

JOINT EMPLOYER SUBMISSION

PLAIN LANGUAGE - ANNUAL LEAVE SHUTDOWN PROVISIONS (AM2016/15)

21 NOVEMBER 2022

**AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY
AUSTRALIAN BUSINESS INDUSTRIAL
AUSTRALIAN CABINET AND FURNITURE ASSOCIATION
AUSTRALIAN CHILDCARE ALLIANCE
BUSINESS SA
CHAMBER OF COMMERCE AND INDUSTRY WESTERN
AUSTRALIA
LOCAL GOVERNMENT NSW
MASTER PLUMBERS AND MECHANICAL SERVICES
ASSOCIATION OF AUSTRALIA
NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION
NATIONAL FIRE INDUSTRY ASSOCIATION
NSW BUSINESS CHAMBER LTD
TASMANIAN CHAMBER OF COMMERCE AND INDUSTRY
WESTERN AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION**

1. BACKGROUND

1.1 This joint submission is filed by:

- (a) Australian Chamber of Commerce and Industry;
- (b) Australian Business Industrial;
- (c) Australian Cabinet and Furniture Association;
- (d) Australian Childcare Alliance;
- (e) Business SA;
- (f) Chamber of Commerce and Industry Western Australia
- (g) Local Government NSW;
- (h) Master Plumbers and Mechanical Services Association of Australia;
- (i) National Electrical and Communications Association
- (j) National Fire Industry Association;
- (k) NSW Business Chamber Ltd; and
- (l) Tasmanian Chamber of Commerce and Industry
- (m) Western Australian Local Government Association

(collectively, **the Joint Employers**)

in response to a Decision¹ issued by a Full Bench of the Fair Work Commission (**Commission**) on 25 August 2022 (**August 2022 Decision**) in relation to annual leave shutdown clauses in modern awards.

Decisions leading up to the August 2022 Decision

¹ [2022] FWCFB 161

- 1.2 The August 2022 Decision followed previous decisions by the Annual Leave Full Bench on 11 June 2015² and 15 September 2015³ in relation to model clauses dealing with annual leave provisions in modern awards.
- 1.3 Subsequently, on 27 March 2017, the Annual Leave Full Bench handed down a decision⁴, in which it formed a provisional view that a shutdown provision should be inserted into the *Black Coal Mining Award 2010* (**Black Coal Award**). Relevantly, the shutdown provision included a clause empowering an employer to direct an employee to take leave without pay during the period of a shutdown if they had not accrued an entitlement to paid leave for this period.
- 1.4 On 19 October 2017, the Annual Leave Full Bench issued a further decision⁵ (**October 2017 Decision**), in which it stated that:

[31] As we have noted, there is a dispute as to whether an employer should have the power to (in effect) direct an employee to take a period of unpaid leave in circumstances where the employee has not accrued sufficient paid annual leave to cover any part of a temporary shutdown period.

[32] We accept that CMIEG's proposed clause 25.10(d)(iii) – in respect of unpaid leave – is capable of falling within the scope of s.139(1)(b), as being a matter 'about' 'leave'. The central question is whether such a term is necessary to achieve the modern awards objective.

- 1.5 However, the Full Bench ultimately rejected the Coal Mining Industry Employer Group's (**CMIEG**) proposed clause on a merit basis.

² [2015] FWCFB 3406

³ [2015] FWCFB 5771

⁴ [2017] FWCFB 959 at [13]

⁵ [2017] FWCFB 5394

- 1.6 On 19 November 2017, the Annual Leave Full Bench issued a Determination in which the Black Coal Award was varied in accordance with the October 2017 Decision.

The introduction of a Model Term and the August 2022 Decision

- 1.7 On 28 February 2019, the Plain Language Full Bench issued a Statement⁶ in which it asked interested parties to make submissions on matters that included whether modern awards that contained shutdown provisions should be varied to include a model term (**the Model Term**) that largely reflected the provision that had been inserted into the Black Coal Award.
- 1.8 In paragraphs [141] and [142] of the August 2022 Decision, the Full Bench determined that s 139(1)(h) of the *Fair Work Act 2009* (Cth) (**FW Act**) does not provide the Commission with the power to include in an award a term that provides an employer with the ability to direct an employee to take leave without pay during a shutdown period.
- 1.9 The Full Bench formed a provisional view that it was accordingly warranted to vary 78 awards considered in the Decision to reflect the Model Term. This included proposing to vary 52 modern awards (**the Relevant Modern Awards**) that presently empower employers to place employees on unpaid leave during an annual shutdown. The list of these Relevant Modern Awards is annexed at Schedule 1 to these submissions.
- 1.10 In the August 2022 Decision, the Full Bench stated that:

[161] Draft determinations varying the 78 awards in a manner consistent with the provisional views and conclusion stated above will be published in due course.

Interested parties will be provided with a period of 21 days from the date the draft determinations are published to lodge any submissions:

⁶ [2019] FWCFB 1255

(1) in response to the provisional views and conclusions stated in paragraphs [149]- [160] above;

(2) concerning the terms of the draft determinations.

2. SUMMARY POSITION

2.1 The Joint Employers are opposed to the adoption of the Model Term in the August 2022 Decision in the Relevant Modern Awards.

2.2 The Joint Employers instead submit that:

- (a) There is power under s139 of the FW Act to insert terms into modern awards entitling employers to place employees on unpaid leave during a period of shutdown (referred to for convenience as **Unpaid Leave Shutdown Terms**).
- (b) In the alternate, there is power under s93 of the FW Act to insert terms into modern awards entitling employers to direct the taking of annual leave in advance during a shutdown (referred to for convenience as **Annual Leave in Advance Terms**).
- (c) There are strong merit grounds that would support the Commission:
 - (i) maintaining in the Relevant Modern Awards, terms which include Unpaid Leave Shutdown Terms; or
 - (ii) alternatively, inserting into the Relevant Modern Awards, provisions entitling employers to direct the taking of annual leave in advance during a shutdown, in lieu of the Unpaid Leave Shutdown Terms.
- (d) Accordingly, the Model Term should not be adopted for the Relevant Modern Awards.

2.3 In support of this position, we address the following matters in the sections of these submissions that follow:

Section 3 The power to include provisions in modern awards about the taking of unpaid leave during annual shutdowns

Section 4 The power to include provisions in modern awards entitling employers to direct the taking of annual leave in advance during annual shutdowns

Section 5 The merit basis for maintaining the Unpaid Leave Shutdown Terms or alternatively including the Annual Leave in Advance Terms in the Relevant Modern Awards

Section 6 The introduction of the Model Term constitutes a substantive change to the Relevant Modern Awards and should not be pursued in the absence of cogent evidence

3. THE ABILITY TO INCLUDE PROVISIONS ABOUT UNPAID LEAVE IN MODERN AWARDS

Section 139(1)(h)

3.1 The majority judgment (**the Majority**) in the August 2022 Decision expressed the view that the Commission does not have power under s139(1)(h) to include Unpaid Leave Shutdown Terms in modern awards.

3.2 Although feedback on this view does not appear to have been expressly sought in the August 2022 Decision, for the sake of completeness, the Joint Employers respectfully maintain their position that s 139(1)(h) of the FW Act does provide a power for the Commission to insert the Unpaid Leave Shutdown Terms into modern awards.

3.3 The following matters support this conclusion:

(a) Firstly, the Unpaid Leave Shutdown Terms expressly address the topic of unpaid leave. They identify a circumstance when such leave may be

introduced or mandated by the employer. On their face, the Terms deal with the topic of leave.

- (b) Secondly, although the Majority identifies that the Unpaid Leave Shutdown Terms would be tantamount to a standdown, this does not prevent the relevant Terms from being “*about*” unpaid leave within the context of s139 of the FW Act. The word “*about*” is a preposition which is defined by the Macquarie Dictionary as meaning:

“1. *Of, concerning, in regard to...* 2. *connected with...*”^[2]

There is no limitation in the ordinary use of the term “*about*” that prevents a provision (such as the Unpaid Leave Shutdown Terms) being about multiple matters. For instance, the Unpaid Leave Shutdown Terms can be about shutdowns or standdowns, whilst also being about unpaid leave.

- (c) Finally, to the extent that the Majority identifies that “leave” and “leave without pay” are beneficial entitlements to be absent from work, which are distinct from stand downs⁷, such a conclusion does not mean that leave cannot arise when it is mandated by the employer. By way of example, paid annual leave is undoubtedly a beneficial entitlement, however, pursuant to sections 93 and 94 of the FW Act, paid annual leave may be unilaterally imposed upon employees notwithstanding that the leave has not been sought and notwithstanding that paid annual leave is a beneficial entitlement.

^[2] Macquarie Concise Dictionary, 3rd edition, page 3

⁷ August 2022 Decision at [141]

Section 139(1)(c)

3.4 In any event, the Joint Employers submit that there is a separate power to include the Unpaid Leave Shutdown Terms into modern awards pursuant to section 139(1)(c) of the FW Act.

3.5 Section 139(1)(c) empowers the Commission to include terms in modern awards ‘about’:

“arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours.”

3.6 Having regard to the dictionary definition of the word “*about*”⁸, provisions in modern awards that prescribe for the closure of an operation so that employees will not perform work (and not be paid for the relevant periods if they have not accrued sufficient annual leave) are “*of, concerning, in regard to ... connected with*” “*arrangements for when work is performed*”. That is, they are capable of being “*about*” arrangements for when work is performed.

3.7 Furthermore award provisions:

- (a) enabling an employer to define the period of operation of an employer’s business (through the use of closedowns and the introduction of absences) is capable of being about “*hours of work*” as well as “*rostering*”; and
- (b) that enable the employer to close its business, placing employees on paid and unpaid leave are capable of being about “*variations to working hours*”.

3.8 Accordingly, s 139(1)(c) provides the Commission with the power to include provisions dealing with the shutdown of an employer’s business and for employees

⁸ See discussion at paragraph 3.3(b)

to not perform work (and not be paid for work) during the shutdown period if they have not accrued sufficient annual leave to take during the shutdown.

4. THE POWER TO INCLUDE PROVISIONS EMPOWERING EMPLOYERS TO DIRECT THE TAKING OF ANNUAL LEAVE IN ADVANCE DURING ANNUAL SHUTDOWNS

- 4.1 Section 139(1)(h) of the FW Act empowers the Commission to include terms in modern awards ‘about’:

“Leave, leave loadings and arrangements for taking leave”.

- 4.2 Moreover, section 93(3) of the FW Act expressly empowers the Commission to include terms in a modern award:

“requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable”.

- 4.3 The effect of section 93(3) is important.

- 4.4 If a clause in a modern award is included pursuant to s93(3) (which forms part of Part 2-2 of the FW Act), then the terms of the National Employment Standards have effect subject to the modern award terms. That is, the modern award terms may prevail over or govern how the NES provisions apply. This is confirmed by a plain reading of sections 55(2) and (3) of the FW Act:

“(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards); or

(b) by regulations made for the purposes of section 127.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).”

4.5 The insertion of provisions about annual leave in advance into modern awards is a matter that the Commission has previously addressed and found to be permissible, pursuant to the powers in Part 2-2 of the FW Act.⁹

4.6 Indeed, the Explanatory Memorandum to the FW Act expressly contemplates this subject matter being included in modern awards:

“383. Subclause 93(4) enables an award or agreement to include other terms about the taking of paid annual leave – e.g., the taking of paid annual leave in advance of accrual.” (emphasis added)

4.7 Accordingly, provisions about the taking of annual leave in advance, including requirements about when such leave must be taken, may be included in modern awards.

4.8 However, to the extent any requirement to take annual leave in advance is imposed by a modern award (or the power to issue such a requirement is granted to an employer), the requirement must be reasonable. This is required by section 93(3) of the FW Act.

4.9 The question of whether a direction to take annual leave in advance during a shutdown is reasonable is a matter addressed further at paragraphs 7.2 and 7.3 below.

5. THE MERIT BASIS FOR MAINTAINING THE UNPAID LEAVE SHUTDOWN TERMS OR ALTERNATIVELY INCLUDING TERMS PERTAINING TO ANNUAL LEAVE IN ADVANCE

5.1 The Joint Employers submit that there are strong merit based grounds to either:

- (a) maintain the existing Unpaid Leave Shutdown Terms in the Relevant Modern Awards; or

⁹ 4 Yearly Review of Modern Awards - Annual Leave [2015] FWCFCB 3406 at [390]

- (b) alternatively, insert into the Relevant Modern Awards Annual Leave in Advance Terms.

5.2 Given that the modern awards objective governs the exercise of the Commission's discretion in relation to the terms of modern awards, any merit based consideration must be conducted through the prism of section 134 of the FW Act.

5.3 In this regard, in *Alpine Resorts Decision* [2018] FWCFB 4984, the Commission stated at [52]:

The principles applicable to the conduct of the 4-yearly review have been stated comprehensively in a number of Full Bench decisions, most recently in the 4 yearly review of modern awards – plain language re-drafting – standard clauses decision issued on 18 July 2018. The main propositions may be summarised as follows:

- *in particular the modern awards objective in s 134 applies to the review;*
- *the modern awards objective is very broadly expressed, and is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”, taking into account the matters in ss 134(1)(a)–(h);*
- *fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;*
- *the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;*
- *no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;*
- *it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a*

modern award;

- *the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;*
- *in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;*
- *what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;*
- *the matters which may be taken into account are not confined to the s 134 considerations;*
- *section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;*
- *what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;*
- *where an interested party applies for a variation to a modern award as*

part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.

5.4 A similar summary is set out in the *4 yearly review of modern awards – plain language re-drafting – standard clauses* [2018] FWCFB 4177 at [3]-[13].

5.5 Having regard to these principles, we address each of the factors set out in s134(1) with respect to both:

- (a) maintaining the existing Unpaid Leave Shutdown Terms; or
- (b) alternatively, inserting into the Relevant Modern Awards the Annual Leave in Advance Terms,

as an alternative to adopting the Model Term.

Section 134(1)(a) – relative living standards and the needs of the low-paid

5.6 The Joint Employers agree with the Majority that this factor is a neutral consideration with respect to the Model Term.

Unpaid Leave Shutdown Terms

5.7 It is theoretically possible that the maintenance of Unpaid Leave Shutdown Terms will affect the living standards and needs of the low paid in a marginal way. This is because it is possible that a low paid worker could commence working for an employer shortly before an annual shutdown and accordingly find themselves without pay for a brief period after having started work.

5.8 However, the impact of such a scenario is likely to be minor, given that the Unpaid Leave Shutdown Terms typically do not operate for long periods and, under the proposed model terms, must be temporary.

Annual Leave in Advance Terms

- 5.9 It is not apparent that the Annual Leave in Advance Terms will affect relative living standards and the needs of the low-paid as the employees will still receive full pay during any period of annual leave in advance taken.
- 5.10 This factor is a neutral consideration in relation to the Annual Leave in Advance Terms.

Section 134(1)(b) – the need to encourage collective bargaining

- 5.11 To the extent that the terms proposed by the Joint Employers cause any prejudice to the interests of employees, such terms may act as a marginal motivation for employees to collectively bargain.
- 5.12 On the other hand, the introduction of the terms proposed by the Joint Employers are unlikely to motivate employers to collectively bargain.
- 5.13 On this basis, the need to encourage collective bargaining is a broadly neutral consideration with respect to the terms proposed by the Joint Employers. It is, however, better aligned to the s134(1)(b) of the FW Act than the Model Term, which the Majority found does not promote the object in s134(1)(b)¹⁰.

Section 134(1)(c) – the need to promote social inclusion through increased workplace participation

- 5.14 The Model Term presently discourages social inclusion through increased workforce participation.
- 5.15 This is because, if employers are required to provide employees with payment during periods when their business cannot operate (which is the likely effect of the Model Term), then such an outcome will encourage employers to defer engaging new employees in the latter parts of the year. This incentive arises as new

¹⁰ See August 2022 Decision at [160]

employees will have limited or no access to annual leave for the period of annual closedowns that may be implemented by an employer.

5.16 By way of example:

- (a) Where an employer engages in a shutdown for 1 week over the Christmas period, there will be a disincentive to employ any employees after 25 September each year, to ensure that the employer is not required to provide payments to employees who will not be working.
- (b) In a more extreme example, if a business engages in a shutdown for 2 weeks over the Christmas period, this employer would have a disincentive to not employ anyone after 25 June of each year, with such disincentive escalating in magnitude each month after 25 June.

5.17 On the other hand, both the Unpaid Leave Shutdown Terms and the Annual Leave in Advance Terms avoid this additional burden on employers and do not carry any disincentive to employment.

Section 134(1)(d) – the need to promote flexible modern work practices and efficient and productive work

5.18 Again, the effect of the Model Term, which is to require employers to pay employees during periods of shut downs where they have not accrued sufficient annual leave, cannot be said to promote flexible modern work practices and efficient and productive work.

5.19 Flexible modern work practices and productivity are not supported if, during a defined period each year where business operations experience periods of low demand or minimal productivity, businesses face an obligation to pay some employees (with minimal leave balances) despite no demand for the employees' services.

