled circle is joined to the adjacent data point (representing *WR Act* agreements in the fast food sector) by a dotted line. These visual cues are intended to indicate that the results for *IR Act* agreements in the fast food sector should be treated with caution. There are two reasons for this. The first reason is that only eight fast food agreements were made during the period of operation of the *IR Act*, compared with more than 140 agreements in each subsequent legislative period. This small number of agreements reduces the reliability of the findings for this period. The second reason is that these eight agreements were all made between large franchisors and unions, whereas within the full sample of fast food agreements only 17 per cent of agreements were made with unions. The characteristics of agreements made during this period may be linked more closely to the identity of the parties than to the legislative framework that was operating when the agreements were made. These factors will be taken into account when interpreting the results.

In Figure 1 the average reading ease scores for agreements made in each legislative period, across both the higher education and fast food sectors, are shown.

**Figure 1: Reading ease in higher education and fast food sector agreements, by legislative period, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 1 compares reading ease scores in the higher education and fast food sectors, on the basis of average scores for agreements grouped by legislative period from 1993 to 2011. A chi-square test for independence indicated a statistically significant relationship<sup>98</sup> between the dates of commencement of agreements (categorised by legislative period) and reading ease scores<sup>99</sup> for both databases.<sup>100</sup>

Across the two sectors, Figure 1 reveals only very slight changes in reading ease across the four legislative periods.<sup>101</sup> In the higher education sector, reading ease gradually improved in each successive legislative period, but the overall change was small, from an average reading ease score of 47.6 in the *IR Act* period to a score of 50.4 under the *FW Act*. Similarly, in the fast food sector, the average reading ease scores in different legislative periods fell within a narrow range and changed only marginally over time: the average reading ease score was 62.2 for *IR Act* agreements, 62.9 for *WR Act* agreements, 61 for Work Choices agreements and 63 for *FW Act* agreements. A consistent pattern across the two sectors is evident with the elevation of scores under the *FW Act*, but this improvement in readability is very slight.

<sup>98</sup> A statistically significant relationship means that the association between the variables (dates of commencement and reading ease scores) does not arise by chance alone.

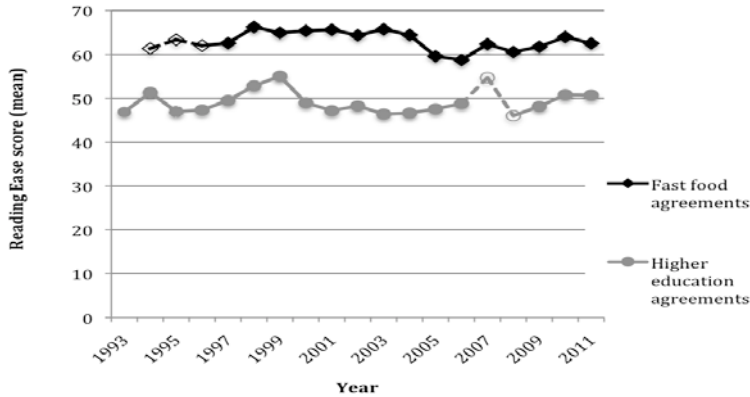
<sup>99</sup> For the purposes of performing the chi-square test, the reading ease scores were grouped in three categories. For the Fast Food Agreements Database, the categories were: less than 60; 60 to 64; and more than 64. For the Higher Education Agreements Database, the categories were: less than 46; 46 to 50; and more than 50.

<sup>100</sup> For the Fast Food Agreements Database,  $\chi^2_{(6)}=80.074$ ,  $p < 0.001$ ; for the Higher Education Agreements Database,  $\chi^2_{(6)}=18.637$ ,  $p < 0.01$ .

<sup>101</sup> Nevertheless, there is a statistically significant association between reading ease scores and the date that agreements commenced operating, where agreements are grouped by legislative period, see above note to Figure 1.

In Figure 2, average reading ease scores for higher education and fast food agreements are shown on a yearly basis.

**Figure 2: Reading ease in higher education and fast food sector agreements, by year, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 2 shows average reading ease scores across fast food and higher education agreements, grouped by year, from 1993 to 2011. Higher scores indicate more readable agreements.

