

# The Evolving Pluralistic Approach to Employee Representation at the Enterprise in Australia

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## 1. Employee Representation at Enterprise Level

### 1.1 Introduction

Australia has never had a system of employee representation at the enterprise level of the kind operating in many European countries. From 1904 until the early 1990s, the conciliation and arbitration framework functioned as the principal mechanism for determining employees' wages and conditions.<sup>1</sup> Between the early 1990s and 2006, conciliation and arbitration was overshadowed by the shift to enterprise-level bargaining.<sup>2</sup> With effect from March 2006, the conservative Howard Government's 'Work Choices' legislation<sup>3</sup> drove the final nail into the coffin of the traditional arbitral system. Individualized employment bargaining was that Government's priority, although it failed to take hold on a widespread basis.<sup>4</sup> The election of a Labor Government in late 2007 saw an immediate return to collectivism in labour relations,<sup>5</sup> with further support to collective bargaining provided under the *Fair Work Act 2009* (Cth) (FW Act) with effect from 1 July 2009.<sup>6</sup>

Throughout the development of Australian employment relations, workers' interests have been represented primarily via the 'single channel' of trade unions.<sup>7</sup> European-style mechanisms for worker participation, such as works councils, have not enjoyed the support

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<sup>1</sup> Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

<sup>2</sup> Richard Mitchell and Richard Naughton, 'Australian Compulsory Arbitration: Will It Survive into the Twenty-First Century?' (1993) 31 *Osgoode Hall Law Journal* 265.

<sup>3</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth); for a retrospective analysis and assessment of this highly significant reform legislation, see Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, 2009.

<sup>4</sup> Although estimates varied, at their highest, statutory individual workplace agreements covered between 5% and 7% of the workforce: Department of Education, Employment and Workplace Relations (DEEWR), *Submission to the Senate Standing Committee inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008*, pages 7-8.

<sup>5</sup> Mainly through the abolition of statutory individual workplace agreements by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth).

<sup>6</sup> Breen Creighton, 'A Retreat from Individualism? The Fair Work Act 2009 and the Re-Collectivisation of Australian Labour Law' (2011) 40:2 *Industrial Law Journal* 116. On the FW Act generally, see Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22:1 *Australian Journal of Labour Law* 3.

<sup>7</sup> Greg Patmore, 'A Voice for Whom? Employee Representation and Labour Legislation in Australia' (2006) 29:1 *University of New South Wales Law Journal* 8, at pages 9-10. See also Greg Patmore, 'Giving Employees a Voice in the Workplace: A Comparative Historical Perspective', in Marian Baird, Keith Hancock and Joe Isaac (eds), *Work and Employment Relations – An Era of Change (Essays in Honour of Russell Lansbury)*, The Federation Press, Sydney, 2011, page 153.

of Australian unions, employers or industrial tribunals. On the other hand, there have been several waves of interest in various types of worker participation schemes in Australia, especially in the 1970s and mid-1980s. The period since the 1990s has seen increasing use of joint consultation committees (JCCs) – formal, ongoing committees consisting of management and employee representatives<sup>8</sup> – and other workplace-based forms of employee voice.<sup>9</sup> However, the steady decline in union membership over the last thirty years, and the growth of ‘high trust’ human resource management (HRM) practices, have not led to the evolution of a ‘second channel’ of employee representation.

The most important form of employee representation at enterprise level in Australia is the enterprise bargaining framework, which provides a role for union and non-union bargaining representatives. The application of agreements made under the FW Act to all relevant employees within an enterprise, or part of an enterprise, means that many more employees benefit from enterprise bargaining than are members of trade unions. Given its significance in the Australian labour law system, the regulation of enterprise bargaining under Part 2-4 of the FW Act is explained in section 2 of this article – with a particular focus on the provisions relating to employee bargaining representatives. First, though, some further historical background is provided about the limited development of works councils/committees in Australia; followed by a discussion of the incidence of JCCs and some other voluntary employee representation practices, occupational health and safety (OHS) committees, and employee representation on company boards.

## 1.2 Historical background<sup>10</sup> and current position

### (a) 1904-1996

From the commencement of the federal conciliation and arbitration system in 1904 until the early 1990s, ‘awards’ made by an independent industrial tribunal were the main form of regulation of employees’ terms and conditions of employment.<sup>11</sup> While the award system provided significant legal rights to registered trade unions,<sup>12</sup> awards did not generally make provision for the establishment of employee consultative or information-sharing bodies at workplace level.<sup>13</sup> This was due both to constitutional constraints on the capacity of the federal industrial tribunal,<sup>14</sup> and an attitudinal reluctance on the part of

<sup>8</sup> Mick Marchington, ‘Surveying the Practice of Joint Consultation in Australia’ (1992) 34:3 *Journal of Industrial Relations* 530, at page 533.

<sup>9</sup> Raymond Markey, ‘The State of Representative Participation in Australia: Where to Next?’ (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 533.

<sup>10</sup> This section of the article summarises the discussion in Anthony Forsyth, ‘The “Transplantability” Debate Re-Visited: Can European Social Partnership Be Exported to Australia?’ (2006) 27:3 *Comparative Labor Law and Policy Journal* 305, at pages 306-315.

<sup>11</sup> Ronald McCallum, ‘Crafting a New Collective Labour Law for Australia’ (1997) 39 *Journal of Industrial Relations* 405. The tribunal, now known as ‘Fair Work Australia’ (previously known as the Australian Industrial Relations Commission), will be referred to herein as ‘the federal industrial tribunal’ or ‘FWA’. On the role and functions of FWA under the FW Act, see Anthony Forsyth, ‘Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR’ (2012) 23:3 *International Journal of Human Resource Management* 476.

<sup>12</sup> W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, The Law Book Company Limited, North Ryde, 2<sup>nd</sup> ed, 1993, pages 888-889.

<sup>13</sup> Richard Mitchell, ‘The Employment Protection Act 1975 and the Extension of Industrial Democracy in Britain – Lessons for Australia’ (1978) 6 *Australian Business Law Review* 105, at page 116.

<sup>14</sup> Creighton, Ford and Mitchell, above note 12, Chapter 18. These limitations on the federal tribunal’s powers no longer apply, because the main constitutional basis for federal labour law has shifted from the ‘labour power’ (in section 51(xxxv) of the *Australian Constitution*), to the ‘corporations power’ (in section 51(xx)): for further discussion, see Rosemary Owens, ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2009) 22:3

many of its members, to regulate matters relating ‘to managerial prerogative’.<sup>15</sup> In turn, Australian unions and employers adopted positions of ambivalence and even hostility towards the notion of worker participation – particularly, for unions, if this entailed the development of alternative employee representative structures.<sup>16</sup>

Unions became more interested in industrial democracy from the late 1960s, influenced partly by overseas developments and driven by the need to ensure that employees had a ‘voice’ in the introduction of new technologies which threatened job security.<sup>17</sup> This resulted in some modest efforts on the part of the Whitlam Labor Government (1972-1975) and the conservative Fraser Government (1975-1983) to promote union-management consultative practices and ‘employee participation’.<sup>18</sup> Stronger support for worker participation eventuated under the Hawke and Keating Labor Governments (1983-1996), including the mandatory development of industrial democracy plans and departmental councils across the federal public service.<sup>19</sup> Further, by the mid-1980s, the federal industrial tribunal’s aversion to interfering with managerial prerogative had started to break down. As a result, awards increasingly began to require employers to inform and consult with employees and unions about workplace restructuring, technological change and redundancies.<sup>20</sup>

With the shift to enterprise bargaining from the early 1990s, the Labor Government’s promotion of workplace democracy was replaced by a range of measures to enhance the productivity and efficiency of Australian firms.<sup>21</sup> That said, the economic recession and mass job-shedding during that period led the Government to enact statutory provisions requiring employers to inform and hold discussions with workers and their representatives about redundancies affecting fifteen or more employees.<sup>22</sup>

### **(b) The Coalition Government, 1996-2007**

The Howard Government’s de-collectivist labour law reforms from 1996 involved not

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*Australian Journal of Labour Law* 258.

<sup>15</sup> Joe Isaac, ‘Industrial Democracy in the Context of Conciliation and Arbitration’, in Russell Lansbury (ed), *Democracy in the Work Place*, 1980, page 34 at 36-42; see also Robert Pritchard, ‘The Legal Framework in Australia for Industrial Democracy’, in the same volume, page 54 at 56.

