A System "On Life Support"? The Changing Employment Landscape and Collective Bargaining in Australia*

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I. Introduction

In Australia, as in many other industrialised economies, recent decades have seen significant shifts in the industries in which people work and the arrangements under which work is performed. This paper considers the extent to which, and how, Australia's collective bargaining laws have been adapted to meet these evolving labour market realities. It starts with a brief snapshot of major changes to Australian employment structures and arrangements in recent decades. This is followed by an overview of the evolution of the legislative framework on collective bargaining and of the state of collective bargaining today. The paper then discusses three ways in which Australian law continues to significantly constrain the capacity of workers to collectively respond to the challenges that evolving labour market developments may pose to the attainment of decent wages and working conditions through collective bargaining, including by way of industrial action. These constraints go to the types of workers that are able to collectively bargain, the level at which collective bargaining may occur, and the scope of matters that can be included in collective agreements. The paper concludes with some observations as to the prospects for change.

Due to the brevity of this paper, the scope of the discussion below is subject to limitations and it is important to clarify these before proceeding. First, the paper focuses on bargaining in the private sector but does not extend to cover the specific regulatory framework that has existed in the building and construction industry in various form since 2005. Second, while of relevance to certain business practices such as outsourcing, this paper does not cover provisions within Australian law which provide for the transfer of a collective agreement in certain circumstances (see further Johnstone and Stewart, 2015). Finally, the paper focuses on the legislative framework at the federal level. There are of course other ways in which the state in Australia (at the federal and state/territory levels) can and does seek to influence collective bargaining processes and outcomes, such as through financial incentives and procurement (see further Howe, 2012).

II. Changing employment structures and arrangements

Like many other industrialised countries, the structure of the Australian labour market has changed significantly in recent decades. There has been a relative and absolute decline in employment in the manufacturing industry, and significant growth in service intensive industries (Productivity Commission, 2015). Of the 11.8 million employed persons in Australia today, around 67% are engaged full-time (Australian Bureau of Statistics, ABS, 2017). Part-time work now accounts for close to a third of employment, compared with a little under a quarter two decades ago. After increasing rapidly in the 1990s, the rate of casual employment has now stabilized at around a quarter of all employees (Ibid).

* The title of this paper draws on a metaphor used recently by the Federal Opposition Leader, the Hon Bill Shorten MP, to describe Australia's collective bargaining system (Australian Financial Review, 2018).

Recent years have also seen developments in Australia broadly corresponding to what David Weil has described as the 'fissuring' of the workplace (Weil, 2014). While the precise nature and extent of this fissuring varies across sectors, empirical and anecdotal evidence suggests that increasing numbers of workers are engaged under work arrangements that lie 'outside the firm's legal boundary': as contractors, or as employees of small subcontractors or franchisees, instead of as the direct employees of vertically organised large firms. Today, around 1 in 10 (1 million) workers in Australia are independent contractors (owner-managers with no employees), and around 134,000 workers are engaged by labour hire firms (ABS, 2017). In many cases, the outcome of this 'fissuring' is that a worker's direct employer exerts limited, if any, control over the terms and conditions of employment. Those with the economic power in a sector or supply chain wield significant influence and, in some cases bureaucratic control, over the pay, working time and other conditions of workers engaged by other entities lower down in the supply chain (Johnstone and Stewart, 2015; Hardy, 2017).

Relevantly for this paper given its focus on collective bargaining (most of which is still done with union representation), recent decades have also seen a significant decline in union membership. In the 1990s, union density dropped faster than in most OECD countries, from 41% of the workforce in 1990 to just 25% in 2000 (Cooper and Ellem, 2011: 36-37). Today union density in the private sector is at record lows, at just 9.3% in the private sector (ABS, 2017).

III. Collective bargaining in Australia

The evolution of collective bargaining regulation

Also like many other jurisdictions, the Australian industrial relations system recognises the benefits that collective bargaining may bring in terms of protecting and promoting the rights and interests of workers, as well as its potential to deliver efficiency gains (Creighton and Forsyth, 2012; Hayter et al, 2011). Official recognition of the practice as a feature of the Australian industrial relations landscape came in the early 1990s. Prior to this time, wages and minimum conditions of employment were set by way of industrial and occupational 'awards,' made by the federal industrial relations commission. While some bargaining at the workplace level occurred, this was done on an informal basis and limited in scope (Peetz, 2012). In 1993, the *Industrial Relations Act 1988* (Commonwealth, hereinafter Cth) was amended so as to provide a central role for workplace or enterprise-level bargaining. This transformative reform essentially involved two discrete shifts: from arbitration to bargaining, and from the determination of pay and conditions at a multi-employer level (by industry or occupation) to a single-employer level (Ibid: 244). The move away from centralized conciliation and arbitration towards bargaining at the workplace or enterprise level was supported by all major industrial actors at the time (the Federal Government, Australian employer groups and the Australian Council of Trade Unions).

