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# THE PROBLEM OF WAGE STAGNATION: DECLINING UNION COLLECTIVE BARGAINING POWER UNDER THE FAIR WORK ACT

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# THE PROBLEM OF WAGE STAGNATION: DECLINING UNION COLLECTIVE BARGAINING POWER UNDER THE FAIR WORK ACT

By Agatha Court

## INTRODUCTION

*‘the main object of labour law has always been ... to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’.*<sup>1</sup>

This thesis will argue that the reduction of the bargaining power of unions and employees through legislative mechanisms is a central reason in the ‘crisis’ of wage stagnation in the Australian workforce.<sup>2</sup> Chapter one will show the causal relationship between the economic conditions of low wage growth and the neoliberal ascendance in labour legislation leading to the shift away from industry bargaining under the conciliation and arbitration system to the dominance of enterprise bargaining, and consequent loss of union bargaining power. Chapter two will interrogate the method of collective bargaining under the *Fair Work Act 2009* (Cth) (FW Act or ‘the Act’), and specific provisions that undermine the ability of unions to bargain collectively.<sup>3</sup> Whilst there are many mechanisms in the Act that do this, such as the restrictions on union right of entry and prohibited content in collective agreements, this thesis will focus on the key provisions that undermine bargaining, the good faith bargaining provisions, and the prohibition on pattern bargaining and restrictions on protected industrial action. These provisions weaken unions’ bargaining capacity, by reducing their bargaining scale, restricting industrial pressure unions use to bargain with, and allowing employers to refuse to make agreements. Together, these provisions severely the capacity of unions to use collective agreements to achieve wage increases. Chapter three will offer a legislative

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<sup>1</sup> Otto Kahn-Freund, *Labour and the Law* (University of Oxford, 3<sup>rd</sup> Edition, 1983) 9.

<sup>2</sup> Cf: Dr Philip Lowe quoted in Andrew Stewart, Jim Stanford & Tess Hardy (eds) *Wage Crisis in Australia: What it is and what to do about It* (University of Adelaide Press, 2018); Stephen Long, ‘Wage Crisis threatens to cause a financial meltdown, killing a ‘fair go’’, *ABC News* (online, 29 November 2018)

<https://www.abc.net.au/news/2018-11-29/wages-stagnation-threatens-financial-stability/10561348>

<sup>3</sup> *Fair Work Act 2009* (Cth).

solution, designed to increase the collective bargaining power of unions and thus to improve wages and conditions for the Australian workforce. These recommendations involve removing restrictions on the scope of bargaining and encouraging the use of multi-enterprise bargaining, amending the good faith bargaining provisions, and repealing some of the restrictions on protected industrial action.

#### A Scope

This area of labour law is broad and complex. For the purposes of clarity and succinctness, I have limited the scope of this research in a number of ways. This research does not address the ‘free rider problem’ where employees reap the benefits of union membership without paying union dues. This problem is a significant one and should be considered in further research. According to John Buchanan and Damian Oliver, ‘wage inequality is an artefact of both market and institutional forces.’<sup>4</sup> These include technological change, automation and changes arising from globalisation.<sup>5</sup> Industry concentration to a few, large firms has led to less returns on productivity to workers, amplified due to low unionisation rates. These large companies often ‘fissure’ the employment relationship so that they have few direct employees, shifting employment to subordinate organisations.<sup>6</sup> As well as this there has been an increase in casualisation, with 24 percent of the workforce employed on a casual basis.<sup>7</sup> These factors have negatively impacted wage growth and undermined collective bargaining but they are beyond the scope of this thesis and will not be addressed further. This research

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<sup>4</sup> John Buchanan and Damian Oliver, ‘Fair Work’ and the Modernization of Australian Labour Standards: A Case of Institutional Plasticity Entrenching Deepening Wage Inequality’ (2016) *British Journal of Industrial Relations*, 54(4), 795.

<sup>5</sup> Jim Stanford, Tess Hardy and Andrew Stewart, ‘Australia we have a problem’ in Andrew Stewart, Jim Stanford & Tess Hardy (eds) *Wage Crisis in Australia: What it is and what to do about It* (University of Adelaide Press, 2018) 10.

<sup>6</sup> Ibid.

<sup>7</sup> Geoff Gilfillan, ‘Characteristics and use of casual employees in Australia’ *Parliament of Australia* (online research report, 19 January 2018)

[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1718/CasualEmployeesAustralia](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia)

will consider the ‘employee’ only as a full-time or permanent part-time worker in the private sector. Additionally, this research will ‘de-gender’ the employee and not address the wage gap or impact of gender on collective bargaining. This is not to deny the importance of this topic; indeed exploring the status of collective bargaining in feminised industries and occupations is critical to fully capturing the issue of the declining collective bargaining power of employees. This project will instead focus on how the FW Act suppresses collective bargaining by weakening union influence on the bargaining system, resulting in reduced ability of employees to bargain for wage increases and what can be done about it.

#### *B* Collective Bargaining: Definition

In his often-used definition, Hugh Clegg defined collective bargaining as:

collective because employees associate together, normally if not invariably in trade unions, in order to bargain with their employers... the process is called bargaining because each side is able to apply pressure on the other. Mere representation of views or appeals for consideration is not bargaining.<sup>8</sup>

The limitations on collective bargaining that will be explored in this thesis bring into question whether the bargaining system under the FW Act can be considered true collective bargaining and not merely agreement making. Critiques of the Act have found that ‘Australia has adopted only a much-attenuated form of the internationally recognised collective bargaining model.’<sup>9</sup> Clegg’s definition should be kept in the mind of the reader throughout this thesis.

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<sup>8</sup> HA Clegg, *Trade Unionism Under Collective Bargaining: A Theory Based on Comparisons of Six Countries* (Basil Blackwell, 1976) 5.

<sup>9</sup>Breen Creighton, ‘Impacts of Enterprise Bargaining on Unions and Employers: Discussants Comments’ (2012) *Labour & Industry: A Journal of the Social and Economic Relations of Work*, 22(3), 279.

## CHAPTER ONE: A WAGE CRISIS? A LEGAL PROBLEM

### A Introduction

This chapter will argue that the current problem of low-wage growth is in large part a result of the declining bargaining power in the Australian labour force. The central argument of the chapter is that there is a causal connection between the current economic problem of low wages and legal reforms over the same period. Chronic low wages have negative consequences for the economy as a whole, impacting inflation, decreasing spending and productivity and lowering living standards.<sup>10</sup> Firstly, the “crisis” of low wage growth will be shown to have begun in the 1980s, and to have accelerated since 2013. Secondly, the legal reforms that have occurred over the same period will be shown to have fractured employees’ bargaining power, and thus their ability to demand wage increases. The legal landscape has developed in a way that prioritises the employer to the detriment of the collective in the bargaining process. The restructuring of the legal parameters of the bargaining system, from the *Industrial Relations Act 1988* (Cth) to the FW Act, is a causal factor of the decline in wages, as this chapter will illuminate.

