Collective Bargaining and Industrial Action Reform

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The Centre for Employment and Labour Relations Law's policy brief series aims to distil academic research in the fields of employment, labour relations and equality law into policy analysis and clear recommendations, drawing on cutting-edge research by leading scholars at the CELRL and other academic institutions around Australia, as well as from our wider international networks. The initial policy briefs are based on some of the presentations to a symposium with the theme 'Labour Law Reform under the Albanese Government', hosted by the Centre on 12 August 2022, and timed to coincide with the Albanese Government's 'Jobs and Skills Summit' held on 1-2 September 2022. However, the series is intended to be an ongoing forum for clear and concise discussion of current policy issues as they emerge. The series is edited by CELRL Directors Associate Professor Tess Hardy and Professor John Howe.

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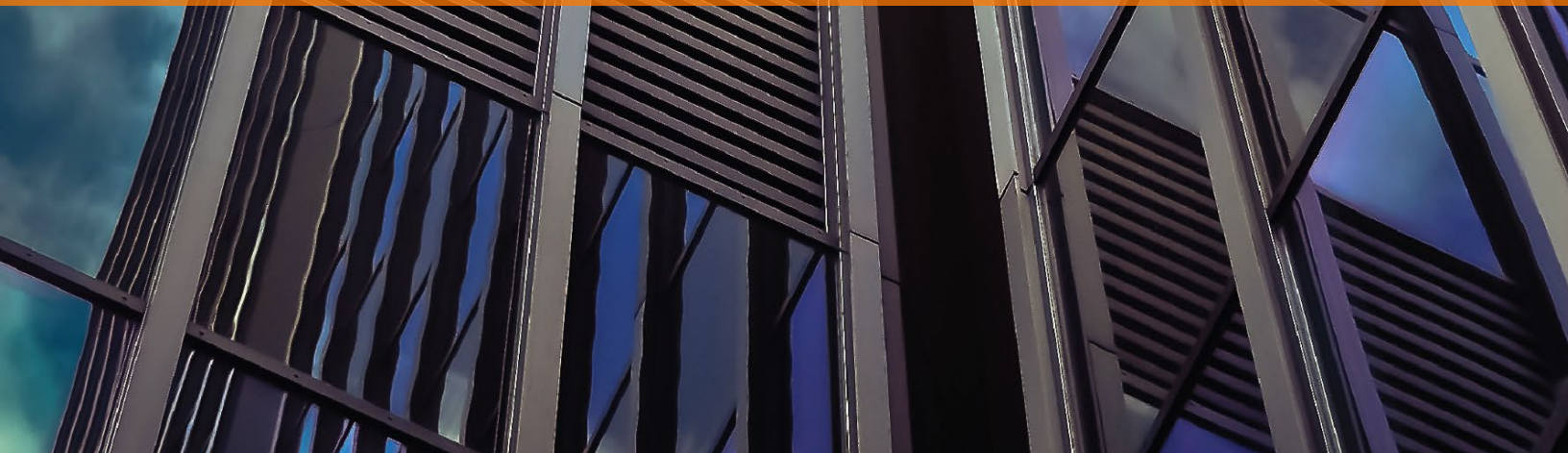

Introduction & Overview of the Problems

Collective bargaining is a vital component of any well-functioning workplace relations system. It serves as a necessary mechanism of self-empowerment for workers and labour engagers to determine the framework that best works to regulate working conditions and the appropriate share of the productivity and profits from common endeavour.

When the current federal statutory framework was introduced as part of the *Fair Work Act 2009* (Cth) (FW Act), one of the goals of then ALP Policy was to put 'bargaining' back at the heart of the workplace relations framework. At the time of the passage of the FW Act, there was a generally optimistic outlook that the inclusion of 'good faith bargaining' obligations, rights to representation for all workers, majority support determinations, and low paid bargaining orders would assist in re-invigorating collective bargaining. These changes would also see the return of union bargaining to workplaces that had been de-unionised or had resisted union agreement-making throughout the Workplace Relations Act period.