5.20 This unproductive and inflexible outcome is exacerbated by the fact that the Model Term does not take into account *why* an employee may not have sufficient annual leave balances during a shutdown period. In some cases, an employee may have elected to take leave at other times of the year, exhausting their leave entitlements before a shutdown. Where an employee makes such an election, under the Model Term, the employee will continue to be paid when they are not required to work during the shutdown and the employer will bear the additional financial cost associated for the employee's choice to take leave earlier in the year.

5.21 In light of the above, we respectfully submit that this factor again weighs against the Model Term.

5.22 On the other hand, both the Unpaid Leave Shutdown Terms and the Annual Leave in Advance Terms avoid this additional burden on employers and accordingly promote productivity.

Section 134(1)(da) – the need for additional remuneration in prescribed circumstances

5.23 This factor is not a relevant consideration.

Section 134(1)(e) – equal remuneration principle

5.24 This factor is not a relevant consideration.

Section 134(1)(f) – the likely impact on business including on productivity, employment costs, and the regulatory burden

5.25 This is a highly relevant consideration, given both:

- (a) the prevalence of annual shutdowns across all industries; as well as

- (b) the widespread practice of employers directing employees to take leave without pay during a shutdown in circumstances where an employee does not have sufficient annual leave accrued to use during this period.

October/November 2022 Employer Survey

- 5.26 During October and November 2022, affiliates of the Australian Chamber of Commerce and the Australian Industry Group conducted a survey in relation to the extent that employers use annual shutdown provisions to direct employees who have insufficient annual leave to take leave without pay during the period of such a shutdown (**October/November 2022 Employer Survey**). A copy of the October/November 2022 Employer Survey results are annexed at Schedule 2 of these submissions. Further evidence regarding the conduct of the survey (which was hosted by Ai Group) will be filed by Ai Group.
- 5.27 2,390 employers responded and took part in the October/November 2022 Employer Survey which found the following:
- (a) 1,990 (83.26%) of these employers are covered by a modern award;
 - (b) 1,205 (60.55%) of these employers do not have an enterprise agreement that covers their award-covered employees;
 - (c) since 1 January 2010, 89.5% of these employers have shut down all or part of its operations;
 - (d) since 1 January 2010, these employers have shut down all or part of their operations on 1,781 occasions;
 - (e) the reason that these employers implemented shut downs included:
 - (i) to enable full-time and part-time employees to take annual leave (54.3%);

- (ii) to coincide with an annual or seasonal slow down or cessation of trade (68.16%);
 - (iii) to enable the routine maintenance of plant and/or equipment (15.05%);
 - (iv) to reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented (28.3%); and
 - (v) to coincide with shutdowns implemented by other related organisations such as clients or suppliers (54.41%);
- (f) 78.61% of these employers identified that they had experienced situations where an employee had not accrued sufficient annual leave to utilise during the period of a shut down; and
- (g) where employees had not accrued sufficient annual leave to take during a shut down, employers managed this situation in the following ways (including but not limited to):
- (i) requiring employees to perform work (21.36%);
 - (ii) directing employees to take leave without pay (79.93%); and
 - (iii) permitting employees to take annual leave in advance (48.79%).

5.28 The above responses to the October/November 2022 Survey demonstrate that:

- (a) the use of shut downs by employers is a commonly used and widespread practice;
- (b) employers utilise shut downs for legitimate and appropriate reasons which include:
 - (i) seasonal slowdowns and the cessation of trade during certain periods of the years; as well as

- (ii) for the purpose of undertaking important and necessary maintenance to plant and equipment; and
- (c) it is not uncommon for employees to have not accrued sufficient annual leave to take during a shut down and in these circumstances employers have heavily utilised the ability to direct these employees to take leave without pay during these periods.

Local Government NSW Survey 2022

- 5.29 The October/November 2022 Employer Survey is complemented by a separate survey conducted by Local Government NSW (**LGNSW**) in November 2022 (**LGNSW Survey**).
- 5.30 LGNSW issued a survey to its members, 37% of which completed the survey.
- 5.31 A copy of the Survey questions are located behind Schedule 3.
- 5.32 The responses to key questions (Questions 4, 5, 6, 7 and 8) are located behind Schedule 4. All survey responses are contained in an Excel spreadsheet filed separately with these Submissions (identified as Schedule 5).
- 5.33 In summary, the LGNSW Survey was completed by 47 Councils, employing in excess of 10,000 employees.¹¹
- 5.34 Since 2010:
- (a) 96% of respondents had implemented a shutdown;¹² and
 - (b) of those respondents 77% have implemented shutdowns on more than 10 occasions.¹³

¹¹ See Schedule 4, Question 1

¹² Schedule 3, Question 4

¹³ Schedule 3, Question 5

5.35 87% of respondents indicated that there had been situations in which employees affected by a shutdown did not have annual leave to cover the whole shutdown period.¹⁴

5.36 In response to these scenarios, the overwhelming majority of employers relied on either unpaid leave or annual leave in advance to ensure that the employees could be placed on leave during the period of the shutdown.¹⁵

5.37 Specifically:¹⁶

- (a) almost 30% of respondents required employees to take leave without pay;
- (b) more than 50% of respondents had utilised annual leave in advance; and
- (c) almost 50% of respondents relied upon other forms of paid leave to cover the shutdown.

5.38 What emerges from the LGNSW Survey is that the combination of leave without pay, annual leave in advance and other leave available in a workplace (time in lieu, RDOs, etc) are heavily relied upon by the Local Councils to facilitate the closing down of the workplace for a period.

May 2014 Employer Survey

5.39 The widespread usage of annual shutdowns was also previously identified in a May 2014 joint employer survey conducted in respect of matters pertaining to annual leave (**May 2014 Employer Survey**) as part of the 4 Yearly Review of Modern Awards.¹⁷

5.40 The May 2014 Employer Survey contained the responses of some 4137 businesses.

¹⁴ Schedule 3, Question 7

¹⁵ Schedule 3, Question 8

¹⁶ Schedule 3, Question 8

¹⁷ <https://asset.fwc.gov.au/documents/sites/awardsmodernfouryr/am201447-sub-aig-230614.pdf>, page 88 onwards

- 5.41 Whilst identifying some limitations with the May 2014 Survey, in a decision of a Full Bench of the Commission on 11 June 2015¹⁸, at [47] the Full Bench stated that:

Taking account of all these issues we are satisfied that the Employer Survey provides a valuable insight into the practical issues facing employers in the management of the existing annual leave arrangements and we will take the Employer Survey responses into account. The Employer Survey utilised the available databases in order to maximise the number of responses. A substantial number of responses were received (relative to other employment surveys) and the respondents were reasonably representative of the population of employers in each state and territory. The methodological limitations with the survey (i.e. it was not a random stratified sample) mean that the results cannot be extrapolated such that they can be said to be representative of all employers.

- 5.42 The May 2014 Employer Survey generated the following insights:¹⁹

- (a) 47% of respondents had closed down all or part of their operations from 1 January 2010 to the date of the survey in May 2014;
- (b) 30% of respondents had closed down all or part of their operations 3-4 times from 1 January 2010 to the date of the survey in May 2014;
- (c) 83% of respondents in the manufacturing industry had closed down all or part of their operations 3-4 times from 1 January 2010 to the date of the survey in May 2014;
- (d) 78% of respondents in the construction industry had closed down all or part of their operations 3-4 times from 1 January 2010 to the date of the survey in May 2014; and

¹⁸ [2015] FWCFB 3406

¹⁹ <https://asset.fwc.gov.au/documents/sites/awardsmodernfouryr/am201447-sub-aig-230614.pdf>, page 59 onwards

- (e) 67% of businesses in the professional, scientific and technical services industry had closed down all or part of their operations 3-4 times from 1 January 2010 to the date of the survey in May 2014.

5.43 The results of the May 2014 Employer Survey again demonstrated how commonly shutdowns are used by employers and, in particular, those who operate in the industries listed above.

5.44 Whilst the May 2014 Employer Survey did not specifically ask businesses about the prevalence of requiring employees to take unpaid leave during a period of shutdown:

- (a) the widespread usage of shutdowns identified in the Employer Survey; and
- (b) the fact that 52 modern awards (the Relevant Modern Awards) presently permit employers to place employees on periods of unpaid leave during a shutdown,

lead to a strong inference that employers are presently commonly implementing shutdowns and placing employees on periods of unpaid leave from time to time during such shutdowns.

Consequence of the implementation of the Model Term

5.45 The Model Term constitutes a substantial shift to the award safety net, by removing from at least 52 modern awards (the Relevant Modern Awards), the ability to direct employees onto unpaid leave during a period of shutdown.

5.46 The Model Term will accordingly directly impose new cost burdens on a substantial proportion of employers for which they will not receive any performance of work or additional productivity return.

5.47 Such an outcome is inimical to business operations and would come at a particularly difficult time, having regard to:

- (a) the decades high inflation currently being experienced in Australia; and
- (b) the increased costs of finance associated with recent increases to interests rates by the Reserve Bank of Australia.

5.48 By contrast, both the Unpaid Leave Shutdown Terms and the Annual Leave in Advance Terms are provisions which take into account the impact of shutdown provisions on business and seek to ameliorate the regulatory burden on business associated with the operation of annual shutdown terms.

134(1)(g) - the need to ensure a simple, easy to understand stable and sustainable modern award system for Australia

5.49 The introduction of model terms can assist in providing a simple, easy to understand stable and sustainable modern award system.

5.50 However, the Model Term as presently drafted sits inconsistently with other provisions of the modern awards objective that outweighs this consideration.

5.51 A better outcome would be if Unpaid Leave Shutdown Terms or Annual Leave in Advance Terms were inserted into the Model Term, thereby ensuring a simple modern award system whilst also furthering other modern awards objectives outlined in section 134.

Section 134(1)(h) – the likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

5.52 The matters mentioned in s134(1)(h) focus on the aggregate impact of an exercise of modern award powers.

5.53 As previously outlined:

- (a) there are grounds to support a strong inference that employers are presently commonly implementing shutdowns and placing employees on periods of unpaid leave from time to time during such shutdowns;²⁰ and
- (b) the Model Term as presently drafted will impose significant additional cost burdens on business at a time where businesses are facing both decades high inflation and increased costs of finance.

5.54 It is accordingly likely that the introduction of the Model Term as presently drafted into the Relevant Modern Awards could have a negative impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

5.55 Without increased revenue or productivity to offset the additional cost burden imposed by the Model Term, the Model Term will act as a disincentive for businesses to employ additional employees and, in some cases, could even lead to redundancies as part of a desire to reduce costs.

5.56 Alternatively, to offset the increase in costs due to the need to pay employees whilst a business is shut down, employers may need to increase the costs of the good and services that they provide, which is inflationary.

5.57 In light of the above, this factor again weighs against the introduction of the Model Term.

5.58 A better outcome would be if Unpaid Leave Shutdown Terms or Annual Leave in Advance Terms were inserted into the Model Term, thereby ensuring a simple modern award system whilst also furthering other modern awards objectives outlined in section 134.

²⁰ See 5.44 above

Other considerations associated with the implementation of a fair and reasonable safety net

- 5.59 There are other more general considerations that suggest the Model Term (as presently drafted) will not give rise to a fair and reasonable safety net, by reason of the inability to direct employees onto unpaid leave during a period of closedown.
- 5.60 By way of example, practical examples of what may occur at a workplace level under the Model Term include:
- (a) employees using all of their annual leave prior to a shutdown and then essentially ‘double-dipping’ by also being paid during the shutdown period when they have exhausted their leave accruals;
 - (b) on the other hand, employers may try to refuse some annual leave requests on account of upcoming shutdowns, leading to employees disputing whether such refusals are “reasonable” and permitted by section 89 of the FW Act;
 - (c) as previously mentioned, employers not hiring employees during the preceding months prior to a shutdown if the amount of time is not sufficient for enough annual leave to have been accrued prior to the shutdown period; and
 - (d) resentment and antipathy amongst employees who have retained enough annual leave to take during a shutdown against employees who do not have access to annual leave but will be paid nonetheless. This is a matter expressly identified in the minority decision of Commissioner Hunt in the August 2022 Decision at [217].

**6. THE INTRODUCTION OF THE MODEL TERM CONSTITUTES A
SUBSTANTIVE CHANGE TO THE RELEVANT MODERN AWARDS AND
SHOULD NOT BE PURSUED IN THE ABSENCE OF COGENT EVIDENCE**

6.1 Pursuant to the *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 (at [19]-[24]) and the *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (at [254]) (**Penalty Rates Case**), it is uncontroversial that:

- (a) cogent reasons would ordinarily be required to departing from previous Full Bench decisions which have made modern award provisions; and
- (b) such cogent reasons would ordinarily be supported by probative evidence directed towards the relevant legislative framework.

6.2 In the present case, the Full Bench has proposed to remove the Unpaid Leave Shutdown Terms on account of a perceived lack of power to introduce such terms into modern awards - thereby extinguishing any need for evidence or other cogent reasons to depart from the previously made award terms.

6.3 However, should the Commission accept the arguments outlined at section 3 above to the effect that the Unpaid Leave Shutdown Terms can be included in modern awards, then cogent reasons (likely supported by probative evidence) would be required to depart from the existing Unpaid Leave Shutdown Terms in the Relevant Modern Awards.

6.4 The Joint Employers submit that no such cogent reasons nor probative evidence presently exist to support the introduction of the Model Term into the Relevant Modern Awards.

7. CONCLUDING COMMENTS

7.1 On an evaluative basis, the Joint Employers submit that the modern awards objective does not warrant the adoption of the Model Term unless the Model Term is varied (at least in respect of the Relevant Modern Awards) to include:

- (a) the Unpaid Leave Shutdown Terms; or
- (b) alternatively, the Annual Leave in Advance Terms.

7.2 To the extent that the Commission has any concern that the Unpaid Leave Shutdown Terms or the Annual Leave in Advance Terms have any unjustifiably prejudicial impact upon employees, there are also a range of mitigating measures the Commission could consider adopting to ameliorate any prejudicial impact upon employees.

7.3 By way of example:

- (a) The period of unpaid leave or annual leave in advance that an employee could be directed to take in an Unpaid Leave Shutdown Term or Annual Leave in Advance Term could be temporally limited.
- (b) Adequate notice periods pertaining to the taking of the leave could be introduced. This is particularly relevant for any directions to take annual leave in advance - which must be reasonable pursuant to section 93(3) of the FW Act.
- (c) Other limitations could be introduced, if necessary, in order to ensure that any provisions operate reasonably.