### B The Current Wage Crisis

What is the current wage crisis? Australia’s orthodox economic narrative of the past quarter century is one of sustained success. Famously, we have experienced ‘27 years of continuous, uninterrupted growth’.<sup>11</sup> The Australian economy is a cause of envy; according to Gabriel Sterne, Global Head of Macro Research, Oxford Economics, Australia’s ‘record-breaking

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<sup>10</sup> Stanford, Hardy & Stewart (n 5) 6.

<sup>11</sup> Mathias Cormann, ‘Australia: 27 Years of Economic Growth and Counting’, *Foreign Policy*, (Web Page, 26 April 2019) <https://foreignpolicy.com/sponsored/australia-27-years-of-economic-growth-and-counting/>;

expansion is a positive beacon for other advanced economies.’<sup>12</sup> Yet simultaneously, Australia is currently facing a ‘per capita recession’ of ongoing low wage growth.<sup>13</sup> Per capita recession is calculated by measuring GDP (gross domestic product) and removing the impact of population growth. This is done because population growth often masks weak productivity and spending.<sup>14</sup>

### *1 Economic Trends since the 1980s*

The trend of wage stagnation, despite economic growth in the economy overall can be traced to the 1980s. This problem has occurred across OECD countries. The countries with the lowest wage growth over this time period also experienced ‘modernisation’ of their industrial system simultaneously.<sup>15</sup> Australia’s modernisation trajectory will be explored later in this chapter, but it occurred in tandem with the neoliberal political ascendancy across the OECD. In Australia in the mid-1970s, labour share of GDP (total share of economic output that is paid to workers)<sup>16</sup> was over 58 per cent; it fell to 47 per cent in 2017.<sup>17</sup> Economist Joe Isaac has found that ‘since 1983...real average weekly earnings ... have risen well short of labour productivity increases. This contrasts with the period from 1965 to 1980 when real earnings exceeded productivity.’<sup>18</sup> John Buchanan and Damian Oliver note that the ‘‘great compression’ in the distribution of wage-related income between the 1940s and 1970s has

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<sup>12</sup>Edmund Tang, ‘Australia on course to celebrate 30 years of growth, says Oxford Economics’ *Austrade* (Web Page, 26 April 2019) <https://www.austrade.gov.au/news/economic-analysis/australia-on-course-to-celebrate-30-years-of-growth-says-oxford-economics>

<sup>13</sup> Stephen Letts, ‘Australia’s economy just entered recession on a per capita basis’ *ABC News*, (online, 7 March 2019) <https://www.abc.net.au/news/2019-03-06/gdp-q4-2018/10874592>

<sup>14</sup> Patrick Commins, ‘Australia risks a ‘per capita’ recession’, *The Financial Review*, (online, 3 March 2019) <https://www.afr.com/markets/australia-risks-a-per-capita-recession-20190303-h1bxfq>

<sup>15</sup> Buchanan & Oliver (n 4) 792

<sup>16</sup> Jim Stanford, ‘Exploring the decline in the labour share of GDP’ *Centre for Future Work*, (website, 3 August 2018), [https://www.futurework.org.au/exploring\\_the\\_decline\\_in\\_the\\_labour\\_share\\_of\\_gdp](https://www.futurework.org.au/exploring_the_decline_in_the_labour_share_of_gdp)

<sup>17</sup> Alison Pennington, *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia’s Private Sector* (Centre for Future Work, December 2018) 4; Jim Stanford, *Historical data on the decline in Australian industrial disputes* (Centre for Future Work, 2018)

<sup>18</sup> Joe Isaac, ‘Why Are Australian Wages Lagging and What Can Be Done About It?’ (2018) *The Australian Economic Review* 51(2), 175

given way to the ‘great dispersion’.<sup>19</sup> Australia has traditionally had one of the lowest proportions of ‘low pay employees’ (those earning less than two-thirds of the median income) in comparison to countries such as the UK and the US. Since 1993 however, Australia has recorded the largest increase in the number of low pay employees in comparison to those countries.<sup>20</sup>

## 2 *The Wage Crisis is Accelerating*

Australia is experiencing increased inequality in wage distribution, where the gains of productivity are being distributed to less and less people.<sup>21</sup> Reserve Bank of Australia Governor, Dr Philip Lowe, recently described the economic dangers of what he called a ‘crisis... in real wage growth’, noting that ‘beyond... [the] purely economic effects, the slow wages growth is diminishing our sense of shared prosperity.’<sup>22</sup> In the latest OECD survey of the Australian economy, the sentiment was echoed:

Inclusiveness has been eroded... households in upper income brackets have benefited disproportionately from Australia’s long period of economic growth. Real incomes for the top quintile of households grew by more than 40 per cent between 2004 and 2014 while those for the lowest quintile only grew by about 25 per cent.<sup>23</sup>

Low wage growth for middle- and lower-income earners has a flow on effect, decreasing consumer spending and productivity. Across all incomes, since 2013, nominal wages have been growing at around 2 per cent per year, the slowest sustained growth since the end of the Second World War.<sup>24</sup> Essentially, ‘real pay has [...] become delinked from labour productivity

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<sup>19</sup> Buchanan & Oliver (n 4).

<sup>20</sup> Ibid.

<sup>21</sup> Susan Hayter, ‘A fair globalization: The role of collective bargaining in stemming the rising tide of inequality in earnings and income’, (2009) *International Journal of Labour Research*, 1(3), 28

<sup>22</sup> Stanford, Hardy and Stewart (n 5) 4; Philip Lowe, ‘Productivity Wages and Prosperity,’ (Speech, Australian Industry Group, 13 June 2018).

<sup>23</sup> OECD, *OECD Economic Surveys Australia* (Overview Report, 2107) 4

<sup>24</sup> Stanford, Hardy, Stewart (n 5) 6



growth ... and the share of national income going to workers has consequently reduced.’<sup>25</sup> Further, since 2013, ‘the gap between productivity and wages has widened notably, with real productivity growing almost four times faster than real wages’.<sup>26</sup> Over this period Australia has experienced the most ‘substantial deceleration of wages’ of any major industrial country.<sup>27</sup> This is undermining financial stability.<sup>28</sup> Jim Stanford suggests Australia may have ‘experienced a structural change in 2013 or so — a structural shift that does not reflect traditional macroeconomic or cyclical conditions.’<sup>29</sup>

### 3 *Economic Orthodoxies: No Answer?*

Economic orthodoxies suggest that market forces will correct the current trends in low wage growth. The problem is thus described as ‘cyclical, rather than structural.’<sup>30</sup> Yet despite low unemployment of between 5-6 per cent since 2012, Australian wages have not risen.<sup>31</sup>

According to Prime Minister Scott Morrison, ‘as the labour market tightens, that’s obviously going to lead over time to a boost in wages’, because ‘the laws of supply and demand ... have not been abolished’.<sup>32</sup> However, many labour economists recognise that there are ‘structural, institutional and even political factors in explaining wage patterns.’<sup>33</sup> Economist Thomas Piketty has noted that the main problem with the economic orthodoxy of centre-right politics:

Is quite simply that it fails to explain the diversity of wage distributions we observe in different countries at different times. ... In order to understand the dynamics of wage

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<sup>25</sup> Ibid.