However, the first 13 years of the FW Act shows that this optimism was misplaced. Collective bargaining coverage is in decline; real wages are stagnating; business share of profit is increasing, and the statutory tools designed to increase bargaining coverage have withered on the vine. There are many reasons for this decline involving a variety of social, political and economic factors. However, regulatory design is also at play. Some of the fundamental underpinnings of the FW Act are contributing to these problems. In particular, the problems at the core of the bargaining model include:

- The FW Act entrenches non-union agreement-making as the default – union involvement and collective bargaining are not necessary to the creation of agreements;

- The FW Act entrenches employer control over all agreement-making processes including initiating agreement-making, and agreement ballots, and casts unions in the role of agents of individual members with little institutional or other role;

- The FW Act entrenches enterprise level agreement-making, which is at odds with twenty-first century business practices, where the locus of control of work may be effectively severed from the legal entity engaging the workers; and

- There is no effective right to strike for workers to exercise power in collective negotiations, and no meaningful alternative such as arbitration.

The model of collective bargaining under the FW Act is broken. Below we set out some options for reform. Significantly, if collective bargaining is to be an effective mechanism for increasing workers' real wages and improving their employment conditions, a model must be developed that embraces the role of unions as representatives of the interests of workers and as parties principle in bargaining - a model that empowers workers within the agreement-making process and respects their choices as to the level and subject matter of bargaining, and includes a genuine right to strike in support of the interests of workers.

Options for Reform

Collective agreements should be the product of genuine negotiation with worker representatives

One of the most significant changes implemented by the FW Act when compared to earlier regulatory models was the streamlining of agreement-making: abolishing any distinction between union and non-union agreements, and the relegation of the role of trade unions in workplaces to merely one representative voice amongst the potential for many.[1] In doing this, the FW Act essentially codified non-union agreement-making as the **only** way to make agreements. It further embedded the understanding that collective agreements could only be legitimate if 'approved' by all employees of a business, opened the door to small cohort agreement-making by employers, and promulgated the idea that all employees were entitled to separate bargaining representation, and that all such representatives were 'equal'.[2]

Declining union density is a significant problem when considering how to build an effective model of collective bargaining. However, including non-unionised workforces at the core of the model reinforces trends towards declining density, creating a vicious circle. We cannot exclude non-unionised workers from our thinking, but equally if all models of regulation are built around them, then we are not creating a collective bargaining system but merely entrenching a model of agreement-making.

The discussion below of industry / multi-employer bargaining is one concrete mechanism to re-embed trade unions in the collective bargaining system. Operationally any functional model of industry level bargaining requires union involvement, with agreement outcomes covering all workers unionised or not.

For enterprise level agreement-making, one option is to enshrine the necessity for agreements actually to be the product of bargaining, created through genuine negotiations with a trade union. The requirement for an agreement to be put to a ballot of the workers to be covered by it could be retained as a failsafe to ensure that the workers (both union and non-union) agree with the changes negotiated on their behalf. This would also enable a fast tracked approval process to be designed.

The difficulty of course is non-unionised workplaces, and non-unionised employees. Why do employers want to create collective agreements at sites where no unions are seeking to bargain? Because employers want to reduce award inflexibilities, increase productivity, gain certainty over future costs, and obtain the cost savings and efficiencies of dealing collectively with workers.[3] However, this begs the question as to why the **collective bargaining** system creates a pathway for employers to deal with their employees collectively without those employees being adequately and appropriately represented in a genuine negotiation process. Where employers want the benefits that can arise through the creation of a collective agreement, they should have to engage in a meaningful bargaining process to obtain them. Safety net conditions should not be able to be traded away without negotiation. In the

[1] See Kurt Walpole, 'The Fair Work Act: Encouraging collective agreement-making but leaving collective bargaining to choice' (2015) 25(3) *Labor & Industry* 205; Shae McCrystal and Mark Bray 'Non-Union Agreement-Making in Australia in Comparative and Historical Context' (2021) 41 *Comparative Labor Law and Policy Journal* 753.