Figure 2 confirms that higher education agreements have barely changed over time. To the extent that there is any improvement at all, it is only marginal, with yearly average reading ease scores increasing from 46.8 in 1993 to 50.7 in 2011. These yearly scores span a narrow range from 46.0 to 55.0. The sharpest contrast in average scores is between the peak scores (indicating improved readability) of 52.8 and 55.0 in 1998 and 1999 respectively, and the lower scores (ranging from 46.4 to 48.9) from 2000 to 2006, but again these changes are marginal. A second period of slightly elevated reading ease scores followed in 2010 and 2011 (with scores of 50.8 and 50.7 respectively).

In the fast food sector, the trend over time is for reading ease scores to remain steady, commencing in 1994 with an average score of 61.3 and ending in 2011 with an average score of 62.5. In making this comparison, it should be noted that the unfilled circles for the years 1994 to 1996 in the fast food sector<sup>102</sup> indicate that the low numbers of agreements in each of these years should be taken into account when interpreting the results.<sup>103</sup> However, even if the year 1997 were taken as the starting point for the purposes of a comparison with the most recent agreements in 2011, this only confirms the view that there has been little or no change over time since the scores for 1997 and 2011 are identical (62.5). There was little variation in the intervening period, with average yearly reading ease scores ranging from 58.7 to 66.2.

<sup>102</sup> It should be noted that there are also unfilled circles for the years 2007 and 2008 in the higher education sector since only three agreements commenced operating in 2007 and one agreement commenced operating in 2008: see Table 1.

<sup>103</sup> Three agreements were made in 1994 and in 1995 and two agreements were made in 1996: see Table 1.

The most pronounced divergence in the results is found in the comparison between the two sectors. The average reading ease score across all agreements in the higher education sector is 48.58 (a score at the upper end of the range of 40 to 49, which indicates the text is 'difficult' to read<sup>104</sup>). This average score is substantially lower than the score range of 60 to 69 that has been suggested as an acceptable benchmark in earlier studies of complexity in legal documents.<sup>105</sup> Thirty-six per cent of agreements in the higher education sector (149 agreements) received a score of less than 50 (indicating they are 'difficult' to read); and 98 per cent of agreements (403 agreements) received a score below the threshold score of 60 (indicating they are 'fairly difficult' to read). All higher education agreements failed to meet the aspirational goal of agreements being 'fairly easy' to read (that is, with a score of 70 or above).

By way of contrast, in the fast food sector, the average score across all agreements is 62.6 (indicating an 'acceptable' level of readability). There are no agreements that are classified as 'difficult' to read (with a score of less than 50), and only 28 per cent of agreements (210 agreements) received a score less than the threshold of 60, indicating they are 'fairly difficult' to read. Sixty-nine per cent of fast food agreements received scores within the range 60 to 69 (indicating 'acceptable' readability) and the remaining 3 per cent of agreements fall within the aspirational range of 70 to 79 ('fairly easy' to read).

When examining these results, it should be borne in mind that positions in the fast food sector are generally low skilled, and undertaken by workers with low educational qualifications.<sup>106</sup> The average worker in the higher education sector will have the capacity to comprehend texts written at a higher reading grade level than the average worker in the fast food sector. Therefore, the high proportion of agreements that are 'fairly difficult' to read may be more manageable for workers in that sector than if the same level of readability was present in agreements in the fast food sector.

Nevertheless, even highly educated readers will benefit from improved readability,<sup>107</sup> and the policy goal of making agreements 'easier to understand' did not discriminate between industries. If anything, the policy of simplicity was made even more explicit for the higher education sector than other sectors as a consequence of the HEWRR funding rules.

## 2 *Findings based on the Flesch-Kincaid Grade Level Formula*

A second test, which has been used to verify these results, is the Flesch-Kincaid Grade Level Formula. This test uses a slightly different formula to provide an estimate of the grade level required to read a document.<sup>108</sup> Grade eight is used as the

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<sup>104</sup> R Flesch, above n 71, 230.

<sup>105</sup> See the studies outlined in pt III (Methodology).

<sup>106</sup> Pech et al, above n 91, 6.

