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COLLECTIVE BARGAINING AND PROTECTED INDUSTRIAL ACTION UNDER THE FAIR WORK ACT: IS THERE TENSION?

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I INTRODUCTION

At the heart of the *Fair Work Act 2009* (Cth) ('the Act') lies a syllogism: collective bargaining promotes fairness and productivity; the Act promotes collective bargaining; therefore, the Act promotes fairness and productivity. And at the heart of this syllogism lies a tension. While the Act seeks to promote collective bargaining, it also wishes to minimise industrial action. Why is this a problem? The precondition for employees to effectively bargain is the ability to bring to bear pressure in the form of industrial action. While the Act allows employees to take industrial action, it tightly regulates its every aspect. Further, there is a tension within the Act's conception of collective bargaining. Collective bargaining requires, and represents, employee freedom. I will evaluate the extent to which the Act deprives employees of this freedom. I will argue the highly regulated version of bargaining and industrial action instigated by the Act interferes with it achieving its objects. Based on these failings, I make some modest recommendations, including a return to increased arbitration and the support of alternative workplace institutions to re-energise collectivism.

II BACKGROUND

A *What is Collective Bargaining?*

Of collective bargaining, Clegg states:

> Its subject matter is terms of employment. It is collective because employees associate together, normally if not invariably in trade unions, in order to bargain with their employers. It does not require collective action on the employer's side as well, for unions bargain both with employer's associations and with individual employers or their representatives . . . The process is called bargaining because each side is able to apply pressure on the other. Mere representation of views or appeal for consideration is not bargaining.[1]

B *Why Bargain?*

What is the purpose of collective bargaining? A number have been identified.

[1] HA Clegg, *Trade Unionism Under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Basil Blackwell, 1976) 5.

The first is democratic: 'allowing all those who have work or want to work to have a say in their working life'.[2] Applying this idea, Pettit, Bogg and Estlund hold that 'a free and democratic society entails … the ability to contest the decisions of others, both public and private actors, who wield power over one's life and livelihood'.[3] Traxler and Brandl state that collective bargaining is a 'cornerstone of industrial democracy'[4] for the reason that 'it gives employees a collective voice'.[5]

Absent collective bargaining, employees may be deprived of voice due to the power imbalance in the employment relationship.[6] As Davidov observes, 'an individual employee needs her employer much more than the other way around'.[7] As a result, employees must accept a high degree of control of their working lives by their employer, resulting in a 'democratic deficit'.[8] However, by 'joining forces and acting in concert, workers can rectify this situation, to one extent or another, since the employer can be expected to be more concerned about the prospect of losing the work of all her employees (even if only for a limited time)'.[9]

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[2] International Labour Organisation, *World Labour Report 1997–98: Industrial Relations, Democracy and Social Stability* (International Labour Office, Geneva, 1997) 27.

[3] Alan Bogg and Cynthia Estlund in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 142.

[4] Franz Traxler and Brend Brandl, 'The Economic Impact of Collective Bargaining Coverage' in Susan Hayter (ed), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (Edward Elgar, 2011) 227.

[5] Ibid.

[6] Voice also has another aspect. According to Hirschman, voice provides an employee in disagreement with management an alternative to exit from an organisation: Albert Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press, 1970). The employee given voice may stay and express their disagreement with management, making constructive criticism, leading to improved employment conditions and more productive work practices. Hayter states that 'where voice is exercised and heard, this can be associated with improvements in enterprise performance': Susan Hayter, 'Conclusion' in Susan Hayter (ed), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (Edward Elgar, 2011) 277, 310. Peetz states 'there is a body of evidence collected over the years that shows benefits from employee voice for economic performance. Direct and indirect participation by employees in decision making — preferably in combination — on average lead to lower absenteeism, lower labour turnover, higher morale and employee satisfaction, and higher productivity': David Peetz, 'Does Industrial Relations Policy Affect Productivity?' (2012) 38(4) *Australian Bulletin of Labour* 268, 270. Not only then does the business benefit from improved performance from their incumbent employees, with the potential for higher revenue as a result, but the business cuts costs, by saving on the need to hire and train new employees.

[7] Guy Davidov, 'Collective Bargaining Laws: Purpose and Scope' [2004] 1 *International Journal of Comparative Labour Law and Industrial Relations* 81, 84.

[8] Ibid.

[9] Ibid. Kahn-Freund sees the role of collective bargaining in more stark terms, 'power stands against power': Otto Kahn-Freund, *Labour and the Law* (Stevens, 1983) 69. Davidov argues this has a '"civilizing" impact' on the employer: Davidov, above n 7, 84. This ensures that employers 'will not be able to do anything they please … but will rather be subject to a "rule of law," albeit privately negotiated, at least to some extent and with regard to some decisions': Ibid 86. Kahn-Freund too sees the democratic element in enterprise bargaining principally deriving from these privately negotiated rules: 'through being countervailing forces, management and organised labour are able to create by autonomous action a body of rules, and thus relive the law of one of its tasks': Kahn-Freund at 69.

The second function of collective bargaining is a distributive one: 'helping to find the best possible balance in the production and the distribution of the fruits of growth'.[10] Davidov states that 'it is now undisputed that through collective bargaining employees can and do achieve better terms and conditions'.[11]

A third reason for bargaining is for increased efficiency. This is achieved primarily by reduction of industrial action and increase in productivity.[12] Efficiency may also be improved through 'the reduced transaction costs for employers of bargaining with a group, rather than negotiating terms and conditions of employment with each employee separately'.[13]

C *What Is Industrial Action?*

In general, industrial action is understood to include any action taken by employees to further their interests. This captures strikes, work to rule and go-slow tactics, as well as picketing.

The Act comes with its own statutory definition of industrial action. Section 19(1) states:

> (1) Industrial action means action of any of the following kinds:
>
> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
>
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
>
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
>
> (d) the lockout of employees from their employment by the employer of the employees.

Certain action is expressly excluded from the definition of industrial action. Section 19(2) states:

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[10] International Labour Organisation, above n 2.
[11] Davidov, above n 7, 89.
[12] Ibid.
[13] Breen Creighton and Anthony Forsyth, 'Rediscovering Collective Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 10.