<sup>26</sup> Jim Stanford, ‘Charting Wage Stagnation in Australia’ in in Andrew Stewart, Jim Stanford & Tess Hardy (eds) *Wage Crisis in Australia: What it is and what to do about It* (University of Adelaide Press, 2018) 33

<sup>27</sup> Ibid, 34.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, 37

<sup>30</sup> David Peetz, ‘Collective Bargaining and Power’ in Andrew Stewart, Jim Stanford & Tess Hardy (eds) *Wage Crisis in Australia: What it is and what to do about It* (University of Adelaide Press, 2018) 104.

<sup>31</sup> Stanford, Hardy, Stewart (n 5) 7

<sup>32</sup> Philip Coorey, ‘Scott Morrison urges bosses to turn profits into higher wages’, *Australian Financial Review*, (online, 10 September 2017)

<sup>33</sup> Stanford, Hardy, Stewart (n 5) 9

inequality, we must introduce other factors, such as the institutions and rules that govern the operation of the labour market in each society'.<sup>34</sup>

Further, the education and skills levels of the workforce have been increasing over this time period, another indicator that wages should be rising not falling.<sup>35</sup> It is clear that an economic explanation of low wage growth does not go far enough. The institutions and rules as described by Piketty are negatively impacting wage growth, specifically the decreasing power of unions to collectively bargain for wage increases.

### *C Trends in Collective Bargaining Over This Period*

At the same time that wages growth has stagnated, union membership has suffered a precipitous decline from approximately 50 percent in the late 1970s to 15 percent today.<sup>36</sup> This is the lowest rate in Australia's history and one of the lowest in the OECD.<sup>37</sup> The number of employees covered by a collective agreement has fallen too.<sup>38</sup> The total decline in collective bargaining power this represents is a direct causal factor in the current wage crisis. The decline reflects the 'modernisation' of the collective bargaining system. Notably then, Australia's industrial laws are some of the most 'repressively hostile to unions' in the OECD.<sup>39</sup> Legal changes that reduce the influence of unions, and thus the collective bargaining power of workers, are clearly implicated.

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<sup>34</sup> Thomas Piketty, 'Capital in the Twenty-first Century' (Harvard University Press, 2014) 308.

<sup>35</sup> Peetz (n 30) 105

<sup>36</sup> Stanford, Hardy, Stewart (n 5) 9.

<sup>37</sup> Ibid.

<sup>38</sup> Peetz (n 30) 105.

<sup>39</sup> Josh Bornstein, 'Requiem for the right to strike' (Paper, Monash University) 1.

## *I Union Membership*

In August 2016, 1.56 million Australians were members of a trade union.<sup>40</sup> Only two years earlier, the number of union members was 1.68 million, a decline of 8.1 per cent.<sup>41</sup> While union membership has been in decline since the early 1980s, the decline has accelerated. This has reduced not only the bargaining power of unions, but the resources at their disposal. Legal changes have directly impacted the coverage of unions, their ability to fund their costs of organising (through compulsory unionisation and bargaining fees) which in turn has reduced the attractions of membership. Thus a spiral begins, as unions lose members, are less able to deliver gains, and so lose more members.

## *2 Enterprise Bargaining*

The number of Australian workers whose wages are determined by enterprise bargaining agreements is also in decline.<sup>42</sup> Importantly, not only is the number of enterprise agreements in decline, the ability of these agreements to deliver wage increases is also falling. From 2000 to 2013, those employees covered by enterprise agreements achieved wage increases between 3.5-4.5 per cent.<sup>43</sup> However, since 2013 there has been a ‘pronounced deceleration’ in wage increases afforded by enterprise agreements.<sup>44</sup> Similarly, agreement coverage rose consistently until 2009 and then ‘spiked’ after the introduction of the Fair Work Act.<sup>45</sup> Coverage then ‘plateaued’ between 2010 and early 2014 at around 2.6 million employees and subsequently entered a steep decline, to the point where enterprise agreement coverage is

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<sup>40</sup> Peter Gahan, Andreas Pekarek and Daniel Nicholson ‘Unions and Collective Bargaining in 2017’ (2018) *Journal of Industrial Relations*, 60(3) 338; Australian Bureau of Statistics, *Characteristics of Employment, Australia, 2017* (ABS Cat. No. 6333.0, 2017) Available at: [www.abs.gov.au/ausstats/abs@.nsf/mf/6333.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/6333.0)

<sup>41</sup> Gahan, Pekarek, Nicholson, (n 40).

<sup>42</sup> Stanford (n 16) 23.

<sup>43</sup> *Ibid*, 24

<sup>44</sup> *Ibid*.

<sup>45</sup> Pennington, (n 17) 19.

now just 2 million workers.<sup>46</sup> The number of private sector enterprise agreements is only half 2010 levels, dropping from 24,459 agreements to 12,305 in June 2018.<sup>47</sup> Jim Stanford warns that if ‘falling wage expectations become concretised in multi-year collective agreements, wage stagnation may become a lasting and persistent feature of Australia’s labour market.’<sup>48</sup> New agreements are not being signed as old ones expire; in ‘June 2017, 2089 agreements were due to expire compared to 846 new agreements approved, again suggesting that the current flows of agreements cannot maintain the current stock of existing agreements.’<sup>49</sup>

The most rapid decline in enterprise agreements since 2013 occurred in enterprises with less than 20 employees.<sup>50</sup> Yet over the same period, small firms have accounted for a disproportionate share of employment growth.<sup>51</sup> Economist Alison Pennington notes that the erosion of agreement coverage has contributed to an increasing reliance on the award system as a pay-setting mechanism.<sup>52</sup> Further, the ability of enterprise agreements to deliver wage increases through collective bargaining is decreasing. According to David Peetz:

In... 2016-17, the average [wage increase through agreement] was just 3.1% (the lowest recorded) and in the first nine months of 2017-18 it was 2.8%. Thus collective bargaining, where it occurs, is having less of an impact on wages.<sup>53</sup>

In short, not only is the number of employees covered by enterprise agreements decreasing, the ability of these agreements to provide workers with pay increases is also decreasing. Overall, the ability of collective bargaining to provide meaningful improvements in the conditions of employees is in chronic decline.

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid 21.

<sup>48</sup> Stanford (n 16) 26.

<sup>49</sup> Ibid.

<sup>50</sup> Pennington, (n 17) 5

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 7.

<sup>53</sup> Peetz (n 30) 106

## *D Corresponding Legal Developments*

During this period of wage stagnation, profound changes were made to the industrial system. The ‘modernisation’ of labour law is an intrinsic factor in the current paradox of high productivity and low wage growth. Beginning in the late 1980s, Australia’s industrial system was recalibrated, in line with the ideological commitments of the neoliberal order. This led to the end of industry-wide award bargaining and the primacy of the enterprise bargaining model. The result was the stunting of the collective bargaining power of unions and employees.