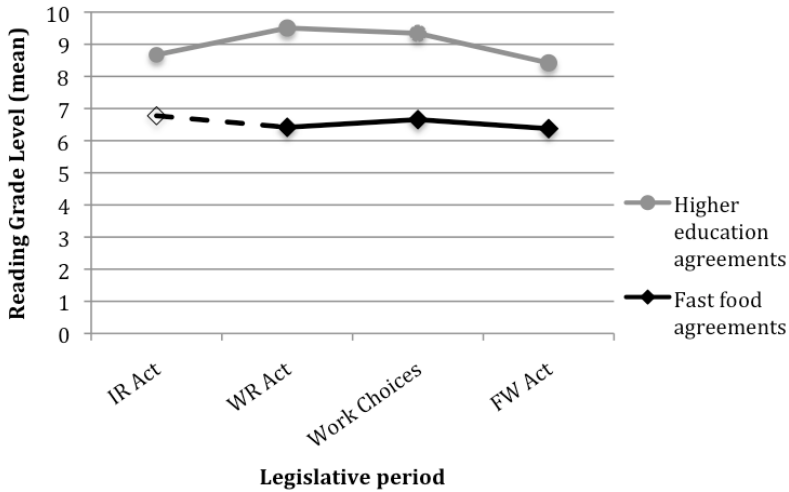
<sup>107</sup> Susan Kleimann and Barbra Enlow, 'Is Plain Language Appropriate for Well-Educated and Politically Important People? Results of Research with Congressional Correspondence' (2003) 50 *Clarity* 4.

<sup>108</sup> See the formulas in n 65 above.

benchmark of an ‘acceptable’ level of readability, while the aspirational goal is to achieve a ‘fairly easy’ standard of readability, which equates to the grade six level.

Figure 3 shows readability using the grade level formula, charting average scores by legislative period across two sectors.

**Figure 3: Reading grade level in higher education and fast food sector agreements, by legislative period, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 3 shows the mean reading grade level score for higher education and fast food agreements commencing in 1993 through to 2011, categorised by legislative period. A Chi-square test for independence indicated a statistically significant relationship between the dates of commencement of agreements (categorised by legislative period) and grade level scores<sup>109</sup> for both databases.<sup>110</sup>

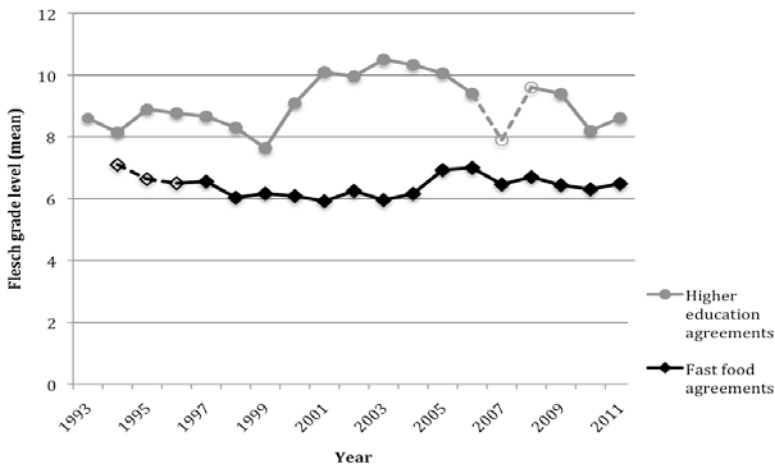
Figure 3 shows that there has been very little change in the readability of agreements over time. The chart shows elevated reading grade level scores for higher education sector agreements during the period of operation of the *WR Act* (scoring 9.5) and the Work Choices legislation (scoring 9.3), up from a score of 8.7 under the *IR Act*. Under the *FW Act*, the average reading grade level score for higher education agreements fell back to 8.4. These patterns are not mirrored in the fast food sector where the average results are almost uniform across all four legislative periods: the average reading grade level score for agreements made under the *IR Act* was 6.8; under the *WR Act*, the average score was 6.4; during the Work Choices period, the average score was 6.6; and under the *FW Act*, the average score was 6.4. The only pattern associated with legislative change that is consistent across both sectors is the slight improvement in readability under the *FW Act*.

Similar patterns emerge when the results are displayed by year in Figure 4.

<sup>109</sup> For the purposes of performing the chi-square test, the grade level scores were grouped in three categories. For the Fast Food Agreements Database, the categories were: less than 6.1; 6.1 to 6.6; and more than 6.6. For the Higher Education Agreements Database, the categories were: less than 8.4; 8.4 to 9.6; and more than 9.6.

<sup>110</sup> For the Fast Food Agreements Database,  $\chi^2_{(6)}=80.074$ ,  $p < 0.001$ ; for the Higher Education Agreements Database,  $\chi^2_{(6)}=56.327$ ,  $p < 0.001$ .

**Figure 4: Reading grade level in higher education and fast food sector agreements, by year, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 4 shows the mean reading grade level score for higher education and fast food agreements commencing in 1993 through to 2011, categorised by year.