However, industrial action does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

McCrystal notes that in addition to work stoppage this definition 'is capable of covering work bans, go-slows, rolling stoppages and work to rule'.[14] Whether the definition covers picketing is less clear.[15]

Whether or not the industrial action taken accords with the Act's definition is important as only industrial action found captured by the definition will enjoy access to protection under the protected industrial action provisions. Unprotected action attracts a mandatory order from the Fair Work Commission ('FWC') to stop the action. Breach of such an order attracts civil[16] and possible criminal[17] penalties.

D *Why Take Industrial Action?*

The International Labour Organization ('ILO') recognises the inherent economic and social objectives of industrial action. Economic objectives include placing pressure on an employer as part of the process of collective bargaining. Kahn-Freund and Hepple call this the need for 'autonomous sanction'.[18] They hold that 'except in marginal situations, conditions of employment cannot be regulated by legislation'.[19] Social objectives include 'solutions to economic and social policy questions and problems … of direct concern to the workers'.[20]

[14] Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 113.
[15] Ibid 116.
[16] Section 539.
[17] Section 675(1).
[18] Otto Kahn-Freund and Bob Hepple, *Laws against Strikes* (Fabian Society, 1972) 7.
[19] Ibid.
[20] International Labour Organisation, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (International Labour Office, Geneva, 5th ed, 2006) [526].

This attempt to separate the economic from the social is somewhat artificial. This artifice is bridged if one sees industrial action as another aspect of worker voice. Mantouvalou states that collective bargaining and industrial action should be regarded as 'fundamental avenues of voice'.[21]

III Causes of Tension under the Act

While the foregoing sketched the nature and reason for bargaining and industrial action, much of the discussion came from the point of view of employees. 'Why take industrial action?', for example, explained why employees might seek this option. But what is the government's motivation? Why would they encourage bargaining or allow industrial action?

Collins recounts the political settlement between capital and labour:

> Laws granted organisations of workers the right to bargain collectively on behalf of their members and to take industrial action to reinforce their demands. In return, however, trade unions accepted limits on their activities, which confined the scope of strike action, and in particular prohibited political strikes.[22]

In Australia, the settlement initially related to a system of arbitration, collective bargaining existing as a 'level',[23] within the arbitration system.

While the settlement sought to prevent industrial action, it also sought to protect the rights of workers in employment relations. Kahn-Freund states 'the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.[24]

The government, as author of the labour law to which Kahn-Freund refers, then legislates against the employer to the extent required to be a counterweight. It intervenes to promote the interests of the employee, by legislating for freedom of association, supporting collective

[21] Virginia Mantouvalou, 'Democratic Theory and Voices at Work' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014).
[22] Hugh Collins, *Employment Law* (Oxford University Press, 2010) 117.
[23] Louise Thornthwaite and Peter Sheldon, 'Employer and Employer Association Experiences of Enterprise Bargaining: Being Careful What You Wish For' (2012) 22(3) *Labour & Industry* 255, 256.
[24] Kahn-Freund, above n 9, 18.

bargaining or observing the right of employees to take industrial action, thereby supporting the operation of employee 'autonomous sanction'.

Yet the Act does more than this. Section 3 defines the objects of the Act. It states:

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and …
>
> (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Defying the prediction of Kahn-Freund, the Act is equally active in promoting the interests of the employer. While we find the social interest of fairness as an objective, it is bookended by business concerns: flexibility and productivity.

Can the Act at once support social and economic objectives? Or is there an inherent tension?

I suggest the answer depends on how government imagines economic interests are best served. This in turn depends on how government conceives of economic interest: is economic interest to be equated with business interest?

One view understands economic prosperity to be the result of countervailing market and social institutions. What is good for a business may not necessarily then be good for the economy. Countervailing impediments to business may add to, not detract from, aggregate prosperity. Scholars of European economic history have described how 'gains in economic performance and state efficiency were consequent on the incorporation of diverse, organised interests into policy formation',[25] while John Kenneth Galbraith has described how the economic success of America was 'deeply dependent on the operation of the power of a multiplicity of institutions that check and balance the force and possible domination that might otherwise be exercised by one institution'.[26]

[25] Joshua Cohen and Joel Rogers, 'Secondary Associations and Democratic Governance' [1992] (4) *Politics & Society* 393, 394.
[26] Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009) 81.

While business or industry interests may have their operations constrained, for example, by the institution of unions, the economy as an aggregate may benefit by their countervailing efforts. Under this view, while there is tension in the duelling forces of capital and labour, there is no inherent tension in their promotion by legislation. Indeed, their dual promotion is an economic fundament, a precondition to prosperity.

The objects of the Act by contrast are based on an apparently unproblematic alignment of business interest with economic prosperity. Business interest is nested within economic interest, existing conceptually as a subcategory of the economy. Section 3 of the Act charts the causal relationship of promoting business interests with the promotion of economic prosperity, locating the Act within laws that are 'flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity'. Business flexibility therefore leads to industry productivity which results in economic prosperity. Under this conception, business interests and economic prosperity can thereby be used almost interchangeably, being as they are points on the same spectrum. And the Act in its objects section does just that, making no meaningful separation between the promotion of business interest and economic prosperity.

Working within this cosmology, the dual promotion of social and economic interest is apprehended as a balancing act, with social interests and their institutions seen as a threat to the economy that must be kept in check. In such a situation, workplace regulation is riven with tension. Labour law must be cast in a way that '*complements* rather than *counters* market interests',[27] usurping the law's object as identified by Kahn-Freund.

We see this tension borne out in the Act.

The objects in s 3 define a qualified version of collective bargaining and industrial action. To some extent this is in keeping with the terms of the settlement as described by Collins, with a limit to the scope of industrial action.

But other aspects of the Act's definition go much further than the historical settlement, with a restriction on bargaining level and the policing of bargaining process by good faith obligations. In practice there are other restrictions, including regulation of allowable bargaining content.

[27] Donella Caspersz, Michael Gillan and Daniel White, 'State, Ideology and the Emergence of "Good Faith" Collective Bargaining Regulation in Australia' (2011) 53(5) *Journal of Industrial Relations* 632, 634.