[2] Given that each employee is entitled to nominate their own representative, this means that a union representing multiple workers in bargaining has no greater status than any individual bargaining representative, and those representatives may have absolutely no experience or knowledge of collective bargaining or the regulatory framework – see Joellen Riley, 'Bargaining Fair Work Style: Fault-Lines in the Australian Model' (2012) 37(1) *New Zealand Journal of Employment Relations* 22; Rosalind Read, 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining? in Shae McCrystal, Breen Creighton and Anthony Forsyth, *Collective Bargaining Under the Fair Work Act*, Federation Press, 2018, p 69.

[3] As to the prevalence of non-union agreement making under the FW Act see Mark Bray, Shae McCrystal and Leslee Spies, 'Why doesn't anyone talk about non-union collective agreements?' (2020) 62(5) *Journal of Industrial Relations* 784.

modified enterprise bargaining system proposed above, employers would remain free to engage employees on contract terms and conditions that conform with the modern award (or enterprise agreement if one applies) and NES safety net.

Fixing the MSD problems

Majority support determinations (MSDs) were Labor's solution to the problem (under the Howard Coalition's laws) of employers refusing to bargain. If the big banks, or Telstra, persisted with their individual contracts approach, a union could obtain an MSD from the FWC compelling the employer to commence bargaining collectively.

Under FW Act, ss 236-237, the union has to prove that a majority of the employees who will be covered by the agreement want to bargain. This can be established through a workplace ballot, or simpler methods like petitions (MSDs have been granted in most cases on that basis).

In some ways this has been an effective mechanism – especially in smaller workplaces where it is not as difficult to show majority support.[4] However, it is necessary to reconsider whether the threshold of majority support is too high in some instances where a first agreement is sought; and MSDs are not working in relation to renewal of agreements.

(i) MSDs for a first agreement

It is argued below that thresholds of employee support to trigger bargaining should be lower than a majority (of the relevant workers) in the context of large workforces in the industry or multi-employer context. This involves a shift away from the 'majoritarian' concept which frames enterprise-based collective bargaining systems like ours, to a concept of 'legitimacy'.

The same approach should be applied to bargaining for a first enterprise agreement. That is, recognising that obtaining majority support becomes more and more difficult as the size of the enterprise/employee constituency increases, the required threshold could progressively decrease.

Further, rather than required percentages, an approach based on fixed numerical thresholds would have the advantage of creating a fixed target for those organising workers to aim for. Under the current 50% requirement, those organising workers may have no idea of the actual number of workers needed to hit the 50% threshold (as employers have no obligation to release this information prior to the MSD hearing), and in practice some employers have actively 'managed' their workforce numbers to try to defeat MSD applications, including hiring more casual workers between the date of a union petition drive and the MSD hearing.

(ii) MSDs for renewal agreements

This problem is playing out in a number of higher education institutions at present, where management representatives are refusing to commence negotiations for new enterprise agreements. The only way the NTEU can compel the universities to start bargaining is by obtaining an MSD. However the NTEU faces a significant challenge in proving majority support among workforces of many thousands of staff (even through a petition, e.g. all casuals on the books at the time majority support is assessed are included).

The reform needed here is to remove the requirement to show majority employee support for a renewal enterprise agreement. The terms and conditions of employment at the enterprise are already regulated collectively – what

[4] Anthony Forsyth, John Howe, Peter Gahan and Ingrid Landau, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46:3 *Industrial Law Journal* 335.

purpose is served by a majority support determination in those circumstances, other than to frustrate and delay workers who have already been unable to bargain or take lawful strike action during the unexpired term of the agreement? At present the provisions only serve to strengthen employer control over collective bargaining, and to divert diminishing union resources.[5]

Instead, there should be a statutory requirement on all parties to start bargaining for a new enterprise agreement – e.g. no later than 3 months after the expiry of the current agreement (unless both parties agree to commence negotiations later).

Alternatively, as was the case under the FW Act provisions prior to the 2015 amendment countering the Full Federal Court ruling in the *JJ Richards Case*,[6] employee representatives could simply be given the power to initiate bargaining for a replacement agreement, and to take industrial action in support of their claims.