<sup>16</sup> Kenneth Walker, *Australian Industrial Relations Systems*, Harvard University Press, Cambridge, Massachusetts, 1970, pages 80-81; Orwell de R Foenander, *Industrial Conciliation and Arbitration in Australia*, The Law Book Co. of Australasia Pty Ltd, Sydney, 1959, page 191.

<sup>17</sup> Walker, above note 16, pages 63, 65, 405; Alastair Crombie, ‘Industrial Democracy – Job Satisfaction or Social Transformation’, in Robert Pritchard (ed), *Industrial Democracy in Australia*, CCH Australia Limited, Sydney, 1976, page 47.

<sup>18</sup> Julian Teicher, ‘Consultation and Participation in the Australian Public Sector’, in Edward Davis and Russell Lansbury (eds), *Managing Together: Consultation and Participation in the Workplace*, Longman, South Melbourne, 1996, page 115 at 116-118; Department of Productivity, *Commonwealth Government’s Policy on Employee Participation*, 1978.

<sup>19</sup> Public Service Board, *Guidelines on the Establishment and Operation of Departmental Councils in the Australian Public Service*, July 1984; Department of Employment and Industrial Relations, *Industrial Democracy and Employee Participation: A Policy Discussion Paper*, 1986. For discussion see Michael Gurdon, ‘The Emergence of Co-Determination in Australian Government Employment’ (1985) 124 *International Labour Review* 465.

<sup>20</sup> See, in particular, *Termination, Change and Redundancy Case* (1984) 8 I.R. 34; and the High Court of Australia’s decisions in *Federated Clerks’ Union v Victorian Employers’ Federation* (1984) 154 C.L.R. 472 and *Re Cram; Ex parte NSW Colliery Proprietors’ Association Limited* (1987) 163 C.L.R. 117. On the extensive reach of award information and consultation obligations by the early 1990s, see Debora Campbell and Malcolm Rimmer, ‘Managing Retrenchment: Award Standards or Enterprise Agreements?’ (1994) 20 *Australian Bulletin of Labour* 45.

<sup>21</sup> See further section 2.1(b) of this article, below.

<sup>22</sup> Marilyn Pittard, ‘International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment’ (1994) 7 *Australian Journal of Labour Law* 170; in essence, these provisions were a statutory formulation of the redundancy protections that had been inserted in many awards since the *Termination, Change and Redundancy Case* in 1984 (see note 20 above and accompanying text).

only the dilution and removal of many of the rights traditionally enjoyed by trade unions, but also the dismantling of support for employee participation in the workplace through collective or union-based structures.<sup>23</sup> Instead, the Government promoted employee share ownership<sup>24</sup> and other approaches that provide a limited basis for genuine employee involvement in workplace decision making. Somewhat paradoxically, the late 1990s-early 2000s saw a renewed debate within the Australian union movement about the merits of works councils and other processes for information provision and dialogue at the workplace.<sup>25</sup> In part, this focus on European-style worker participation came in response to a series of high-profile corporate collapses, which highlighted the absence of legal rights for Australian employees to information and consultation over business restructuring issues.<sup>26</sup> However, divisions among unionists about the role that any alternative employee representative bodies might play<sup>27</sup> – and the predominant focus of trade unions on the Howard Government’s reduction of their collective bargaining and organizational rights<sup>28</sup> – saw this brief interest in works councils dissipate without the adoption of any decisive policy position.

### **(c) The Rudd and Gillard Labor Governments, 2007-present**

The Labor Government elected in November 2007 did not bring to office any policy commitment to expand employee participation in the enterprise – other than through the long-established Australian tradition of trade union representation. However, the Government has bolstered employee and union rights to information and consultation over workplace restructuring in the following ways:

- awards (now known as ‘modern awards’) may include ‘procedures for consultation, representation and dispute settlement’ (FW Act, section 139(1)(j)) – a standard ‘consultation clause’ has been inserted in all modern awards,<sup>29</sup> requiring employers to provide information and consult with employees (and their representatives) about decisions to implement major workplace changes affecting current or future employment levels;
- to obtain approval by FWA,<sup>30</sup> enterprise agreements *must* have a ‘consultation term’

<sup>23</sup> See eg Anthony Forsyth, ‘The Retreat from Government Support for Social Dialogue in the Australian Public Service’ (2003) 62 *Australian Journal of Public Administration* 52.

<sup>24</sup> House of Representatives Standing Committee on Employment, Education and Workplace Relations, *Shared Endeavours: Inquiry into Employee Share Ownership in Australian Enterprises*, 2000.

<sup>25</sup> Australian Council of Trade Unions (ACTU), *Works Councils – Time for a Debate*, Discussion Paper for the ACTU Executive, March 2001; Greg Combet, ‘Employee Consultation in an Australian Context: The Works Council Debate and Trade Unions’, in Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy*, Pluto Press, Sydney, 2003, page 134.

<sup>26</sup> Much interest centred on European Union law, and the laws of some continental European countries (primarily Germany), which enable employees to be routinely involved in management decisions about workplace restructuring and its consequences. See Anthony Forsyth, ‘Giving Employees a Voice over Business Restructuring: A Role for Works Councils in Australia’, in Gollan and Patmore, above note 25, page 140.

<sup>27</sup> See eg Martin Foley, ‘Democratising the Workplace: Unions and Works Councils?’, in Paul Gollan, Ray Markey and Iain Ross (eds), *Works Councils in Australia: Future Prospects and Possibilities*, The Federation Press, Sydney, 2002, page 37.

<sup>28</sup> Rae Cooper, Bradon Ellem, Chris Briggs and Diane van den Broek, ‘Anti-unionism, Employer Strategy, and the Australian State, 1996-2005’ (2009) 34:3 *Labor Studies Journal* 339.

<sup>29</sup> See eg *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, clause 8, at: [http://www.fwa.gov.au/documents/modern\\_awards/award/ma000089/default.htm](http://www.fwa.gov.au/documents/modern_awards/award/ma000089/default.htm).

<sup>30</sup> Enterprise agreements only have legal effect once they are approved by FWA (FW Act, section 54(1)). Such approval requires FWA to be satisfied that numerous requirements have been met in relation to the making and content of a proposed agreement (see sections 186-187), including that employees will be ‘better off overall’ under the agreement than they would be under a relevant modern award (see also section 193).

(FW Act, section 205(1)), requiring information and consultation about major workplace change – a model consultation term (in much the same form as the standard award consultation clause referred to above) applies if the parties to an enterprise agreement do not include their own consultation provision (FW Act, section 205(2); *Fair Work Regulations 2009* (Cth), Schedule 2.3),<sup>31</sup>

- under Part 6-4 of the FW Act, FWA may make remedial orders where an employer fails to notify and consult with relevant unions about proposed redundancies affecting fifteen or more employees (see sections 786-789).<sup>32</sup>

The Labor Government was returned to office at the federal election held in August 2010, although without a clear majority. As a result, Labor currently governs with the support of several independent members of Parliament, and another from The Greens. While industrial relations was a key election issue in 2007, by the time of the 2010 election it had receded in importance with both major political parties adhering to a policy of ‘no further change’ to the FW Act. However, workplace relations returned to the newspaper headlines in late 2011, following major bargaining disputes between Australia’s main airline, Qantas, and the Transport Workers Union (TWU), the Australian Licensed Aircraft Engineers Association (ALAEA) and the Australian and International Pilots Association (AIPA). The dispute in fact made the news globally, when Qantas grounded its world-wide fleet on 29 October 2011, at the same time as it announced a proposed lockout following months of industrial action by members of the three unions.<sup>33</sup> The federal Government then became involved in the dispute, making an application to FWA for termination of all protected industrial action affecting the airline. FWA granted the application,<sup>34</sup> paving the way for the tribunal to arbitrate the three bargaining disputes. Qantas and the ALAEA have since reached an agreement,<sup>35</sup> while the disputes between the airline and the TWU and AIPA are scheduled for arbitration throughout 2012.