7.4 The Joint Employers thank the Commission for the opportunity to make this submission.

Filed on behalf of the Joint Employers by Australian Business Lawyers & Advisors

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21 November 2022

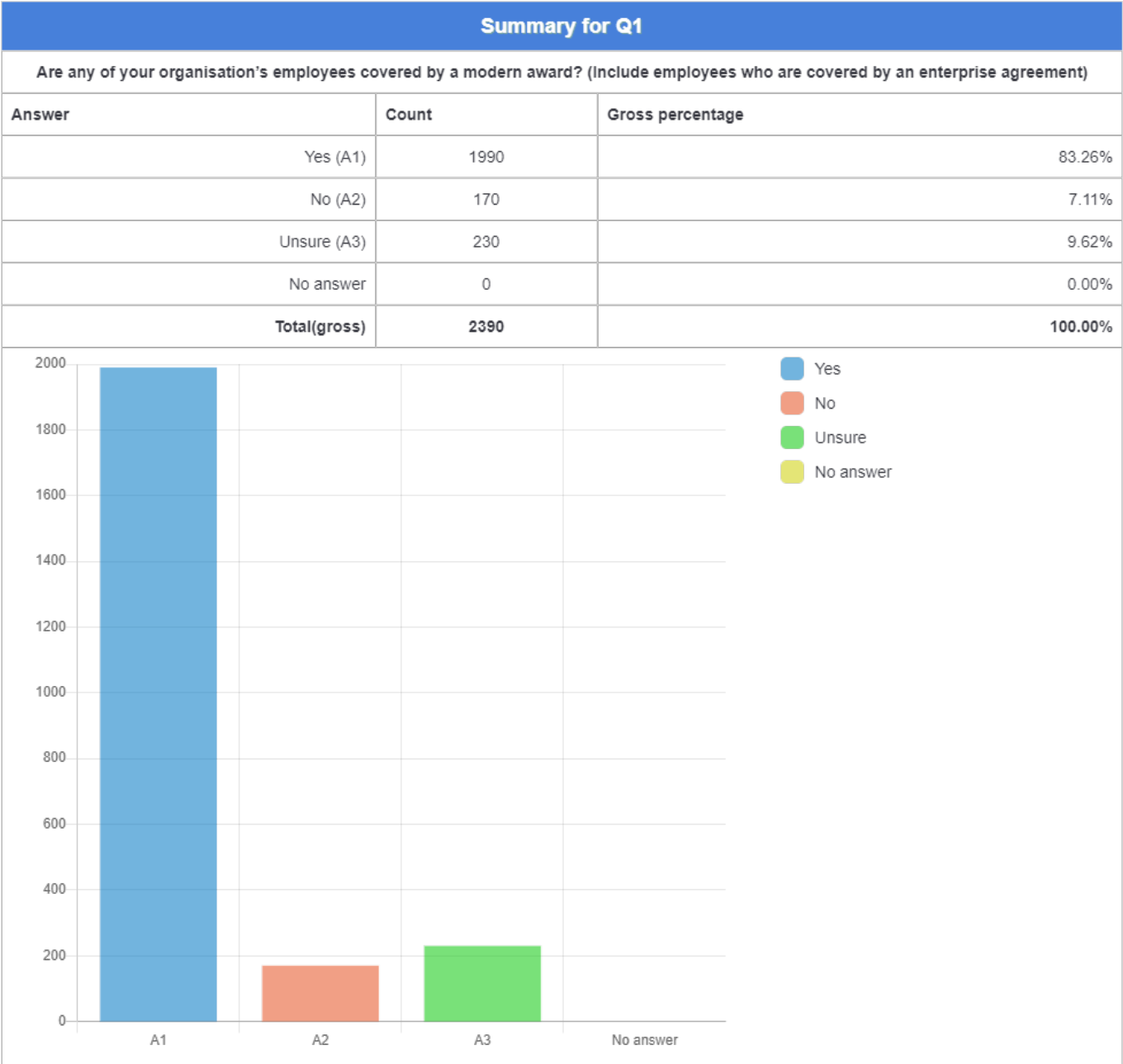
SCHEDULE 1

Awards that presently empower employers to place employees on unpaid leave during an annual shutdown

1. Aluminium Industry Award 2020 (clause 22.4)
2. Ambulance and Patient Transport Industry Award 2020 (clause 22.7)
3. Aquaculture Industry Award 2020 (clause 22.9)
4. Asphalt Industry Award 2020 (clause 21.8)
5. Black Coal Mining Industry Award 2020 (clause 24.9)
6. Broadcasting and Recorded Entertainment Award 2020 (clause 18.6)
7. Building and Construction General On-site Award 2020 (clause 31.3)
8. Car Parking Award 2020 (clause 24.6)
9. Cement, Lime and Quarrying Award 2020 (clause 22.8)
10. Cleaning Services Award 2020 (clause 21.4)
11. Coal Export Terminals Award 2020 (clause 20.7)
12. Concrete Products Award 2020 (clause 22.6)
13. Contract Call Centres Award 2020 (clause 22.10)
14. Electrical Power Industry Award 2020 (clause 21.8)
15. Electrical, Electronic and Communications Contracting Award 2020 (clause 21.5)
16. Fitness Industry Award 2020 (clause 21.3)
17. Food, Beverage and Tobacco Manufacturing Award 2020 (clause 25.11)
18. Gardening and Landscaping Services Award 2020 (clause 20.9)
19. Gas Industry Award 2020 (clause 20.7)
20. Graphic Arts, Printing and Publishing Award 2020 (clause 31.12)
21. Higher Education Industry—General Staff—Award 2020 (clause 24.4)
22. Horse and Greyhound Training Award 2020 (clause 18.6)
23. Hydrocarbons Industry (Upstream) Award 2020 (clause 25.7)
24. Joinery and Building Trades Award 2020 (clause 27.9)
25. Journalists Published Media Award 2020 (clause 20.8)
26. Manufacturing and Associated Industries and Occupations Award 2020 (clause 34.7)
27. Meat Industry Award 2020 (clause 25.8)
28. Mining Industry Award 2020 (clause 22.7)
29. Mobile Crane Hiring Award 2020 (clause 24.6)
30. Miscellaneous Award 2020 (clause 21.4)
31. Oil Refining and Manufacturing Award 2020 (clause 24.6)
32. Pest Control Industry Award 2020 (clause 23.9)
33. Pharmaceutical Industry Award 2020 (clause 21.5)
34. Plumbing and Fire Sprinklers Award 2020 (clause 24.4)
35. Poultry Processing Award 2020 (clause 21.5)
36. Premixed Concrete Award 2020 (clause 22.8)
37. Racing Clubs Events Award 2020 (clause 23.5)
38. Racing Industry Ground Maintenance Award 2020 (clause 21.5)
39. Road Transport (Long Distance Operations) Award 2020 (clause 20.4)
40. Road Transport and Distribution Award 2020 (clause 24.9)
41. Salt Industry Award 2020 (clause 23.10)
42. Seafood Processing Award 2020 (clause 21.11)
43. Security Services Industry Award 2020 (clause 21.4)

- 44. Silviculture Award 2020 (clause 22.5)
- 45. Storage Services and Wholesale Award 2020 (clause 24.5)
- 46. Surveying Award 2020 (clause 22.7)
- 47. Telecommunications Services Award 2020 (clause 22.9)
- 48. Textile, Clothing, Footwear and Associated Industries Award 2020 (clause 32.6)
- 49. Timber Industry Award 2020 (clause 28.10)
- 50. Vehicle Repair, Services and Retail Award 2020 (clause 29.6)
- 51. Wine Industry Award 2020 (clause 24.9)
- 52. Wool Storage, Sampling and Testing Award 2020 (clause 23.5)

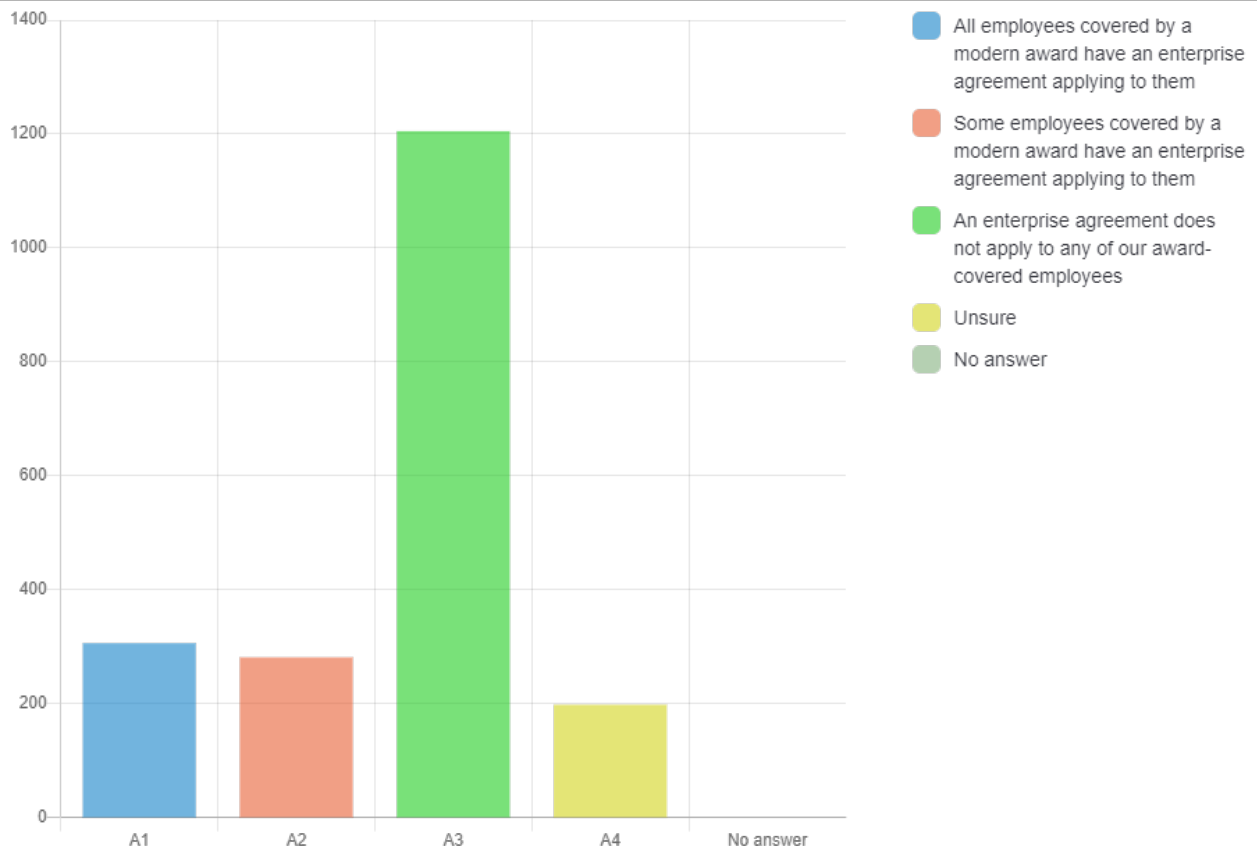
Schedule 2



Summary for Q2

Does an enterprise agreement apply to your organisation's award-covered employees?

Answer	Count	Gross percentage
All employees covered by a modern award have an enterprise agreement applying to them (A1)	306	15.38%
Some employees covered by a modern award have an enterprise agreement applying to them (A2)	281	14.12%
An enterprise agreement does not apply to any of our award-covered employees (A3)	1205	60.55%
Unsure (A4)	198	9.95%
No answer	0	0.00%
Total(gross)	1990	100.00%