### *1 The Arbitration Era*

From Federation till the late 1980s, Australia had ‘the distinctive antipodean institution of arbitrated awards’ as the basis of its industrial system: the *Conciliation and Arbitration Act 1904* (Cth).<sup>54</sup> Unlike other systems at the time, the Australian system was a state-centric answer to the problem of industrial conflict. New Zealand was the only other jurisdiction to implement a similar industrial system. A core element of the arbitration system was the concept of ‘comparative wage justice’ which ensured horizontal wage increases across industries through industry-wide bargaining (this term is explored later in this chapter). This system was predicated on union involvement in the wage-setting process, and implied a need for the bargaining strength of unions to be roughly similar to that of business.

Buchanan and Oliver describe the system as:

...an amalgam: collective bargaining embedded within a conciliation and arbitration system. Industrial tribunals shaped relations between the parties and codified principles that governed both their conduct and substantive pay and conditions as fluctuations in growth and struggles over productivity dividends evolved.<sup>55</sup>

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<sup>54</sup> Buchanan & Oliver, (n 4) 800.

<sup>55</sup> Ibid.

Importantly, unions were conceptualised as ‘principal parties’, acting in the broad interest of workers, not just as representatives of individual employees/members.<sup>56</sup> Industrial disputes were viewed not as the disputes of individuals but a ‘common cause’.<sup>57</sup> Unions had a monopoly on employee voice, in contrast to being merely *representatives* of employees as individuals, as in the current system. Jill Murray describes the arbitration vision as bargaining in the ‘public sphere.’<sup>58</sup> A special power in the constitution allowed the industrial tribunals not only to resolve disputes between employers and employees, but to set minimum standards across entire industries.<sup>59</sup> The High Court echoed this reasoning in *Jumbunna Coal Mine v The Victorian Coal Miners’ Association*:

An industrial dispute is something more than a dispute between an employer and his individual workmen. It is a dispute between a combination of workmen and their employer or employers ...if the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen..<sup>60</sup>

Under this system, bargaining occurred at multiple levels: through the award system negotiated by employers and trade unions, as well as above-award enterprise level agreements. Bray and Stewart argue that ‘awards were highly collectivist instruments. Indeed, they were virtually ‘owned’ by the registered organisations that were party to them, providing both trade unions and employer associations with enforceable collective rights and many opportunities to participate in award making and variation.’<sup>61</sup> The common law

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<sup>56</sup> Jill Murray, ‘Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law’, (2006) 35(4) *Industrial Law Journal*, 351

<sup>57</sup> *Jumbunna Coal Mine, No Liability and Another v The Victorian Coal Miners’ Association* (1908) 6 CLR 309, 332

<sup>58</sup> Murray, (n 56) 344

<sup>59</sup> Andrew Stewart, ‘Australian Labour Law in transition: the impact of the Fair Work Act,’ (2010) 37(1) *New Zealand Journal of Employment Relations*, 3

<sup>60</sup> *Jumbunna Coal Mine* (n 49) 350, 360.

<sup>61</sup> Mark Bray and Andrew Stewart, ‘From The Arbitration System To The Fair Work Act: The Changing Approach In Australia To Voice And Representation At Work’ (2013) 34(1) *Adelaide Law Review*, 25

principle of treating like cases alike created the notion of ‘fair comparability’ or ‘pattern agreements’ in Australia through the doctrine of ‘comparative wage justice.’<sup>62</sup>

(a) *Comparative Wage Justice*

The concept of comparative wage justice was therefore a key element of the wage system.

This principle imbedded the concept of industry-level bargaining within the parameters of the employment system. The core notion of comparative wage justice is that ‘employees doing the same work for different employers or in different industries should by and large receive the same amount of pay irrespective of the capacity of their employer or industry.’<sup>63</sup> An expanded understanding of this was that there should be an appropriate ratio between workers’ pay when they undertook similar, but not the same work. The South Australian industrial tribunal described this concept as:

- (1) That wage levels shall be proper by comparison with what is paid to other persons doing comparable work; and
- (2) That they also allocate a reward which fairly values the work in question in relation to that of other disciplines or areas.<sup>64</sup>

Thus, the award system ranked jobs in relation to each other; comparing factors such as skills, responsibilities and physicality.<sup>65</sup> From the 1930s, in practice this meant that wages ‘orbited’ around the metal industry, with wages set in relation to a qualified metal tradesperson.<sup>66</sup> The mechanism meant that the ‘strong protected the weak’; highly unionised workforces with effective bargaining power (construction, manufacturing, transport etc) “extended” their collective power to weaker, less unionised, industries, and wages rose in relation to them.<sup>67</sup> This created the compressed wage structure of the Australian economy in

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<sup>62</sup> Buchanan & Oliver, (n 4) 800

<sup>63</sup> Chris Provis, ‘Comparative wage justice’ (1986) 21(3) *The Journal of Industrial Relations*, 25

<sup>64</sup> ‘Police Officers Award (Appeal) Case’, South Australian Industrial Reports, vol. 41, 732.

<sup>65</sup> Tim Lyons ‘Minimum Wages’ in Andrew Stewart, Jim Stanford & Tess Hardy (eds) *Wage Crisis in Australia: What it is and what to do about It* (University of Adelaide Press, 2018) 74

<sup>66</sup> *Ibid.*

<sup>67</sup> Barry Hughes, ‘Wages of the strong and the weak’. (1973) 15 *The Journal of Industrial Relations*, 15: 1–24.

comparison to other English speaking countries.<sup>68</sup> Thus, the system was integral in Australia's high wage structure.

### 3 Reforms

The reforms of the late 1980s followed a particular economic rationale still dominant in the contemporary body politic. All industrial relations acts since these reforms, including the FW Act, have been based on a neoliberal understanding on the purpose of labour law – though with varying levels of extremity. These reforms have empowered ‘militant managerialism’.<sup>69</sup> Neoliberalism revived a ‘legal ideology that also cast an affirmative preference for hierarchy and inequality as non-intervention.’<sup>70</sup> They have flipped the core purpose of the bargaining system, from awards that spread the wage gains of the strong to the weak, to the opposite, where the bargaining system is designed to leave elements of the workforce behind – unorganised, reliant on the now *un-bargained* award system.<sup>71</sup>

The reforms were in response to the perceived inability of the arbitration system to adjust to the global economy. They were an answer to the economic issues of the time: widespread unemployment, inflation and economic stagnation.<sup>72</sup> It was an answer shaped by the rightward shift of political discourse – of both the Labor and Coalition parties.<sup>73</sup> With the ascent of neoliberalism, the perceived inadequacies of the system were ‘defined in market and managerialist terms’; the need to reduce ‘restrictive work practices’ and ensure

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<sup>68</sup> Buchanan & Oliver, (n 4) 801

<sup>69</sup> Chris Briggs and John Buchanan, Economics, Commerce and Industrial Relations Group, Parliament of Australia, *Labor Market Deregulation: A critical Assessment*, (Research Paper, June 2000) ii.

<sup>70</sup> Sanjukta Paul, ‘A radical legal ideology nurtured our era of economic inequality’ *Aeon*, (webpage, June 2019) [https://aeon.co/ideas/a-radical-legal-ideology-nurtured-our-era-of-economic-inequality?utm\\_source=Aeon](https://aeon.co/ideas/a-radical-legal-ideology-nurtured-our-era-of-economic-inequality?utm_source=Aeon)

<sup>71</sup> Buchanan & Oliver, (n 4) 803.