At the time of writing, a Government-appointed panel is conducting a ‘post-implementation review’ of the FW Act (the panel must report to the Minister for Employment and Workplace Relations by 31 May 2012).<sup>36</sup> The Review aims to assess whether the legislation has been operating in accordance with its stated objects, which include: ‘to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians’ (FW Act, section 3). In light of the Qantas dispute, the statutory provisions regulating enterprise bargaining and protected industrial action have been a major focus of the Review. It is highly unlikely that the Review will make recommendations concerning

<sup>31</sup> See eg *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)* [2010] FCA 652, where a penalty of A\$660,000 was imposed on an employer that failed to observe the consultation requirements applicable under a number of enterprise agreements, in relation to the proposed privatization of its business and the effects this would have on employees. This penalty was reduced, on appeal, to A\$249,600: see *QR Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (No 2)* [2010] FCAFC 150.

<sup>32</sup> These provisions reflect those first introduced in 1993, discussed at note 22 above and accompanying text.

<sup>33</sup> Protected (ie lawful) industrial action may be organized and taken by employees/unions, and employers, in support of claims made in negotiations for an enterprise agreement under the FW Act; see section 2.1 of this article.

<sup>34</sup> *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444.

<sup>35</sup> The agreement has been endorsed by FWA through the exercise of its powers under Part 2-5 of the FW Act to make ‘workplace determinations’, in limited situations including where the tribunal has terminated protected industrial action: see *ALAEA v Qantas Airways Ltd* [2012] FWAFB 236; and section 2.1 below.

<sup>36</sup> Full details of the Review terms of reference, process, and submissions made by interested parties may be found at: <http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Pages/Home.aspx>.

the development of non-union employee representative structures, such as works councils, as there is no impetus for this among Australian unions, employers or policy-makers at the present time.

### 1.3 Legal status and frequency of voluntary employee representation system

Given that there has been little direct legal support for industrial democracy and worker participation under Australian law, the incidence of voluntary consultative and participatory practices has always been fairly limited. The last Australian Workplace Industrial Relations Survey showed that in 1995, JCCs operated in 33% of workplaces surveyed; 43% per cent had OHS committees (see further section 1.4 below); and 16% had employee representatives on company boards (see further section 1.5 below).<sup>37</sup> Much more common than these representative forms of employee participation were 'direct engagement' HRM techniques, such as management 'walk-arounds', team building and work groups.<sup>38</sup>

There is little recent data on the incidence, nature and operation of JCCs in Australian workplaces. The two most recent studies are those by Forsyth et al (2008, capturing data mostly from the period 1991-2003),<sup>39</sup> and Holland et al (2009, analyzing data obtained in 2003-2004)<sup>40</sup> (see Table 1 below). Both these studies provide evidence of an increase in the incidence of JCCs in Australian workplaces from the early 1990s to the mid-2000s; and suggest that JCCs have been used to complement (rather than to act as a substitute for) traditional union forms of employee representation.<sup>41</sup> Despite the high level of employees' perception of effectiveness of JCCs reported in Holland et al's study, the conclusion of the Forsyth et al study that JCCs act as a form of employee *voice* – but not employee *power* – remains apposite today. There is still no legislation providing for such matters as the independent election of employee representatives on JCCs, or the extent of the committees' information, consultation or co-decision making rights – raising ongoing questions as to the ability of JCCs to act as a vehicle for genuine employee influence in the workplace.<sup>42</sup>

<sup>37</sup> Alison Morehead, Mairi Steele, Michael Alexander, Kerry Stephen and Linton Duffin, *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey*, Addison Wesley Longman, Sydney, 1997, pages 123, 188-189, 453.

<sup>38</sup> *Ibid*, pages 181-182, 187-188.

<sup>39</sup> Anthony Forsyth, Samantha Korman and Shelley Marshall, 'Joint Consultative Committees in Australia: An Empirical Update' (2008) 16:1 *International Journal of Employment Studies* 99.

<sup>40</sup> Peter Holland, Amanda Pyman, Brian Cooper and Julian Teicher, 'The Development of Alternative Voice Mechanisms in Australia: The Case of Joint Consultation' (2009) 30:1 *Economic and Industrial Democracy* 67. See also Julian Teicher, Peter Holland, Amanda Pyman and Brian Cooper, 'Australian Workers: Finding their Voice?', in Richard Freeman, Peter Boxall and Peter Haynes (eds), *What Workers Say: Employee Voice in the Anglo-American Workplace*, ILR Press, Ithaca, New York, 2007, page 125.

<sup>41</sup> Although compare the findings in Raymond Markey, 'Non-Union Employee Representation in Australia: A Case Study of the Suncorp Metway Council Inc. (SMEC)' (2007) 49:2 *Journal of Industrial Relations* 187, examining a non-union employee representative body more in the nature of a works council than a JCC.

<sup>42</sup> See also Raymond Markey and Rosemary Reglar, 'Consultative Committees in the Australian Steel Industry' in Raymond Markey and Jacques Monat, *Innovation and Employee Participation through Works Councils: International Case Studies*, Avebury, Aldershot, 1997, page 358; and Markey, above note 41.

**Table 1: JCCs in Australian Workplaces**

	Forsyth et al 2008 (results of analysis of federal enterprise agreements, 1991-2003)	Holland et al 2009 (results of large-scale employee survey, 2003-2004)
Incidence of JCCs	JCCs operating in 33.3% of agreements (in 2003) <sup>43</sup>	52.8% of employees reported presence of JCC in workplace
Union/non-union agreements <sup>44</sup>	JCCs in 47.8 of union agreements; 33% of non-union agreements (1991-2003)	[no equivalent finding]
Selection of employee representatives on JCCs	Provision for union representation in 11% of agreements (1991-2003) <sup>45</sup>	Unelected volunteers, 29.4% Elected by employees, 29.2% Management-chosen, 17.6% Union-selected, 4.9%
Effectiveness of JCCs	69% of agreements provided for JCC input into strategic business issues; 63% silent on powers of JCC (additional sample of 48 federal agreements 2003-2006)	80% of employees perceived JCC as quite/very effective

Holland et al's study also provided updated data on the incidence of various HRM/indirect employee representation practices, such as 'open door policies' for the discussion of workplace problems (employees reported these to be present in 83.4% of workplaces); regular staff meetings (64.7%); and employee involvement programs, eg quality circles (40.4%).

#### 1.4 Employee representation under occupational health and safety legislation

In the absence of works council-type bodies, the only example of mandatory employee representation through formalized structures at the enterprise level in Australia is in respect of OHS.<sup>46</sup> The post-Robens<sup>47</sup> OHS statutes operating at federal, state and territory levels have all contained provisions requiring employers to inform and consult workers about a wide range of safety issues through elected OHS representatives and workplace-based OHS committees.<sup>48</sup> Following concerted efforts over the last few years to harmonize the separate OHS statutes operating around Australia into one common piece of legislation,<sup>49</sup> the *Work Health and Safety Act* (WHS Act) commenced operation on 1 January 2012 in the following jurisdictions: Commonwealth (ie federal), New South Wales, Queensland, Australian Capital Territory and Northern Territory.<sup>50</sup>

<sup>43</sup> Note that the incidence of JCCs in federal agreements peaked, at 57.9%, in 1999.

<sup>44</sup> The former distinction between union and non-union agreements no longer applies under the FW Act; all enterprise agreements are now made between bargaining representatives of employers and employees, see section 2 of this article.

<sup>45</sup> However, the *actual* incidence of union representation on JCCs was thought to be considerably higher.

<sup>46</sup> Ray Markey and Greg Patmore, 'Employee Participation in Health and Safety in the Australian Steel Industry, 1935–2006' (2011) 49:1 *British Journal of Industrial Relations* 144.

<sup>47</sup> *Report of the Committee on Safety and Health at Work 1970-72*, HMSO, London, 1972 (Robens Report).

<sup>48</sup> Michael Quinlan and Richard Johnstone, 'The Implications of De-collectivist Industrial Relations Laws and Associated Developments for Worker Health and Safety in Australia, 1996–2007' (2009) 40 *Industrial Relations Journal* 426, at page 430.

<sup>49</sup> See eg Commonwealth of Australia, *National Review into Model Occupational Health and Safety Laws*, First Report (2008) and Second Report (2009). For further background on the monumental OHS harmonization process, see Breen Creighton and Andrew Stewart, *Labour Law*, 5<sup>th</sup> edition, The Federation Press, Sydney, 2010, Chapter 15.