Australia's industrial relations framework has since been subject to multiple rounds of legislative reform. However, key elements of the bargaining framework have endured. Enterprise bargaining continued under the (conservative) Coalition Government between 1996 and 2007, although there was provision for a wider variety of forms of agreement and individual statutory agreements were promoted over other agreement forms. There were also increasingly onerous restrictions placed on trade unions and their capacity to take industrial action in pursuit of bargaining claims. Following a successful union-led campaign against the Howard Government's industrial relations reforms, the Rudd Labor Government won power in 2007 promising a fairer and more balanced industrial relations system.

The introduction of the *Fair Work Act* (FW Act) in 2009 has widely been regarded as a return to collectivism (Stewart, 2009). This Act, which continues in force today, recognises the importance of collective bargaining as a means of ensuring fairness for employees, and of promoting democratic values (Forsyth, 2011). It seeks 'to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits.' (Part 2-4, s. 171). The Act sets out a framework which promotes enterprise bargaining, underpinned by a safety net of minimum wages and conditions of employment by way of statutory minima and industry and occupation awards. Part 2-4 of the

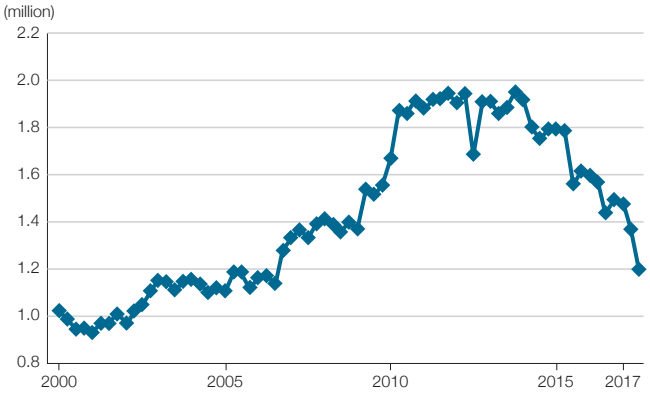
Act contains a number of mechanisms that seek to facilitate bargaining and open up the practice to previously excluded employees and workplaces, such as provision for representation during bargaining (including by unions), good faith bargaining requirements (supported by bargaining orders), majority support determinations and the low-paid bargaining stream (see further below).

The state of collective bargaining in Australia today

While the introduction of the FW Act saw a growth in collective agreement making (Cooper, Ellem and Todd, 2012), the most recent data available suggests collective bargaining coverage in the private sector is in decline. The number of employees covered by active enterprise agreements has fallen significantly in recent years (see Figure 1), and in the most recent September quarter, experienced one of the largest drops recorded (down by 170,000) (Australian Department of Jobs, 2017). These figures have led some commentators to foreshadow the 'virtual extinction of collective bargaining in the private sector' (Janda, 2018). The wage premium delivered through collective bargaining is also declining. Despite strong job growth in recent years, wage increases in private sector agreements approved in the September 2017 quarter were at a 25-year low of 2.4% (Ibid).

Today, just under one third of Australian employees are covered by federal enterprise agreements. This means that increasing numbers of workers (almost one in four) are reliant on awards to set their minimum pay and conditions of employment (see Table 1). This is of particular significance given the transformation in the role played by awards over the past several decades: from standardising wages and a broad range of terms and conditions of employment across particular industries or occupations to providing a narrow safety net of minimum wages and conditions of employment. As the gap between awards and enterprise bargaining has grown, so too has the incentive for employers to avoid bargaining and/or to engage workers through forms that fall outside the scope of the collective agreement (see further Part V below).