<sup>72</sup> Joe Collins & Drew Cottle, ‘Labor Neoliberals or Pragmatic Neo-Laborists? The Hawke and Keating Labor Governments in Office, 1983—96’ (2010) 98 *Labour History*, 27.

<sup>73</sup> There were many contemporary critiques of the push towards enterprise bargaining, see further: S Frenkel and D Peetz, ‘Enterprise Bargaining: the BCA’s Report on Industrial Relations Reform’, (1990) 32(1) *Journal of Industrial Relations*, 69-99.



‘flexibility’.<sup>74</sup> Otto Kahn Freund has warned against the ‘misleading... ambiguity of the word *freedom* in labour relations.’<sup>75</sup> Flexibility echoes the purpose of *freedom of contract* in 19<sup>th</sup> century labour law, namely the freedom or flexibility of the employer to control the employment relationship to the detriment of the employee.

The *Industrial Relations Reform Act 1993* (Cth) moved ‘the system away from conciliation and arbitration, and in favour of collective bargaining’ at the single enterprise level.<sup>76</sup> The Act fundamentally changed the structure of bargaining: there were now two streams in which wage standards could be set, an enterprise bargaining stream and the award. Importantly, the award was no longer a mechanism for setting wage increases across industries; rather, it was a safety net.<sup>77</sup> Scholars are in general agreement that the reforms introduced by Howard in 1996 were a continuation of the changes made under Keating.<sup>78</sup> The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) continued the decentralisation of collective bargaining. Section 3(b) defined its objective as to ensure ‘that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employee at the workplace level’.<sup>79</sup> After the 2004 election, Howard introduced the most radical innovation of the neoliberal legal project: *WorkChoices*.<sup>80</sup> This legislation sought to completely remove union-led collective bargaining from the industrial system, prioritising individual contracts and attacking the safety net.<sup>81</sup> Importantly, the election of Labor in 2007 did not result in a significant shift away from the individualised conception of the labour system. The new FW Act ‘retained the primacy of enterprise

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<sup>74</sup> Briggs & Buchanan, (n 69).

<sup>75</sup> Kahn Freund (n 1) 24.

<sup>76</sup> Victoria Lambropoulos & Michael Wynn, ‘Unfair Labour Practices, Trade Union Victimisation and Voice’ (2013) 34 *Adelaide Law Review*, 49.

<sup>77</sup> Buchanan & Oliver, (n 4) 803.

<sup>78</sup> Shae McCrytal, ‘Smothering the Right to Strike: Work Choices and Industrial Action’ (2006) 19(2) *Australian Journal of Labour Law*, 198-209.

<sup>79</sup> *The Workplace Relations and Other Legislation Amendment Act 1996* (Cth) s3(b)

<sup>80</sup> *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth)

<sup>81</sup> Buchanan & Oliver, (n 4) 803.

bargaining and, most significantly, a number of Howard-era changes, including tight restrictions on union campaigning capacity, constraints on award content and prohibitions on pattern bargaining.’<sup>82</sup> Restrictions on industrial activity under both these Acts have further reduced the ability of unions to bargain, as they limit their capacity to exert pressure in support of their demands.

Thus, neoliberal dominance of employment relations has seen a dramatic reduction in the collective bargaining power of unions. Bargaining at the enterprise level diffused unions’ power, from the level of industry which was inherently *collective*, to the smallest denominator, the enterprise. At this level the employer has a clear dominance in setting the parameters of bargaining, while the union is unable to exert the collective bargaining power of its entire membership. This recalibration of the industrial system has ensured a structural asymmetry in power relations between employers, unions and employees.

#### *E Conclusion*

The purpose of this chapter was to outline the economic problem of low wage growth, and one of its primary causes, the reduction in bargaining power of unions as a result of legal reforms and modernisation, starting from the IR Act up to the current FW Act. The Keating reforms and all subsequent industrial law reform in Australia implemented an ideological shift affecting the fundamental structure of industrial law. This shift occurred across the OECD, over this period. Lord Wedderburn described the shift in 1993, predicting that the rise of individualism under neoliberalism would ‘disestablish collectivism ... and dismantle machineries of corporatist consensus in the name of competitiveness.’<sup>83</sup> Whilst it is clear that these reforms were made in response to economic concerns at the time; they have

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<sup>82</sup> Ibid, 804.

<sup>83</sup> Lord Wedderburn, ‘Labour Law and the Individual: Convergence or Diversity?’ in *Labour Law and Freedom, Further Essays in Labour Law* (Lawrence & Wishart, 1995) 311, quoted in Lambropoulos & Wynn (n 76) 1.

become a persistent structural impediment to bargaining for wage rises. The next chapter will focus on this time period with an analysis of collective bargaining as it exists in the FW Act; and how aspects of the Act have led to this problem.

## *CHAPTER 2: COLLECTIVE BARGAINING AND THE FAIR WORK ACT*

### *A Introduction*

The purpose of this chapter is to evaluate the current legal regime as it relates to collective bargaining – the FW Act. As was outlined in the previous chapter, the Act has presided over wage stagnation and falling enterprise agreement coverage. The Act has failed to adequately address these structural problems which undermine collective bargaining. This chapter will argue that the provisions to compel bargaining, the good faith provisions, the prohibitions on pattern bargaining, the constraints on industrial action and the limited use of the low paid bargaining provisions together substantially limit union bargaining power, and thereby obstruct collective efforts to achieve wage increases.

### *B Collective Bargaining in FWA*

The Act retained many elements of *WorkChoices*, repealing only the most extreme anti-collective bargaining provisions. The FW Act has the same ideological foundations as the industrial legislation of the past 30 years. The Act is ‘primarily concerned with the rights and freedoms of individual workers. Unionism is tolerated, but not actively encouraged – certainly not the ‘militant’ variety’.<sup>84</sup> Rosalind Read argues that:

the objects of the FW Act do not indicate an explicit intention to address the inequity of bargaining power which is inherent in the employment relationship other than obliquely through references to fairness and consistency with international obligations. The statutory preoccupation with fairness in the FW Act implies a need for even-handedness. The Australian trope of the ‘fair go all round’, instead of an affirmative action approach which addresses unequal bargaining

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<sup>84</sup> Stewart, (n 59) 21

power by privileging collective representation, appears to guide the form of the legislation from its title onward.<sup>85</sup>

Insofar as the Act seeks to facilitate bargaining, it allows the parties to bargain according to their strengths or weaknesses as the case may be. It does not seek to address the unequal bargaining power inherent in the employer/employee relationship. This is in contrast to equivalent Acts in other, similar jurisdictions. For example, the object of the *Employment Relations Act 2000* (NZ) includes ‘acknowledging and addressing the inherent inequality of power in employment relationships.’<sup>86</sup> In contrast, the FW Act states that its object is to provide ‘a simple, flexible and fair framework that enables collective bargaining in good faith... for enterprise agreements that deliver productivity benefits.’<sup>87</sup> The Act *enables* rather than *encourages* the use of collective bargaining, with onerous statutory requirements placed on unions participating in the process (for example, the union right of entry requirements,<sup>88</sup> protected industrial action,<sup>89</sup> pattern bargaining<sup>90</sup>).