<sup>50</sup> It is unclear, at the time of writing, when (or if) South Australia, Victoria and Western Australia will adopt the WHS Act; Tasmania will do so from 1 January 2013.

Part 5 of the WHS Act contains provisions giving effect to one of the objects of the legislation, ‘which is to provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety’.<sup>51</sup> These provisions are largely modeled on those operating under Victorian legislation.<sup>52</sup> In summary, Part 5 of the WHS Act provides for the following representation and consultative arrangements:<sup>53</sup>

- A ‘person who conducts a business or undertaking’ (PCBU; this includes employers and occupiers of workplace premises) must consult with its workers (eg employees, contractors, volunteers) about health and safety matters directly affecting them – for example, the identification of workplace hazards and risks, and ways of minimizing or eliminating those risks. Such consultation must ensure that the workers are properly informed, have an opportunity to contribute their views on the PCBU’s decision-making process, have those views taken into account, and be advised of the final outcome of the consultation. Penalties of up to A\$100,000 may be imposed where a PCBU fails to comply with these consultation obligations.
- Workers may request a PCBU to conduct an election for health and safety representatives (HSRs) representing separate ‘work groups’ within the PCBU. Negotiations over the composition of these work groups must commence within 14 days of the request (with any disputes resolved by an inspector from the relevant OHS regulatory agency in each jurisdiction). Elections for HSRs are to be conducted in the manner preferred by the employees in each work group, with the PCBU required to provide any necessary resources, facilities and assistance.
- Once elected, HSRs hold office for a three-year term. They have significant powers of representation, consultation, monitoring and investigation in relation to health and safety matters affecting the work group – including the capacity to call in an inspector, and to direct workers to cease work in the event of a serious risk or imminent hazard. Further, PCBUs must provide HSRs with (for example) reasonable resources to carry out their functions, paid time off to attend relevant training courses, and payment at normal rates while performing their functions as a HSR.<sup>54</sup>
- HSRs also have the power to request a PCBU to establish a health and safety committee (HSC), which must be set up within two months of the request (a group of five or more workers in the PCBU may also initiate this process). The workers and the PCBU must agree on the composition of the HSC (with any disputes resolved by an inspector), although at least half of its members must be workers who have not been nominated by the PCBU. In addition, the HSR for each work group must be included in the HSC. The role of HSCs includes developing standards, procedures and rules on health and safety issues to be observed in the PCBU, and (more generally) facilitating cooperation on such issues. To those ends, HSCs must meet at least once every three months, or on the request of at least half of the committee’s members. HSC members have similar rights of support from the PCBU to those accorded to HSRs (see above).

<sup>51</sup> Safe Work Australia, *Worker Representation and Participation Guide*, page 2.

<sup>52</sup> *Occupational Health and Safety Act 2004* (Vic), Parts 4 and 7.

<sup>53</sup> Creighton and Stewart, above note 49, pages 475-484. See also Safe Work Australia, above note 51.

<sup>54</sup> On this last right of HSRs, compare the position of bargaining representatives under the FW Act; see *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, discussed in section 2.2 of this article.

There is limited data on the incidence of HSRs and HSCs operating under the federal, state and territory OHS statues that preceded the new WHS Act. Creighton and Stewart point to various (somewhat dated) sources indicating that ‘only a minority of workplaces have [HSRs]’, and that HSRs ‘make only very sparing use of the powers which are conferred on them’ under the relevant legislation.<sup>55</sup> In contrast, according to Markey and Patmore: ‘Recent Australian data indicates that, for the eastern states at least, 59 per cent of workplaces with five or more employees have [HSCs] (Considine and Buchanan 2007), compared with 43 per cent in all Australian workplaces with 20 or more employees in 1995 (Morehead *et al.* 1997: 453).’<sup>56</sup>

### 1.5 Employee representation on corporate boards

Adhering to the Anglo-American, shareholder-oriented model of corporate regulation, there are no legal requirements in Australia for employee representation on company boards of the kind found in European ‘stakeholder’ systems.<sup>57</sup> However, from the 1950s, it was common for the boards of state – and later, federal – government authorities to include some form of employee representation in their governance structures (eg the NSW Electricity Commission, and the Australian Broadcasting Corporation). These practices reached their peak in the 1970s and 1980s, but have declined since then due to the privatization and corporatization of many public sector bodies.<sup>58</sup> While the Australian corporate governance framework does not mandate formalized employee representation on boards, there has been increased academic attention in recent years to issues such as corporate social responsibility (CSR); workplace partnerships; and other measures that could see employees play a greater role in the management of companies.<sup>59</sup> However, apart from the voluntary CSR initiatives implemented by many companies, there is little public policy pressure around these sorts of issues in Australia at the present time.<sup>60</sup>

## 2. Employee Representation and Collective Bargaining

### 2.1 Unionization and collective bargaining today

#### (a) Australian unions and unionization

In recent years, the precipitous decline in union membership levels in Australia has slowed down. In 2008, the total number of employees in unions grew by 3%, although

<sup>55</sup> Creighton and Stewart, above note 49, page 475.

<sup>56</sup> Markey and Patmore, above note 46, page 147, referring to Gillian Considine and John Buchanan, *Workplace Industrial Relations on the Eve of Work Choices: A Report on a Survey of Employers in Queensland, NSW and Victoria*, Workplace Research Centre, University of Sydney, 2007; and Morehead *et al.*, above note 37.

<sup>57</sup> See eg Irene Lynch-Fannon, *Working Within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding: US and EC Perspectives*, Hart Publishing, Oxford, 2003; Richard Mitchell, Anthony O’Donnell, Shelley Marshall, Ian Ramsay and Meredith Jones, *Law, Corporate Governance and Partnerships at Work*, Ashgate, Farnham, 2011, Chapter 1.

<sup>58</sup> Raymond Markey, ‘A Stakeholder Approach to Corporate Governance: Employee Representatives on Boards of Management’, in Gollan and Patmore, above note 25, page 122 at 129-132.

<sup>59</sup> See eg Mitchell *et al.*, above note 57; Stephen Bottomley and Anthony Forsyth, ‘The New Corporate Law: Corporate Social Responsibility and Employees’ Interests’, in Doreen McBarnett, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, Cambridge, 2007, page 307; Shelley Marshall, Richard Mitchell and Ian Ramsay (eds), *Varieties of Capitalism, Corporate Governance and Employees*, Melbourne University Press, Carlton, 2008.

<sup>60</sup> For a rare example of media attention being given to European-style corporate governance, see Fiona Smith, ‘Faber-Castell puts workers on board’, *The Australian Financial Review*, 29 November 2011.

union membership density remained at its 2007 level of 18.9% of the workforce.<sup>61</sup> In 2009, union density increased for the first time in twenty years, to 19.7% of the workforce.<sup>62</sup> However, the most recent figures show union density at a new low of 18.3% in 2010, with 41.5% of public sector employees – but only 13.8% of private sector workers – in trade unions.<sup>63</sup> Despite the overall drop in membership, unions retain a strong presence in key sectors of the economy including construction, manufacturing, road transport, aviation, education and health care. The union movement also played a critical role (through the ACTU's 'Your Rights at Work Campaign') in the unseating of the Howard Government in 2007,<sup>64</sup> and the subsequent replacement of the deeply unpopular Work Choices legislation with the FW Act. Unions remain highly influential within the Labor Party and, therefore, the present federal Government.

The statutory framework for labour regulation provides Australian unions with significant legal rights, as it has done for most of the past century (apart from the Howard Government's period in office, 1996-2007, when some of these rights were diluted).<sup>65</sup> Detailed provisions regulating the formation, registration and operation of unions (and employer organizations) are found in the *Fair Work (Registered Organisations) Act 2009* (Cth) (FWRO Act), which has among its stated objects: 'to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered' (section 4). Most registered unions are large, industry-based organizations which emerged from the union amalgamation process in the late 1980s/early 1990s.<sup>66</sup> The FWRO Act also provides for the registration of 'enterprise associations' having at least twenty members employed within the same enterprise (sections 18C, 20) – perhaps similar in some ways to Japan's enterprise-based unions. However, very few enterprise associations have been established under these provisions in the FWRO Act (or previous statutory provisions).<sup>67</sup>

Under Part 3-4 of the FW Act, officials of unions registered under the FWRO Act have the right to enter an employer's premises for purposes of ensuring compliance with employees' minimum entitlements under legislation, awards and agreements; to hold discussions with employees (ie union members and potential members); and for purposes of enforcing federal and state OHS laws.<sup>68</sup> These union 'right of entry' provisions provide

<sup>61</sup> Australian Bureau of Statistics (ABS), *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2008, Cat. No. 6310.0.