Collective bargaining is very unevenly dispersed across the Australian labour market, with employees in the private sector and in smaller enterprises less likely than those in the public sector and large enterprises to be covered by a collective agreement (ABS, 2014). Employees are least likely to be covered by a collective agreement in the accommodation and food services; administrative and support services; retail trade; and health care and social assistance industries (Ibid). A higher proportion of females and young workers are award-reliant than males (Productivity Commission, 2015: 1102). Permanent and fixed-term employees are more likely to be covered by an enterprise agreement than casual workers (Ibid). Around 30% of enterprise agreements do not involve a trade union (Ibid: 1108).[1]



Source: Centre for Future Work (2018: 14), based on Dept of Jobs and Small Business data.

Figure 1. Private sector employees covered by enterprise bargaining agreements, 2000-2017

1. This reflects a distinctive and longstanding feature of the Australian legislative framework in which collective 'bargaining' can take place without a trade union (Gahan and Pekarek, 2012: 217). Under the FW Act, a trade union must give notice to the Commission when it is approving an agreement that it wants to be 'covered' by the agreement (see ss.183(1) and 201(2) of the FW Act).

Table 1. Instrument providing rate of pay for all employees, 2010-2016

Instrument providing rate of pay	2010 (%)	2012 (%)	2014 (%)	2016 (%)
Award	15.2	16.1	18.8	23.9
Collective Agreement (Federally Registered)	31.5	32.0	32.6	30.2
Collective Agreement (State Registered)	11.9	9.8	8.6	6.2
Collective Agreement (Unregistered)	0.1	0.2	0.2	0.1
Individual Agreement (Registered and Unregistered)	37.3	38.7	36.4	36.2
Owner/managers of incorporated enterprises	4.1	3.3	3.4	3.5

Source: Department of Jobs (2017).

Table 2. Collective agreement approvals by year, 2013-2017

Type of agreement	Year			
	2013-14	2014-15	2015-16	2016-17
Single enterprise (s.185)	5,602	5,027	4,523	4,663
Greenfields	745	399	252	162
Multi-enterprise	56	55	26	33
Total	6,403	5,481	4,801	4,858

Source: Fair Work Commission (2017: 54).

Of those collective agreements in operation today, the vast majority are what are described in the FW Act as 'single enterprise' agreements (Table 2). Multi-enterprise agreements are few and far between.

IV. Changing employment and organizational structures and the level of bargaining

As noted above, recent years have seen significant fissuring of workplaces in Australia, in the form of greater commercialization of work relationships, along with increased diversity in organisational and employment arrangements. These developments have far-reaching implications for the capacity of workers to collectively negotiate improvements in wages and working conditions. The rise in supply chain and franchising arrangements, for example, may render it difficult if not impossible for workers to bargain for significant improvements in pay and working conditions at the enterprise level as the locus of economic power and control lies beyond the confines of the enterprise itself. This is particularly the case where enterprises are 'price takers' because of factors such as their position in the contracting chain and intense competition. In this context, multi-employer or other forms of more coordinated bargaining may be more suitable. Changes to employment forms—the rise of independent contracting for example—also presents challenges to collective bargaining (see further McCrystal, 2014).

Despite these changing business practices, Australia's collective bargaining laws continue to focus overwhelmingly on bargaining at the enterprise or workplace level. Under the FW Act, bargaining is to take place primarily by way of the making of 'single-enterprise agreements' (FW Act, s. 172(2)), with an 'enterprise' defined as a business, activity, project or undertaking (s. 12). A 'single enterprise agreement' can be made by one employer (and its employees), or by two or more employers (and their employees) where they are related corporations or engaged in a joint venture or common enterprise (s. 172(5)). It can also be made by two or more employers specified in a 'single interest employer authorisation' from the federal tribunal, the Fair Work

Commission (FWC).[2]

Upon application, the FWC must make a single interest authorisation, providing it is satisfied that the employers agree to bargain together and are not 'coerced' into so agreeing (s. 249(1)), or where the FWC is satisfied that the employers carry on similar business activities under a franchising arrangement. A 'single interest authorisation' can also be granted to groups of employers covered by a ministerial declaration (s. 247). The Act provides the Minister with discretion as to whether or not to make such a declaration, although it identifies a number of factors that he or she must take into account. These include, for example, whether the employers have previously bargained together; the extent of their common interests, whether they are governed by a common regulatory regime or have a common source of public funding, and the extent to which it would be 'more appropriate' for each of the relevant employers to make a separate enterprise agreement. Notably, only employers can apply to the FWC or the Minister for a single interest authorisation.