Industry/multi-employer bargaining

(i) Multi-employer bargaining units

In its simplest form, multi-employer bargaining could take place on an industry or sectoral basis. This is the model that has been proposed in the UK by the Institute of Employment Rights (IER),[7] and in the US by the Harvard 'Clean Slate for Worker Power' Project.[8] As noted in Kennedy et al:[9]

> The IER proposed that collective bargaining occur across different sectors of the UK economy, with a "sector" being a trade, industry or occupation (or parts thereof) designated by the Secretary of State for Labour. Similarly, Clean Slate envisaged the availability of bargaining in entire sectors, such as the whole US fast-food industry. In both proposals, the industry or sector would effectively become the employee bargaining unit, on whose behalf bargaining would take place …

In the IER and Clean Slate proposals, industry-wide bargaining would occur through sectoral panels or councils comprised of unions and employer representatives. Adapted to the Australian context, unions could bargain with relevant employers for an agreement covering all or part of an industry (e.g. all of the fast-food sector, or certain types of fast-food operators a union wants one agreement with, or fast-food operators in a specific geographic location) – subject to the principle (discussed below) that workers determine the level at which they want to bargain.

Turning to other configurations of multi-employer bargaining, US scholar Mark Barenberg[10] has outlined some options for matching bargaining units with the business structures adopted by 'disintegrated employers' including:[11]

- immediate employers and user firms in a single product supply chain: e.g. factories producing primary washing machine parts, factories assembling secondary components, warehouses and delivery services for storing and transporting parts/assembled products, and retail stores selling the washing machines;

[5] Note: a union's ability to apply for a good faith bargaining order up to 90 days before the nominal expiry date of a current agreement (s 229(3)(a)(i)) is of no use, as the employer must have already agreed to or initiated bargaining (s 230(2)(a)).
[6] See now FW Act, s 437(2A), responding to *JJ Richards& Sons Pty Ltd v FWA* (2012) 201 FCR 297.
[7] IER, *Rolling Out the Manifesto for Labour Law*, Liverpool: IER, 2018.
[8] Sharon Block and Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy,* Labor and Worklife Program: Harvard Law School, 2020.
[9] Tim Kennedy, Ben Redford, Renee Burns and Anthony Forsyth, 'Rebuilding Worker Power in Australia through Multi-Employer Bargaining' (2021) 31:3 *Labour and Industry* 225, 228.
[10] Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining and Striking*, Roosevelt Institute, 2015, 3-7.
[11] The following quote summarising Barenberg's options is drawn from Kennedy et al (2021), 229.

- production and distribution networks: e.g. goods sold by Walmart, Target and Kmart stores produced in the same factories, transported by some of the same shipping companies to the same ports, unloaded by the same stevedores, delivered by the same transport firms, stored in the same warehouses, and delivered again to the retail stores (all these companies are nodes in a network pattern);
- "hub and spoke" contract wheels: where all the suppliers to a lead firm bargain in a unit with that firm, e.g. a building owner (hub) contracts with cleaning and security companies, landscapers, insurers and tenants (spokes);
- "pyramid" structures: e.g. the fast-food company at the pinnacle of a business hierarchy, which franchises the many small restaurants beneath it.

To illustrate further how this might work, United Workers Union (UWU) leaders have indicated that multi-employer bargaining units could take the form of:[12]

> … horizontal configurations (e.g. all poultry producers in Australia); vertical configurations (as adopted by the UWU in the Fresh Food Campaign, taking in the major supermarkets, the logistics companies that service them, and the growers of fresh produce at the supply end); and something like Barenberg's production and distribution networks (e.g. the multiple distribution, transport and other businesses that feed into the operations of mega-retailers like Amazon and Costco).

The objective here is to enable workers to bargain where the locus of employer power is – but for reasons explained below, we should not make this the main focus of the test for determining whether multi-employer bargaining occurs.