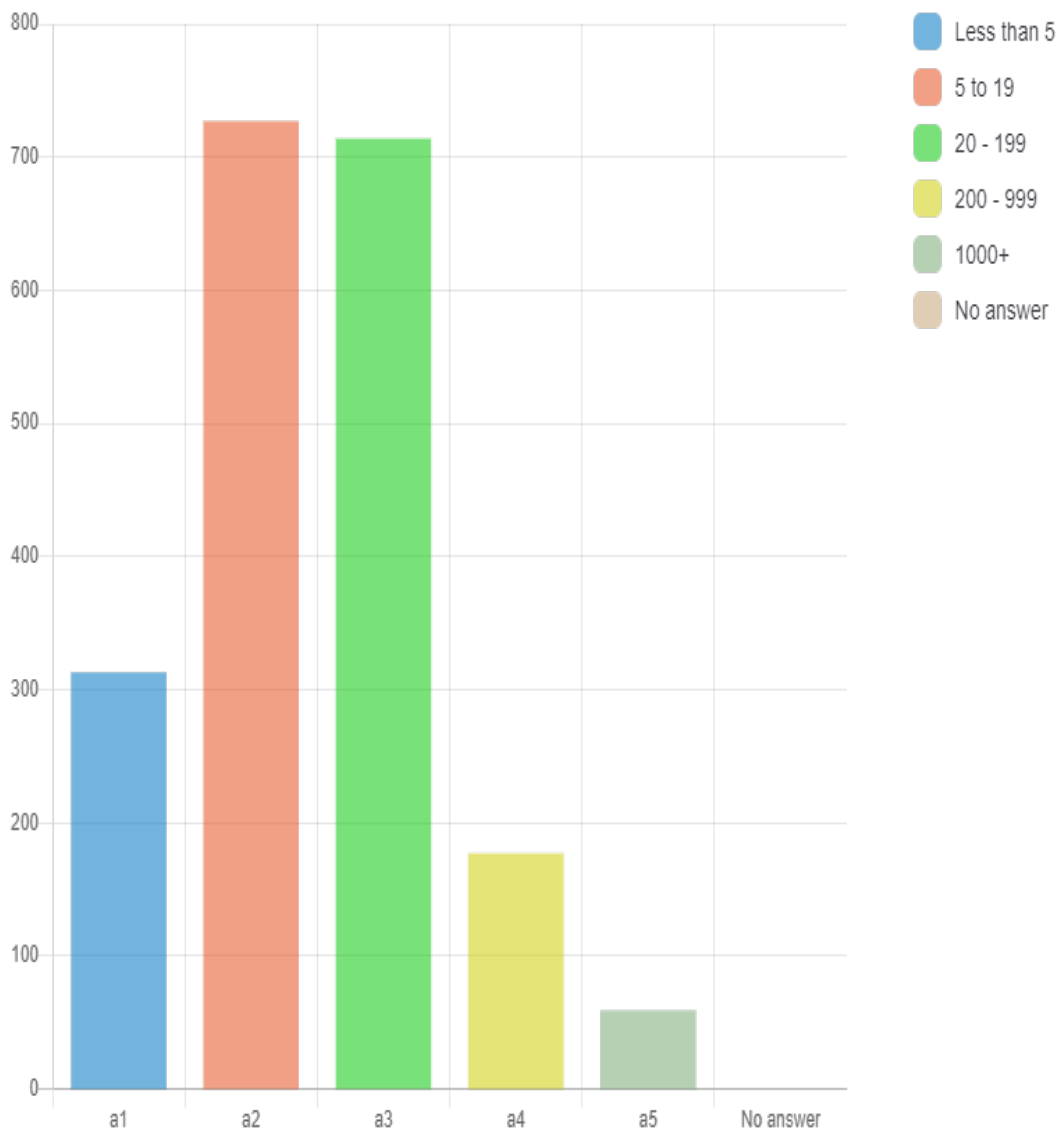


Summary for Q3			
Which modern awards cover your organisation?			
Answer	Count	Gross percentage	
	Unsure (82001)	51	4.37%
Aboriginal and Torres Strait Islander Health Workers and Practitioners Controlled Health Services Award 2020 (82002)	3	0.10%	
	Agree Crew Award 2010 (82003)	6	0.30%
	Aircraft Cabin Crew Award 2020 (82004)	0	0.00%
	Airline Operations – Ground Staff Award 2020 (82005)	4	0.20%
	Airport Employees Award 2020 (82006)	0	0.00%
	Air Pilots Award 2020 (82007)	2	0.10%
	Alpine Resorts Award 2020 (82008)	0	0.00%
	Aluminium Industry Award 2020 (82009)	2	0.10%
	Ambulance and Patient Transport Industry Award 2020 (82010)	1	0.05%
	Amusement, Sports and Recreation Award 2020 (82011)	10	0.50%
	Animal Care and Veterinary Services Award 2020 (82012)	1	0.05%
	Aquaculture Industry Award 2020 (82013)	1	0.05%
	Architects Award 2020 (82014)	10	0.50%
	Asphalt Industry Award 2020 (82015)	2	0.10%
	Banking, Finance and Insurance Award 2020 (82016)	15	0.75%
	Black Coal Mining Industry Award 2020 (82017)	5	0.25%
	Book Industry Award 2020 (82018)	0	0.00%
	Broadcasting, Recorded Entertainment and Cinema Award 2020 (82019)	6	0.30%
	Building and Construction General On-site Award 2020 (82020)	815	33.88%
	Business Equipment Award 2020 (82021)	8	0.40%
	Car Parking Award 2020 (82022)	1	0.05%
	Cement, Lime and Quarrying Award 2020 (82023)	9	0.45%
	Cemetery Industry Award 2020 (82024)	0	0.00%
	Children's Services Award 2010 (82025)	9	0.45%
	Cleaning Services Award 2020 (82026)	16	0.80%
	Clerks – Private Sector Award 2020 (82027)	420	31.16%
	Coal Export Terminals Award 2020 (82028)	1	0.05%
	Commercial Sales Award 2020 (82029)	48	3.42%
	Concrete Products Award 2020 (82030)	10	0.50%
	Contract Call Centres Award 2020 (82031)	7	0.35%
	Corrections and Detention (Private Sector) Award 2020 (82032)	0	0.00%
	Cotton Ginning Award 2020 (82033)	1	0.05%
	Credging Industry Award 2020 (82034)	0	0.00%
	City Cleaning and Laundry Industry Award 2020 (82035)	1	0.05%
	Educational Services (Post-Secondary Education) Award 2020 (82036)	12	0.60%
	Educational Services (Schools) General Staff Award 2020 (82037)	12	0.60%
	Educational Services (Teachers) Award 2020 (82038)	10	0.50%
	Electrical, Electronic and Communications Contracting Award 2020 (82039)	39	1.96%
	Electrical Final Industry Award 2020 (82040)	6	0.30%
	Fast Food Industry Award 2020 (82041)	3	0.15%
	Fire Fighting Industry Award 2020 (82042)	2	0.10%
	Fitness Industry Award 2020 (82043)	4	0.20%
	Food, Beverage and Tobacco Manufacturing Award 2020 (82044)	27	1.36%
	Funeral Industry Award 2020 (82045)	0	0.00%
	Gardening and Landscaping Services Award 2020 (82046)	12	0.60%
	Gas Industry Award 2020 (82047)	1	0.05%
	General Retail Industry Award 2020 (82048)	48	2.41%
	Graphic Arts, Printing and Publishing Award 2020 (82049)	26	1.31%
	Hair and Beauty Industry Award 2020 (82050)	4	0.20%
	Health Professionals and Support Services Award 2020 (82051)	82	1.61%
	Higher Education Industry – Academic Staff – Award 2020 (82052)	2	0.10%
	Higher Education Industry – General Staff – Award 2020 (82053)	3	0.15%
	Horse and Offshoot Tackling Award 2020 (82054)	0	0.00%
	Horticulture Award 2020 (82055)	12	0.60%
	Hospitality Industry (General) Award 2020 (82056)	16	0.80%
	Hydrocarbons Piped Gasolines Award 2020 (82057)	0	0.00%
	Hydrocarbons Industry (Upstream) Award 2020 (82058)	3	0.15%
	Jewelry and Smelting Trades Award 2020 (82059)	134	6.73%
	Journalism/Publishing Media Award 2020 (82060)	0	0.00%
	Labour Hired/ Assistance Industry Award 2020 (82061)	11	0.55%
	Legal Services Award 2020 (82062)	9	0.45%
	Live Performance Award 2020 (82063)	31	1.36%
	Local Government Industry Award 2020 (82064)	9	0.45%
	Mammepins and Mussels Award 2020 (82065)	0	0.00%
	Manufacturing and Associated Industries and Occupations Award 2020 (82066)	428	21.51%
	Marine Tourism and Charter Vessels Award 2020 (82067)	0	0.00%
	Marine Tugage Award 2020 (82068)	0	0.00%
	Maritime Drivers Or on Dock Award 2020 (82069)	1	0.05%
	Market and Retail Research Award 2020 (82070)	1	0.05%
	Meat Industry Award 2020 (82071)	4	0.20%
	Medical Practitioners Award 2020 (82072)	9	0.20%
	Mining Industry Award 2020 (82073)	6	0.30%
	Miscellaneous Award 2020 (82074)	60	3.02%
	Molten Crave Mining Award (82075)	3	0.15%
	Nursery Award 2020 (82076)	5	0.25%
	Nurses Award 2020 (82077)	16	0.78%
	Oil Refining and Manufacturing Award 2020 (82078)	2	0.10%
	Passenger Vehicle Transportation Award 2020 (82079)	2	0.10%
	Patrols Award 2020 (82080)	8	0.40%
	Pest Control Industry Award 2020 (82081)	1	0.05%
	Pharmaceutical Industry Award 2020 (82082)	4	0.20%
	Pharmacy Industry Award 2020 (82083)	1	0.05%
	Plumbing and Fire Sprinklers Award 2020 (82084)	107	5.36%
	Pots, Mats and Enclosed Water Vessels Award 2020 (82085)	1	0.05%
	Port Authorities Award 2020 (82086)	3	0.15%
	Poultry Processing Award 2020 (82087)	1	0.05%
	Prepared Concrete Award 2020 (82088)	1	0.05%
	Professional Cleaning Industry (International) Award 2020 (82089)	0	0.00%
	Professional Cleaning Industry (Domestic) Award 2020 (82090)	0	0.00%
	Professional Employees Award 2020 (82091)	139	6.90%
	Racing Clubs Events Award 2020 (82092)	1	0.05%
	Racing Industry Ground Maintenance Award 2020 (82093)	0	0.00%
	Rail Industry Award 2020 (82094)	7	0.35%
	Rail Estate Industry Award 2020 (82095)	6	0.30%
	Registered and Licensed Clubs Award 2020 (82096)	2	0.10%
	Restaurant Industry Award 2020 (82097)	6	0.30%
	Road Transport and Distribution Award 2020 (82098)	84	3.21%
	Road Transport Long Distance Operations Award 2020 (82099)	8	0.40%
	Salt Industry Award 2020 (82100)	0	0.00%
	Seafish Processing Award 2020 (82101)	3	0.15%
	Seafishing Industry Award 2020 (82102)	0	0.00%
	Security Services Industry Award 2020 (82103)	3	0.15%
	Silviculture Award 2020 (82104)	0	0.00%
	Social, Community, Home Care and Disability Services Industry Award 2010 (82105)	60	3.02%
	Sporting Organisations Award 2020 (82106)	2	0.10%
	State Government Agencies Award 2020 (82107)	3	0.15%
	Stevedoring Industry Award 2020 (82108)	0	0.00%
	Storage Services and Warehouse Award 2020 (82109)	16	1.77%
	Sugar Industry Award 2020 (82110)	1	0.05%
	Supported Employment Services Award 2020 (82111)	5	0.25%
	Surveying Award 2020 (82112)	3	0.15%
	Telecommunications Services Award 2020 (82113)	4	0.20%
	Textile, Clothing, Footwear and Associated Industries Award 2020 (82114)	12	0.60%
	Timber Industry Award 2020 (82115)	122	6.12%
	Transport (Cash in Transit) Award 2020 (82116)	6	0.30%
	Travelling Shows Award 2020 (82117)	0	0.00%
	Vehicle Repair, Services and Detail Award 2020 (82118)	268	10.32%
	Waste Management Award 2020 (82119)	8	0.40%
	Water Industry Award 2020 (82120)	1	0.05%
	Wine Industry Award 2020 (82121)	4	0.20%
	Wool Storage, Sampling and Testing Award 2020 (82122)	2	0.10%
	Total(gross)	2229	100.00%
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Summary for Q4

How many people does your organisation employ in Australia?

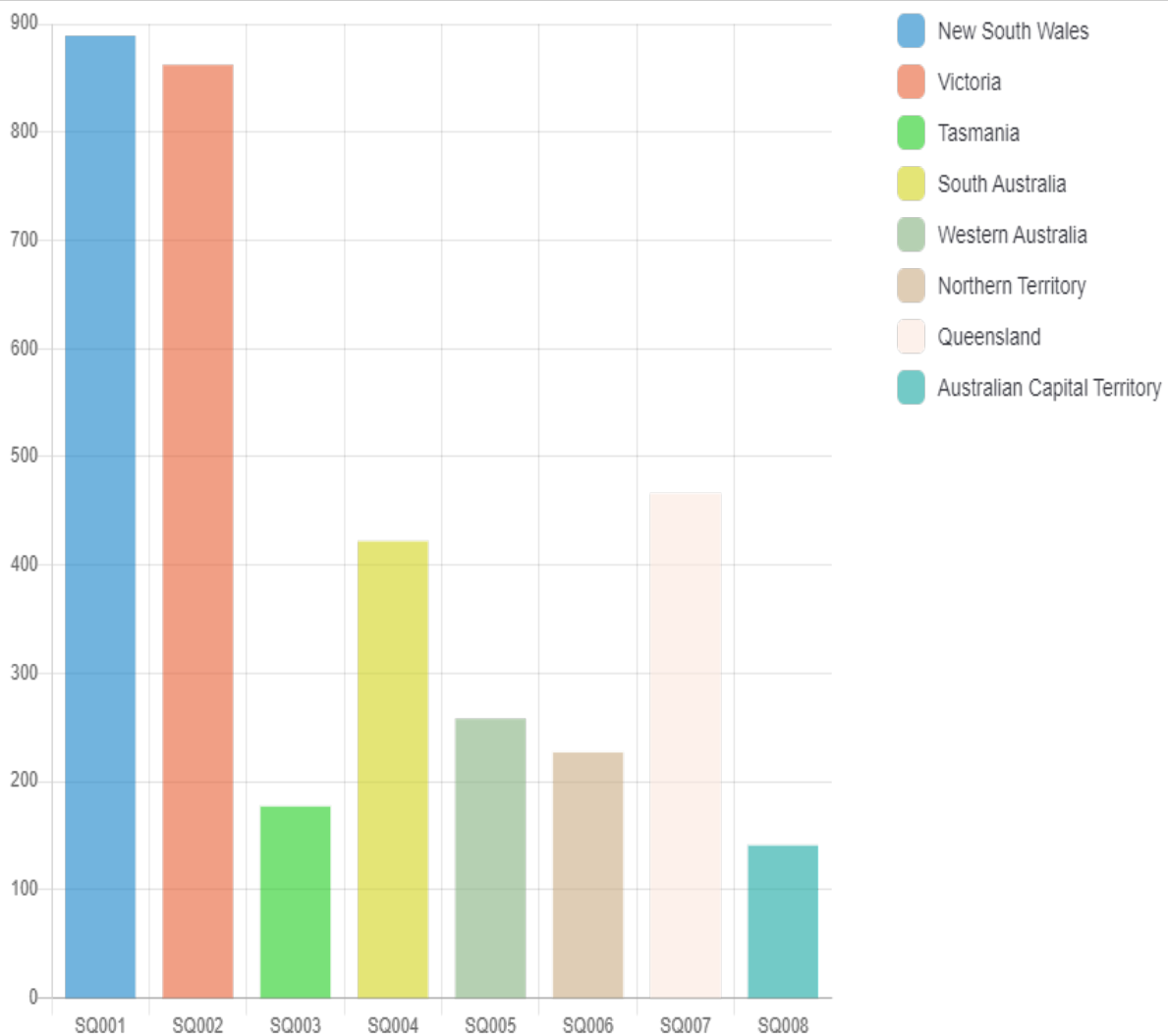
Answer	Count	Gross percentage
Less than 5 (a1)	313	15.73%
5 to 19 (a2)	727	36.53%
20 - 199 (a3)	714	35.88%
200 - 999 (a4)	177	8.89%
1000+ (a5)	59	2.96%
No answer	0	0.00%
Total(gross)	1990	100.00%



Summary for Q5

Which states and territories does your organisation operate in? Choose all that apply.

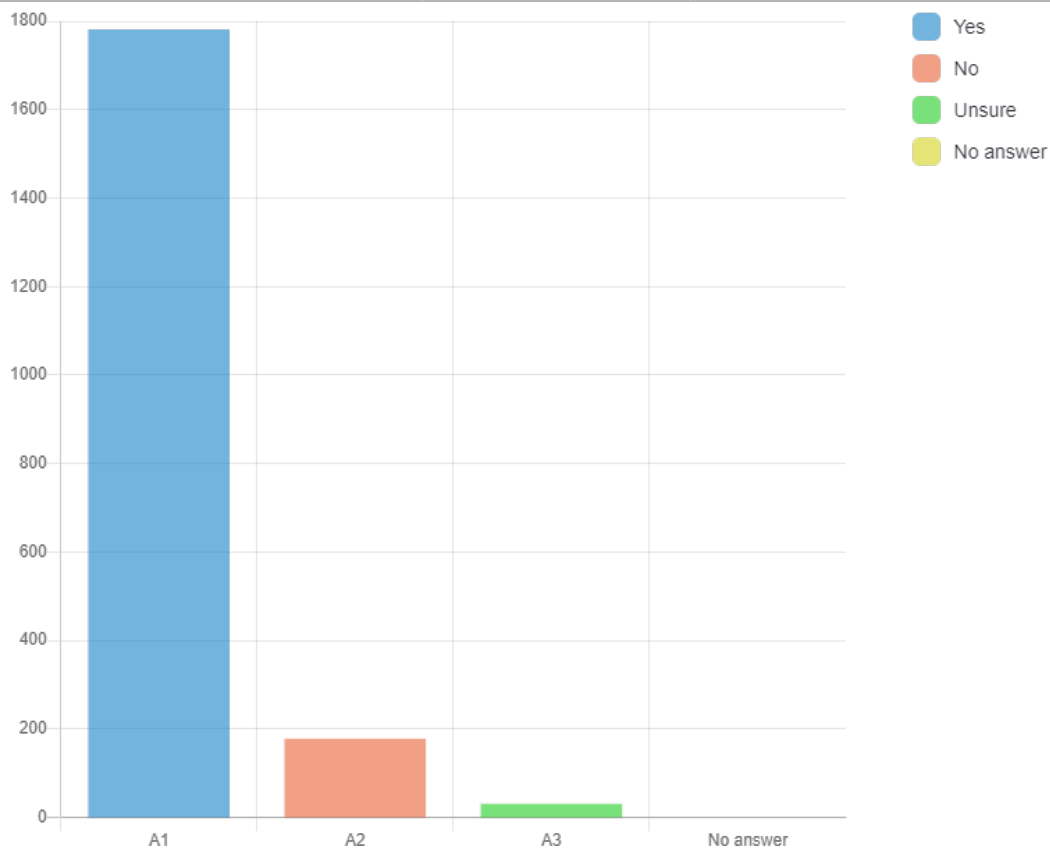
Answer	Count	Gross percentage
New South Wales (SQ001)	889	44.67%
Victoria (SQ002)	862	43.32%
Tasmania (SQ003)	177	8.89%
South Australia (SQ004)	422	21.21%
Western Australia (SQ005)	258	12.96%
Northern Territory (SQ006)	227	11.41%
Queensland (SQ007)	466	23.42%
Australian Capital Territory (SQ008)	141	7.09%
Total(gross)	3442	100.00%



Summary for Q6

Since 1 January 2010, has your organisation shut down all or part of its operations at any time?

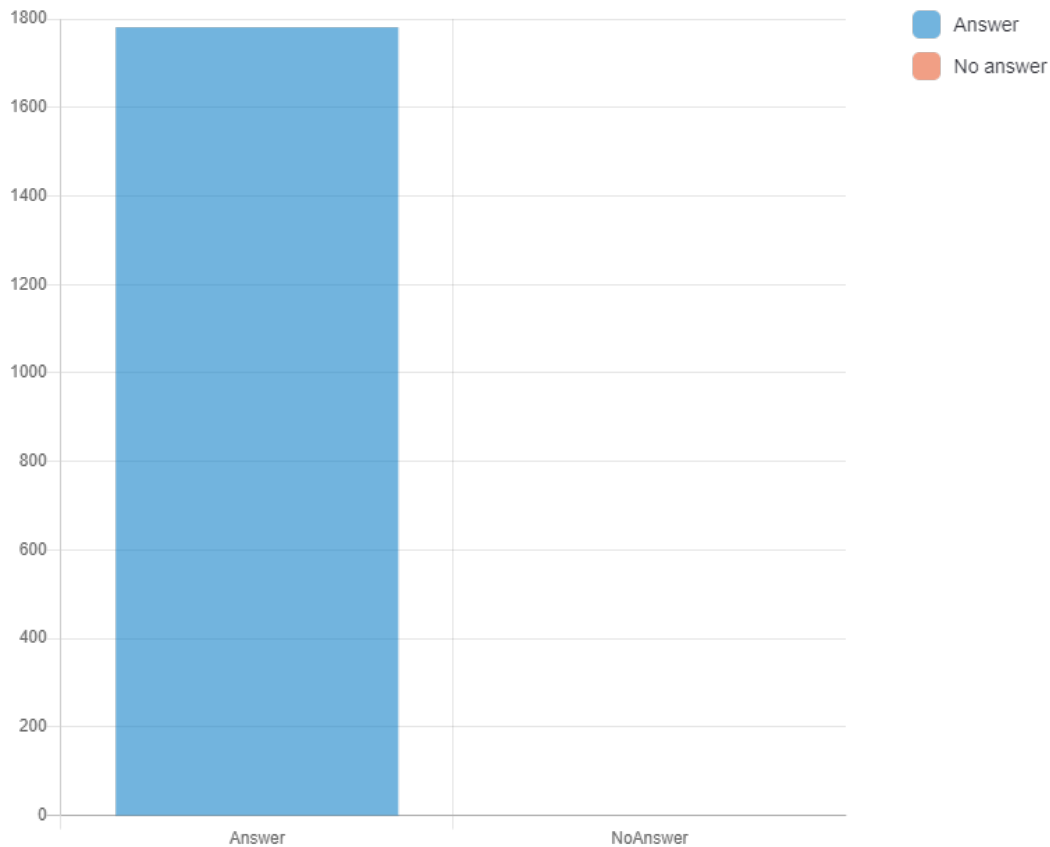
Answer	Count	Gross percentage
Yes (A1)	1781	89.50%
No (A2)	178	8.94%
Unsure (A3)	31	1.56%
No answer	0	0.00%
Total(gross)	1990	100.00%



Summary for Q7

On how many occasions since 1 January 2010 has your organisation shut down all or part of its operations?

Answer	Count	Gross percentage
Answer Browse	1781	100.00%
No answer	0	0.00%
Total(gross)	1781	100.00%



Summary for Q8

Why has your organisation implemented shut downs?