The FW Act also provides for 'multi-employer agreements.'[3] Unlike its predecessor, the *Workplace Relations Act 1996*, there is no longer any requirement for parties wishing to bargain above the enterprise-level to apply for prior authorisation.[4] However, the Act continues to promote bargaining at the enterprise level and restrict bargaining at higher levels in a number of ways. This reflects what Gahan and Pekarek (2012) describe as 'a deep-seated suspicion—among employers, governments and the tribunal—of the consequences of more centralized or coordinated arrangements' (Ibid: 206). It is also an approach that has made Australia the subject of consistent criticism by the ILO supervisory bodies for its non-compliance with freedom of association and collective bargaining conventions to which it is a party (Creighton, 2012).

First, the Act limits the availability of the statutory mechanisms intended to facilitate the bargaining process to parties seeking to reach, or bargaining for, a 'single enterprise agreement.' These include, for example, scope orders (to resolve disputes over the coverage of a proposed agreement), majority support determinations (to determine whether majority support for a collective agreement exists among employees and if so, to impose an obligation on an employer to collectively bargain) and bargaining orders (to enforce the good faith bargaining requirements).

Second, the FW Act constrains multi-employer bargaining through failing to provide statutory immunity for workers and unions who take industrial action in pursuit of a multi-employer agreement. This lies in contrast to the regime of 'protected industrial action' that exists in relation to single-enterprise agreements, under which employees and employers who wish to take industrial action in pursuit of a proposed agreement are afforded immunity from civil liability (providing they comply with the procedural requirements in the Act). By removing any capacity for workers to take protected industrial action in pursuit of a multi-employer agreement, Australian law severely limits the capacity for workers and unions to apply pressure to achieve their bargaining objectives. As others have emphasised, there is little if any genuine capacity to 'bargain' without such a right (Clegg, 1976: 5-6).

Third, a number of provisions in the Act essentially operate to preclude a union from lawfully taking industrial action when it is engaging in 'pattern bargaining.' Under s. 412, a person is engaging in 'pattern bargaining' if they are seeking common terms in two or more separate agreements, without 'genuinely trying to reach agreement' with each of those employers.[5] The FW Act does not go so far as to prevent unions from coordinate bargaining processes, goals and outcomes across multiple workplaces. However, the Act does not afford 'protection' to industrial action taken in support of it, and also enables employers to seek a court injunction order to stop or prevent the action (s. 422).

Fourth, the rules within the Act for the approval of proposed collective agreements favour the making of

2. FW Act, s. 172(2), (5).
3. FW Act, s. 172(3)(a).
4. Under the former *Workplace Relations Act 1996*, multi-employer bargaining was subject to a public interest test.
5. The employee bargaining representative bears the burden of proving they were 'genuinely trying to reach agreement': FW Act, s. 412(4).

single enterprise agreements. A proposed multi-enterprise agreement will only cover an enterprise where a majority of employees within that enterprise has voted in favour of the agreement. Any enterprise in which there is not majority support for the proposed agreement will not be covered by it (ss. 182, 184). In comparison, a single-enterprise agreement is approved when it receives a majority vote of those employees across the relevant enterprise who have cast a valid vote (s. 182). The Act further gives primacy to enterprise agreements by providing that an employer covered by a multi-employer agreement can at any time enter into a single enterprise agreement (s. 58(3)). There is also no capacity to add additional employers to a multi-employer agreement once made.

The FW Act contains one important concession to the challenges that enterprise bargaining poses to certain segments of the labour market. The 'low-paid bargaining stream' in Division 9 of the Act was introduced with the explicit objective of facilitate bargaining among low-paid employees or employees who have not historically had access to the benefits of collectively bargaining due to factors such as low bargaining power, low skill levels, difficulties taking industrial action and absence of other incentives to bargain. The types of workers that it was envisaged might benefit from these provisions included, for example, those in community services, cleaning, child care, security and aged care. The low-paid bargaining stream diverges from the general bargaining regime outlined above in important respects. In order to access the stream, employees or their representatives must apply for a 'Low-Paid Authorisation.' To grant an authorisation, FWC needs to be satisfied in relation to a number of issues, such as that those covered by any proposed agreement are 'low-paid,'[6] the history of bargaining and bargaining power of the workers, the likely success of collective bargaining, and the extent to which the terms and conditions of the employees are controlled by external parties or forces.[7] If FWC makes a low-paid authorisation, then the parties have access to bargaining orders. The FWC also has other powers to facilitate bargaining in this stream, including by providing assistance on its own initiative and directing third parties to attend conferences. If the bargaining reaches a stalemate, FWC is empowered to arbitrate an outcome by way of a 'Low-Paid Workplace Determination.'[8]