<sup>62</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2009, Cat. No. 6310.0.

<sup>63</sup> ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2010, Cat. No. 6310.0. To give some idea of the extent and rapidity of membership decline, union density in Australia was 49.5% in 1982; 28.1% in 1998; and 20.3% in 2006. See further David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47:4 *British Journal of Industrial Relations* 623, noting that the rate of union membership decline in Australia has been 'much steeper' than in most other OECD countries (at page 627).

<sup>64</sup> See Kathie Muir, *Worth Fighting For: Inside the Your Rights at Work Campaign*, UNSW Press, Sydney, 2008; and Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide*, Cambridge University Press, Melbourne, 2008, Chapter 8.

<sup>65</sup> Anthony Forsyth and Carolyn Sutherland, 'From 'Uncharted Seas' to 'Stormy Waters': How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16:2 *The Economic and Labour Relations Review* 215.

<sup>66</sup> See eg Kerrie Hose and Malcolm Rimmer, 'The Australian Union Merger Wave Re-visited' (2002) 44 *Journal of Industrial Relations* 525.

<sup>67</sup> Franklin Gaffney and Paul Gollan, 'Enterprise Unions: A False Hope or the New Frontier?', Paper for the Australian Labour Law Association Conference, University of Sydney, 2004.

<sup>68</sup> Note that there are many requirements that must be met by union officials in order to obtain entry to an employer's premises for any of these purposes, eg the production of a right of entry permit, and the provision of at least 24 hours' notice of any proposed entry: see further Creighton and Stewart, above note 49, pages 709-716.

a significant basis for union recruitment and activism in the workplace. Unions are also able to initiate court proceedings on behalf of their members, eg to enforce minimum employment standards and other rights accorded to employees under the FW Act.<sup>69</sup> Further, union members (and, indeed, employees who choose *not* to join or be involved in unions) have important rights under the ‘general protections’ provisions in Part 3-1 of the FW Act. These include protection from dismissal or other adverse treatment by an employer for reason of an employee’s union membership or activism, or seeking representation by a union in relation to workplace issues (eg disciplinary action against an employee, or negotiations for a new enterprise agreement).<sup>70</sup> The broad interpretation by the courts of the general protections provisions, particularly those relating to ‘industrial activity’, has led to an appeal to the High Court of Australia in a case involving the actions of a workplace union delegate in raising allegations of impropriety within his employer’s organization.<sup>71</sup>

### **(b) Collective bargaining**

Unions also have a central role in the system of enterprise bargaining which operates under Part 2-4 of the FW Act – although, as noted earlier in this article, the bargaining framework now envisages the participation of non-union employee representatives in enterprise agreement negotiations (see further section 2.2 below). The shift away from the traditional conciliation and arbitration architecture, in favour of enterprise-based bargaining, was a policy response to the significant restructuring of the Australian economy in the mid-late 1980s – including deregulation of the financial sector, the removal of import tariffs, and increased exposure of Australian firms to international competition. As Don Watson, an adviser to former Labor Prime Minister Paul Keating, explains:

One school of hardline rationalists, including the *Economist* magazine, believed Australia began deregulation at the wrong end – the government should have started with the labour market and moved onto the financial markets later. But whichever end it began, how could it be stopped once started? Each reform created pressure for another. Once competitiveness became the essential condition of success, how could labour be quarantined? That had been the refrain from business and from the other side of politics for years.<sup>72</sup>

The move to *enterprise* bargaining was considered necessary, as a supplement to industry-level awards determined by the federal industrial tribunal, because it was through negotiations at the enterprise level that the parties could focus on changes to work practices that would deliver improvements in efficiency and productivity.<sup>73</sup> That overall philosophy has guided successive legislative reforms – of both Labor and Coalition governments – over the last twenty years.<sup>74</sup> During this period, there has also been a general consensus as

<sup>69</sup> See FW Act, Part 4-1, especially section 539; and Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 22:3 *Australian Journal of Labour Law* 306.

<sup>70</sup> See Creighton and Stewart, above note 49, pages 557-574.

<sup>71</sup> *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (Full Court of the Federal Court, 9 February 2011), where the majority found that disciplinary action taken by the employer against the union delegate breached Part 3-1 of the FW Act. The High Court heard the appeal on 29 March 2012, and (at the time of writing) the Court’s decision is reserved.

<sup>72</sup> Don Watson, *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM*, Random House Australia, Milsons Point, 2002, page 367.

<sup>73</sup> Critical also, here, was the *linking* of improvements in wages and employment conditions to productivity measures at the enterprise level. See eg Business Council of Australia (BCA), *Enterprise-Based Bargaining Units: A Better Way of Working*, Report to the BCA by the Industrial Relations Study Commission, Volume 1, July 1989; Prime Minister, *Speech by the Prime Minister, The Hon PJ Keating MP, to the Institute of Directors Luncheon*, Melbourne, 21 April 1993.

<sup>74</sup> On the early series of statutory provisions supporting enterprise bargaining, see Ron McCallum, ‘Collective Bargaining

to the desirability of enterprise bargaining among the main union and employer groupings.

That said, there have been (sometimes, profound) differences of view as to the precise *shape* of the legal framework for enterprise bargaining. The key differences have centred around union rights in bargaining, the role of the federal tribunal in facilitating and intervening in negotiations, the imposition of ‘good faith bargaining’ obligations, and whether the system should provide for individualized – or only collective – bargaining. A detailed consideration of these issues, in the context of the evolution of statutory support for enterprise bargaining in Australia, is beyond the scope of this article.<sup>75</sup> It suffices to say, as indicated earlier, that the FW Act has restored the primacy of *collective* bargaining. Further, the 2009 legislation provides for greater levels of tribunal oversight of the bargaining process – including through FWA’s powers to make orders to enforce the good faith bargaining requirements applicable to all bargaining representatives.

The FW Act retains the predominant focus upon bargaining at the level of a single enterprise (or part of an enterprise),<sup>76</sup> although multi-employer agreements may also be made.<sup>77</sup> Single-enterprise agreements are *made* between employers and their employees, when a majority of the employees who vote on a proposed agreement vote in favour of it,<sup>78</sup> whereas agreements are *negotiated* between the bargaining representatives of the employer and employees involved. The bargaining process is quite closely regulated, with bargaining representatives having the ability to apply to FWA for:

- good faith bargaining orders<sup>79</sup> and serious breach declarations (an order to address serious and repeated breaches of the good faith obligations),<sup>80</sup>
- majority support determinations (the mechanism through which a reluctant

Australian Style: The Making of Section 115 Agreements under the Industrial Relations Act 1988 (Cth)’ (1990) 3 *Australian Journal of Labour Law* 21; Ron McCallum ‘Enhancing Federal Enterprise Bargaining: The Industrial Relations (Legislation Amendment) Act (Cth)’ (1993) 6 *Australian Journal of Labour Law* 63; Richard Naughton, ‘The New Bargaining Regime Under the Industrial Relations Reform Act’ (1994) 7 *Australian Journal of Labour Law* 147. These laws followed the faltering (and largely reluctant) attempt by the federal tribunal to introduce an enterprise focus for determining wages and conditions, within the constraints of the award system: see *National Wage Case April 1991 Decision* (1991) 36 I.R. 120; *National Wage Case October 1991 Decision* (1991) 39 I.R. 127.

<sup>75</sup> See the references at note 74 above; and Marilyn Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62; Ron McCallum, ‘Australian Workplace Agreements – An Analysis’ (1997) 10 *Australian Journal of Labour Law* 50; Anthony Forsyth and Carolyn Sutherland, ‘Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining’ (2006) 19:2 *Australian Journal of Labour Law* 183; Joel Fetter, ‘Work Choices and Australian Workplace Agreements’ (2006) 19:2 *Australian Journal of Labour Law* 210; Rae Cooper and Bradon Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22:3 *Australian Journal of Labour Law* 284.

<sup>76</sup> FW Act, sections 12 (definition of ‘enterprise’) and 172(2)(a).