Figure 4 confirms that there has been very little change in the level of readability of higher education agreements over time. The average reading grade score for higher education agreements made in 1993 is the same as the score for those made in 2011 (8.6 in both cases). However, there were significant variations (from 7.6 to 10.5) across the average yearly results in the higher education sector. In the early years of bargaining, from 1993 to 1998, the average reading grade level score for higher education agreements in the sector remained steady, ranging between 8.1 and 8.9, before dropping off to 7.6 in 1999. This was followed by a period of substantial elevation in average scores from 2001 to 2005 (with scores ranging between 9.9 and 10.5). The average results came full circle in 2010 and 2011, dropping back down to average scores of 8.2 and 8.6 respectively.

In the fast food sector, there was a slight drop in the average reading grade level scores from 7.1 in 1994 to 6.5 in 2011. Overall, the chart of yearly results over time is flat in the fast food sector, reflecting the narrow range of these average yearly results. The lowest average reading grade level applicable to agreements made in the sector was in 2002 (a score of 5.9) and the highest average reading grade level required for agreements was in 1994 (a score of 7.1) and 2006 (a score of 7.0).

The reading grade level results confirm the substantial difference between higher education and fast food agreements when it comes to readability. The difference between the two sectors represents close to 3 years of reading education; the higher education agreements scored an average reading grade score of 9.2 compared with an average reading grade score of 6.4 for the fast food sector.

Overall, using reading grade level as an indicator of readability, it may be concluded that little, if any, meaningful progress has been made towards creating

agreements that are ‘easy to understand’. In both sectors, there is very little difference in the reading grade level scores for the first agreements made in 1993 and 1994 and the most recent agreements made in 2010 and 2011.

### 3 *Explaining shifts in readability*

To the extent that there are statistically significant shifts in average readability scores for agreements made in particular years between 1993 and 2011, there are some indicators in agreements themselves about possible reasons for these shifts. For example, grade level scores are elevated for the years from approximately 2001 to 2005 (during the period of operation of the *WR Act*) in the higher education sector, indicating that agreements became more difficult to read during this period. This might be explained by the transfer of award provisions into agreements as a consequence of the processes of ‘award simplification’ that were mandated by the *WR Act*. This process involved the removal of certain ‘non-allowable’ content from awards.<sup>111</sup> Awards were also reviewed by the Australian Industrial Relations Commission to ensure that they did ‘not include matters of detail or process that [were] more appropriately dealt with by agreement at the workplace or enterprise level’.<sup>112</sup>

In response to this process, a number of agreements made in the higher education sector after the commencement of the *WR Act* in 1997 expressed an intention to preserve any conditions that had been excised from awards as part of the award simplification process, by including those conditions in subsequent enterprise agreements.<sup>113</sup> The inclusion of some provisions from awards is then evident in agreements made in the subsequent bargaining round.<sup>114</sup>

In contrast, in the fast food sector there is no evidence in the texts of agreements that provisions from awards — excised as part of the award simplification process — were subsequently included in enterprise agreements. This may reflect the weak union presence in the sector.<sup>115</sup> Further, the elevation of reading level scores in the higher education sample from 2001 is not mirrored in the fast food sector.

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<sup>111</sup> *WROLA Act* sch 5, items 50(1), 51(1), (2). Non-allowable matters in awards ceased to have effect on 30 June 1998, but formal removal of those matters from a number of higher education awards was not completed until 2005: see, eg, Higher Education Academic Staff Core Conditions of Employment Award 2005 (Print 967160, Kaufman SDP, 23 December 2005).

<sup>112</sup> *WROLA Act* sch 5, item 51(6).

<sup>113</sup> See, eg, University of Melbourne Enterprise Agreement 1997, cl 20; University of Queensland Academic Agreement 1997, cl 15.

<sup>114</sup> Eg, the University of Melbourne Enterprise Agreement 2001 contains several provisions that had been transferred from various higher education awards, such as allowances for trades workers and position and classification standards. This agreement has a reading ease score of 51 and a reading grade level of 8, compared with 68 and 5.5 respectively for the earlier agreements made in 1997. The University of Queensland Academic Agreement 2000, sch 2, contains 12 clauses identified as ‘non-allowable’ award matters extracted from the Universities and Post Compulsory Academic Conditions Award 1995. This agreement has a reading ease score of 48 and a reading grade level of 8.9, compared with 52 and 8.2 respectively for the earlier agreement made in 1997.

<sup>115</sup> As evidenced by the low proportion of agreements that were made with unions: see above n 88 and accompanying text.