Barenberg proposed that various types of "indirect employers" (like those above) would be obliged to collectively bargain with US unions – where those indirect employers have "sufficient bargaining power" over the direct employer (e.g. where a major retailer has power to insist that any warehouses it contracts with meet employment standards set by the retailer, it would be considered an indirect employer of the warehouse workers - and a union representing the warehouse workers could bargain with the retailer as well as any direct warehouse employer).[13]

This has some parallels with the franchisor liability provisions in the FW Act (especially s 558B(4)), considering factors such as the extent to which a franchisor has influence or control over a franchisee; action taken by a franchisor to ensure the franchisee knew and understood their legal obligations, etc. Of greater concern, we also see this approach in the failed low-paid bargaining (LPB) provisions. Included in the (too many) gateways to whether LPB occurs are consideration of:

- 'the degree of commonality in the nature of the enterprises to which the [proposed] agreement relates, and the terms and conditions of employment in those enterprises' (s 243(2)(e));

- 'the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement' (s 243(3)(d), emphasis added; see also s 246(3)).

[12] Kennedy et al (2021), 230; emphasis added.

[13] Barenberg (2015), 14-31. See also Timothy Barktiw, 'Charting a New Course in a Fissured Economy? Employer Concepts and Collective Bargaining in the US and Canada' (2021) 37:4 *International Journal of Comparative Labour Law and Industrial Relations* 385, considering the work of scholars including Callaci, Davidov, Shamir, Harper and Prassl in framing broader conceptions of the 'employer' in various labour law systems based on factors like the levels of subordination, control and dependency between business entities.

Employers are free to pursue bargaining on a multi-employer basis under the FW Act now without any consideration of those kinds of factors (see s 172(3)).[14]

There is ample evidence of the power exerted over the businesses directly employing workers, by lead firms and other contracting parties throughout complex supply chains in sectors like cleaning, road transport, clothing production and fresh food production. It should be enough that the workers and their union want to bargain with multiple businesses to counter that power.

However, to make a proposed system of multi-employer bargaining workable, some kind of nexus would need to be established between the business entities that a union seeks to bring into the bargaining and the direct employer of the relevant workers. The difficult question is identifying the precise content of that nexus: relevant factors could include the nature of the corporate/legal relationship between the various business entities, whether one of them supplies labour/services/ products to another, whether the business entities are competitors/operate in the same market, and the occupation/work performed by the workers and the workplace location(s). The ultimate point of the inquiry would be to determine whether the operations of the lead firm(s) and its (their) relationship with the direct employer have an impact on the wages and conditions of the workers in question – thereby demonstrating a sufficient nexus between the relevant business entities.

The scope order provisions in their current form (FW Act, ss 238-239) would be obsolete in the multi-employer bargaining context, e.g. the concept of an agreement's coverage needing to be 'fairly chosen' by reference to a geographically, operationally or organisationally distinct part of a business (which has been interpreted in too many cases in support of the coverage chosen by the employer).

However, the FWC could be given the role of resolving disputes over the scope or composition of industry/multi-employer bargaining units. The criteria for resolving such disputes could include the FWC's assessment of the sufficient nexus considerations discussed above; but more importantly, whether a union's proposed bargaining configuration is consistent with, and necessary to achieve, the objective of workers countering the power of businesses which impact upon the wages and conditions of direct employees.

(ii) Establishing the right to bargain in multi-employer contexts

Rather than focusing predominantly on the nature of the relationship between the employer and other relevant business entities, 'any legislative framework must put *workers at the centre* of determining the focus and scope of multi-employer bargaining'.[15] Barenberg expresses this in terms of a guiding (although not fully explained) principle of ensuring 'maximum potential for worker empowerment'.[16] If workers' preferences are to determine whether, and in what form, multi-employer bargaining is to occur, there will need to be some way of establishing what 'the workers' want – such as a threshold level of support among the workers in the bargaining unit that must be exceeded. In the Clean Slate proposal, the threshold for a US union to trigger sectoral bargaining was set at the lower of 5,000 union members or 10% membership among the workers in the relevant sector. In New Zealand's proposed new system of Fair Pay Agreements (FPAs), the threshold is 10% of employees in the relevant sector who will be covered by the proposed FPA *or* 1,000 such employees.[17] This is the 'representation test' for initiating the FPA process; there is also a 'public interest test', discussed below.