While this stream was widely regarded as one of the most exciting and innovative features of the FW Act, its operation to date has largely been met with disappointment and frustration by those who have sought to use it, and others who hoped it may provide some way to improve wages and conditions of employment among key low-paid sectors (see further Cooper, 2014). Since its introduction in 2009, there have been five applications for a low-paid authorisation, by unions representing workers in aged care, nursing and in private sector security companies. These have resulted in one authorisation being made (dealing with two of the applications), two applications being dismissed and one withdrawn. In its application of the statutory provisions, the FWC has shown a marked reluctance to depart from the longstanding prevailing preference within the Australian system for enterprise agreements. This is reflected in its unwillingness to permit access to the stream by employees with existing agreements (irrespective of how low the pay and conditions in these agreements were or the conditions under which they were negotiated); and/or where it is unconvinced that the applicant union had made sufficient efforts to bargain with the relevant employers on an enterprise basis. There have been no applications lodged under this part of the Act in the past three years.[9]

V. Changing employment forms and the scope of bargaining

A key feature of Australia's evolving labour market is the increasingly diversity of ways in which workers are engaged to perform labour. To what extent has Australia's collective bargaining framework evolved to reflect and respond to these developments? This section considers this question from two distinct angles. It first briefly considers the extent to which Australian law permits workers who are not engaged in an employment

6. There is no definition of 'low-paid' in the Act, with the statute leaving it open to the Fair Work Commission to determine its meaning.
7. FW Act, s. 243.
8. FW Act, s. 263.
9. Based on Fair Work Commission Quarterly Reports to the Minister under s. 654 of the FW Act.

relationship to bargain collectively with those to whom they provide services. It then turns to consider the extent to which those that are able to access collective bargaining under the Act may bargain over matters relating to the extent to which, and the conditions under which, their employer engages workers through various arrangements.

As noted above, there is evidence to suggest that work relationships in Australia are increasingly commercialized: that is, workers are providing their labour to another party through a commercial contract for services rather than an employment contract. While independent contracting is found in all sectors of the economy, these types of arrangements have been given particular impetus by the emergence and increasing popularity of digital platform work in the 'gig economy,' such as Uber and Airtasker. In Australia, while the law is still in flux, the general position taken to date is that these types of workers are 'independent contractors' rather than employees.[10] As contractors rather than employees, these workers are generally unable to access the collective bargaining regime in the FW Act (ss. 11, 13-14). The exception to this is contract outworkers in the textile and clothing industry, which have been deemed as employees for the purposes of the FW Act, including its collective bargaining provisions (s.789BB).[11] For all other self-employed workers, any efforts to collectively negotiate conditions risk running afoul of the restrictive trade practices provisions in Part IV of the *Competition and Consumer Act 2010* (Cth). While Australia's competition regulator (the Australian Competition and Consumer Commission, ACCC) is empowered under this Act to authorise groups of self-employed workers to collective negotiate the conditions under which they are engaged, applications for such authorisations are assessed through a competition law frame rather than an industrial one (McCrystal, 2014). Even where an authorisation is granted, there is no institutional supports for bargaining and a party is unlikely to be permitted to apply any form of concerted pressure on the other (Ibid).

Even where workers are in an employment relationship and so able to collectively bargain under the FW Act, they face significant constraints as to the extent to which they can bargain with their employer over issues going to the forms through which labour is engaged. These statutory constraints have existed ever since enterprise bargaining first received legislative imprimatur in 1993. Originally these parameters were informed by constitutional considerations, and more specifically by the requirement that there be an 'industrial dispute' which was defined as a dispute about matters pertaining to the relationship between employers and employees. This 'matters pertaining' formula has been carried through all subsequent iterations of federal legislation. The content of agreements was subject to further statutory restrictions by the *Workplace Relations Act 1996* and narrowed again with the passage of the *Workplace Relations Amendment (Work Choices) Act* in 2006. This latter statute enumerated a long list of 'prohibited content' that would attract penalties on all relevant parties if included. This included a range of union security-type provisions and, most relevantly for the purposes of this paper, terms seeking to regulate the conditions under which contractors or labour hire employees were engaged.