It must also be acknowledged that higher reading ease scores in the fast food sector are sometimes found in ‘bare bones’ agreements that strip away employee entitlements. For example, the Donut King Munno Park Agreement 2007 scores exceptionally well with a readability score of 77 and a reading grade level of 3.7. However, this agreement is only four pages long and contains only eight clauses. In contrast, the Donut King Northgate Agreement 2007 has a lower readability score of 59 and a reading grade level of 7. This agreement is 29 pages long with 18 clauses and four schedules. It is immediately evident from an inspection of the texts of these agreements that the readable Donut King Munno Park agreement provides fewer employee entitlements than the less readable Donut King Northgate agreement.

Nevertheless, the quantitative data does not point to any association between the use of ‘bare bones’ templates and any improvement in readability. In fact, the average reading ease score achieved by agreements based on ‘bare bones’ templates created by industrial consultants was 58.6. The average reading ease score for agreements based on union templates was marginally better (63.4) and the best average reading ease score (68) was achieved by agreements based on templates developed by employer associations.

As noted above, across both sectors, Fair Work agreements were slightly more readable than Work Choices agreements, using both the reading ease and reading grade level tests. One possible explanation for this is that the legislation itself was drafted in a way that was intended to be ‘simple and straightforward to understand in terms of structure, organisation and expression’.<sup>116</sup> Most commentators have agreed that the legislation provides a good exemplar of readability.<sup>117</sup> This may have influenced the readability of agreements, particularly where the language used to express legislative requirements (such as the National Employment Standards)<sup>118</sup> was directly incorporated into agreements, or where agreements adopted model terms relating to flexibility and dispute resolution.<sup>119</sup>

## **B Findings about the Use of Jargon**

The software that assesses the use of jargon provides a report on the proportion of jargon in the agreement (that is, the number of jargon words as a percentage of the total number of words in the agreement). Results from both the higher education and fast food sectors show changes in the proportion of jargon in agreements over time.

Before examining the mean results grouped by legislative period and by year, it is important to note that the mean proportion of jargon across agreements in all time periods is 0.3 per cent in the fast food sector and 0.29 per cent in the

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<sup>116</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [4].

<sup>117</sup> The *FW Act* has generally been commended for its relative simplicity in comparison with the Work Choices Act and *WR Act* that preceded it: Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3. In contrast, the Work Choices legislation was considered so complex that ‘it might as well be in another language’: Stewart, above n 4, 218.

<sup>118</sup> *FW Act* pt 2-2.

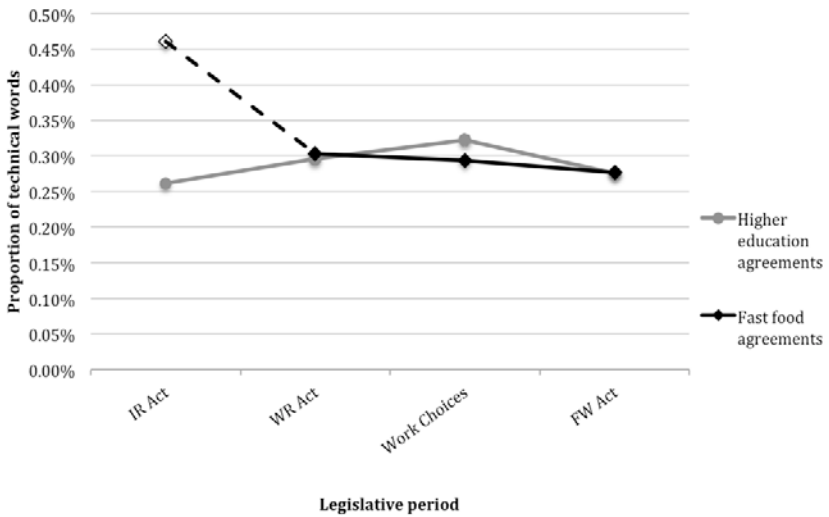
<sup>119</sup> *Fair Work Regulations 2009* (Cth), schs 2.2–2.3.



higher education sector. At first glance, this may seem a low proportion of jargon, but it should be remembered that the list of jargon represents a narrow category of legalistic and technical industrial relations terms and the policy goal has been to avoid the use of jargon. Further, the study is concerned not only with the extent to which agreements make use of jargon, but with any changes in the proportion of jargon in agreements over time. It is also worth noting that these average results, relating to the use of jargon across all time periods, are very similar across the two sectors. As discussed below, this contrasts with the findings for readability where there are substantial differences between the two sectors.