IV POINTS OF TENSION IN COLLECTIVE BARGAINING

A *Level of Bargaining*

Section 172 provides for three types of enterprise agreements: single-enterprise agreements, multi-enterprise agreements and greenfields agreements. While it is intended that employees will bargain for agreements of all three types, protected industrial action is only available for single-enterprise agreements.

This means that pattern bargaining, the practice of negotiating common terms in two or more agreements will not be covered by protected industrial action. This stands in addition to injunctions to restrain pattern bargaining.[28] The net effect is to forestall many employees from exercising this bargaining option, corralling collective bargaining activity into single-enterprise agreements.[29]

A number of organisations and commentators have observed that this restriction to the choice of bargaining level contravenes a number of ILO standards.[30] In response, the Australian Government stated that protected industrial action is not available for pattern bargaining to ensure that bargaining remained voluntary. McCrystal observes that 'the use of the term "voluntary" here differs from the manner in which it is used by the ILO supervisory bodies … in the ILO context the term "voluntary" means free from state interference or prescription, and

[28] Sections 409(4) and 422.

[29] McCrystal notes the exceptions:

> 'Industrial action can only be taken to support negotiations for a single enterprise agreement and industrial parties must be genuinely trying to reach agreement at that single enterprise in order to get a protected action ballot or to actually take protected industrial action. However, despite this, the FW Act does not retain the level of control over potential multi-employer or industry level agreement making that have been features of the federal legislation since 1993. In particular, parties who wish to negotiate and enter into multi-employer agreements no longer need to convince the federal regulatory agency that a multi-employer agreement is in the public interest in order to negotiate (the situation after the Work Choices amendments) or register (the situation before the Work Choices amendments) a multi-employer agreement. Parties are now free to engage in multi-employer or industry level negotiations and register multi-enterprise agreements without scrutiny or oversight. Further, where multi-employer bargaining could be of assistance to overcome a history of long term reliance on awards, low pay or failure to undertake collective bargaining in low paid sectors, Fair Work Australia can require employers to bargain in good faith at a multi-employer level'.

Shae McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009' (2010) 21(1) *The Economic and Labour Relations Review* 37, 47.

[30] Shae McCrystal, 'Fair Work in the International Spotlight: The CEPU Complaint to the ILO's Committee on Freedom of Association' (2011) 24(2) *Australian Journal of Labour Law* 163.

does not exclude the use of industrial pressure'.[31] The Australian Government by contrast 'uses the term to mean free from industrial pressure or industrial action by other bargaining parties'.[32]

The government deploys law here not in the service of worker protection, as Kahn-Freund imagined, but in the role of business protection, acting as a counterweight to possible external union action.

In addition to the departure from international norms and legal obligations this represents, the attempt by the Act to add protection and promotion of business to its brief impedes the basal operation of the Act. Creighton states that the absence of lawful industrial action in support of making multi-enterprise agreements and greenfields agreements means 'true collective bargaining is limited to negotiation for single enterprise agreements'.[33]

Not only does this limit the number of agreements about which collective bargaining activity will occur, it kills off a bargaining practice with efficiency advantages and that has appeal to some employers.

Thornthwaite and Sheldon note: 'there remains a strong preference among many employers (as well as unions) in some industries for pattern bargaining … where there is substantial informal pattern bargaining regardless of legislative prohibitions'.[34]

Employers breach legislative prohibitions because pattern bargaining can help 'to keep wages out of competition'.[35] It also has other business advantages. As Creighton observes, 'collective bargaining is hard'.[36] It requires time and expertise, and is a considerable drain on business resources.[37] Pattern bargaining can offer time savings and economies of scale.

In their research on business attitudes to collective bargaining, Thornthwaite and Sheldon found:

[31] Ibid.
[32] Ibid.
[33] Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law' [2011] (2) *Industrial Law Journal* 116, 127.
[34] Thornthwaite and Sheldon, above n 23, 266.
[35] Ibid.
[36] Breen Creighton, 'Impacts of Enterprise Bargaining on Unions and Employers: Discussants Comments' (2012) 22(3) *Labour & Industry* 275, 282.
[37] Ibid 283.

> [S]ubstantial weakening in the apparent consensus of the last two decades in favour of structuring Australian industrial relations through an enterprise bargaining system. A number of interviewees considered that many of their members (or clients) would prefer not to continue with enterprise bargaining. In fact, in a demonstration of this preference, many employers are shifting back to award-only arrangements.[38]

Interviewees gave five main reasons for their antipathy towards collective bargaining, three of which stemmed from the resource cost involved.[39]

The Act sets up a dicot for employment arrangements: award or single-enterprise agreement. As revealed by the research, some employers are reverting to awards due to the resource costs involved in collective bargaining. Also revealed in the research, some employers actively engage in pattern bargaining. I submit that pattern bargaining, for some employers, might serve as a mid-point in this dicot, a compromise to stem the exit from the collective bargaining system: less onerous than engaging in single-enterprise bargaining, but still delivering some of the ostensible benefits of bargaining with a discount on direct and transaction costs.

Creighton too notes the problem of pattern bargaining, the disjoint between law and practice and its propensity to be 'counterproductive in policy terms'.[40] Creighton suggests a solution might lie in adopting a hybrid form of agreement, with higher-level terms negotiated at industry or regional level to be augmented by terms tailored to individual enterprises.[41] This would, states Creighton:

> [B]e more rooted in reality than a system which persists in pretending that employers and unions — especially in highly unionised sectors such as construction — can be compelled (or even

[38] Thornthwaite and Sheldon, above n 23, 268–9.
[39] Ibid 269. The authors state: 'First, employers whose primary product market strategy is cost minimisation find the transaction and direct costs of enterprise bargaining too expensive when compared to employing award-only labour. Second, those employers who want unfettered management prerogatives, or at least to retain the much enlarged areas of managerial prerogatives they had enjoyed in recent years, find enterprise bargaining counter-productive precisely because it places those areas back into discussion and bargaining. Third, those with a preference to invest in human resource management and employee engagement consider it to be a time consuming process that they cannot control, and one which can undermine their own people management strategies implemented in-house. Fourth, the "forgotten companies" do not want to engage in enterprise bargaining because they lack both protection against unions and access to an independent "umpire". Finally, for many employers, enterprise bargaining is simply a time and energy consuming distraction, taking them away from core business'.
[40] Creighton, 'Impacts of Enterprise Bargaining on Unions and Employers: Discussants Comments', above n 35, 276.
[41] Ibid.