Answer	Count	Gross percentage
To enable full time and part-time employees to take annual leave (SQ001)	967	54.30%
To coincide with an annual or seasonal slow down or cessation of trade (SQ002)	1214	68.16%
To enable the routine maintenance of plant and / or equipment (SQ003)	268	15.05%
To reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented (SQ004)	504	28.30%
To coincide with shut downs implemented by other related organisations, such as clients or suppliers (SQ005)	969	54.41%
Unsure (SQ006)	12	0.67%
Other (SQ007)	185	10.39%
Total(gross)	4119	100.00%

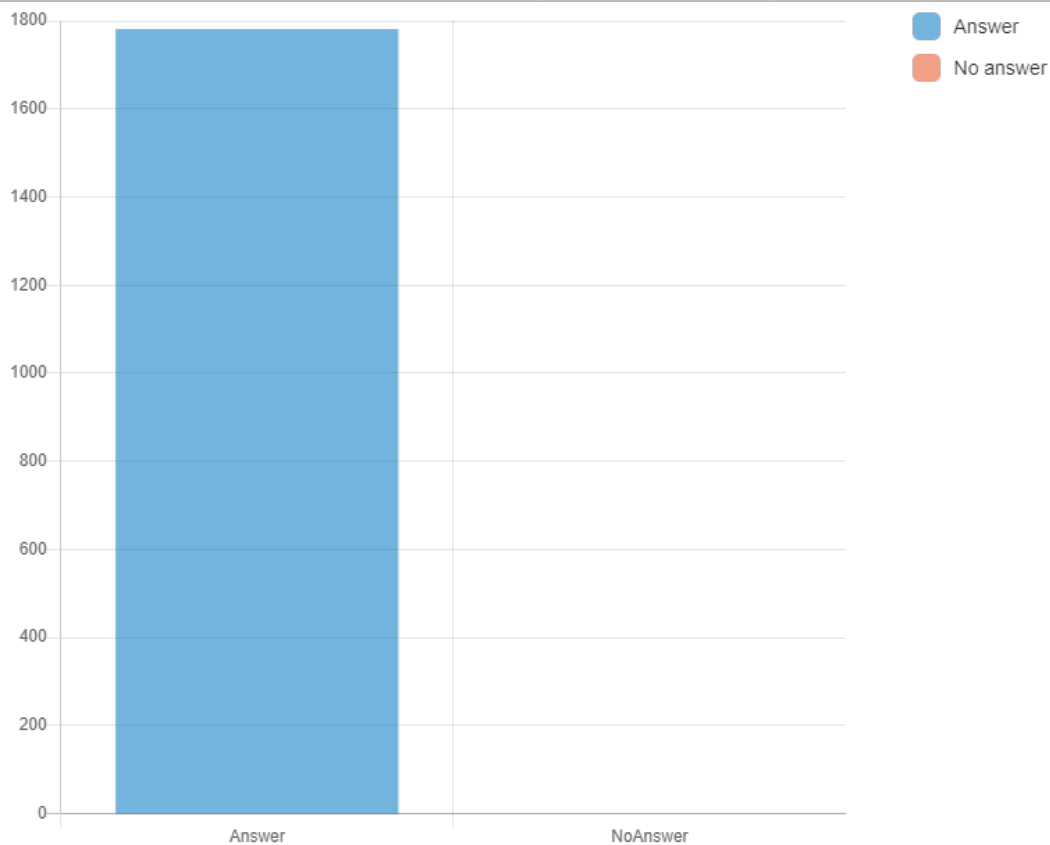
- ☒ To enable full time and part-time employees to take annual leave
- ☒ To coincide with an annual or seasonal slow down or cessation of trade
- ☒ To enable the routine maintenance of plant and / or equipment
- ☒ To reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented
- ☒ To coincide with shut downs implemented by other related organisations, such as clients or suppliers
- ☐ Unsure
- ☐ Other

Summary for Q7



On how many occasions since 1 January 2010 has your organisation shut down all or part of its operations?

Answer	Count	Gross percentage
Answer Browse	1781	100.00%
No answer	0	0.00%
Total(gross)	1781	100.00%



Summary for Q9

Thinking about the shut downs implemented by your organisation; has there ever been a situation in which any of the affected employees did not have enough annual leave to cover the whole shut down?

Answer	Count	Gross percentage
Yes (A1)	1400	78.61%
No (A2)	298	16.73%
Unsure (A3)	83	4.66%
No answer	0	0.00%
Total(gross)	1781	100.00%

-  Yes
-  No
-  Unsure
-  No answer

Summary for Q10

What approach did your organisation take where employees had not accrued enough annual leave to cover all or some of the shut down?

Answer	Count	Gross percentage
They performed work (SQ001)	299	21.36%
They were required to take unpaid leave (SQ002)	1119	79.93%
They were allowed to take annual leave in advance (SQ003)	683	48.79%
They were permitted or required to take another form of paid leave (SQ004)	154	11.00%
They were paid; but they were not required to work or access a form of leave (SQ005)	37	2.64%
Unsure (SQ006)	11	0.79%
Other (SQ007)	72	5.14%
Total(gross)	2375	100.00%

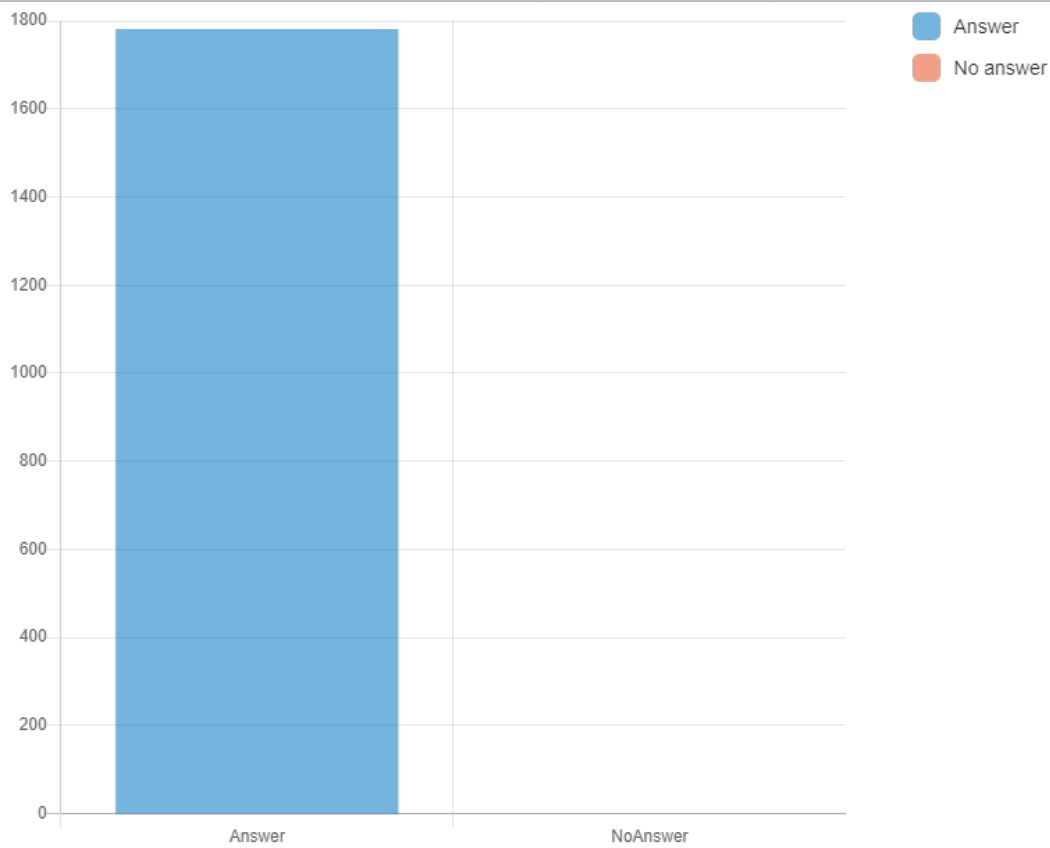
- ☐ They performed work
- ☐ They were required to take unpaid leave
- ☐ They were allowed to take annual leave in advance
- ☐ They were permitted or required to take another form of paid leave
- ☐ They were paid; but they were not required to work or access a form of leave
- ☐ Unsure
- ☐ Other

Summary for Q7



On how many occasions since 1 January 2010 has your organisation shut down all or part of its operations?

Answer	Count	Gross percentage
Answer Browse	1781	100.00%
No answer	0	0.00%
Total(gross)	1781	100.00%



4 Year Review of Modern Awards - Annual Shutdown Survey

PAGE TITLE

The Fair Work Commission is currently reviewing annual leave award provisions regarding shut downs as part of its 4 yearly review of modern awards. The Commission is considering redrafting and amending such provisions in the context of these proceedings.

Your responses will assist Local Government NSW and Australian Business Lawyers prepare its submissions to the Commission about the potential changes to shut down clauses.

You should only complete the survey once. The survey will close on **9 November 2022**.

Question Title

* 1. How many people does your Council employ?

- ☐ 20-199
- ☐ 200-999
- ☐ 1000-1499
- ☐ 1500-1999
- ☐ 2000+

Question Title

* 2. Does a registered enterprise agreement apply to your Council's award-covered employees? Choose the most appropriate answer:

- ☐ Yes
- ☐ No

If yes to question 2, proceed to question 3.

If no or unsure to question 2, please proceed to question 4.

The remainder of this survey relates to 'shut downs' or 'close downs'. A 'shut down' is a period during which a council closes all or some of its operations; and it consequently directs affected full-time and part-time employees to take annual leave (unless they have not accrued enough annual leave).

Question Title

* 3. Does the registered enterprise agreement provide for 'shutdowns' or 'close downs'? If yes to question 3, please name the enterprise agreement.

☐ Yes

☐ No

Insert enterprise agreement

Question Title

* 4. Since 1 January 2010, has your organisation shut down all or part of its operations at any time?

☐ Yes

☐ No

Question Title

* 5. On how many occasions since 1 January 2010 has your organisation shut down all or part of its operations?

Question Title

* 6. Why has your organisation implemented shut downs? Choose all options that apply.

☐ To enable full time and part-time employees to take annual leave

☐ To coincide with an annual or seasonal slow down or cessation of trade

☐ To enable the routine maintenance of plant and / or equipment

☐ To reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented

☐ To coincide with shut downs implemented by other related organisations, such as clients or suppliers

☐ Unsure

☐ Other (please specify)

Question Title

* 7. Thinking about the shutdowns implemented by your council; has there ever been a situation in which any of the affected employees did not have enough annual leave to cover the whole shut down or close-down?

☐ Yes

☐ No

Question Title

* 8. What approach did your council take where employees had not accrued enough annual leave to cover all or some of the shut down? Choose all options that apply:

☐ They performed meaningful duties within the limits of their skill, competence or training for the whole or part of the close-down.

☐ They were directed to take leave without pay.

☐ By agreement they were permitted to take annual leave in advance.

☐ They were permitted or directed to take another form of paid leave.

☐ They were paid; but they were not required to work or access a form of leave.

Other (please specify)

Question Title

* 9. Since 2012, how many employees on average have been directed to take leave without pay during annual 'shut downs' or 'close down' periods? If not applicable, please insert 'N/A.'

Question Title

* 10. In instances where a direction to take leave without pay was made – was the leave regarded as service for the purposes of the accrual of long service leave, sick leave or annual leave?

☐ Yes

☐ No

Question Title

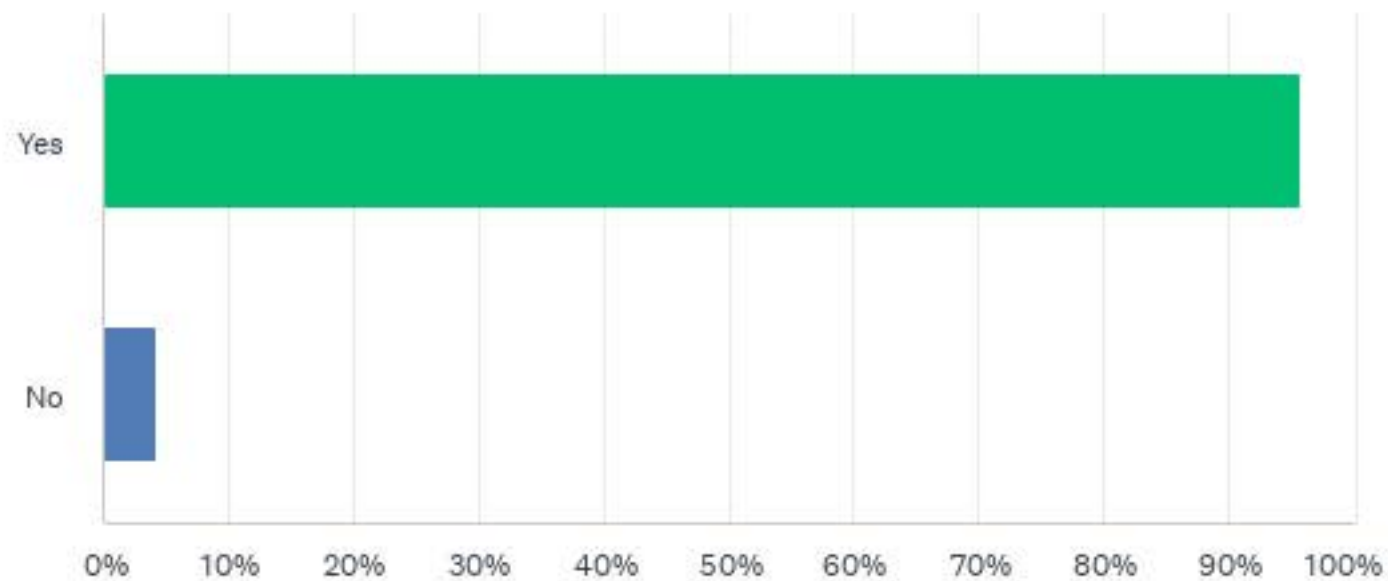
* 11. Has an employee who has taken annual leave in advance left employment prior to the accrual of the entitlement actually accruing?

☐ Yes

☐ No

—

Q4 Since 1 January 2010, has your organisation shut down all or part of its operations at any time?



Q5 On how many occasions since 1 January 2010 has your organisation shut down all or part of its operations?

Answered: 47 Skipped: 0

#	RESPONSES	DATE
1	Each Year	11/7/2022 2:42 PM
2	Annually - Council closes down between Christmas and new year	11/7/2022 9:46 AM
3	Yearly annual close down between Christmas and New Year Twice during COVID	11/4/2022 11:50 AM
4	12	11/4/2022 8:50 AM
5	8	11/4/2022 8:17 AM
6	12	11/3/2022 4:03 PM
7	Christmas Shutdowns - Annually from 2010 to 2020 (we stayed open over Christmas last year and will do so again this year). Union Picnic Day - we shutdown for union picnic day and have done so annually	11/3/2022 2:29 PM
8	Annual for the ordinary days of work which falls between Christmas Day and New Years Day for Administration Staff only	11/3/2022 1:27 PM
9	10	11/3/2022 11:13 AM
10	Each year between Christmas and new year	11/3/2022 11:03 AM
11	Each Christmas period	11/3/2022 9:26 AM
12	15 consecutive years	11/3/2022 9:10 AM
13	12	11/3/2022 9:09 AM
14	Christmas Break every year and some services during COVID. Have also shut or unable to run some services during 2020-2022 due to lack of staff	11/3/2022 8:53 AM
15	We shut down over the Christmas and New Years' period. Essential services remain open including waste, our pools, and we have on-call arrangements in place for Water and Sewer and Urban Maintenance services	11/3/2022 8:53 AM
16	11	11/3/2022 8:30 AM
17	11 times (annually)	11/3/2022 8:23 AM
18	Since 2016 amalgamation 6	11/3/2022 8:11 AM
19	Not sure. At least for the last 3 years	11/3/2022 7:25 AM
20	11	11/3/2022 6:08 AM
21	12	11/3/2022 6:02 AM
22	Each year at Christmas	11/3/2022 12:49 AM
23	11	11/2/2022 11:00 PM
24	12	11/2/2022 10:27 PM
25	21 occasions (3 days between xmas-new year + 2 week Childcare closure)	11/2/2022 9:42 PM
26	Approximately 12 yrs.	11/2/2022 8:43 PM
27	each year from last working day before Christmas Eve through to the first Monday after New Year's day	11/2/2022 5:23 PM

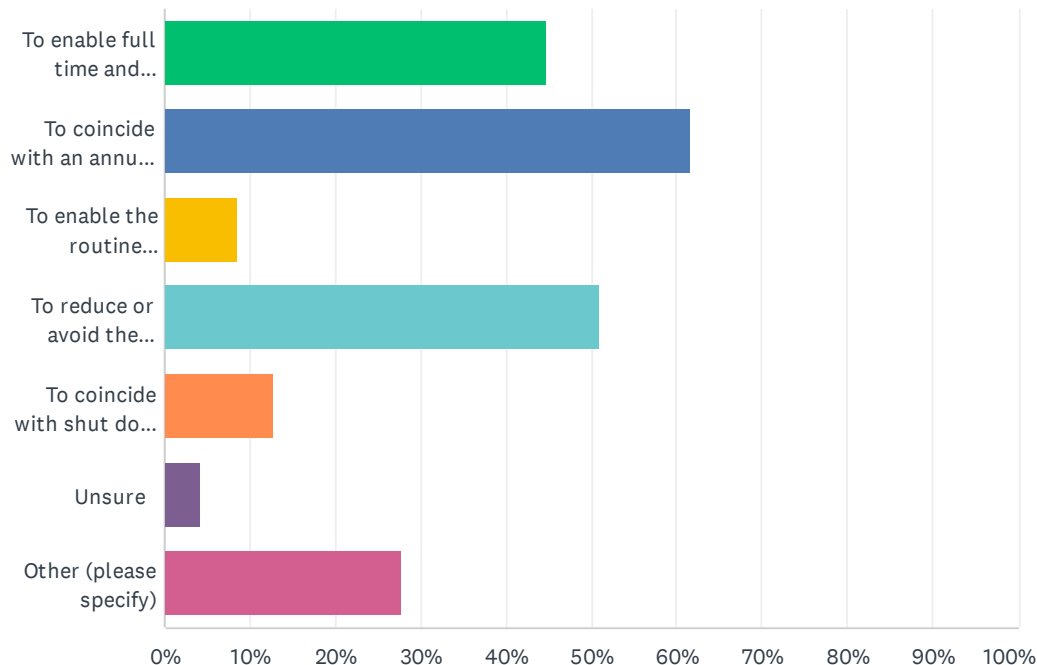
4 Yearly Review of Modern Awards - Annual Shutdown Survey

SurveyMonkey

28	Annually over Christmas, some essential community services will continue during the shut down period.	11/2/2022 5:18 PM
29	12 times - Christmas periods	11/2/2022 5:04 PM
30	Once each year since 1 January 2010. And more than once for some years as a result of the COVID-19 pandemic.	11/2/2022 4:47 PM
31	eleven 11	11/2/2022 4:46 PM
32	Every year	11/2/2022 4:41 PM
33	Council has an annual shutdown period over the Christmas break, generally the shutdown for indoor and administration is 1 week and for outdoor operations up to 4 weeks maximum.	11/2/2022 4:34 PM
34	Nil	11/2/2022 4:34 PM
35	6	11/2/2022 4:33 PM
36	12	11/2/2022 4:28 PM
37	0	11/2/2022 4:28 PM
38	5	11/2/2022 4:21 PM
39	Approx. 12	11/2/2022 4:17 PM
40	Annual basis shutdown - Christmas to New year. During Covid-19 - Following Public Health orders - lockdowns Non-essential services - shutdowns for union picnic days - Annual Emergency situations - floods, bush fires not sure of how often since 2010 this has happened.	11/2/2022 4:14 PM
41	10	11/2/2022 4:12 PM
42	Annually	11/2/2022 4:11 PM
43	2	11/2/2022 4:11 PM
44	5	11/2/2022 4:04 PM
45	13	11/2/2022 4:03 PM
46	22 (Xmas shutdown - Day-care centre only)	11/2/2022 4:00 PM
47	each year	11/2/2022 3:58 PM

Q6 Why has your council implemented shut downs? Choose all options that apply.