Figure 5 illustrates the mean proportion of jargon in higher education and fast food agreements for each of the four legislative periods.

**Figure 5: Percentage of jargon in higher education and fast food agreements, by legislative period, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 5 shows the mean number of jargon words in higher education agreements as a percentage of the mean total number of words in agreements, by legislative period. A Chi-square test for independence indicated a statistically significant relationship between the dates of commencement of agreements (categorised by legislative period) and the proportion of technical words in agreements<sup>120</sup> for both databases.<sup>121</sup>

Figure 5 shows that, in the higher education sector, there has been very little change in the proportion of jargon in agreements from the time the first agreements were made under the IR Act (when, on average, 0.26 per cent of words in

<sup>120</sup> For the purposes of performing the chi-square test, the scores relating to the proportion of technical words were grouped in three categories. For the Fast Food Agreements Database, the categories were: less than 0.2 per cent; 0.2 to 0.3 per cent; and more than 0.3 per cent. For the Higher Education Agreements Database, the categories were: less than 0.24 per cent; 0.24 to 0.3 per cent and more than 0.3 per cent.

<sup>121</sup> For the Fast Food Agreements Database,  $\chi^2_{(6)}=105.282$ ,  $p < 0.001$ ; for the Higher Education Agreements Database,  $\chi^2_{(6)}=33.846$ ,  $p < 0.001$ .

agreements were jargon words) to the time the most recent agreements were made under the *FW Act* (when, on average, 0.28 per cent of words in agreements were jargon words). There is also little fluctuation in the results in the intervening periods: on average, 0.30 per cent of words in *WR Act* agreements were jargon words, and 0.32 per cent of words in *Work Choices* agreements were jargon words. These variations in the average results for higher education agreements in different legislative periods are statistically significant (that is, the changes over time are unlikely to be explained by chance alone).<sup>122</sup> However, it could not be said with any certainty that these variations over time are substantively informative, particularly in light of the approximate nature of the testing instrument.<sup>123</sup>

Turning to the results in the fast food sector in Figure 5, no firm conclusions can be drawn from the fact that *IR Act* agreements contained a much higher proportion of jargon words (0.45 per cent) than the average across all agreements made in the sector (0.3 per cent). As noted earlier, only eight agreements commenced operating during this period, and it may be that the types of organisations involved in bargaining (unions and franchisors) influenced this outcome. However, a closer examination of the outcomes for all fast food agreements involving these parties only partially supports this suggestion. Across all time periods, agreements made by franchisors and unions contained an average proportion of jargon words of 0.35 per cent. While this is higher than the average proportion of jargon words across all agreements (0.3 per cent), the average result for the *IR Act* period (0.45 per cent) is higher still. It is therefore possible that some aspect of the *IR Act*, or other conditions applying during this period, contributed to a higher proportion of technical words being contained in these agreements.

Examining the results in the fast food sector across subsequent legislative periods (from the *WR Act* period onwards), it is apparent that the trend is flat, mirroring the trend for the higher education sector. During the period of operation of the *WR Act*, 0.30 per cent of words in agreements came from the list of jargon; this decreased to 0.29 per cent under the *Work Choices* legislative framework and 0.28 per cent under the *FW Act*. Again, although these differences are statistically significant, in relation to the policy goal to avoid the use of jargon in agreements, it cannot be said that legislative changes have brought about any substantial improvement in this area.

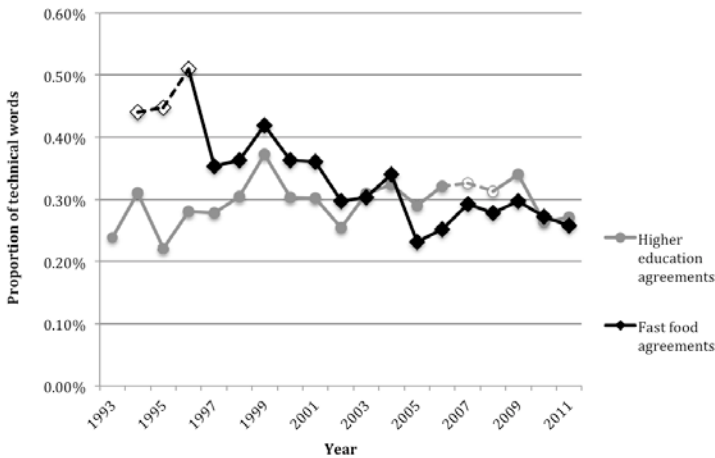
Figure 6 illustrates the trends over time when the mean results for the use of jargon are grouped by year rather than by legislative period.