Part 2-4 of the FW Act establishes mechanisms aimed at assisting the bargaining process. These provisions highlight the overly procedural nature of the Act, with unnecessary hurdles to bargaining and complicated provisions that prove limited in their practical application. Majority Support Determinations (MSD)<sup>91</sup> are the mechanism whereby a bargaining representative for an employee may apply to the Fair Work Commission (‘FWC’) to compel a reluctant employer to the table, requiring a majority of covered employees to indicate their preference for one (through vote<sup>92</sup> or petition<sup>93</sup>). Prior to 2015 amendments to the Act, unions

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<sup>85</sup>Rosalind Read, ‘Direct Dealing, Union Recognition and Good Faith Bargaining under the Fair Work Act’, (2012) 25 *Australian Journal of Labour Law*, 150

<sup>86</sup>*Employment Relations Act 2000* (NZ) pt 1 (3).

<sup>87</sup>FWA (n 3) s171(a).

<sup>88</sup>Ibid s5 12 ; *The Work Health and Safety Act 2011* (Cth) pt 7.

<sup>89</sup>FW Act (n 3) pt 3-3.

<sup>90</sup>Ibid s412.

<sup>91</sup>Ibid s236-237.

<sup>92</sup>*Australian Manufacturing Workers’ Union (AMWU) v Cochlear* [2012] FWA 5374.

<sup>93</sup>*CFMEU v Xstrata Ulan Surface Operations Pty Limited* [2012] FWA 4798 .

were able to bring reluctant employers to the bargaining table via protected industrial action, confirmed in the case *JJ Richards*.<sup>94</sup> The removal of this option has further limited the means in which unions can compel an employer to bargain. Contrast this to New Zealand where a Union can compel an employer by virtue of its status as a bargaining representative.<sup>95</sup> Breen Creighton argues that the decision by the Rudd Government ‘formally to vest the decision to negotiate or not to negotiate exclusively in the employer’ is ‘clearly fundamentally inconsistent with the accepted view that the purpose of collective bargaining is to redress the power imbalance between capital and labour in the market economy.’<sup>96</sup> Creighton further states: ‘it defies reason to vest the decision ... to negotiate in the party whose power is to be curtailed by the bargaining process.’<sup>97</sup> Under the Act, unions must devote considerable time and effort just to commence bargaining, a requirement that especially disadvantages employees in low-paying and insecure industries. By positioning unions as mere representatives of individual employees, instead of parties in their own right, the Act expresses a neoliberal understanding of employee voice. Similarly, under s240 if all parties agree they may request the tribunal’s assistance through arbitration. The caveat of all parties agreeing to arbitration means that this provision does little to resolve protracted disputes or disputes with employers who remain ideologically and practically opposed to collective agreements. These provisions either lack strength or have failed to be utilised in an effective manner. This problem is repeated throughout the Act.

### *C Good Faith*

Under s228 of the FW Act, parties to a proposed enterprise agreement must meet the good faith bargaining (GFB) requirements.<sup>98</sup> The drafting of this provision highlights the focus on

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<sup>94</sup> *J.J Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53.

<sup>95</sup> ER Act (n 86) s30; Murray, (n 56) 351.

<sup>96</sup> Breen Creighton ‘Getting to the Bargaining Table’ in Shae McCrystal, Breen Creighton & Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 43.

<sup>97</sup> *Ibid.*

<sup>98</sup> FW Act (n 3) s228.

procedures over outcomes that dominates the framing of the Act. Subsections a–d of s228 are basic requirements that can easily be fulfilled by an employer seeking to frustrate a bargaining outcome such as in *AMWU v Cochlear*.<sup>99</sup> They are:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information ...in a timely manner;
- (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;<sup>100</sup>

Note that ‘genuine consideration’ does not mean an employer must acquiesce in any way to the demands of the union; as section two states the good faith provisions do not require a ‘bargaining representative to make concessions during bargaining for the agreement.’<sup>101</sup> This means there is little incentive to bring the bargaining to a successful conclusion, as exemplified by the eight year *AMWU v ResMed* bargaining process.<sup>102</sup> Further, the Courts have interpreted subsections e–f narrowly, further limiting the usefulness of these provisions in fostering true collective bargaining. These provisions relate to:

- (e) refraining from capricious or unfair conduct that undermines ... collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

In *CFMEU v Tahmoor Coal Pty Ltd*,<sup>103</sup> the court took ‘a strict, textual approach’ to the question of what constituted capricious or unfair conduct in relation to direct dealing with employees.<sup>104</sup>

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<sup>99</sup> *Cochlear* (n 92); Anthony Forsyth & Bradon Ellem, ‘Has the Australian Model Resisted US-Style Anti Union Organising Campaigns?’ in Shae McCrystal, Breen Creighton & Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 64.

<sup>100</sup>FW Act (n 3) s228(a)-(d).

<sup>101</sup> Ibid s228(2)(a).

<sup>102</sup> *Australian Manufacturing Workers Union (AMWU) v ResMed Limited* [2014] FWCFB 3501; Forsyth & Ellem (n 99) 65.

<sup>103</sup> [2010] FWAFB 3510; (2010) 195 IR 58.

<sup>104</sup> Read, (n 85) 145.

The provisions thus do little to encourage meaningful bargaining. Under s228(2), a party can refuse to move from an adopted position, as long as they have given ‘genuine consideration to the proposals’.<sup>105</sup> Should such a situation occur, under the doctrine of ‘impasse’ the employer is then able to put their offer directly to the employees for a vote.<sup>106</sup> The offer may make no concession to union demands. In Vice President Watson’s words, in a case where the union representative opposed the employer’s proposal, ‘the process for approval essentially then became a battle for hearts and minds of the employees who decide whether to approve the agreement’.<sup>107</sup> This encapsulates the understanding of bargaining under the Act; the bargaining process is one of the employer putting forward an offer, which may or may not be altered through union input, but should the employer not reach an agreement with the union, then they may put an unaltered agreement to a vote of employees. Further, as an agreement does not require union input, an enterprise agreement may be no more than ‘an employer simply drafting an agreement that is accepted without discussion by an unorganised group of workers,’ not an instrument of collective bargaining.<sup>108</sup> The problem with the Act’s GFB provisions is that they are concerned with *how* parties meet, rather than the outcome of the bargaining. Thus, the GFB requirements have proved to be of limited use in encouraging collective bargaining.