Answered: 47 Skipped: 0

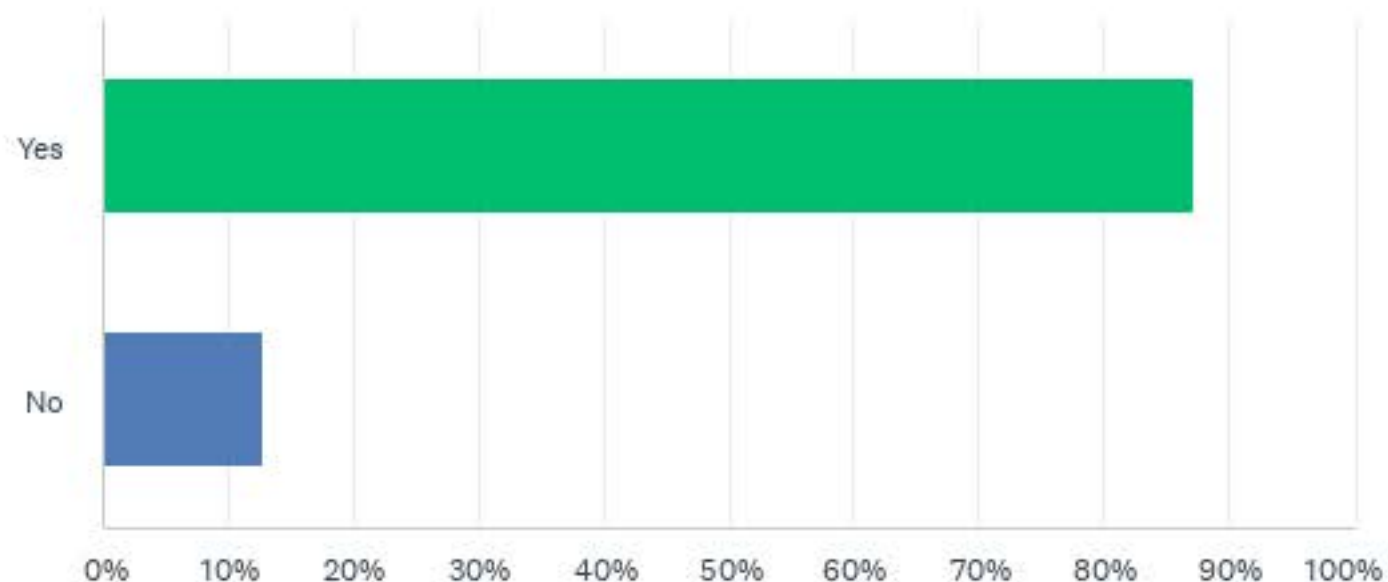


ANSWER CHOICES		RESPONSES	
To enable full time and part-time employees to take annual leave		44.68%	21
To coincide with an annual or seasonal slow down or cessation of trade		61.70%	29
To enable the routine maintenance of plant and / or equipment		8.51%	4
To reduce or avoid the disruption that would be caused by multiple public holidays if a shut down was not implemented		51.06%	24
To coincide with shut downs implemented by other related organisations, such as clients or suppliers		12.77%	6
Unsure		4.26%	2
Other (please specify)		27.66%	13
Total Respondents: 47			

#	OTHER (PLEASE SPECIFY)	DATE
1	GM appreciation for unpaid overtime during year.	11/4/2022 11:50 AM
2	manage leave liability	11/3/2022 9:10 AM
3	Christmas/New year closure period	11/3/2022 9:09 AM
4	To reduce leave liability	11/2/2022 8:43 PM
5	Availability of staff / resources during the period	11/2/2022 5:23 PM
6	COVID-19	11/2/2022 4:47 PM

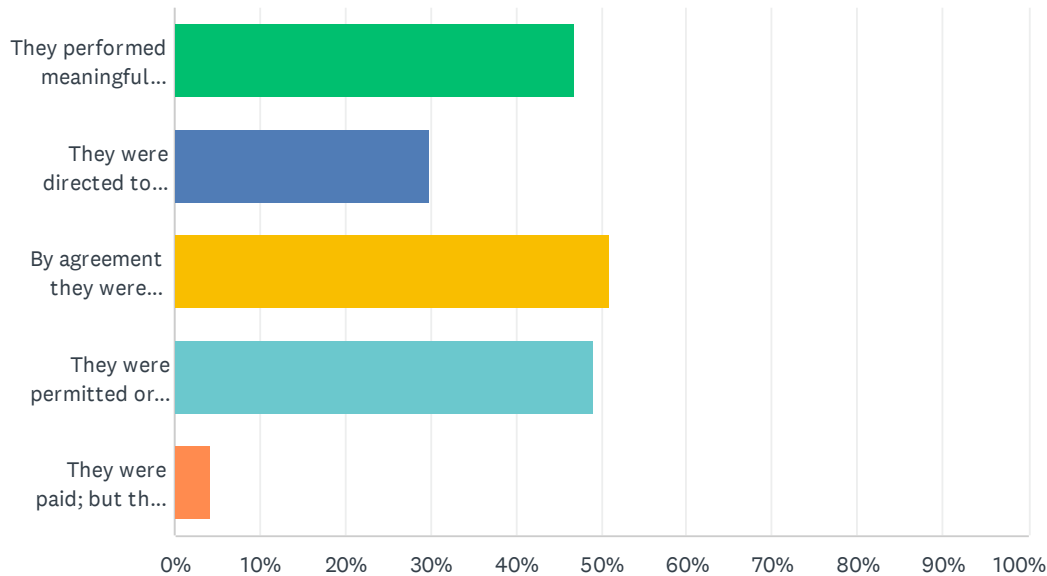
7	To assist in reducing excess leave balances	11/2/2022 4:41 PM
8	N/A	11/2/2022 4:34 PM
9	Between Christmas and New Year shutdown	11/2/2022 4:28 PM
10	na	11/2/2022 4:28 PM
11	Follow public health orders, emergency situations i.e bushfires or floods	11/2/2022 4:14 PM
12	Covid Closure	11/2/2022 4:11 PM
13	Christmas close-down only	11/2/2022 4:04 PM

Q7 Thinking about the shutdowns implemented by your council; has there ever been a situation in which any of the affected employees did not have enough annual leave to cover the whole shut down or close-down?



Q8 What approach did your council take where employees had not accrued enough annual leave to cover all or some of the shut down or close-down? Choose all options that apply:

Answered: 47 Skipped: 0



ANSWER CHOICES	RESPONSES	
They performed meaningful duties within the limits of their skill, competence or training for the whole or part of the close-down.	46.81%	22
They were directed to take leave without pay.	29.79%	14
By agreement they were permitted to take annual leave in advance.	51.06%	24
They were permitted or directed to take another form of paid leave.	48.94%	23
They were paid; but they were not required to work or access a form of leave.	4.26%	2
Total Respondents: 47		

#	OTHER (PLEASE SPECIFY)	DATE
1	accrued RDO	11/3/2022 4:03 PM
2	We usually give the employee a choice of the selected two options	11/3/2022 2:29 PM
3	Flex Time is encouraged to be accrued throughout the year and "banked" for this purpose	11/3/2022 1:27 PM
4	Bonus day and RDO	11/3/2022 11:03 AM
5	Put through as TIL and work it back, not LWOP	11/3/2022 9:26 AM
6	built up Flex time and TIL	11/3/2022 9:10 AM
7	Able to accrue TIL	11/3/2022 8:53 AM
8	Often a combination of the above	11/3/2022 8:30 AM

9	Allowed to accrue TIL in advance to cover stand down	11/3/2022 8:23 AM
10	Staff are able to use 2 flex days during this time	11/3/2022 7:25 AM
11	Applied Special Leave (i.e. COVID-19)	11/2/2022 4:47 PM
12	they used accrued time accumulated by agreement in advance	11/2/2022 4:46 PM
13	We don't allow anyone to take leave in advance.	11/2/2022 4:41 PM
14	Unaware of situations however outdoor staff would be required to work on skeleton crews and indoor staff would manage leave within flex balances or in some circumstances staff could purchase leave in advance.	11/2/2022 4:34 PM
15	N/A	11/2/2022 4:34 PM
16	My answer is NA but the survey is forcing me to tick a box.	11/2/2022 4:28 PM
17	Moved to skeleton crew(s) or LWOP if that couldn't be accomodated.	11/2/2022 4:17 PM
18	Allowed to bank 3 RDOs or take TIL during close-down days	11/2/2022 4:04 PM

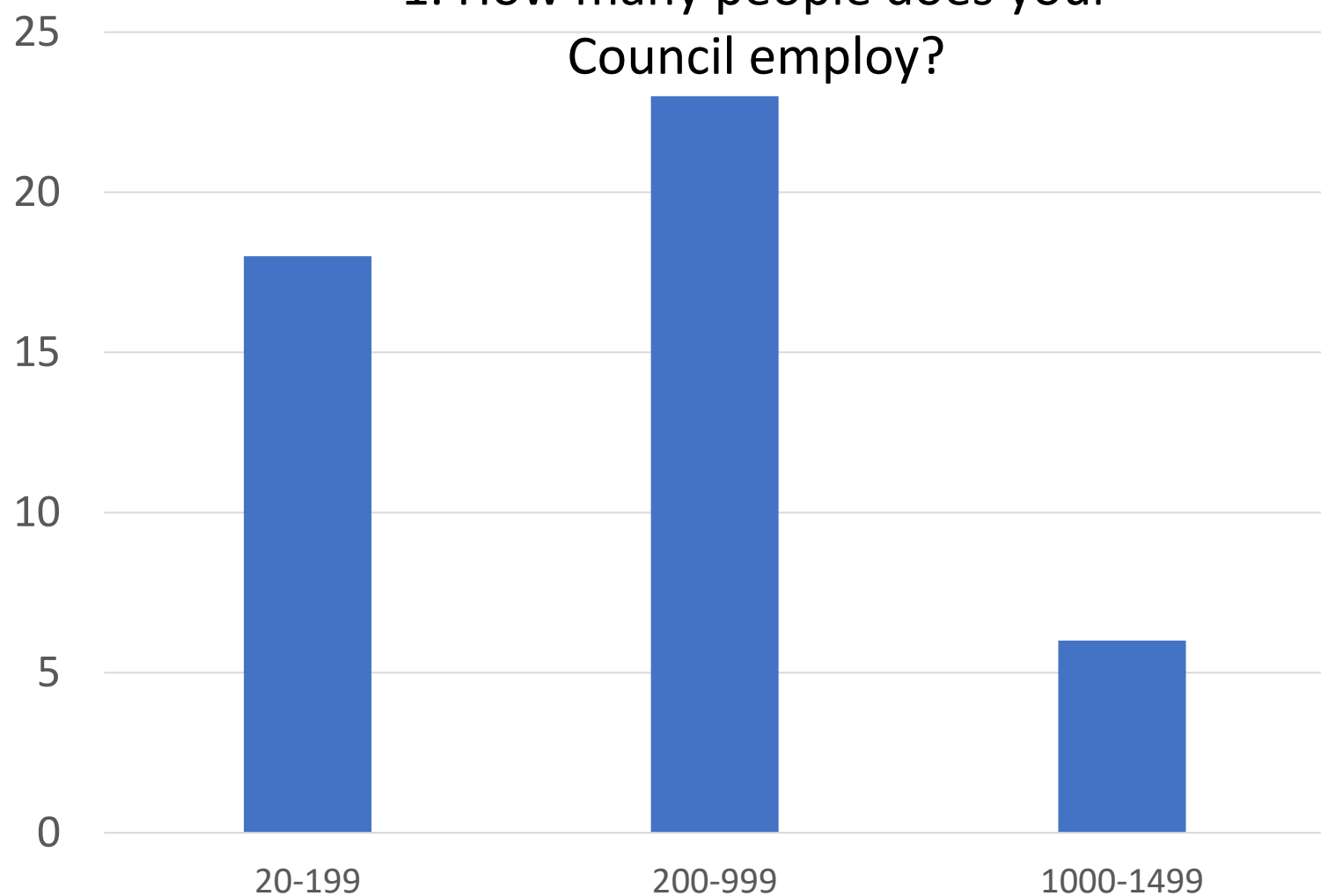
Schedule 5

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1. How many people does your Council employ?

20-199	200-999	1000-1499
18	23	6

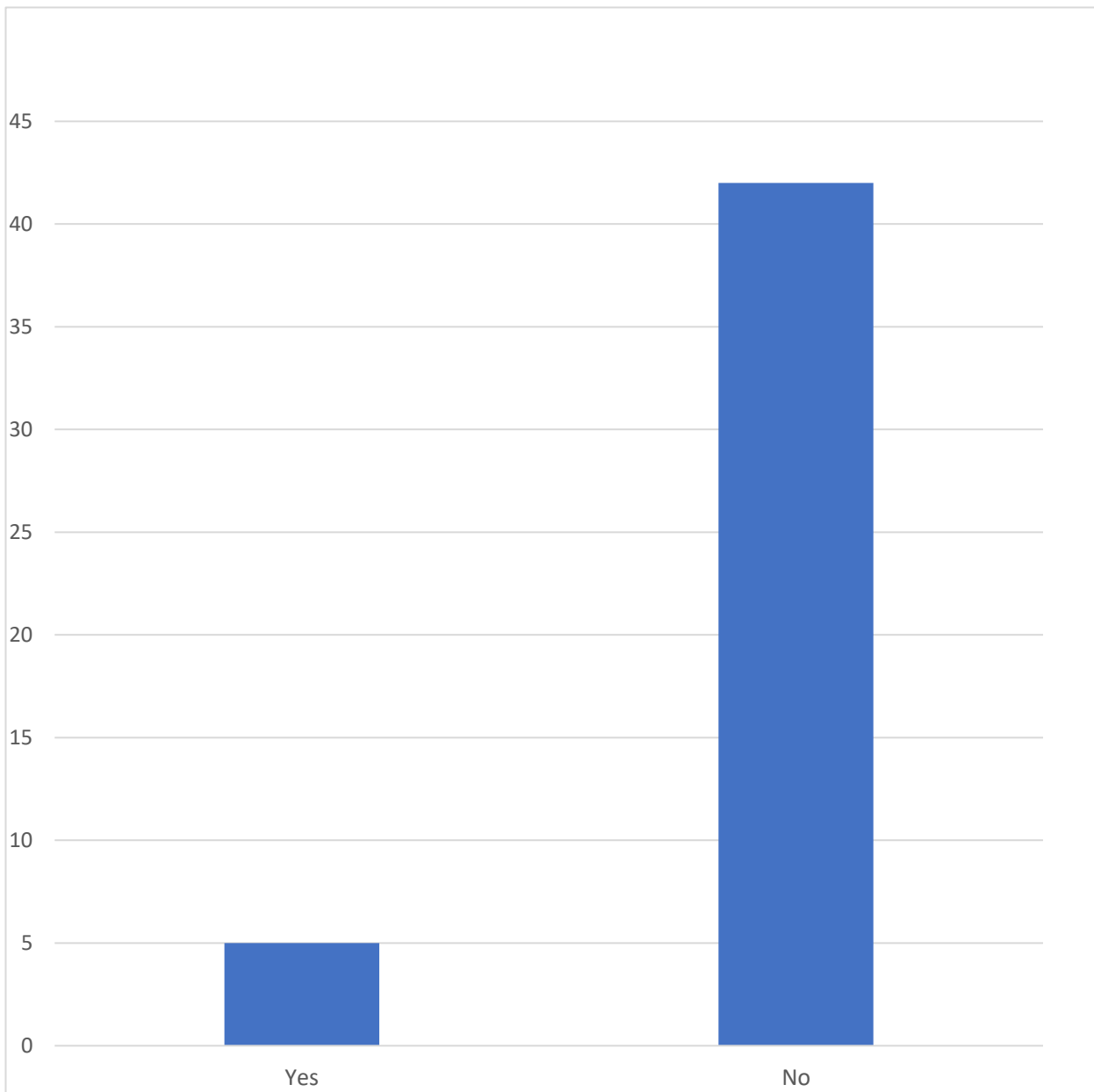
1. How many people does your Council employ?