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<sup>122</sup> Jane E Miller, *The Chicago Guide to Writing about Numbers* (University of Chicago Press, 2004) 40.

<sup>123</sup> In relation to the importance of communicating substantively informative rather than statistically significant findings, see Lee Epstein, Andrew D Martin and Matthew M Schneider, 'On the Effective Communication of Results of Empirical Studies, Part I' (2006) 59 *Vanderbilt Law Review* 1811, 1827–34.

**Figure 6: Percentage of jargon in higher education and fast food agreements, by year, 1993–2011**



**Source:** Higher Education Agreements Database (n=410); Fast Food Agreements Database (n=758).

**Note:** Figure 6 illustrates the mean proportion of jargon in higher education agreements for each year from 1993 to 2011.

Presenting the data on a yearly basis in Figure 6 allows the differences between the two sectors to be seen more clearly than in Figure 5. Overall, in the higher education sector, the results confirm that there is very little variation in the average results for each year with only a slight increase in the proportion of jargon in agreements over the entire period. This may be contrasted with the decline in the use of jargon over time in agreements in the fast food sector. The average yearly results in the fast food sector are more varied than the results for the higher education sector.

The most notable feature of Figure 6 is the convergence in the results across the two sectors over time. When the first agreements were made in 1993 in the higher education sector, the average proportion of jargon in those agreements was 0.24 per cent; whereas the average proportion of jargon in the first fast food agreements made in 1994 was 0.44 per cent. However, by the final year of coding in 2011, 0.27 per cent of words in higher education agreements were jargon words. This outcome is very similar to agreements in the fast food sector in 2011 where 0.26 per cent of words in agreements were jargon words.

Overall, the results relating to the proportion of jargon words in agreements suggest that there has been very little change in this aspect of complexity over time. There is a slight increase in the proportion of jargon words in higher education agreements and a more substantial decrease in the proportion of jargon words in fast food agreements. If the two sectors are considered together, then there is only marginal improvement overall in this area of complexity.

## 2 *Explaining shifts in the use of Jargon*

The combination of very subtle shifts over time (at the 0.1 per cent level), and the fact that the list of technical terms has not been validated by earlier studies, makes it problematic to draw any concrete conclusions about the influence of legislative change on the use of jargon in agreements. It is, however, worth noting that agreements made during the period of the *FW Act* contain a slightly lower proportion of jargon words than agreements made in the preceding period. This is consistent with the findings relating to readability and provides some support, if only very slight, for the hypothesis that the *FW Act* provides greater support for simplicity in bargaining outcomes, in comparison with earlier periods, particularly the Work Choices period.

## V Policy Implications of the Empirical Findings

The empirical findings reported in this article suggest that very little progress has been made in achieving greater simplicity in the language of enterprise agreements. The only area where there has been any appreciable improvement over time is in the reduction in the proportion of jargon words in enterprise agreements in the fast food sector, but this is offset by an increase in the proportion of jargon words in higher education agreements. With respect to the level of readability of agreements in both sectors, there is very little difference between the earliest agreements in 1993 and 1994 and the most recent agreements in 2011. These results are hardly surprising given the lack of any precise legislative or regulatory encouragement for the bargaining parties to use simple language in agreements.

In the intervening period between 1993 and 2011, the study reveals two patterns that are associated with changes to the legislative framework. The first pattern is found in the results for the period 2001 to 2005, when there is a decline in average readability scores for agreements in the higher education sector. The second pattern is found in the slight but marked improvement in readability scores and a reduction in the use of jargon words in agreements made in both sectors during the period of operation of the *FW Act*. One possible explanation for each of these patterns is that they result from the inclusion in agreements of clauses of varying complexity from other sources. In relation to the first pattern, there is some evidence that clauses that had been excised from awards as part of the simplification process were adopted in subsequent agreements. In relation to the second pattern, under the *FW Act*, it is possible that model clauses and legislative provisions that have been drafted in simple language have found their way into agreements. Both of these explanations assume that the incorporated award provisions in the earlier period were characterised by lower levels of readability, and the incorporated clauses from the *FW Act* and regulations were characterised by higher levels of readability. This hypothesis could be tested in future research using the methods outlined in this article. Further research could also explore the reasons why drafters use, or fail to use, simple language.<sup>124</sup>