The FW Act abandoning the prohibited content provisions that existed under *Work Choices*. However, the former Labor Government reneged on its initial promise to the union movement that there would be no restrictions on the content of agreements (Stewart, 2018: 171). Most relevantly for the purposes of this paper and despite there no longer being any constitutional reason for doing so, the FW Act retained (although expanded) the 'matters pertaining' requirement.[12] Under the current regime, certain terms that do not pertain to the employment relationship are deemed 'non-permitted' (s. 172(1)). A non-permitted matter in a collective

10. The Australian approach is generally to apply the common law test (looking at the totality of the relationship between the parties and applying the 'multi-factor test') to determine whether, on a case by case basis, these workers are independent contractors or employees. See further *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, and Stewart and Stanford (2017).
11. This provision was inserted by the *Fair Work Amendment (Textile, Clothing and Footwear) Act 2012* (Cth).
12. Under the FW Act, agreements may contain terms about matters pertaining to the relationship between the employer and the employees who will be covered by the agreement; matters pertaining to the relationship between the employer and any employee organisation that will be covered by the agreement; deductions from the wages for any purpose authorised by an employee covered by the agreement; and how the agreement will operate (s. 172). An agreement must not contain 'unlawful terms' (s. 186).

agreement is unenforceable (s. 253(1)(a)). Moreover, industrial action will not be protected where the union did not 'reasonably believe' the term to be about a permitted matter (s. 409(1)(a)).

The effect of all this is that parties can include and enforce certain terms regulating the extent to which and how non-standard forms of labour are engaged in their collective agreements but not others. Parties may enforce terms that regulate the wages and conditions of various forms of directly-engaged labour, including casual and fixed-term forms of employment. Parties may also enforce clauses that provide for the conversion of casual and fixed-term employees to permanent employment. Unions may indirectly regulate the wages and conditions of contractors and labour hire workers by way of including a 'parity' clause (also commonly referred to in Australia as a 'sites rate' or 'jump up' clause) within an agreement, which effectively extends employees' wages and conditions under an agreement to contractors or labour hire workers engaged at the workplace where this relates sufficiently to the job security of the host's direct employees.[13]

However, parties *may not* enforce terms that prohibit or limit the capacity of an employer to engage certain forms of labour (casual employees, fixed term employees, contractors or labour hire workers), on the basis that these types of provisions do not sufficiently pertain to the relationship between the employer and its own direct employees or their union.[14] Nor does it appear that parties can enforce any sort of clause requiring an employer to only procure goods or services from other businesses that adhere to certain stipulated standards (Stewart, 2018: 178).

VI. Concluding observations and prospects for change

While support for collective bargaining has waxed and waned in Australia since the early 1990s, there has been an enduring consensus that collective bargaining should be actively constrained to the enterprise level. Following the former Coalition Government's concerted attempts to de-collectivize Australian workplaces, the *Fair Work Act* 2009 constituted a deliberate attempt to restore fairness and collective bargaining to the Australian industrial relations system. The Act introduced a number of important reforms which have gone some way in removing constraints on the capacity of parties to bargain on a multi-employer basis. It has not, however, decisively departed from the longstanding policy preference in Australia for enterprise bargaining. Not only does Australian law continue to promote enterprise bargaining, it continues to actively constrain the capacity of parties to bargain in more coordinated or centralized forms (Thornwaite and Sheldon, 2012: 256). While multi-employer bargaining is permitted, it is generally only where employers are already willing to do so: that is, the Act permits multi-employer agreement-making but not multi-employer bargaining.

The FW Act introduced an important, albeit to date unsuccessful, attempt by way of the low-paid bargaining stream to address the challenges that enterprise bargaining poses for fragmented business structures, and some sectors of the labour market where employment is scattered in small enterprises or where the characteristics of the workforce otherwise militate against bargaining at the enterprise level.

However, as pointed out recently, these reforms still effectively see the demands of the increasingly typical modern workplace as 'an apparent afterthought' rather than placing them at the centre of the system (Butler, 2018). With respect to collective bargaining and employment forms, this paper has highlighted the continuing reluctance of Australian law to recognise collective bargaining rights for self-employed workers, or to accept that it is legitimate for those workers in an employment relationship to seek to regulate the extent to which and how their employers engage various forms of labour. While in relation to the latter, the FW Act has seen some broadening of the scope of matters that can be included in collective agreements, it continues to impose constraints that have important implications for the wages and conditions of workers, both directly and indirectly-engaged.