> persuaded) not to negotiate on an industry-wide basis if they in fact perceive it to be in their interests to do so.[42]

The appeal by Creighton to reality is pertinent. The tension between the real and the ideal is identified as a significant cause of dissatisfaction by employers with collective bargaining.[43]

For employees, the effective ban on pattern bargaining deprives them of the prosperity promised to come from collective bargaining. McCrystal states 'the inability of the union movement to support their claims to industry wide or multi-employer bargaining through protected industrial action compounds the difficulty of spreading the gains made through bargaining to these sectors of the community'.[44]

Some reform in this area is needed to remove this inner conflict and give effect to the Act's objects.

B *Content of Bargaining*

In relation to content of collective bargaining, s 172 states:

> Enterprise agreements may be made about permitted matters
>
> (1) An agreement (an enterprise agreement) that is about one or more of the following matters (the permitted matters) may be made in accordance with this Part:
>
> (a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;
>
> (b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

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[42] Ibid 277.

[43] Thornthwaite and Sheldon state: 'employer disenchantment with the experience of the enterprise bargaining system also reflects the mismatch between dream and reality in relation to the form of agreement-making it has mandated … employer associations had lobbied fiercely for the decentralisation of bargaining to the enterprise since the 1980s. They claimed it would be a boon for employers, simplifying their lives, reducing external and internal constraints they faced, restricting unnecessary costs (both direct and transactional) and enabling them to shape their workplaces more according to their own vision. Yet, not surprisingly, many employers have found that participation in enterprise bargaining is not only very time consuming but also a source of additional legal costs, complexity, confusion and administrative burden on their operations': Thornthwaite and Sheldon, above n 23, 265.

[44] McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009', above n 29, 48.

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Creighton observes the stipulation that agreements be about 'matters pertaining' to the relationship of employer and employee is 'somewhat unfortunate'[45] as the use of these terms invites the confused jurisprudence that developed in relation to these terms under the conciliation and arbitration system.

Another unfortunate effect is the narrowing this brings to bargaining.

Thornthwaite and Sheldon chart the decline in employer ambitions for the outcomes of collective bargaining under the Act's 'bounded'[46] freedoms: 'if we compare employers' experiences with enterprise bargaining today with those in the 1990s, employers are now using increasingly instrumental approaches and they hold declining expectations of potential benefits from enterprise bargaining'.[47]

The narrow, self-focus on the single enterprise; the exclusion from discussion of anything decided legalistically to be beyond 'matters pertaining' to the relationship of employer and employee; and the quarantining of wider social concerns that might be dear to an employee provide little on which to build the relationship that the hoped-for gains of collective bargaining depend.

Continuing as it begins, bargaining under these conditions cannot expand beyond its narrow bounds, its only probable evolution a tendency to reductionism. And this is the result Thornthwaite and Sheldon document.[48]

While noting the 'somewhat unfortunate' inclusion of the terms 'matters pertaining' under the Act, Creighton concedes its inclusion is in part offset by the s 172(1) expansion of allowable matters: 'it *is* permissible to include provision dealing with the relationship between employers and unions, and deductions from wages that are authorised by the employee — these being

[45] Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law', above n 32, 137.
[46] Thornthwaite and Sheldon, above n 23, 257.
[47] Ibid.
[48] They state: 'there is a growing keenness to keep bargaining scope narrow as part of a tendency to engage in more instrumental and even cynical ways than was once the case. Overall then, this focus is on short-term optimising of positions rather than medium-term development of relationships or organisational culture': Ibid 266.

amongst the areas that gave rise to most difficulty under the traditional system'.[49] Not everyone is equally enamoured.

Far from embracing the opportunity for greater and more coordinated employee involvement in agreement making offered by the Act, employers have resisted. The Victorian Employers' Chamber of Commerce and Industry ('VECCI') has submitted that provisions such as these under the Act represent 'an expansion of matters that are subject to negotiation and industrial action which otherwise has diminished management prerogative'.[50]

It is difficult to see how anything approaching a productive relationship could realistically develop when employers so preciously guard their advantage; and regard any expansion of negotiation as a trespass on their power. We are left with a 'bounded',[51] 'attenuated',[52] system that gives small voice to employees, and amplifies employer cynicism. Thornthwaite and Sheldon state: 'according to most employer association officials interviewed, the aspirations of their members regarding the scope of their enterprise agreements has shrunk to merely focus in wage fixation'.[53]

If Australia's experiment with collective bargaining has delivered little more than a decentralised wage fixing system, employer associations as co-authors of this experiment must share the blame. Perversely it may be business interests and their shaping influence that have prevented collective bargaining from delivering widespread business improvement and overall economic uplift.

Indeed, so successful have businesses been at keeping bargaining scope to the single issue of wage fixation, that wage atrophy has now been identified as a threat to the national economy.[54] This outcome is at odds with the goal of economic prosperity identified as an object of the Act in s 3.

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[49] Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law', above n 32, 138.
[50] Victorian Employers' Chamber of Commerce and Industry, 'Towards a Fairer, More Flexible and More Productive Workplace Relations System: VECCI Submission to the Fair Work Act Review' (2012) <http://www.vecci.org.au/About_VECCI/Documents!FWA_Review/Fair%20Work%20Act%20Review%20-%20VECCI%20Submissions. pdf>, 6.
[51] Thornthwaite and Sheldon, above n 23, 257.
[52] Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law', above n 32, 142.
[53] Thornthwaite and Sheldon, above n 23, 268.
[54] 'Real wage growth continued at a record low rate … this result led Federal Treasurer Scott Morrison to observe that wages growth in Australia was now too low and would undermine consumer spending and growth, as well as government revenue': Andreas Pekarek and Peter Gahan, 'Unions and Collective Bargaining in Australia in 2015' (2016) 58(3) *Journal of Industrial Relations* 356, 359.

C *Agent of Bargaining*

The Act enshrines collective bargaining without collectivism. This sets in train numerous points of tension.