<sup>77</sup> FW Act, section 172(3)(a). ‘Greenfields’ agreements (for a single enterprise, or multiple enterprises), may be made for a genuine new enterprise that an employer proposes to establish (section 172(2)(b), (3)(b), (4)), eg a new construction project or mining venture; greenfields agreements must be made between an employer and a union (or unions) with the right to represent the interests of the employees who will perform work under the proposed agreement.

<sup>78</sup> FW Act, section 182(1); those entitled to vote are the employees who will be covered by the proposed agreement. Employees cannot be requested to vote on an agreement until certain ‘pre-approval steps’ have been taken by the employer, including the provision to employees of information about the terms of the agreement and the voting process: see FW Act, sections 180-181.

<sup>79</sup> See the good faith bargaining requirements set out in FW Act, section 228; and sections 229-233 relating to bargaining orders. On the operation of these provisions, see Anthony Forsyth, ‘The Impact of ‘Good Faith’ Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, at pages 13-33. See also Breen Creighton, *Good Faith Bargaining under the Fair Work Act – Striking a Balance*, Discussion Paper for the Business Council of Australia, January 2010; Breen Creighton and Pam Nuttall, ‘Good Faith Bargaining Down Under’ (2012) 33:2 *Comparative Labor Law and Policy Journal* 257.

<sup>80</sup> FW Act, sections 234-235.

- employer can be compelled to bargain);<sup>81</sup>
- scope orders (to deal with disputes over the coverage of an agreement);<sup>82</sup>
- low-paid authorisations (which trigger the operation of a special low-paid bargaining stream aimed at facilitating the making of multi-enterprise agreements for low-paid employees, who traditionally have not been covered by collective agreements);<sup>83</sup>
- assistance by the tribunal in resolving bargaining disputes (eg through conciliation, mediation or – if all bargaining representatives agree – arbitration).<sup>84</sup>

However, the Labor Government’s intention was that these various ‘tools’ through which FWA can intervene in bargaining should operate in the background. *Voluntary* bargaining relationships developed between employers, employees and unions are meant to be the norm: ‘Where there is new regulation it is focused on facilitating the bargaining processes in situations where an employer and their employees are unable to successfully bargain together.’<sup>85</sup> Table 2 below shows that (consistent with the Government’s plans) the number of applications for bargaining orders, majority support determinations, scope orders, low-paid bargaining authorisations and FWA assistance under section 240 represents only a small proportion of the total number of enterprise agreements submitted to FWA for approval.

**Table 2: Applications for FWA Involvement in Bargaining under FW Act, Part 2-4<sup>86</sup>**

Matter Type	1 <sup>st</sup> Year (1 July 2009 – 30 June 2010)	1 <sup>st</sup> Quarter 2010-11 (1 July – 30 Sept 2010)	2 <sup>nd</sup> Quarter 2010-11 (1 Oct – 31 Dec 2010)	3 <sup>rd</sup> Quarter 2010-11 (1 Jan – 31 March 2011)	4 <sup>th</sup> Quarter 2010-11 (1 April – 30 June 2011)	1 <sup>st</sup> Quarter 2011-12 (1 July – 30 Sept 2011)	2 <sup>nd</sup> Quarter 2011-12 (1 Oct 2011- 31 Dec 2011)
Applications for bargaining orders (s.229)	121	26	19	24	27	25	34
Application for serious breach declaration made (s.234)	0	0	0	0	0	0	0

<sup>81</sup> FW Act, sections 236-237; see Forsyth, above note 79, pages 33-47. Majority support determinations may be made if FWA is satisfied that a majority of employees in a workplace want to bargain. This mechanism is a rough approximate of the ‘union recognition’ laws that operate in the British and North American labour law systems, with the difference that the Australian provisions do not *require* a ballot to be conducted among the relevant employees; rather, majority support for collective bargaining can be established on the basis of petitions signed by employees (among other methods).

<sup>82</sup> FW Act, sections 238-239.

<sup>83</sup> FW Act, Part 2-4, Division 9; see Richard Naughton, ‘The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?’ (2011) 24 *Australian Journal of Labour Law* 214.

<sup>84</sup> FW Act, section 240.

<sup>85</sup> Commonwealth of Australia, *Explanatory Memorandum, Fair Work Bill 2008 (Cth)*, para [r.114].

<sup>86</sup> FWA, *Annual Report of Fair Work Australia: 1 July 2009-30 June 2010*, Melbourne, 2010, pages 73-77; FWA, *Annual Report of Fair Work Australia: 1 July 2010-30 June 2011*, Melbourne, 2011, pages 80-83; FWA, *Quarterly Reports to the Minister*, available at: <http://www.fwa.gov.au/index.cfm?pagename=aboutquarterlyreports>.

Applications for majority support determinations (s.236)	111	29	25	14	25	16	19
Applications for scope orders (s.238)	48	5	6	9	11	11	6
Applications for FWA to deal with bargaining disputes (s.240)	506	55	44	55	67	84	115
Applications for low-paid authorisations (s.242)	2	0	0	0	0	0	1
Applications for approval of enterprise agreements (s.185)	7420	2127	2036	1210	1700	1967	2379

As was mentioned in section 1.2 of this article, an important adjunct to the formalized enterprise bargaining process is the legal recognition of the right of employees/unions to strike and take other forms of industrial action (eg work bans, short stoppages) – and of the employer to engage in a lockout of the workforce – in support of bargaining claims.<sup>87</sup> The exercise of these rights is subject to many limitations and restrictions (including the requirement that protected industrial action by employees must be approved by a majority voting in a secret ballot).<sup>88</sup> Further, protected industrial action may be ended by FWA on various grounds, including that the action threatens community health, safety or welfare, or to cause significant damage to the Australian economy (or an important part of it).<sup>89</sup> When this occurs, FWA may then arbitrate the outcome of the bargaining dispute (after the expiry of a mandatory 21-day, or up to 42-day, negotiating period).<sup>90</sup> While overall levels of industrial disputation in Australia have fallen considerably over the last thirty years, most of the industrial action that now takes place is (not surprisingly, given that it is legally sanctioned) connected to enterprise bargaining.<sup>91</sup>

The FW Act has, in the early period of its operation, had a modest effect in increasing the coverage of collective agreements. ABS data show that the number of Australian

<sup>87</sup> FW Act, Part 3-3. For a detailed examination of the these provisions, see Shae McCrystal, *The Right to Strike in Australia*, The Federation Press, Sydney, 2010.

<sup>88</sup> FW Act, Part 3-3, Division 8; see Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots Before Employee Industrial Action' (2007) 20 *Australian Journal of Labour Law* 272.

<sup>89</sup> FW Act, Part 3-3 Division 6, especially s 424; it was under this provision that the tribunal terminated all industrial action in the Qantas dispute in late 2011, see notes 33-34 above and accompanying text.

<sup>90</sup> In this instance, FWA would be making an 'industrial action related workplace determination' under FW Act, Part 2-5, Division 3; the Qantas dispute provides a rare example of the exercise of these powers, see note 35 above and accompanying text.

<sup>91</sup> For detailed discussion of the relevant ABS data over an extended period, see David Peetz, 'Industrial Conflict with Awards, Choices and Fairness', in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012 (forthcoming).

employees covered by collective agreements increased from 39.8% of the workforce in 2008, to 43.4% in 2010.<sup>92</sup> This level of collective bargaining coverage is relatively high among comparable industrialized economies. Further, DEEWR data show an increase in the number of operative enterprise agreements from 22,371 (covering 2.05 million employees) in July 2009, to 23,403 agreements (covering almost 2.6 million employees) as at 30 June 2011.<sup>93</sup> Overall, however, the evidence to date suggests that the FW Act has not had a major impact on the spread of collective bargaining – and is unlikely to have altered van Wanrooy et al’s assessment (in 2009) that such bargaining is confined mainly to large, unionized workplaces in the public sector and to some sections of the private sector.<sup>94</sup>

## 2.2 Role of labor unions in the selection or working of employee representatives

### (a) Overview of the bargaining representative provisions

As is already apparent from the discussion in section 2.1 above, bargaining representatives (BRs) play a key role in the collective bargaining framework operating under Part 2-4 of the FW Act. Division 3 of Part 2-4 contains provisions relating to the obligation of employers to notify employees of their right to be represented in bargaining, and the appointment and revocation of appointment of employee and employer BRs. Unions have somewhat privileged status in the arrangements for the selection of employee BRs. However, as a member of FWA has observed: ‘It can be seen that the scheme of the legislation is that employees are advised that they are free to choose their [BR] and may also nominate themselves. This is not surprising given that any resultant agreement is between the employer and the employees at the enterprise.’<sup>95</sup> This pluralistic approach to employee representation under the FW Act stands in contrast to North American labour law systems, where a ‘majority’ union obtains the *exclusive* right to bargain on behalf of employees in a bargaining unit.<sup>96</sup>

### (b) Requirement to notify employees of representational rights

Under section 173 of the FW Act, within 14 days of the commencement of bargaining for an enterprise agreement, an employer must provide each employee that will be covered by the proposed agreement with a notice of their right to be represented in the bargaining. This ‘notice of employee representational rights’ must specify that the employee is entitled to appoint a BR for purposes of bargaining, and any application that may be made to FWA in relation to the bargaining (section 174(2)). The notice must also explain the effect of an employee’s membership of a union on their right to appoint a BR (section 174(3); see further below).<sup>97</sup>

<sup>92</sup> ABS, *Employee Earnings and Hours*, August 2008 and May 2010, Cat. No. 6306.0.