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<sup>105</sup> *CFMEU v AGL Loy Yang Pty Ltd* [2016] FWC 4364 ; FWA (n 3) s228(1)(d)

<sup>106</sup> Kurt Walpole, ‘The Fair Work Act: Encouraging collective agreement making but leaving collective bargaining to choice’ (2015) 25(3) *Labour and Industry: a journal of social and economic relations of work*, 213

<sup>107</sup> *The Broken Hill Town Employees' Union v Barrier Social Democratic Club Ltd* [2012] FWA 1096 (14 February 2012) [24].; *Ibid*, 214

<sup>108</sup> Mark Bray & Andrew Stewart, ‘What Is Distinctive about the Fair Work Regime?’ (2013) 26(1) *Australian Journal of Labour Law*, 26

### *1 Agreement Termination*

It is important to note the ability of employers to terminate expired agreements with FWC consent under s225. In practice this means that employers can use the threat of award rates to undermine the bargaining position of the union/employee. Such behaviour is not considered a breach of GFB. In 2015, in *Aurizon*, the FWC found 'that it will not always be inappropriate to terminate an expired enterprise agreement while bargaining is ongoing.'<sup>109</sup> A Senate inquiry highlighted the impact this decision had:

Terminating an agreement while the parties are negotiating or preparing to negotiate its replacement can produce a seismic shift in the bargaining outcome by taking away any leverage employees might have had and allowing employers to maximise this advantage.<sup>110</sup>

In this circumstance, the FWC decision is the opposite of Kahn-Freund's conception of labour law as serving to counteract bargaining inequality; instead it entrenches the privileged position of the employer.

### *D Restrictions on Industrial Action*

The circumstances in which workers can take protected industrial action (PIA) are very narrow. This undermines the ability of unions and employees to use industrial action to press their demands for wage increases. There are two areas of concern here, the difficulty in undertaking protected industrial action in the first place, and secondly, the ease with which protected industrial action can be terminated. Shae McCrystal states that the issue with the Act's provisions on industrial action are:

the totality of the laws such that the overarching regulation of strike action constitutes more than the sum of its parts. The total effect of the laws is not a right to strike at all, but a highly

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<sup>109</sup> AMWU (WA branch), Submission 154, 3; Senate Standing Committee on Education and Employment, Parliament of Australia, (Corporate Avoidance of the Fair Work Act, September 2017) 4.13; *Aurizon Operations Limited; Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd* [2015] FWCFB 540

<sup>110</sup> *Ibid*, 4.17



restricted and regulated sphere of lawful strike action, the existence of which paradoxically makes it easier to identify and pursue ‘unlawful’ strike action.<sup>111</sup> Under common law, all strike action is unlawful.<sup>112</sup> Such actions form economic torts with potential liabilities for economic damage and the ability of employers to obtain interlocutory injunctive relief.<sup>113</sup> Strike action is therefore only lawful if a statutory regime provides protections for common law actions. Paradoxically, the legalising of industrial action in the 1993 reforms has severely limited its use. The protections against adverse action for employees under s340-342 only apply if employees and their bargaining representatives follow all statutory provisions.<sup>114</sup> Inadvertent breaches of the law are still considered non-compliance and will lead to statutory sanctions, employees may lose jobs and unions can be pursued for economic loss as the action is unprotected.<sup>115</sup>

### *1 Taking Protected Industrial Action*

Taking industrial action requires adherence to a strict process. Industrial action cannot be taken in support of a multi-enterprise agreement or in support of pattern bargaining for common claims across different enterprises.<sup>116</sup> Employees cannot take PIA in support of work health and safety concerns or compliance concerns.<sup>117</sup> Some forms of action are not considered to be industrial action within the definition of the Act and therefore cannot be protected, such as picketing.<sup>118</sup> To be *protected* industrial action, the action must fall into one of three categories: (a) employee claim action;<sup>119</sup> (b) employee response action... in response

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<sup>111</sup> Shae McCrystal, ‘Why is it so hard to take lawful strike action in Australia?’ (2019) 61(1) *Journal of Industrial Relations*, 130.

<sup>112</sup> *Ibid*, 131.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid*.

<sup>116</sup>FWA (n 2) s412

<sup>117</sup> *Ibid* s 19(2); McCrystal, (n 111)

<sup>118</sup> FWA (n 2) s19; *David Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108

<sup>119</sup> FW Act (n 2) s409

to industrial action by the employer;<sup>120</sup> or (c) employer response action.<sup>121</sup> Section 417 prevents a party from taking industrial action during the nominal term of an enterprise agreement.<sup>122</sup> To initiate PIA, a protected action ballot order (PABO) can be initiated only after an employer has agreed to commence bargaining by issuing a notice of representational rights (s173).<sup>123</sup> If the employer does not wish to bargain, the union/employees must first obtain a MSD. The steps in initiating a PABO are technical and slow; a bargaining representative must apply to the FWC for a ballot, provided that the notification time has been reached. The agreement covering the employees must have expired, or expire within 30 days.<sup>124</sup> If the order is granted it must be held by secret ballot, either attend in person, electronically or by mail but *not* by show of hands.<sup>125</sup> At least half the employees must vote and a majority of those who vote must support the action.<sup>126</sup> Action must then occur within 30 days. For the ballot order to be granted in the first place the bargaining representative must show they were genuinely trying to reach an agreement with the employer.<sup>127</sup> This requirement is commonly used by employers to oppose the granting of a ballot order.<sup>128</sup>

Clearly, these requirements constrain and limit the scope for industrial action. The procedural requirements also make it easy for a bargaining representative to make a mistake and therefore be undertaking unprotected industrial action. This occurred in the case *Esso Australia v The Australia Workers' Union* where a disagreement over a bargaining term was found by the High Court in Esso's favour, meaning therefore the AWU was liable for coercion under s343. Further, in the High Court's interpretation of s413(5), bargaining

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<sup>120</sup> Ibid s410

<sup>121</sup> Ibid s411; Andrew Stewart, *Stewart's Guide to Employment Law*, (Federation Press, 6<sup>th</sup> Edition, 2018) 431

<sup>122</sup> FW Act (n 3) s417

<sup>123</sup> Ibid s437(2A)

<sup>124</sup> Ibid s438

<sup>125</sup> Ibid s449;

<sup>126</sup> Ibid s459

<sup>127</sup> Ibid s 443(1)(b)

<sup>128</sup> Stewart (n 121) 434

representatives who have breached any order of the FWC, no matter whether it was accidental or merely technical, are unable to participate in any industrial action for the duration of the bargaining period. In dissent, Gageler J argued that due to the nature of the Act's bargaining scheme, with large numbers of orders, breaches would be common. Further, that the majority's reasoning imposed:

a harsh and rigid form of industrial discipline ... [where the] bargaining representative, ... thereby becomes an industrial cripple and an industrial outlaw – prevented from backing its negotiating stance with protected industrial action and prevented from organising or engaging in any protected industrial action for the enterprise agreement...<sup>129</sup>

This again limits the bargaining power of employees and undermines true collective bargaining.

## 2 *Ending Protected Industrial Action*

Even if bargaining representatives are able to navigate the complex statutory requirements, the FWC can end or suspend industrial action on four grounds:

- S425 if one party requests a cooling off period (suspension)
- S426 if the industrial action is causing significant economic harm to a third party
- S423 if the industrial action is causing significant economic harm to either party
- S424 if the industrial action 'is threatening, or would threaten: to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or to cause significant damage to the Australian economy or an important part of it.'