Collective bargaining imagines an agent representing a collective of employees. This assumes the existence of both a collective and an identifiable agent.

As Clegg observed, typically collective bargaining occurs when employees associate together, 'normally if not invariably in trade unions'.[55] The trade union then demarcates the collective and the union representative acts as the agent in bargaining negotiations.

Making this assumption under the Act is problematic. Such a scenario is no longer invariably so.

Trade union membership has collapsed.[56] The de facto compulsory trade unionism that once existed in many industries[57] is now rare. Even industries that once enjoyed moderate union density now often do not.[58]

Further, the Act allows bargaining outside of union representation. Under the Act, all but greenfields agreements are simply made by an employer and their employees.[59] No mention is made of unions.

In negotiating the agreement, an employee may appoint anyone as their bargaining representative. It may be them, their friend. Or their union. But unions are granted no special status and enjoy no elevated position over any other bargaining representative.

Creighton states:

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[55] Clegg, above n 1, 5.
[56] Peetz and Bailey note 'in 1951, 60% of employees were trade unionists, up from a mere 6% in 1901. However, membership then plummeted; by 2008–2010 only 19% of the workforce belonged to unions': David Peetz and Janis Bailey, 'Dancing Alone: The Australian Union Movement Over Three Decades' (2012) 54(4) *Journal of Industrial Relations* 525, 527. By 2014 this figure had fallen to 15%: Pekarek and Gahan, above n 53, 357.
[57] Rae Cooper and Bradon Ellem, 'Fair Work and the Re-Regulation of Collective Bargaining' (2009) 3 *Australian Journal of Labour Law* 284, 294.
[58] Pekarek and Gahan, above n 53.
[59] Section 172.

> [I]t may be that the legislation is simply reflecting the realities of the modern labour market: as elsewhere, levels of trade union membership have declined sharply over recent years, and it is understandable that the legislature should try to accommodate that reality — albeit within what is still essentially a collectivist regulatory framework.[60]

And therein lies the tension. The Act promotes collective bargaining without promoting collectivism.

McCrystal notes that 'the Act reinforces the fundamental right of employees to be represented by a union in negotiations, requiring employers to recognise and bargain with all bargaining representatives'.[61] This neutral stance has been applauded by some as a welcome change from the hostility towards unions under the previous framework.

For Peetz, granting representation rights to all is 'another mechanism by which employers have circumvented unions'.[62] This mechanism is also in tension with the objects of the Act. Firstly, it falls short of international legal obligations to which the Act is committed; secondly, it does not actively promote unionism, an institution essential to the effective operation of collective bargaining.[63]

Putting all employee representatives on an equal footing, thereby bypassing unions, not only upsets principles, it also builds in problems for the Act: how can a collectivist system function without the unit of collectivism, namely a union? While on one hand the Act outlines its objects as 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining',[64] on the other the Act 'gives primacy and protection to individual rights but does little to actively foster collective rights or collective action'.[65]

There is another problem. While the Act contemplates union and non-union representatives participating in bargaining, in any number, it hasn't considered the practicalities. Who will, for

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[60] Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law', above n 32, 144.
[61] McCrystal, 'Fair Work in the International Spotlight', above n 30, 165–6.
[62] David Peetz, 'The Impacts and Non-Impacts on Unions of Enterprise Bargaining' (2012) 22(3) *Labour & Industry* 237, 248.
[63] Kahn-Freund states 'as a power countervailing management the trade unions are much more effective than the law has ever been or can ever be … everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of the law': Kahn-Freund, above n 9, 21.
[64] Section 3.
[65] McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009', above n 29, 48.

example, pay the wages of non-union representatives? While some of these details have been resolved,[66] at least one structural problem remains: conceivably, every employee could appear as a representative at the bargaining table. Riley concludes:

> [I]t is clear that if too many non-union employees decided to pursue their rights of individual representation too vigorously, the system could become quite unmanageable. Presently, the general apathy of most of the non-unionised workforce is the only thing that permits collective enterprise bargaining to proceed efficiently.[67]

The threat to the system posed by its own potential operation speaks of the Act's internal tension.

While Creighton, noted above, observes that the rules on bargaining representatives simply reflect the reality of the rise in non-unionism, labour regulation that simply enshrines market practice, rather than attempting to modify behaviour, is the exception. The Act, as every reform before it, seeks to actively influence the character and makeup of the Australian labour market. Also, and more so than many other subjects of legislation, labour market regulation involves more than legislative provisions. Each wave of reform to pass through the industrial relations system carries with it the introduction, expansion or dismantling of institutions tasked with the law's implementation. Should not unions be credited as essential institutions in the system and receive the support they need to keep the wheels of bargaining turning?[68]

Alongside the defeat of the overarching object of a system based on collective bargaining, smaller but no less significant objects also suffer. How might, for example, the object of fairness to working Australians be affected by novice representatives bargaining for their conditions compared to 'a professional, such as a union official … [who] will bring expertise to the negotiation'[69] who might otherwise be doing their bidding in a positively unionised system?

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[66] See, eg, *Bowers v Victoria Police* [2011] FWA 2862 (13 May 2011) on the question of who pays for the time of non-union representatives.
[67] Joellen Riley, 'Bargaining Fair Work Style: Fault-Lines in the Australian Model' [2012] (1) *New Zealand Journal of Employment Relations* 22, 29.
[68] Ewing, Howell and Bogg have each pointed out the tendency to underestimate the extent to which unions require the positive support of government. Bogg notes, people fail 'to identify the State's positive role in constructing and supporting bargaining institutions': Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 21. The neutral stance, exemplified in the Act, is 'largely indifferent to the success or failure of trade-union organizations': Ewing quoted in Bogg. On this view, a neutral position from the government positively enables the withering of unionism.
[69] R Fells, *Effective Negotiation: From Research to Results* (Cambridge University Press, 2010) 138.

V Points of Tension in Industrial Action

While employees rely on their voice being heard within collective bargaining, collective bargaining finds its power in the spectre of industrial action.

For a collective bargaining system to work at its optimum, a key requirement is access to industrial action. This access exists under the Act.

Yet, as Collins noted, under the settlement unions accepted limits on industrial action in return for the right to collectively bargain. These limits exist under the Act.