Is there any prospect for change? The current Coalition Government has not foreshadowed any major

13. *Asurco v CFMEU* (2010) 197 IR 364; and *Australian Industry Group v FWA* (2012) 205 FCR 339.
14. *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313*; Australian Postal Corporation v CEPU* (2009) FWAFB 344*; AMWU v Visy Board* (2018) FWAFB 8.

relevant reforms. All three of these legal constraints—on the level of bargaining, the types of workers that can access bargaining and permissible content of agreements—are longstanding features of the Australian industrial relations landscape. They are also fiercely contested. Employer groups strongly resist any calls for greater liberalisation of the *collective* bargaining framework. Also militating against any changes in this regard is the Australian Productivity Commission, a federal independent statutory body responsible for providing research and advice to the government on economic and social matters. In its recent review of Australia's workplace relations system, the Commission concluded that there was 'insufficient evidence that the risks and challenges posed by new employment arrangements are sufficient to warrant a new bargaining framework.' (Productivity Commission, 2015: 708). While it recognised the challenges that enterprise bargaining posed to small enterprises, its proposed solution was a new 'enterprise contract' (Ibid: 1099), which would give small businesses greater flexibility but do nothing to increase the capacity of workers in these businesses to bargain collectively with their employers.

On the other hand, there are signs that the union movement will be pursuing major reforms to the collective bargaining rules in the FW Act. There is consistent criticism from the union movement as to the failure of collective bargaining rules to reflect 'the modern economy,' and they recently launched a major campaign directed at the need to 'Change the Rules' (Workplace Express, 2017; National Union of Workers, NUW, 2015). The details of any reform proposals, however, are not yet clear.

The Federal Opposition—the Australian Labor Party (ALP) —continues to express its commitment to strengthening 'the ability of workers to come together collectively and democratically to improve their living standards' (Butler, 2018). Again, however, details are hazy as the ALP is yet to release its workplace relations policy in the lead up to the next federal election. To date, it has only indicated support for putting 'the bargaining back into enterprise bargaining' (Shorten, 2018). It is unclear to what extent it will be willing to reconsider the low-paid bargaining stream or otherwise lift some of the restrictions on multi-employer bargaining. No doubt it will be under significant pressure from the Australian trade union movement to do so, however, it will face equal countervailing pressure from employers to the very least maintain the status quo.

Views as to appropriate limitations on the *content of agreements* are equally divided. Employers call for greater restrictions on the scope of bargaining, arguing that clauses that limit the extent to which and how they engage 'outside' labour constitute an unacceptable constraint on managerial prerogative. In this, they enjoy the support of the Productivity Commission, which recommended recently that it be unlawful for a collective agreement to restrict the engagement of casuals, independent contractors and labour hire workers, or to regulate the wages and conditions of workers not directly employed (including by way of parity clauses) (Productivity Commission, 2015: 820). In contrast, unions advocate for changes in the law so as to enable *all* workers that perform work at an enterprise, including those indirectly engaged through a labour hire provider and contractors, to be included in collective bargaining with a business (e.g. NUW, 2015). Enabling agreements at a host employer to cover labour hire workers has also been supported by state inquiries into labour hire at the state level.[15]

In the early 1990s Australia established a bargaining system predicated on the assumption that all workers were in an employment relationship, and that all employers enjoyed economic autonomy and engaged a relatively stable and secure workforce. This system—and in particular its commitment to bargaining at the enterprise level—endures. Yet the contemporary Australian employment landscape looks very different. As a result, the bargaining system is showing signs of increasing strain. The legal framework is not solely to blame for the collective bargaining malaise in Australia today, but it is an important contributing factor. To return to the Federal Opposition Leader's metaphor, enterprise bargaining would seem to be a patient warranting urgent attention. Whether an appropriate response will be forthcoming, however, is far from clear. The major players in Australian industrial relations can agree that the patient is in a parlous state, however, there is little clarity or

15. See, eg, Recommendation 2 of the Victorian Inquiry into the Labour Hire Industry and Insecure Work (2016).

consensus as to appropriate treatment. In the meantime, Australia's collective bargaining system will continue to fail to deliver for many Australian workers, and simply continue to be out of reach altogether for many others.

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