[14] Cf. the form of multi-employer bargaining facilitated by single interest employer authorisations (ss 172(5)(c), 247-252) which specifies relevant factors including the common interests of the relevant employers.
[15] Ibid; emphasis in original.
[16] Barenberg (2015).
[17] *Fair Pay Agreements Bill 2022* (NZ), cl 29(1). The UK Labour Party has recently outlined a similar 'Fair Pay Agreements' proposal for sectoral bargaining, but without specifying the thresholds for triggering its operation: *Employment Rights Green Paper: A New Deal for Working People* (2021) 5-6.

It is important, as Forsyth has previously argued,[18] that workers' preferences are assessed on the basis of achievable thresholds of employee support. This requires a fundamental shift away from the concept of majoritarianism as the determinant of whether collective bargaining occurs. In the US, UK and Australia under the FW Act, employers have been allowed to pervert 'democratic' notions (translated as a requirement for the union to show majority support) as a ruse for avoiding bargaining altogether. In the US/UK, this has occurred through anti-union tactics in the campaign period to thwart the required majority being obtained – and in Australia, by challenging the union's proposed employee constituency or engaging in other strategies to prevent the issuing of a majority support determination.

Access to multi-employer bargaining should be based instead on a concept of legitimacy[19] – i.e. what level of employee support should a union have to establish, to demonstrate that it is the legitimate representative of a group of workers within the proposed multi-employer bargaining configuration that they have chosen? Further, for these purposes, the extent of required support should decrease as the bargaining unit extends. For example:

- for bargaining across all the KFC stores in a franchise chain: the threshold could be at least 2,000 employees;[20]
- and to bargain across the whole fast-food sector nationally: at least 1,000 employees.

These sample thresholds recognise the barriers to organising workers across disparate locations in multi-employer structures and the certainty of continued employer resistance. They would also level the playing field, which has been tilted in favour of employers for too long. Wherever any thresholds are set to trigger bargaining, ballots must not be mandatory to establish the required level of support. Petitions should be the default form of evidence, to minimise the opportunity for employer interference.

In addition to worker preferences, there should be a residual gateway to multi-employer bargaining based on its necessity to improve the wages and conditions of particular workers. For example, in sectors like child care, aged care, cleaning or security, where the absence of collective bargaining has left workers on award or sub-award conditions, a public interest test like that forming part of NZ's proposed FPA process could be applied by the FWC to ensure workers can engage in multi-employer bargaining (whether or not the employee support thresholds are met). Under cl 29(4) of the *Fair Pay Agreements Bill 2022* (NZ), this public interest test requires consideration of whether the relevant employees:

> (a) receive low pay for their work; or
>
> (b) have little bargaining power in their employment; or
>
> (c) have a lack of pay progression in their employment (for example, pay rates only increase to comply with minimum wage requirements); or
>
> (d) are not adequately paid, taking into account factors such as—
>
> > (i) working long or unsocial hours (for example, working weekends, night shifts, or split shifts):

[18] Anthony Forsyth, *The Future of Unions and Worker Representation: The Digital Picket Line*, Hart Publishing, Oxford, 2022, 212-214.
[19] See eg the comparison of representational and regulatory models of collective bargaining in Alan Bogg and Tonia Novitz, 'The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context' (2019) 50:2 *Victoria University of Wellington Law Review* 259, and in the context of regulatory bargaining the notion of 'performance legitimacy' (at 278-279). The authors explain that In the context of union representation for collective bargaining, performance legitimacy focuses on various 'factors [which] provide an indication of the trade union's actual bargaining capabilities, namely the capacity to make a genuine difference which adds value to workers' agreed terms and conditions' (279).
[20] Note: the SDA has a national KFC agreement now, but it is assumed that the employer agreed to bargain (therefore the union did not have to obtain majority support of the 36,000 employees to trigger bargaining).