But in contrast with comparable nations that shared the political development described by the settlement, Australian employees not only suffer limits on industrial action, but also tethers on their freedom to collectively bargain.

Given this bounded form of collective bargaining, we might expect an expansive version of industrial action to compensate for the shortfall in employee freedoms. Such is not the case. Section 408 states:

> Industrial action is protected industrial action for a proposed enterprise agreement if it is one of the following:
>
> (a) employee claim action for the agreement (see section 409);
>
> (b) employee response action for the agreement (see section 410);
>
> (c) employer response action for the agreement (see section 411).

This means protected action must be linked to, and is limited by, an agreement. This ties industrial action to the bounded content of bargains discussed in the previous section.

By restricting industrial action in this way, the government restricts access to industrial action that might be taken in support of collective bargaining. On one hand the government seeks to promote collective bargaining, on the other, it seeks to minimise industrial action, undermining the same bargaining. These two ends are at odds and in constant tension.

Beginning with the apprehension of industrial action, which is based not on its ordinary meaning — to include actions such as picketing — but instead refers to its own statutory definition — itself the subject of divergent judicial opinion — the employee applying for protected industrial action must also run several other rounds of qualification. These include

taking action only in certain times, ensuring the industrial action is in support of matters pertaining to the relationship of employer and employee, showing they were genuinely trying to reach an agreement, bargaining in good faith and holding a protected industrial action ballot. Once won, the protection of their industrial action may yet be withdrawn — if it is in the interests of other parties — by a number of regulatory means.

A *Definition of Industrial Action*

While the definition of industrial action comfortably covers strikes, lockouts, work to rule, go-slows, work bans, and rolling stoppages, other action like picketing may not be covered.

Stemming as it does from a statutory definition, the scope of industrial action — and with it, the range of industrial action that may seek protection — is determined by discovering Parliament's intention in enacting the legislation.

Aside from the not inconsiderable difficulty in divining parliamentary intention, it poses a problem for types of industrial action that may not have been in the Parliament's contemplation.

In *Ambulance Victoria v United Voice*,[70] the Federal Court found the furnishing of ambulance response times to the media by employees was not protected industrial action as it did not meet the definition under s 19.

Ambulance employees, already susceptible to restrictions on industrial action by virtue of their status as an essential service,[71] arguably found a creative solution that at once honoured their duty to the public to not engage in any behaviour that would cause stress or harm, but also apply pressure to their employers as per the purpose of industrial action in support of collective bargaining. Such creativity, because not in the contemplation of legislation, was deprived of protection.

The uncertain legal status of some activities that might be undertaken as part of industrial action undermines the taking of industrial action and, with it, its role in collective bargaining.

B *Expiry of an Existing Agreement*

[70] (2014) 245 IR 375.
[71] See, eg, McCrystal, above n 14, 253–5.

Industrial action cannot be taken while an agreement is current, it can only be organised or engaged in after the nominal expiry date of an enterprise agreement.[72]

McCrystal notes that if employees want to access industrial action in support of their bargaining, 'all of the claims must be raised within the scope of negotiations for the agreement. Parties cannot agree to leave a particularly difficult issue for negotiation and resolution at a later date'.[73]

The timetabling of industrial action only for scheduled periods seems to offend the notion of industrial action as democratic freedom, an expression of employee voice.

It also sits askew with the Australian culture of industrial action whereby employees have favoured short unconditional actions, that seek to send a signal to the employer, rather than longer contingent actions, that await a response from the employer before they are ended.[74]

C *Permitted Matters*

Parties can only take industrial action regarding permitted matters. Permitted matters are defined in s 172 and include matters pertaining to the relationship between employer and employee. Like the definition of industrial action, the scope of claims covered by 'genuinely pertains' is not clear. It remains a category whose contents are found more by a process of elimination than by their positive identification. In *Electrolux Home Products Pty Ltd v AWU*[75] McHugh J stated:

> This Court has consistently held that the rejection of demands of an academic, political, social or managerial nature does not create a dispute about matters pertaining to the relationship between employer and employee … The cases emphasise that 'matters pertaining' to the relations of employers and employees must pertain to the relation of employees as such and

[72] Section 417.
[73] McCrystal, above n 14, 160.
[74] Peetz notes that while this strategy of industrial action developed in part as a response to particularities of the conciliation and arbitration system, he also concludes that 'despite the major changes in industrial law in Australia, aimed in part at making it more like other countries (those without arbitration), but less supportive of the right to strike, Australia retains its own distinct culture of industrial relations and patterns of industrial conflict behaviour. These are ingrained and slow to change': David Peetz, 'Industrial Action, the Right to Strike, Ballots and the Fair Work Act in International Context' (2016) 29 *Australian Journal of Labour Law* 133, 152.
[75] (2004) 221 CLR 309.

> employers as such, that it, employees in their capacity as employees, and employers in their capacity as employers.[76]

Providing some guidance, this approach largely responds to the question of 'what genuinely pertains?' by introducing another equally elusive conceptual space: 'what does "capacity" of employee and employer cover?'

Categories with porous boundaries are prone to evade clear judicial guidance. This is not news. But when a nation relies on its industrial relations system to deliver prosperity, and that system depends on collective bargaining to be its engine, where collective bargaining relies on the ability to take industrial action to be effective, and that action is unlawful but for the meeting of finely-spun statutory terms, the product of this judicial exegesis takes on extra import. How can employees organise their industrial behaviour, including meeting the many legal requirements for protected industrial action, if the law fails in its essential task to provide a clear and predictable guide for prospective action?

D *Protected Industrial Action Ballot*

In order to initiate industrial action, employees must engage an external body (typically the Australian Electoral Commission) to conduct a secret ballot. Section 436 states the object of this is 'to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement'.