<sup>93</sup> DEEWR, *Trends in Federal Enterprise Bargaining*, June Quarter 2011.

<sup>94</sup> Brigid van Wanrooy, Sally Wright and John Buchanan, *Who Bargains?*, Report for the NSW Office of Industrial Relations, Workplace Research Centre, University of Sydney, 2009, pages 45–49.

<sup>95</sup> *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, para [8].

<sup>96</sup> See Clyde Summers, ‘Exclusive Representation: A Comparative Inquiry into a “Unique” American Principle’ (1998) 20 *Comparative Labor Law and Policy Journal* 47; Anthony Forsyth, ‘Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law’, in Creighton and Forsyth, above note 91.

<sup>97</sup> See also the *pro forma* notice of employee representational rights in Schedule 2.1 of the *Fair Work Regulations 2009* (Cth); and on the manner in which the notice must be given to employees, see regulation 2.04. A considerable body of case law has developed to clarify employers’ obligations under these provisions: see eg *Bland v CEVA Logistics (Australia) Pty Ltd* [2011] FWAFB 7453.

**(c) Employee bargaining representatives: union and non-union**

The FW Act establishes a ‘default rule’ in favour of union BRs in the following circumstances. If an employee who will be covered by a proposed enterprise agreement is a member of a union, and the union is entitled to represent the industrial interests of the employee<sup>98</sup> in relation to work that will be performed under the agreement, then that union will *automatically* be the employee’s BR (section 176(1)(b), (3)).<sup>99</sup> However, the union will not have such default BR status if the employee has:

- appointed another person, including the employee himself or herself, as the employee’s BR (section 176(1)(c), (4)); or
- revoked the union’s status as the employee’s BR (see below).

An employee may nominate a person other than a union to be his or her BR by appointing the person in writing (section 176(1)(c)), provided that the person is free from improper influence or control by the employee’s employer or another BR (*Fair Work Regulations 2009* (Cth), regulation 2.06). For example, a management employee who will not be covered by a proposed agreement will not satisfy this requirement of independence of employee BRs.<sup>100</sup> A BR may be appointed at any time prior to the approval of a proposed agreement. The appointment will come into force on the day specified in the instrument of appointment (FW Act, section 178(1)).<sup>101</sup> The instrument of appointment of a non-union BR must, on request, be provided to the employee’s employer (section 178(2)(a)). An employee may revoke the appointment of a non-union BR by written instrument (section 178A(1)); or revoke the default status of a union as the employee’s BR by written instrument (s 178A(2)).

One consequence of these provisions is that the range of persons authorized to act as employee BRs could shift over the course of negotiations for an agreement. Ascertaining the identity of the other BRs involved in agreement negotiations is an important issue for employers, unions and individual employee BRs, so that they are aware of precisely whom they owe obligations to under Part 2-4 (especially the good faith bargaining obligations in section 228). In *Construction, Forestry, Mining and Energy Union v Ostwald Bros Pty Ltd* [2012] FWA 2484, it was found that an employer may call into question the basis on which a union asserts that it has the right to represent the industrial interests of employees (and therefore, the union’s right to act as the employees’ default bargaining representative):<sup>102</sup>

<sup>98</sup> A union’s right to represent the industrial interests of particular employees is determined by the union’s ‘eligibility rule’, which sets out the occupations, types of work or job functions that form the basis for eligibility for membership (see eg *Australian Workers Union v Debco Pty Ltd* [2011] FWA 4393). As these eligibility rules sometimes overlap, contests between unions over membership coverage are quite common in Australia (ie ‘demarcation’ disputes). Sections 133 and 137A of the FWRO Act enable unions and employers to obtain ‘representation orders’ from FWA to resolve such disputes; for a recent (and rare) example, see *Shop, Distributive and Allied Employees Association of Australia v National Union of Workers* [2012] FWAFB 461.

<sup>99</sup> Putting this another way, a union has a right to act as a BR in negotiations for an enterprise agreement, if it has at least one member among the employees who will be covered by the agreement: see eg *Australian Manufacturing Workers Union v Inghams Enterprises Pty Ltd* [2011] FWAFB 6106 (finding that the union was not a BR due to its inability to meet this requirement). FWA has also determined that a union having the status of a BR of employees by virtue of section 176(1) does not stand in a fiduciary relationship with those employees: see *Jupiters Limited v United Voice* [2011] FWA 8317, paras [36]-[39].

<sup>100</sup> *Re MIDG Pty Ltd T/A Healthy Habits Queens Plaza* [2010] FWA 1131.

<sup>101</sup> There is no prescribed form for the instrument of appointment of an employee BR. However, there must be clear evidence of such an appointment, communicated to the employer, to make it effective. For example, employees cannot simply vote for another employee to act as their BR, without providing a formal instrument of appointment to the employer: *Re Safety Glass Pty Ltd* [2009] FWA 1156.

<sup>102</sup> See notes 98-99 above and accompanying text.

when this occurs, ‘the onus falls upon the [union] to demonstrate that its [bargaining representative] status is not merely asserted but open to demonstration as a fact.’<sup>103</sup>

Apart from the above requirements, the FW Act does not place any conditions on who may be appointed as a non-union BR. An employee could appoint another employee, a third party such as a consultant, or (as indicated above) the employee him/herself to act as the employee’s BR. A question that has arisen in the practical operation of these provisions is whether an employee may appoint *another* union – of which the employee is not a member, and which does not have the right to represent the industrial interests of that employee – as his or her BR. In *Tracey v Technip Oceania Pty Ltd* [2011] FWA 3509, a single member of FWA determined that the Maritime Union of Australia (MUA) could act as an employee’s BR in these circumstances, as the MUA official was acting in his *personal* capacity rather than on behalf of the union.<sup>104</sup> However, this ruling was overturned on appeal, the Full Bench majority finding that the evidence was ‘bristling with indications that, in his dealings with the [employer], Mr Tracey was acting as an official of the MUA’ (eg he had sent emails to the employer using the union logo, address and contact details): *Technip Oceania Pty Ltd v Tracey* [2011] FWAFB 6551, para [26].<sup>105</sup> As the MUA official was not a validly-appointed BR under the FW Act, he could not apply for a bargaining order to enforce the good faith bargaining requirements.

#### ***(d) Multiplicity of bargaining representatives and implications for bargaining***

It is possible that more than one union may have default BR status in the negotiation of an enterprise agreement (eg where the proposed agreement will cover different types of workers employed at the same enterprise, such as production and administrative employees in a manufacturing plant). It is also possible that one or more of the employees to be covered by an agreement may nominate another person or persons to be their BR. An employer BR<sup>106</sup> may, therefore, be faced with a situation where it is obliged to bargain with a large number of union and non-union BRs for a proposed agreement – with significant potential to ‘drag out’ the negotiation process. However, if an employer BR (or any other BR) has concerns that bargaining is not proceeding efficiently or fairly because there are multiple BRs for the agreement, the BR may apply for a bargaining order (see FW Act, sections 229(4)(a)(ii) and 230(3)(a)(ii)). In these circumstances, FWA may make an order that particular employee BRs not continue to be involved in negotiations for the agreement.