2. Does a registered enterprise agreement apply to your Council's award-covered employees?

Yes	No
5	42

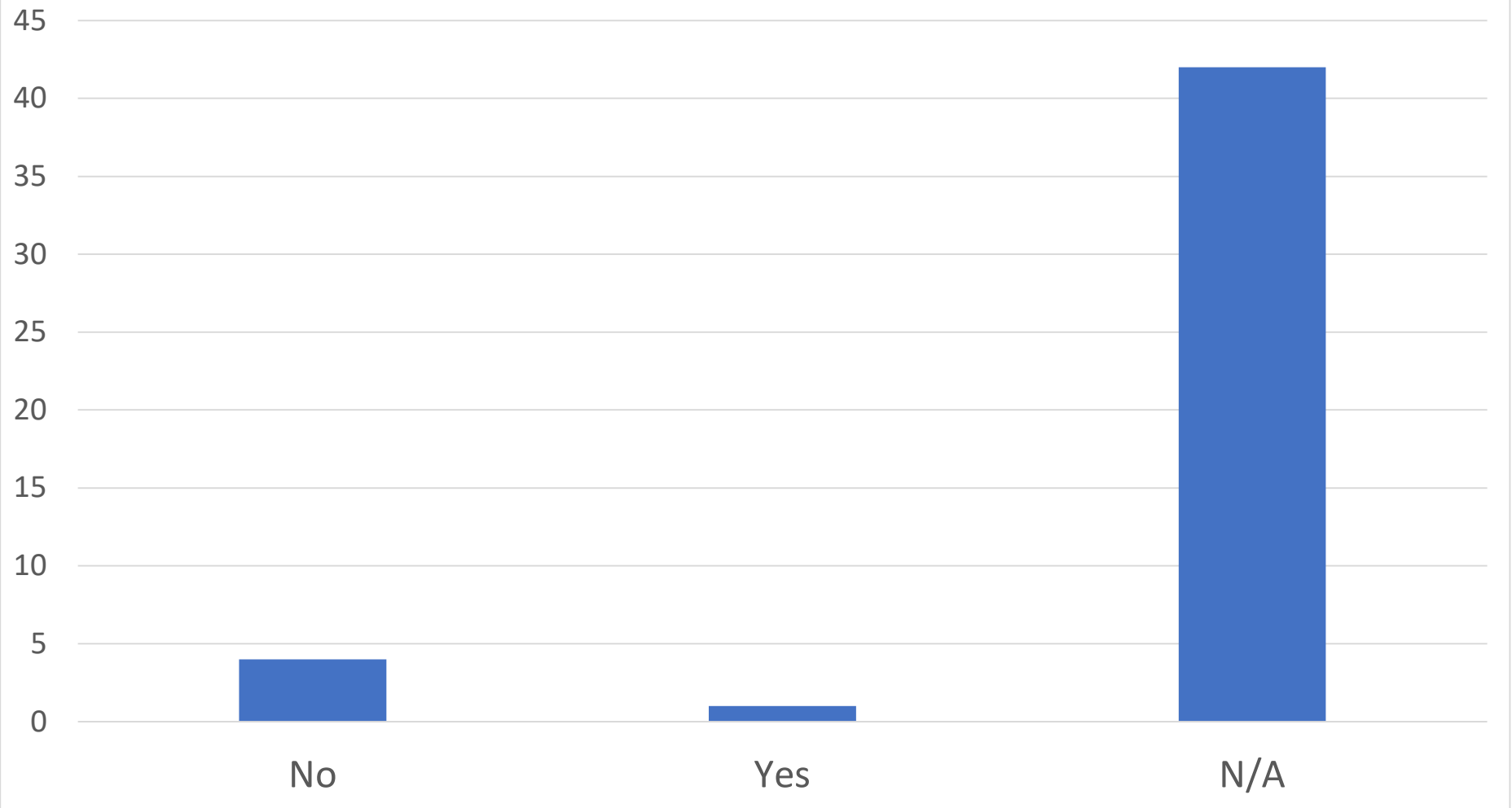
2. Does a registered enterprise agreement apply to your Council's award-covered employees?



3. Does the registered enterprise agreement provide for 'shutdowns' or 'close downs'?

No	Yes	N/A	
4	1	42	

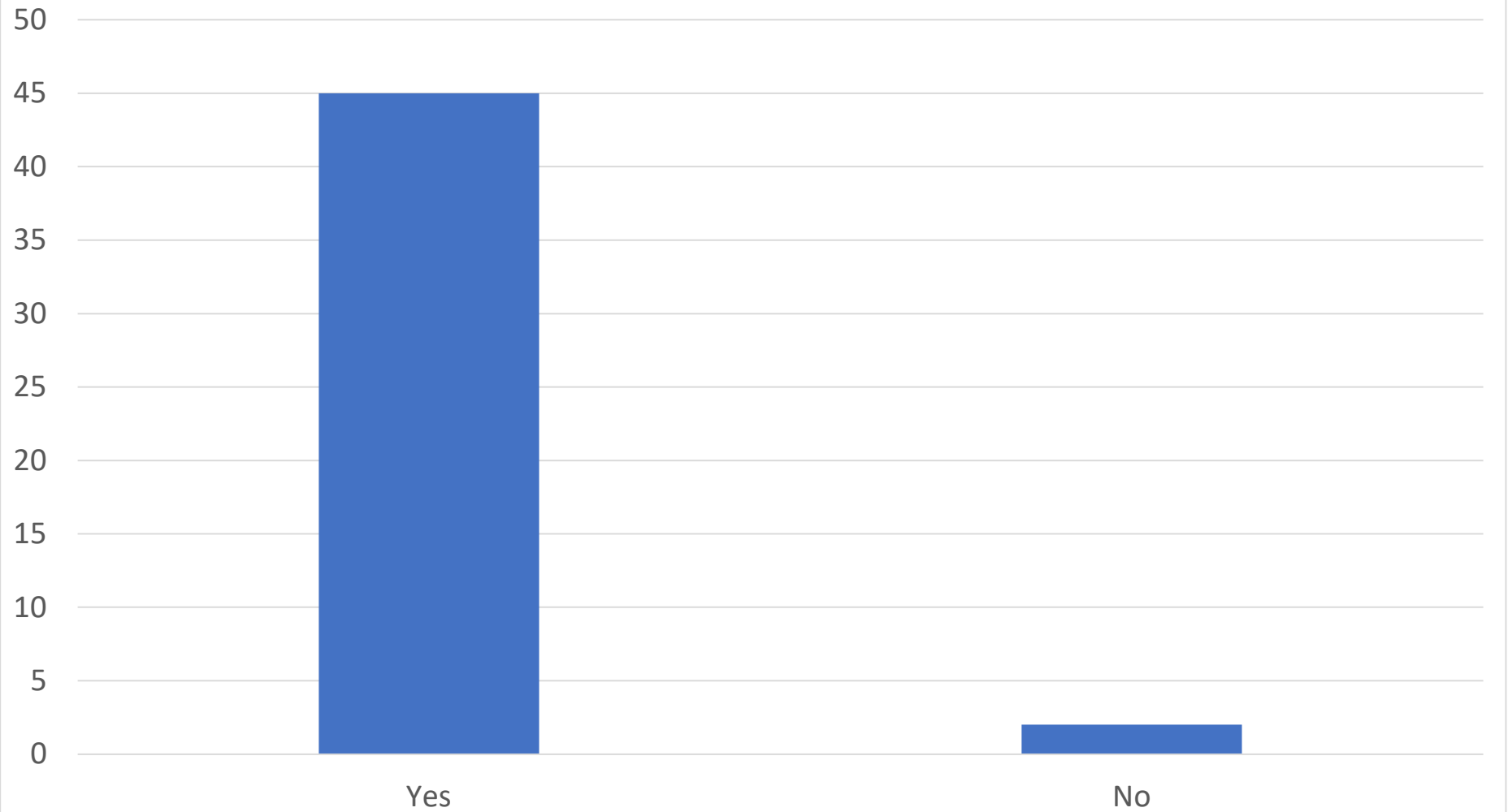
3. Does the registered enterprise agreement provide for 'shutdowns' or 'close downs'?



4. Since 1 January 2010, has your organisation shut down all or part of its operations at any time?

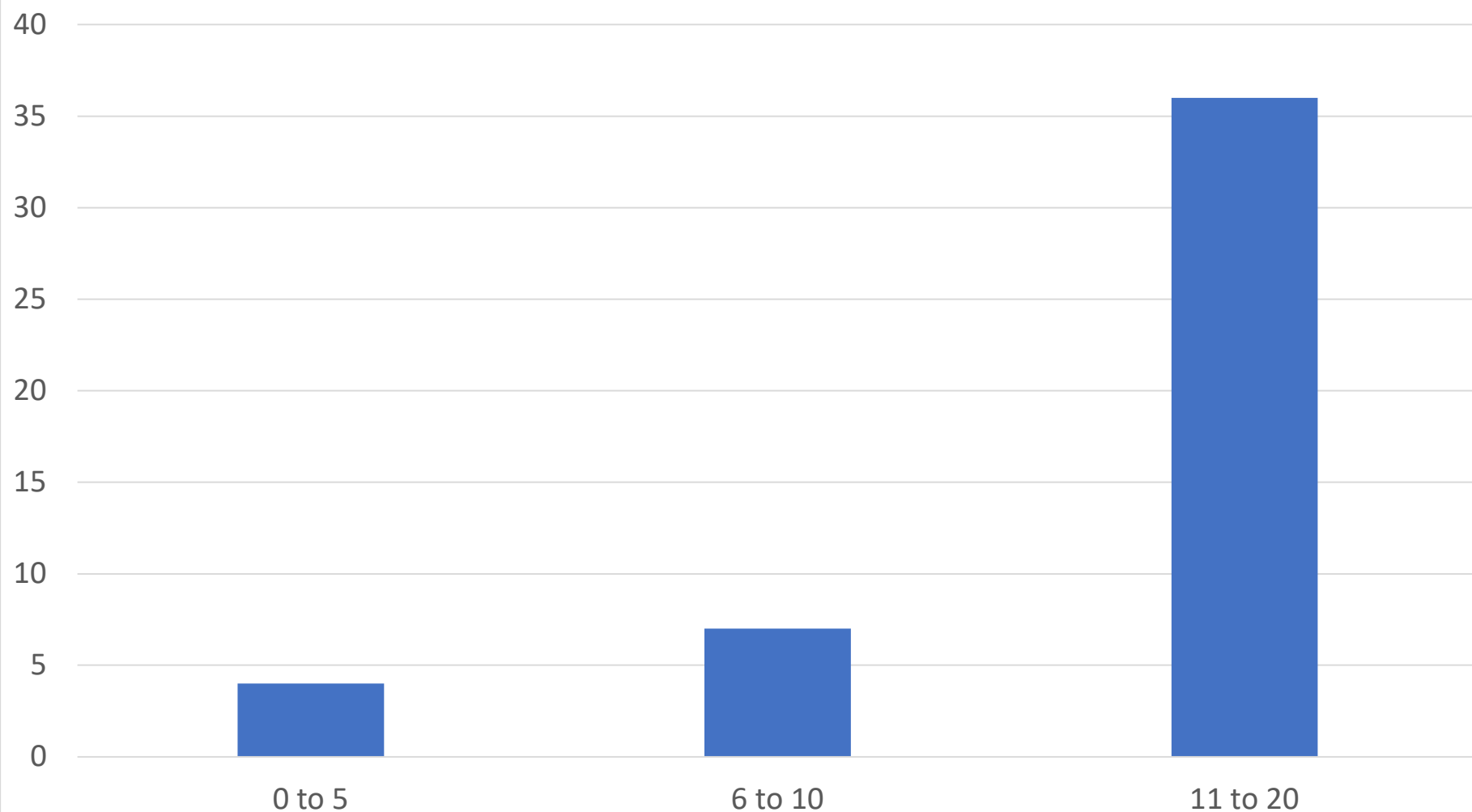
Yes	No
45	2

4. Since 1 January 2010, has your organisation shut down all or part of its operations at any time?



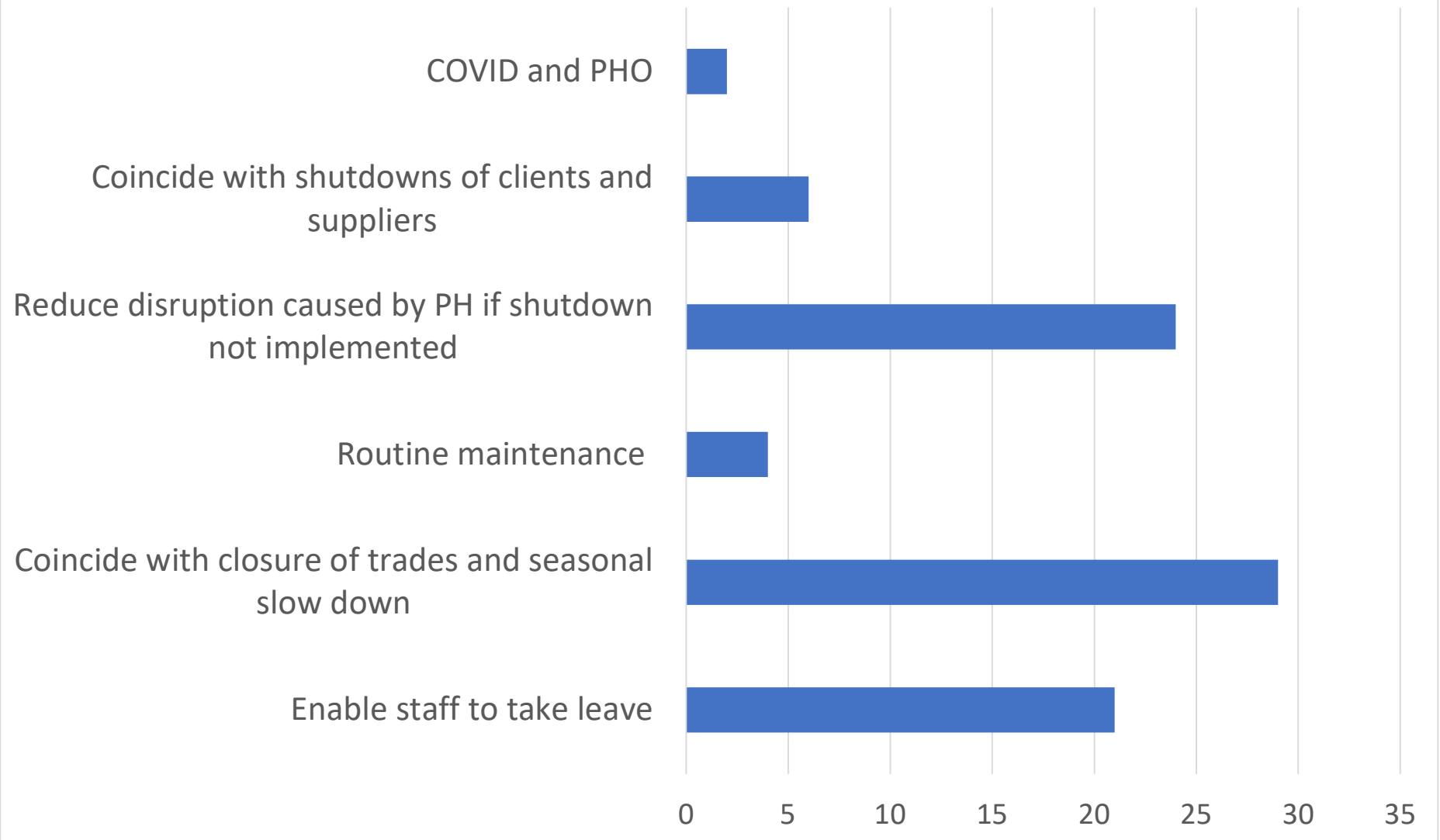
On how many occasions since 1 January 2010 has your operation shut down all or part of its operations?	0 to 5	6 to 10	11 to 20
	4	7	36

5. On how many occasions since 1 January 2010 has your operation shut down all or part of its operations?



6. Why has your council implemented shut downs?	Enable staff to take leave	Coincide with closure of trades and seasonal slow down	Routine maintenance	Reduce disruption caused by PH if shutdown not implemented	Coincide with shutdowns of clients and suppliers	COVID and PHO
	21	29	4	24	6	2

6. Why has your council implemented shut downs?



7. Has there ever been a situation in which any of the affected employees did not have enough annual leave to cover the whole shut down or close-down?