While ballots bring an added democratic aspect to industrial action, Peetz observes 'the use of oppressive procedural requirements to accompany ballots can impede the right to strike'.[77] Peetz makes these observations in the context of an economic analysis of industrial action. Peetz suggests that industrial action will occur when 'for both parties, the expected costs of the strike are lower than the expected benefits, and will continue until, for one of the parties, the marginal expected costs of continuing exceed the marginal expected benefits'.[78] Ballots, representing a cost, will then act as a disincentive to the taking of industrial action.[79]

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[76] Ibid 338–9.
[77] Peetz, 'Industrial Action, the Right to Strike, Ballots and the Fair Work Act in International Context', above n 73, 153.
[78] Ibid 136.
[79] McCrystal takes two views on this. Writing with Creighton she states ballots 'may or may not have some marginal impact on levels of disputation, but they almost certainly serve to legitimate action which has been endorsed through a democratic balloting process': Breen Creighton and Shae McCrystal, 'Strike Ballots and the Law in Comparative Perspective' (2016) 29 *Australian Journal of*

Again, this is another point of tension, with the regulation of industrial action acting against its being taken in support of collective bargaining.

E *Genuinely Trying to Reach an Agreement*

To obtain a ballot, the applicant must have been genuinely trying to reach an agreement in their negotiations with the other party.[80]

A guard against the strategic use of bargaining to trigger access to industrial action, it also adds another procedural obstacle, one containing an evidential burden. In assessing whether the applicant has been genuinely trying to reach an agreement in their negotiations, the Commission may enquire into a number of things: did the applicant meet their good faith bargaining obligations? What claims were made during bargaining? What is the history of the negotiations?

F *Good Faith Bargaining*

While all negotiations are bound by the good faith bargaining obligation prescribed under s 228,[81] the obligation forms part of a threshold question for those seeking to access protected

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Labour Law 121, 129. Elsewhere she takes a less generous position, observing the ballot process 'excessively hinders the exercise of the right to strike': Shae McCrystal, 'The Fair Work Act 2009 (Cth) and the Right to Strike' (2009) 23(1) *Australian Journal of Labour Law* 3, 25.

[80] Section 443.

[81] Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements do not require:

industrial action. In *MUA v Total Marine Services Pty Ltd*[82] the Commission's predecessor held that whether the applicant has been bargaining in good faith would likely be weighed in answering whether or not they were genuinely trying to reach an agreement.

G *Suspension and Termination of Industrial Action*

The point of industrial action under the Act[83] is to apply pressure to the employer. Under Peetz's economic analysis, this pressure is suffered by the employer as a cost. This cost is the key factor in the employer's calculus: when the cost to the employer of action brought by employees approach or overtake expected future benefits from resisting the action, the rational employer seeks a negotiated resolution in the form of a bargain.

But under the Australian system, industrial action may be suspended by the regulator on account of these costs.

Section 426 provides that industrial action may be suspended if it is adversely affecting the employer, threating to cause significant harm to a third party. In deciding whether suspension is appropriate, the Commission must consider whether suspension would be contrary to the public interest or inconsistent with the objects of the Act.

Based on Peetz's cost-benefit theory of industrial action, suspending industrial action according to the adverse effects caused to the employer will always be inconsistent with the objects of the Act, adverse effects being the lever that drives the employer to bargain.[84] The inclusion of this section is telling: it belies an incomplete commitment not only to bargaining, but also the theory behind it. And it spreads to this area the basic tension that underlies and undermines the Act: the desire to deploy industrial action for the ends of bargaining, mixed with a fundamental antipathy to industrial action.

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

[82] (2009) 187 IR 288.

[83] Aside from economic reasons, social justifications exist.

[84] Creighton states 'the "right to strike" is meaningless unless those who take such action have the capacity to exert pressure on the other party by actually inflicting economic pain': Creighton, 'Impacts of Enterprise Bargaining on Unions and Employers: Discussants Comments', above n 35, 285.

Section 424 provides that industrial action may be suspended or terminated when it 'has threatened, is threatening, or would threaten: (c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or (d) to cause significant damage to the Australian economy or an important part of it'. In part a restatement of the settlement, McCrystal by contrast argues that the economic concerns covered by s 424(d) are incompatible with the essential services status to which they are elevated by this section.[85]

More generally it has been observed that 'if the right to take protected industrial action under the FW Act is to be meaningful, the ordinary and expected consequences of industrial action must be allowed to follow, without those consequences leading to suspension or termination of protected industrial action'.[86]

VI Consequences of Regulation

Authors note the apparent paradox that promoting business interests by freeing up the market brings with it increased red tape.[87] The job of promoting specific business agendas, such as undermining union operation per the pattern bargaining provisions, brings with it a particularly heavy regulatory burden.

Regulation itself comes with a warning:

> Regulation is, as Foucault said of governance, the 'conduct of conduct', or as re-phrased by Rose, 'to act upon action'. This has several implications, first and most obviously that regulation will produce changes in behaviour and outcomes that are unintended (though not necessarily adverse), a well-recognised empirical phenomenon in regulation.[88]

[85] McCrystal, 'The Fair Work Act 2009 (Cth) and the Right to Strike', above n 78, 31.
[86] Andrew Stewart, Shae McCrystal and Joanna Howe, 'Response to the Draft Report: Submission to the Productivity Commission Inquiry into the Workplace Relations Framework' (2015), 19–20.
[87] 'Neoliberal states are highly interventionist and that under neoliberalism the state becomes more, not less, important as a regulator. As a result, regulation may become more complex and directive': Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' [2008] (3) *British Journal of Industrial Relations* 532, 532. See also Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' [2006] (4) *Industrial Law Journal* 343.
[88] Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 6.

Those occasions when regulation does result in adverse outcomes have been documented by Grabovsky[89] and Sunstein. Sunstein, writing of the 'paradoxes of the regulatory state',[90] examines 'self-defeating regulatory strategies-strategies that achieve an end precisely opposite to the one intended'.[91]

The increase in regulation required to re-regulate for market interests brings an increased opportunity for regulatory backfire. In the Act we see this occur, leading to partial defeat of its objects.

Attempting to deliver the business agenda of flexibility and productivity, the Act produces the opposite: inflexibility and inefficiency.

The Act has as an object the promotion of flexibility. If flexibility is to mean more than a retreat from employer obligation, and to encompass the spectrum of strategic response by business to economic conditions and labour regulation, then it should include in its definition removal of rigidities around the level of bargaining freedom. For some employers, pattern bargaining is a boon, but by the paradox of the regulatory state this option has been regulated off the bargaining table in the name of advancing business interests.