(ii) contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis[21]

The key here is (again) not to repeat the failure of the LPB scheme in the FW Act, by specifying too many considerations as part of the public interest test (which became insuperable hurdles, in practice). Any public interest test must also avoid consideration of 'productivity', 'efficiency' or other interests of employers (also found in the LPB provisions). The IER's proposed criteria for the Secretary of State to establish sectoral bargaining councils included 'whether there is no (or an insufficient level of) collective bargaining already occurring in the relevant sector of the UK economy. Priority would be given to sectors including adult social care, childcare, hotels, fast food, retail and cleaning.'[22]

Intractable disputes – strike action, agreement termination, and arbitration

One of the major fault lines in the FW Act is the failure adequately to provide for the resolution of intractable collective bargaining disputes. In circumstances where collective bargaining has not produced consensus between the parties and they remain at odds, there are three areas of the FW Act which bear on the capacity of the parties to reach agreement, and whose effects intersect:

1. Protected industrial action;
2. Agreement termination; and
3. Termination of protected industrial action leading to the imposition of a workplace determination.

The protected industrial action provisions provide workers, and employers, with the capacity to exercise lawful 'coercion', in order to pressure the other party to agree to their demands. Recognising the fact that employees are the weaker side of the equation, employers cannot engage in protected industrial action unless employees take action first. However, once protected action commences, both sides can wield this weapon equally.

[21] See also cl 29(5), indicating that a union may present evidence (to meet the public interest test) such as that the employees to be covered by the proposed FPA include a high proportion of migrant workers (who might be subject to systemic exploitation), temporary workers, employees of small-medium businesses, etc.
[22] Kennedy et al (2021), 230, referring to IER (2018).

The capacity to take protected industrial action constitutes the sole source of industrial power accorded to workers to counter the managerial, contractual and property powers of employers. However, the ability of workers to take lawful industrial action is entirely circumscribed under the FW Act. As McCrystal has observed:

> It is very hard for Australian workers to take industrial action when they need to. The range of circumstances under which they can take lawful strike action are very narrow, when those circumstances arise it is technically difficult to engage in lawful strike action and easy to get it wrong, and when lawful strike action does occur the action may be stopped.[23]

Compounding the complexities of the legal regime is restrictive judicial interpretation of the industrial action provisions, which views the ability of workers to take protected action as a 'privilege' rather than a right.[24] This has led to formalistic interpretation of the protected industrial action provisions which has tended to narrow their scope – eg, any mistake, however inadvertent or unintentional in taking protected industrial action which renders it unprotected, now has the effect of making it a contravention of the prohibition on coercion in s 343 and potentially subject to civil penalties.[25]

Furthermore, where workers are able to navigate the legal and practical hurdles to lawful industrial action, industrial action which has a significant impact may be stopped through an order of the FWC under s 424, suspending or terminating the action on the basis of a threat to the welfare, health or safety of the population, or damage to the economy. Use of this provision has been expanded since the decision in *NTEU v Monash University*,[26] which permitted suspension or termination of protected action on no more than a simple threat to the welfare of the population or part thereof.[27]

Exacerbating this, the agreement termination provisions strengthen the hand of employers in collective negotiations by enabling them to threaten to apply to the FWC for termination of any existing agreement if employees do not agree to the terms and conditions proposed.[28] Agreement termination has the effect of removing pre-existing collectively agreed terms, leaving workers reliant on their contracts of employment and any underlying award. The willingness of the FWC to terminate agreements during contested bargaining has emboldened employers in this respect, and the mere threat of agreement termination can now be used to tip the scales in bargaining.[29]

If strike action is to function as the legitimate tool of worker empowerment in the context of collective bargaining, then it must be reformed.

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[23] Shae McCrystal 'Why is it so hard to take lawful strike action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 53.
[24] As in *Esso Australia v The Australian Workers' Union* (2017) 92 ALJR 106 per Keifel CJ, Keane, Nettle and Edelman JJ at 123.
[25] *Esso Australia v The Australian Workers' Union* (2017) 92 ALJR 10; see further Shae McCrystal, 'The Right to Strike and the 'Deadweight' of the Common Law' (2019) 50 *Victoria University of Wellington Law Review* 281.
[26] [2013] FWCFB 5982.
[27] See eg *Sydney Trains; NSW Trains; The Hon. Dominic Perrottet, Minister for Industrial Relations (New South Wales)* [2018] FWC 632.
[28] Under s 226(1) of the FW Act since the decision of the Federal Court in *CEPU v Aurizon Operations Ltd* (2015) 233 FCR 301.
[29] See Shae McCrystal, 'Termination of Enterprise Agreements under the *Fair Work Act 2009* (Cth) and Final Offer Arbitration' (2018) 31(2) *Australian Journal of Labour Law* 131.