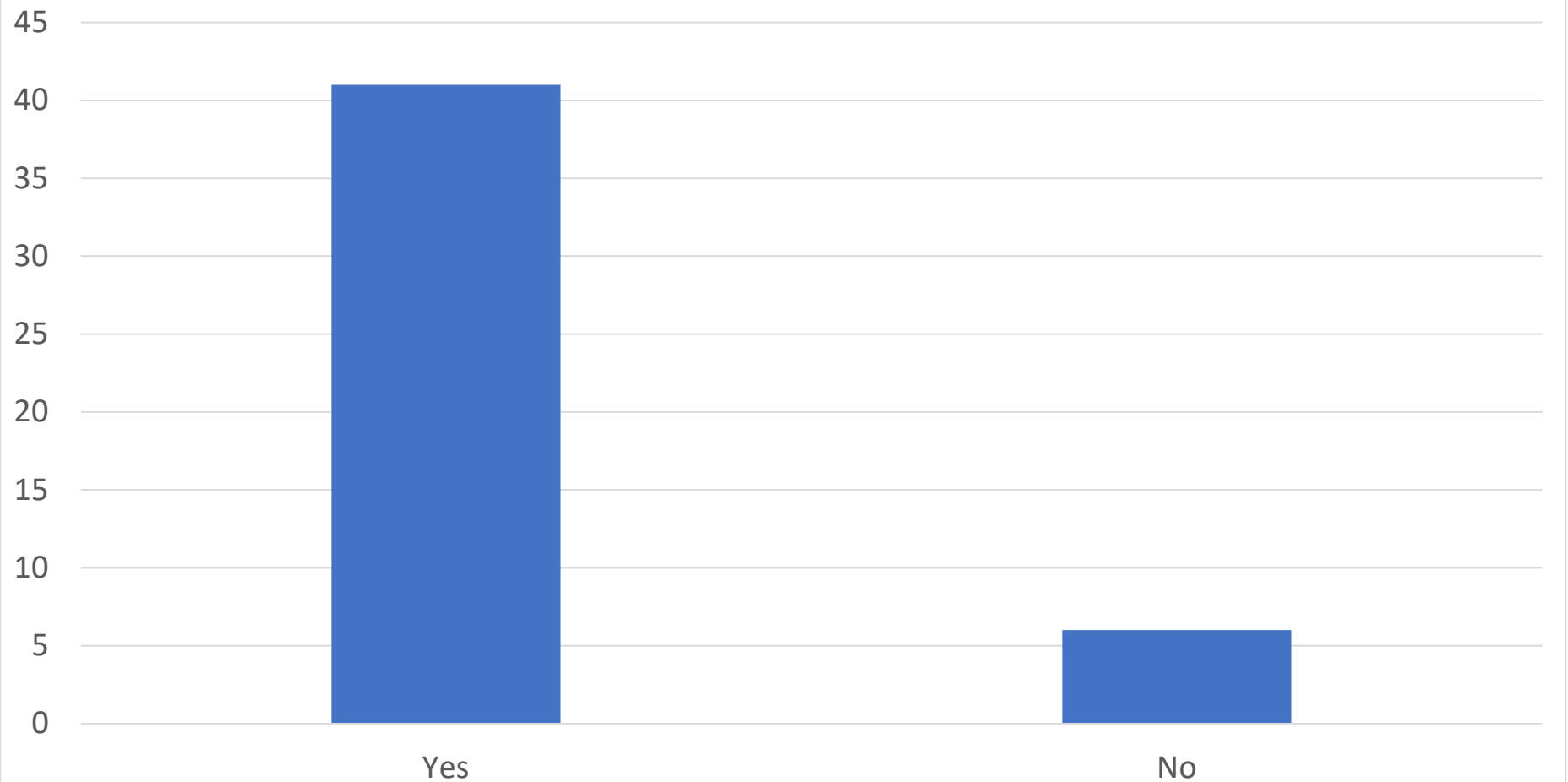
Yes

No

41

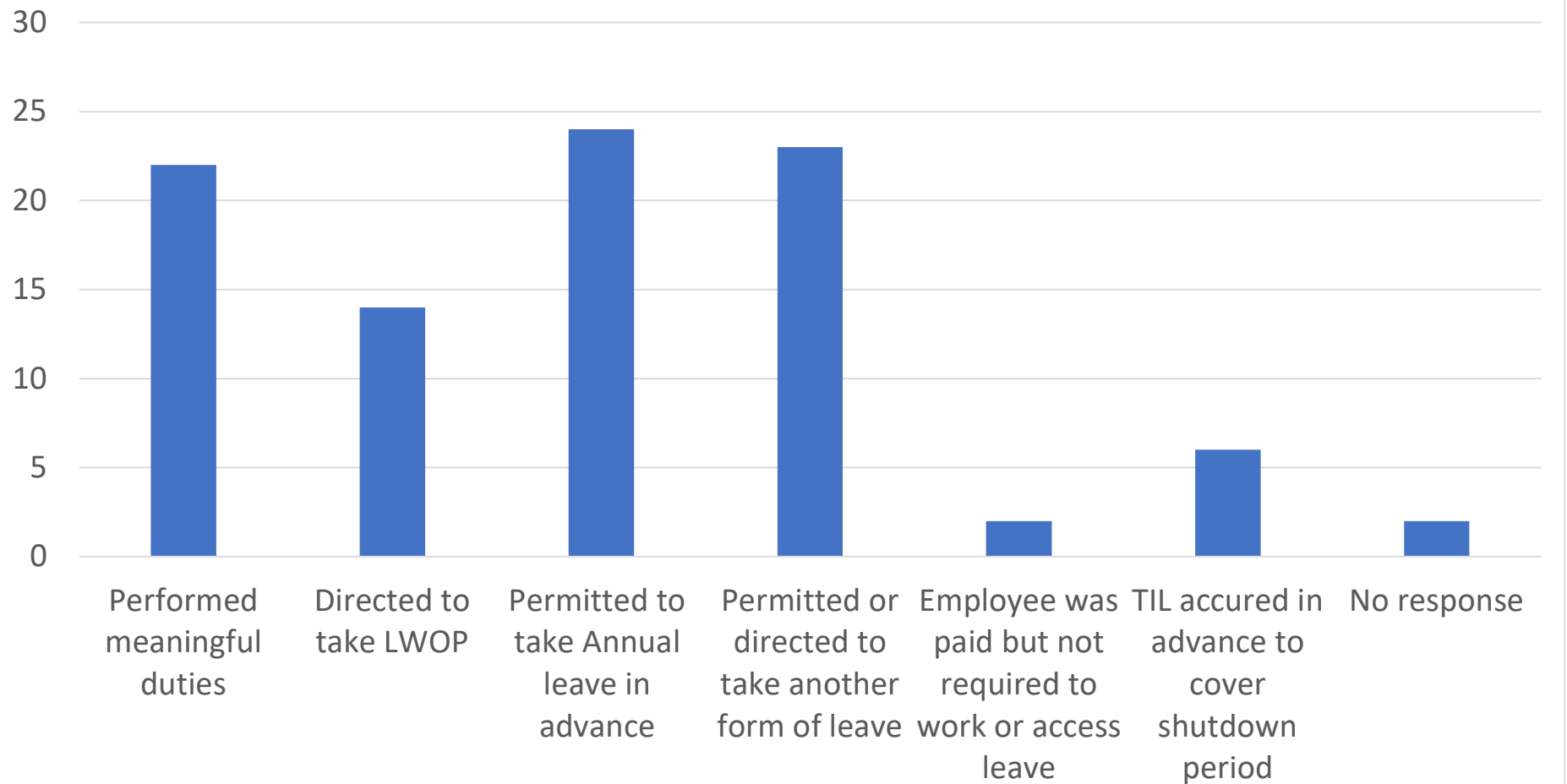
6

7. Has there ever been a situation in which any of the affected employees did not have enough annual leave to cover the whole shut down or close-down?



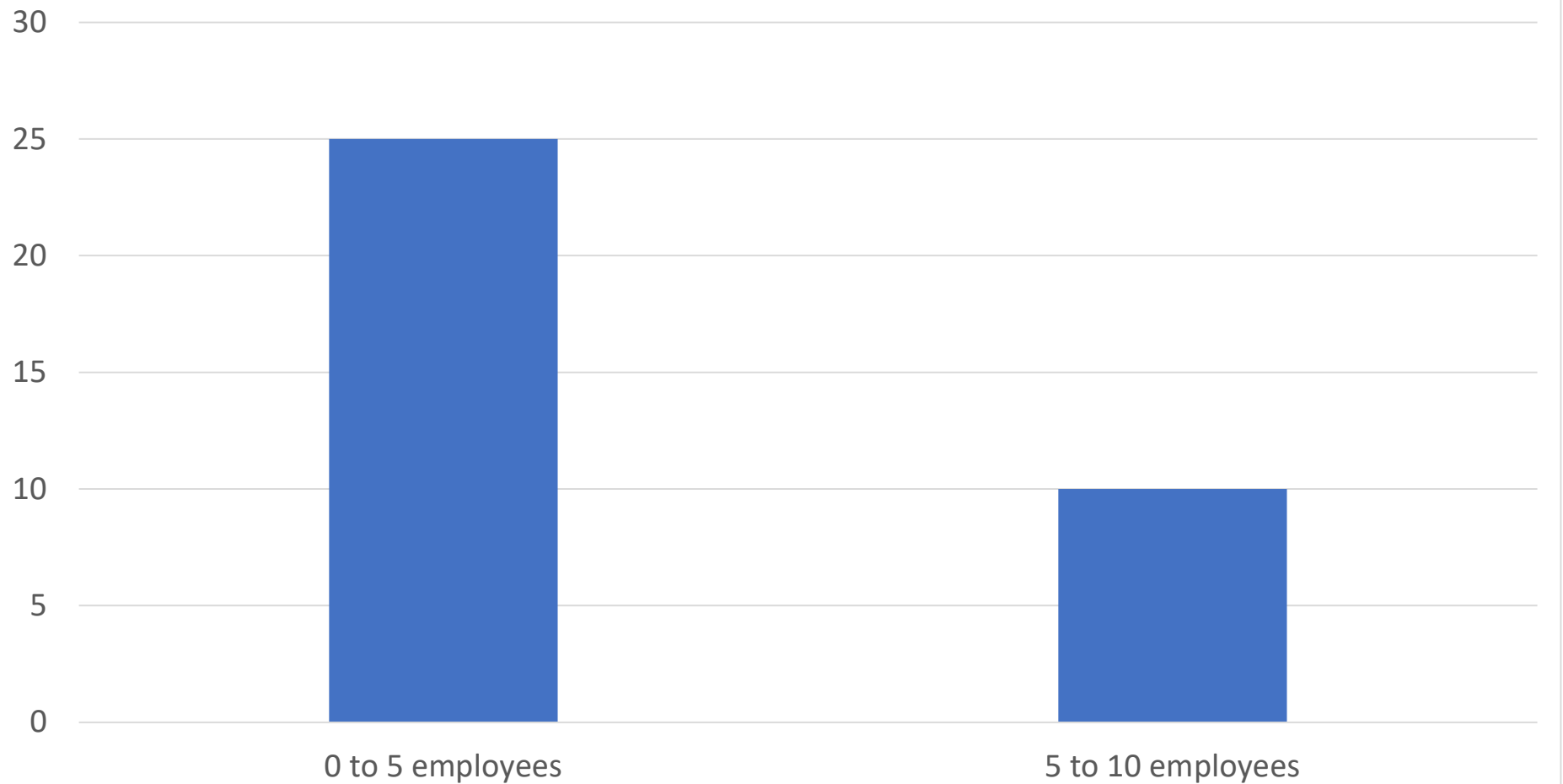
8. What approach did your council take where employees had not accrued enough annual leave to cover all or some of the shut down or close-down?	Performed meaningful duties	Directed to take LWOP	Permitted to take Annual leave in advance	Permitted or directed to take another form of leave	Employee was paid but not required to work or access leave	TIL accrued in advance to cover shutdown period	No response
	22		14	24	23	2	6
							2

8. What approach did your council take where employees had not accrued enough annual leave to cover all or some of the shut down or close-down?



9. Since 2012, how many employees on average have been directed to take leave without pay during annual 'shut downs' or 'close down' periods?	5 to 10	
	0 to 5 employees	employees
	25	10

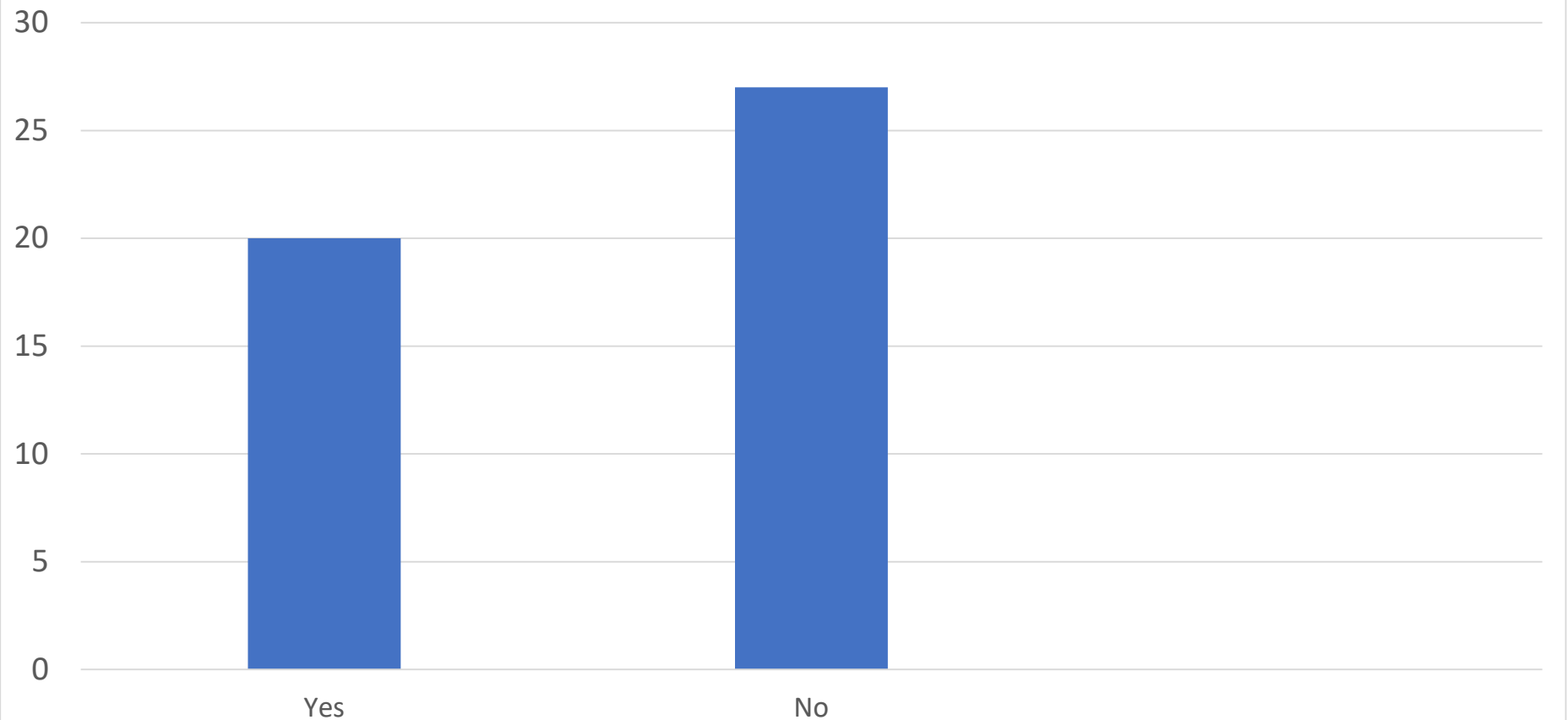
9. Since 2012, how many employees on average have been directed to take leave without pay during annual 'shut downs' or 'close down' periods?



10. In instances where a direction to take leave without pay was made – was the leave regarded as service for the purposes of the accrual of long service leave, sick leave or annual leave?

Yes	No
20	27

10. In instances where a direction to take leave without pay was made – was the leave regarded as service for the purposes of the accrual of long service leave, sick leave or annual leave?



11. Has an employee who has taken annual leave in advance left employment prior to the accrual of the entitlement actually accruing?	Yes	No	
	9	38	

11. Has an employee who has taken annual leave in advance left employment prior to the accrual of the entitlement actually accruing?