Unintended outcomes also result in objects not only self-defeating but acting against each other.

The Productivity Commission, in its review of workplace regulation, wondered whether the diverse objects of the Act could act in concert or must be in conflict.[92]

As argued, unqualified promotion of the institutions of capital and labour begets countervailing conflict in society which benefits the aggregate economy. Individual businesses might not like union activity, for example, but the countervailing force brings with it balance to the economic system historically shown to be productive of prosperity. When this balance occurs not as an external social product of the legislation, but instead occurs as an internal legal process of the legislation — the attempt by the Act to balance the interests of employers with 'working Australians' — the Productivity Commission's fears are realised and we see object fratricide.

[89] P Grabovsky, 'Counterproductive Regulation' (1995) 23 *International Journal of Sociology of Law* 347.
[90] Cass Sunstein, 'Paradoxes of the Regulatory State' (1990) 57(2) *University of Chicago Law Review* 407.
[91] Ibid 407.
[92] 'The FW Act cites objectives that are diverse and — as if often the case with such diversity — potentially in conflict': Productivity Commission, 'Workplace Relations Framework: Inquiry Report' (2015) 75.

For example, trying to free businesses from industrial pressure and train focus on the enterprise as the unit of negotiation via its pattern bargaining provisions, the Act derails its own ambition to 'take into account Australia's international labour obligations',[93] drawing criticism from the ILO.[94]

VII RECOMMENDATIONS

A *Increased Access to Arbitration*

Aside from industrial action, Clegg notes that appeal to arbitration by one party may bring pressure to bear on the negotiation.[95] Under the Act as we have seen, protected industrial action for many reasons may not be an option. Given the legislated limitations on the possible pressure that can be exerted through industrial action in Australia, Clegg's suggestion of appeal to arbitration holds appeal.

Forsyth and Slinn observe that the Act 'can get a reluctant employer to the negotiating table (for example, through a majority support determination) but it cannot compel such an employer to conclude an agreement'.[96] And employees may struggle to propel the employer with their limited industrial action. Given the government's commitment to neutered industrial action, a return to increased use of arbitration seems a logical, if politically improbable, move.

While it may seem a retrograde step, and go against parliamentary aspirations of the last 20 years, with the end of unionism as a countervailing institution, and in the face of legislation that limits access to industrial action, it may be necessary.

In support of this, it has been observed that the actors in industrial relations in Australia have not weaned from the culture of arbitration.[97] Given this, a restoration of greater access to arbitration would simply represent an instance of responsive regulation, with all its attendant

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[93] Section 3(a).
[94] Breen Creighton, 'International Labour Standards and Collective Bargaining under the Fair Work Act 2009' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012). McCrystal, 'Fair Work in the International Spotlight', above n 30.
[95] 'The process is called bargaining because each side is able to apply pressure on the other… the best-known forms of pressure are the strike and the lockout but there are many others … an appeal to arbitration by one side may be intended to put pressure on the other': Clegg, above n 1, 5.
[96] Anthony Forsyth and Sara Slinn, 'Promoting Worker Voice through Good Faith Bargaining Laws: The Canadian and Australian Experience' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 192.
[97] Creighton, 'Impacts of Enterprise Bargaining on Unions and Employers: Discussants Comments', above n 35.

advantages, rather than a command and control model, driven by ideals, ignorant of empirical practice, with all its documented failings.

B *Fostering Alternative Consultation Mechanisms*

Another response is not to seek alternatives to bargaining but attempt its reinvention. Reinvented, it would be less an arena for the clash of employer and countervailing union power, and more a site for partnership.

The ebb of unionism might be an opportunity to move beyond the capital-labour dicot, from settlement to partnership. The rise of individualism[98] and decline in the ethic of collectivism may make this evolution inevitable. The state of bargaining as reported by Thornthwaite and Sheldon appears to make it imperative.

Collins observes all employers 'require industrial relations mechanisms for securing collective cooperation from the workforce'.[99] How to do this? And how to do it absent collectivism? The answer Collins suggests is found in consultation mechanisms. Collins notes that while 'most employers may be sceptical of the potential of collective bargaining as a partnership mechanism, they are certainly not opposed to other consultation mechanism with employees'.[100] These include committees, quality circles and open meetings with managers.[101] These bodies and their processes could be put to the task of making agreements. Not collective bargaining born of unions, it would represent collective agreement making allowed under the Act.

VIII CONCLUSION

The Act has not had a long operation. Industrial relations are a complex of evolving social and economic interests. It is perhaps too early, and certainly never easy, to judge the impact of a single instrument of labour market regulation in isolation. What we can say, after investigating

[98] 'Arguably the most important force driving the industrial relations transformation has been the shift in value systems that has taken place among the populace of most industrial economies, including Australia. In particular, the values and interests of wage earners have been shifting away from a collectivist orientation, with its emphasis on solidarity and equality, the common good, and the need for rational authority structures, towards a more individualist orientation, which places more emphasis on self-interest and personal development': Mark Wooden, 'Industrial Relations Reform in Australia: Causes, Consequences and Prospects' (2001) 34(3) *Australian Economic Review* 243, 248.
[99] Collins, above n 22, 118.
[100] Ibid 127.
[101] Ibid.

the Act's treatment of collective bargaining and industrial action, is that the Act will strain against its own inner tensions to achieve its legislative ambitions. Also, absent meaningful freedom to decide scope and content of bargaining, and time and type of industrial action, can one say the outcome of this miserly haggle that stands as a simulacrum of bargaining is akin to self-determination? What does this mean for the democratic claims of collective bargaining and industrial action? Will they still be enjoyed by employees under the highly 'staged managed'[102] Australian version, where rules are cast according to an inventory of government prescriptions and restrictions? If the past is any guide to the future, employer organisations will see much of their agenda passed into law and continue to agitate for greater individualisation. Rather than collective bargaining creating its own body of rules and evolving into a self-sustaining social institution, we will see more employers withdrawing from the practice and petitioning for greater regulation. Far from relieving the law of one of its tasks by producing an autonomous body of rules, collective bargaining and industrial action in Australia will likely continue to attract law's undying attention.

[102] McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009', above n 29, 49.