A number of examples have arisen of employers facing difficulties due to a multiplicity of employee BRs at the bargaining table.<sup>107</sup> For instance, two senior

<sup>103</sup> [2012] FWA 2484, at para [96].

<sup>104</sup> In this case, the relevant employees were operators of sub-sea ‘remotely operated vehicles’ in the offshore oil and gas industry, whose work falls within the eligibility rule not of the MUA but of the Australian Maritime Officers Union (AMOU); however, none of these employees sought to be represented by the AMOU in negotiations with the employer for a new agreement.

<sup>105</sup> See also *Heath v Gravity Crane Services Pty Ltd* [2010] FWA 7751.

<sup>106</sup> The BRs of employers are the employer itself, and anyone it appoints in writing (eg a lawyer, consultant or employer association): FW Act, section (s 176(1)(a), (d)). See eg *Queensland Nurses Union of Employees v Lourdes Home for the Aged* [2009] FWA 1553; *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399; *Liquor, Hospitality and Miscellaneous Union v Carinya Care Services* [2010] FWA 6489; *Australian Nursing Federation v Victorian Hospitals’ Industrial Association* [2012] FWA 285.

<sup>107</sup> See eg Australian Mines and Metals Association, *Submission to the Fair Work Act Review Panel*, February 2012, pages 87-89, 94-97; Business Council of Australia, *Submission to the Review of the Fair Work Act*, February 2012, pages 35-39.

employment relations operatives at Qantas made the following observations, prior to the development of the full-scale bargaining dispute at the airline during the course of 2011.<sup>108</sup>

... Qantas is in the early stages of a bargaining round, so our experience with the new bargaining rules is limited, but suffice it to say that already we have had some [BRs] nominated outside of the normal channel of union representation, which has involved a range of separate meetings with non-union [BRs]. This has been time-consuming to say the least. In another case involving an agreement covering an important, but numerically small, group of employees, the time that key managers have been taken away from their normal duties to be involved in bargaining has doubled by having to conduct separate and parallel negotiations with two unions in their role as separate [BRs]. In the future, there is scope for electoral battles within unions to be reflected in bargaining forums; for special interest groups based on geography, gender or simply on specific interests such as part-time employment, to seek representation; and for traditional demarcation lines between unions to be revisited.<sup>109</sup>

Some of these issues subsequently played out in the negotiation of an agreement covering Qantas's administrative staff, with two individual BRs representing 111 part-time employees going so far as to oppose the approval of the agreement by FWA.<sup>110</sup>

In other instances, it has been the main union involved in agreement negotiations that has been frustrated by the presence of non-union BRs.<sup>111</sup> For example, in *National Union of Workers v Patties Foods Ltd* [2011] FWA 4103, the union sought to obtain a degree of coordination in the dealings of twelve non-union BRs with the employer (eg by having them provide details of their bargaining claims to the union). The employer responded by informing the employees that they were free to represent the employees who had appointed them, as they saw fit. FWA found that while the union's actions did not amount to improper control over the non-union BRs (in breach of regulation 2.06, see above), nor was there anything improper in the employer's response: 'The general circumstances of these negotiations require the parties to act with some sensitivity and respect towards each other and to ensure that they comply with the provisions of the Act and the Regulations. They also require the parties to ensure that they do not overreach their roles or overreact to the actions of other parties.'<sup>112</sup>

### **(e) Rights of employee bargaining representatives**

The *substantive* rights of both employee and employer BRs in the bargaining process are governed by the good faith bargaining obligations and mechanisms for their

<sup>108</sup> See notes 33-35 and 89-90 above and accompanying text.

<sup>109</sup> Sue Bussell and John Farrow, 'Continuity and Change: The Fair Work Act in Aviation' (2011) 53:3 *Journal of Industrial Relations* 392, at page 398. See also 'Fault lines emerging in good faith bargaining laws, says academic', *Workplace Express*, 4 August 2011.

<sup>110</sup> Their efforts, which included arguments that the proposed agreement discriminated against female workers (by allocating overtime to the predominantly male full-time workforce), were unsuccessful: see *Re Qantas Airways Ltd (Australian Services Union (Qantas Airways Ltd) Agreement 9)* [2011] FWA 3632.

<sup>111</sup> See eg 'Bargaining representatives who don't bargain should lose rights: SPSF', *Workplace Express*, 21 February 2012, discussing Community and Public Sector Union (State Public Services Federation Group), *Submission to Fair Work Act Review Panel*, pages 11-15. See also *Re E Morcom* [2009] FWA 694, where FWA stated (at para [7]) that: '... there appears to be an issue in the minds of the AMWU and CEPU, as bargaining representatives, that Mr Morcom's participation in the bargaining is impeding the bargaining. In relation to that, the bargaining scheme within the current Act clearly recognises the possibility of multiple bargaining representatives. ... In circumstances where the exercise of those rights results in multiple bargaining representatives and, following bargaining, it is thought that the fact of multiple bargaining representatives is impeding bargaining, the Act does not envisage that it is in the hands of one bargaining representative to unilaterally seek to exclude another bargaining representative from the bargaining process.'

<sup>112</sup> [2011] FWA 4103, para [21].

enforcement.<sup>113</sup> While the FW Act contains no provisions dealing with the *procedural* rights of union and non-union BRs, this issue has been addressed in several cases. For example, FWA has determined that an individual, non-union BR does not have the right to paid leave from his/her employer to attend bargaining meetings: ‘For an employee to act as a [BR] it is essentially a voluntary act. I cannot see that the employer is failing to bargain in good faith by the simple act of declining to pay a person who volunteers to act as a bargaining representative with all the rights and responsibilities that such a function entails.’<sup>114</sup> Further, FWA considered that it was not necessary for the employer to conduct bargaining through a ‘single bargaining unit’, as long as the employer met with the individual BR at reasonable times.<sup>115</sup> In another decision, FWA found that workplace-level union delegates level are not automatically considered BRs as a consequence of the union’s status as a BR under section 176(1), and therefore delegates do not have a right to attend bargaining meetings.<sup>116</sup> A contrary finding was made in *Liquor, Hospitality and Miscellaneous Union v Carinya Care Services* [2010] FWA 6489, leaving the position somewhat uncertain. In practice, union delegates often participate in enterprise agreement negotiations by agreement with the employer or under the terms of a pre-existing enterprise agreement.<sup>117</sup>

### 3. Evaluation and Trends

It can be seen from the discussion in this article that employee representation at the enterprise in Australia has historically been predominantly union-based. This remains the case today, despite the continuing decline in levels of union membership among the Australian workforce. Alternative forms of employee representation such as JCCs exist alongside traditional union structures – but without any legal basis, JCCs and similar bodies have little influence in workplace decision-making. Works councils of the kind operating in Germany, and employee representation on corporate boards, are virtually non-existent. The FW Act requires information-provision and consultation over workplace restructuring issues, although for the most part without specifying any representative structure through which this must occur. The only legally-mandated structures for employee representation at the enterprise level are the provisions for electing HSRs and forming HSCs, now found in the WHS Act. Trade unions (and their officials/members) continue to enjoy significant rights and protections under federal workplace laws. Most importantly, unions play a central role in the enterprise bargaining process, although the recognition of non-union bargaining representatives under the FW Act is seeing the evolution of a more pluralistic approach to employee representation in Australia.

<sup>113</sup> See notes 79-80 above and accompanying text.

<sup>114</sup> *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862, para [29]. In this case, the individual BR had been appointed to represent himself and 132 other police officers in the negotiations, with the Police Federation of Australia acting as the union BR for most other officers. While the bargaining meetings occurred only during working hours, the employer had offered flexible rostering to Sergeant Bowers to enable him to attend – but it was not prepared to pay him for time spent acting as a BR.

<sup>115</sup> [2011] FWA 2862, paras [25]-[28].

<sup>116</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v Australian Municipal, Administrative, Clerical and Services Union; Association of Professional Engineers, Scientists and Managers, Australia; Australian Manufacturing Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2010] FWA 4821.

<sup>117</sup> The ACTU is currently campaigning to enhance the rights of union delegates in bargaining, and more generally under the FW Act: Mark Skulley and Pip Freebairn, ‘Unions seek bill of rights for delegates’, *The Australian Financial Review*, 13 January 2012, page 10.