Changes that can easily be accommodated within the existing framework include (but are not limited to):

- Removal of the ability of the FWC to terminate agreements in the context of active and contested bargaining for a new agreement. Agreement termination is a useful mechanism for zombie agreements, or those that no longer comply with the safety net, but it should not be tolerated as a bargaining tactic for employers.
- Reform of s 424 of the FW Act to remove the ability of the FWC to suspend or terminate industrial action on the basis of a threat to 'welfare'.
- The legislative regime should codify the law of industrial action, including penalties for unlawful action, and include a clear direction to the judiciary that this is a right of workers, not a privilege to be constrained through narrow judicial interpretation.
- The definition of industrial action should be amended to include pickets, and to cover the broader range of range of industrial action taken by workers that currently may not be covered by the definition.[30]
- Permitting strike pay to be a matter for negotiation during collective bargaining, and removing the punitive and counter-productive rules around strike pay.

Other, more substantive reforms would include permitting industrial action in support of industry / multi-employer bargaining; and expanding the potential subject matter of bargaining.

Finally, there are the complex, resource intensive and deeply flawed PABO provisions to 'approve' proposed industrial action. These require bargaining representatives to obtain a ballot order from the FWC, and then use a formal ballot agent to ballot those they represent to approve proposed industrial action – where approval requires a quorum of 50% of those balloted, and a majority vote.

Introduced in the Work Choices legislation, these provisions were ostensibly designed to prevent unions from 'bullying' unwilling union members into taking strike action and facilitate union democracy. However extensive research into these provisions by Creighton et al has demonstrated that the provisions do not promote democratic outcomes (other than simple preference aggregation), and provide numerous opportunities for employers to derail or obstruct the process (or trade off a promise not to obstruct for gains like additional notice of industrial action).[31] There is simply no reason for employers to have any input or say in a union decision in respect of authorising industrial action (as distinct from seeking to stop proposed action on any legitimate ground under the FW Act). Furthermore, union members do not take action strike unwillingly – there has never been any evidence to support the notion that militant union officials coerce unwilling members into industrial action.

The PABO requirement should be abolished, and unions should be permitted to authorise proposed industrial action in accordance with their own rules and democratic processes. A legislative requirement for unions to have rules around the authorisation of industrial action, and for members to be able to challenge union decisions where those rules are not complied with, is sufficient to satisfy any democratic imperative.

[30] See further Creighton et al, 'Defining Industrial Action' (2017) 45(3) *Federal Law Review* 383 for analysis of the problem, and Forsyth (2022) pp 217-218 for the importance of expanding the definition to include digital action.
[31] Creighton et al, *Strike Ballots, Democracy and Law*, Oxford University Press, 2020.

If workers are genuinely given meaningful access to protected industrial action, this should create a more level playing field in collective bargaining. Industrial conflict is the logical and expected outcome of a meaningful right to strike. If this outcome is unpalatable, and there is unwillingness to commit to strike action as the means of worker empowerment in bargaining, workers and employers must be given alternative tools to resolve conflict, with easier access to independent arbitration for deadlocked disputes being the most obvious solution. Depending on where a threshold is set, this may well breach Australia's obligations under relevant ILO labour standards, but would be a better outcome than the present situation where only lip service is paid to the right to strike, and workers are left without meaningful industrial power in bargaining.

Conclusion

This paper has outlined a number of options for reforming Australian collective bargaining and strike laws, with the primary objective of enhancing the ability of workers to build and exercise collective power in the workplace. Reforms of this nature are necessary if we are ever to even up the imbalance that has arisen from the creeping accumulation of business power over the last 30 years, facilitated by the absence of sufficient counterweights in the legal and institutional framework for workplace relations.