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<sup>124</sup> For an example of a project investigating why plain language has not been adopted in local government documents, see the Plain Language Project, currently being undertaken by Caroline

In the absence of such research, scholars have suggested various reasons why lawyers and business writers might be reluctant to use simple language in legal documents. One reason is inertia. It is quicker and easier to copy the language of an earlier document, or a template, than to draft an original document in simple language.<sup>125</sup> Other reasons include poor writing skills, the comfort of a familiar style, and the status that can be derived 'from the ability to speak an elitist language'.<sup>126</sup> Rudolf Flesch, the creator of the reading formulas used in this article, suggests that writers might use long words and sentences because they 'have a feeling they must write like lawyers', and they therefore emulate the lawyer's style of putting all 'conditions and modifications into tightly packed sentences,<sup>127</sup> and of 'shy[ing] away from simple, everyday words [to] search for a more dignified substitute'.<sup>128</sup>

Even if only some of these reasons apply in the context of enterprise bargaining, they might be addressed by the provision of template agreements written in simple language. In the original 'Forward with Fairness' pre-election policy, which foreshadowed the Fair Work reforms, the ALP promised that Fair Work Australia would provide examples of 'simple' enterprise agreements.<sup>129</sup> However, to date, this aspect of the policy has not been implemented. The fact that templates are already used in 80 per cent of agreements in the fast food sector<sup>130</sup> suggests that model templates are likely to be highly influential, provided they are easy to use and applicable to the relevant industry.

These agreement templates could be added to the existing Best Practice Guides<sup>131</sup> and templates relating to record-keeping, recruitment and termination,<sup>132</sup> which are currently available on the Fair Work Ombudsman's website. The templates could be developed in consultation with industry, adopting plain language principles and reducing, or avoiding entirely, the use of technical jargon. Readability tests could be used at the development stage to verify that these templates meet the basic requirements relating to plain language. But there are many factors relevant to comprehension that are ignored by readability tests,<sup>133</sup> and these could also be taken into account in the creation of plain language template agreements. These factors include clear expression of complex legal concepts, and

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McKinnon and Roslyn Petelin at the University of Queensland: Caroline McKinnon and Roslyn Petelin, *The Plain Language Project* <<http://www.plainlanguageproject.com/what-s-plain-language>>.

<sup>125</sup> Benson, above n 52, 569. Asprey agrees that one of the reasons that plain language is not adopted is that those drafting the document do not have time to think about it: Asprey, above n 28, 3.

<sup>126</sup> Benson, above n 52, 570.

<sup>127</sup> R Flesch, *Say What You Mean* (Harper and Row, 1972) 63.

<sup>128</sup> *Ibid* 70.

<sup>129</sup> K Rudd and J Gillard, *Forward with Fairness: Labor's Plan For Fairer and More Productive Australian Workplaces* (Australian Labor Party, 2007) 15.

<sup>130</sup> See above n 90 and accompanying text.

<sup>131</sup> Fair Work Ombudsman, *Best Practice Guides* (17 September 2010) <<http://www.fairwork.gov.au/resources/best-practice-guides/pages/default.aspx>>.

<sup>132</sup> Fair Work Ombudsman, *Templates* (17 September 2010) <<http://www.fairwork.gov.au/resources/templates/pages/default.aspx>>.

<sup>133</sup> Hochhauser, above n 62, 24; McKerchar and Walpole, above n 54, 371.

compliance with best practice guidelines for document design.<sup>134</sup> To ensure that the plain language templates are both easy to read, and convey their intended meaning, the templates might be tested on a sample of employers and employees.

To date, the policy objective of creating simpler agreements over time has had very little impact. This may not be surprising given the lack of guidance given to the parties to implement this policy. More progress might be made if the parties were actively encouraged to adopt simple language. The provision of templates in simple language would provide this encouragement without the need for further legislative change.

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<sup>134</sup> See, eg, Ruth Anne Robbins, 'Painting with Print: Incorporating Concepts of Typographic and Layout Design in the Text of Legal Writing Documents' (2004) 2 *Journal of the Association of Legal Writing Directors* 108; Janeen Kerper, 'Let's Space Out: Rethinking the Design of Law School Texts' (2001) 51 *Journal of Legal Education* 267; Cecilia C Doak, Leonard G Doak and Jane H Root, *Teaching Patients with Low Literacy Skills* (Lippincott, 2<sup>nd</sup> ed, 1996) 48.