Of these provisions, s424 has been used to limit the abilities of employees to engage in industrial action. For example, a strike by Sydney Trains employees in February 2018 was suspended on the basis that the action would affect the welfare of Sydney commuters.<sup>130</sup> This

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<sup>129</sup> *Esso Australia Pty Ltd v The Australian Workers' Union* [2017] HCA 54 [103]

<sup>130</sup> *Sydney Trains; NSW Trains; The Hon. Dominic Perrottet, Minister for Industrial Relations (New South Wales)*[2018] FWC 632.

is a disturbing interpretation, as by design, strike action is supposed to affect the economic output of the employer and cause inconvenience and disruption to their economic model. Affecting third parties is also an aim of industrial action, as it increases pressure on the employer to respond to employee demands. Under these grounds, potentially all industrial action can be terminated, in particular by employees of “essential services”, theoretically removing their right to undertake industrial action altogether, ensuring they have no ability to exert pressure to demand collective agreements that increase their wages and conditions. This provision is more likely to effect public sector employees or employees of a large company that has an effective monopoly on a service (such as QANTAS).

#### *E Prohibitions on Pattern Bargaining*

Under the FW Act, collective bargaining is focused at the enterprise level. Multi-enterprise agreements are allowed with the approval of all parties, in practice they are rare.<sup>131</sup> The low paid bargaining provisions are an exception to this and will be explored later in this chapter. The limitations on sector or multi-enterprise bargaining as a bargaining model curtail the bargaining power of unions, in particular the prohibitions on industrial action in support of sector agreements. This effectively prevents less unionised workplaces from participating in true collective bargaining as they lack the ability to exert industrial pressure. In terms of union resources, enterprise bargaining is extremely time intensive, in particular for industries dominated by small businesses.

Pattern bargaining is the use of common terms across two or more agreements.<sup>132</sup> Under the FWA, like the WR Act, pattern bargaining is not proscribed totally, but various restrictions

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<sup>131</sup> FW Act (n 3) s184.

<sup>132</sup> Ibid s412.

exist to limit its use. In practice, like terms are used across enterprise agreements all the time. The Act denies protection to industrial action taken ‘concurrently at several enterprises in order to seek industry wide wages and conditions,’ and allows an employer to seek an injunction to prevent such action.<sup>133</sup> Section 412 provides an exception if the bargaining representative is ‘genuinely trying to reach an agreement’ with the employers, even if that behaviour would otherwise constitute pattern bargaining.<sup>134</sup> Section 421(3) outlines the factors relevant to this, including ‘preparedness to negotiate over terms and take into account the specific circumstances of the employer... and whether the bargaining representative is meeting the good faith bargaining requirements.’<sup>135</sup> The courts have been relatively lenient in their interpretation of actions that constitute pattern bargaining. Despite the Act’s broad terminology of ‘common terms’, which potentially could pick up any number of enterprise agreements, courts have taken a less restrictive approach.<sup>136</sup> In *Trinity Gardens*, the full bench made the obvious conclusion that interpreting the wording of the pattern bargaining provisions broadly could ‘substantially deny employees access to protected industrial action in the real industrial context in which the common market circumstances and common bargaining objectives ... will naturally result in claims for similar wages and conditions.’<sup>137</sup>

Under the legislation, the definition of pattern bargaining describes activities that both unions and employers engage in for practical purposes. Seeking ‘common terms’ in agreements makes the bargaining process itself easier as negotiation and drafting can be expensive and time-consuming processes. Having regard to the restrictions on agreement content, it is not reasonably feasible to draft multiple versions of the same term dealing with the same

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<sup>133</sup> McCrystal, (n 111) 157; FWA (n 3) s422.

<sup>134</sup> FW Act (n 3) s412.

<sup>135</sup> Ibid, s412(3).

<sup>136</sup> *NTEU v University of Queensland* [2009] FWA 90: [2] (at xiv); McCrystal, (n 111) 159.

<sup>137</sup> *Trinity Garden Aged Care v ANF* [2006] AIRCFB PR9737718, 21 August: [22].

subject.<sup>138</sup> Further, in many sectors, such as construction, seeking similar agreements across different businesses is a goal of employer and unions, as it prevents businesses with agreements being undercut by non-union agreements or businesses on the award by taking wages and conditions of employment out of competition. As such, the restrictions on pattern bargaining and multi-enterprise agreements are key examples of the restrictive, at times counter-productive approach the FW Act takes to bargaining. The privileging of the enterprise agreement not only undermines employee bargaining power, it undermines the effectiveness of the entire bargaining system.

#### *F Low – Paid Bargaining Provisions*

The low paid bargaining provisions (LPB) of the FW Act are interesting to note because their existence is based on the premise that bargaining at the enterprise level is a flawed model for vulnerable workers. The explanatory memorandum of the Act states that the ‘Act will be able to facilitate multiple employer bargaining for employees who are low-paid and those who have not historically had access to the benefits of collective bargaining.’<sup>139</sup> The memorandum goes on to argue that since the advent of enterprise bargaining:

...not all employers and employees have participated in enterprise bargaining. This may have occurred because employees in low-paid sectors lack the skills and bargaining power to negotiate for improved wages and conditions at the single enterprise level.<sup>140</sup>

At the time of writing, only one application for a low paid authorisation had been granted, in relation to workers in the aged care industry.<sup>141</sup>

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<sup>138</sup> FW Act (n 3) s194.

<sup>139</sup> Explanatory Memorandum, *The Fair Work Act 2009* (Cth), 169.

<sup>140</sup> *Ibid*, 170.

<sup>141</sup> Application for a Low-Paid Authorisation: United Voice and the Australian Workers’ Union of Employees, Queensland [2011] FWAFB 2633 (Aged Care case).

The LPB provisions invest the FWC with the powers of arbitration to ‘facilitate’ the making of ‘multi-enterprise’ agreements, covering two or more employers.<sup>142</sup> If the bargaining process breaks down, the FWC is able to arbitrate, provided certain circumstances are met.<sup>143</sup> At first glance these provisions seem to be the answer to many of the problems of the current scheme articulated in this thesis. However, like other elements of the Act, the LPB provisions are overly procedural and difficult to use in such a way as to make an impact on bargaining in these sectors.<sup>144</sup>

### *I Accessing LPB*

Under s242, bargaining representatives may apply to the FWC for a low paid authorisation for a multi-enterprise agreement. The FWC will then assess the validity of an authorisation and whether it is in the public interest, taking into account ‘historical and current matters relating to collective bargaining’ and ‘the likely success of collective bargaining.’<sup>145</sup> These include:

- a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
- b) the history of bargaining in the industry...;
- c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
- d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
- e) the degree of commonality in the nature of the enterprises to which the agreement relates<sup>146</sup>

In regard to the success of the bargaining outcome, the FWC must identify whether collective bargaining would improve ‘productivity and service delivery’, whether the number of

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<sup>142</sup> FW Act (n 3) s243.

<sup>143</sup> Ibid.

<sup>144</sup> Richard Naughton, ‘Low Paid Bargaining Scheme – an interesting idea, but can it work?’ (2011) 24(1) *Australian Journal of Labour Law*, 215.

<sup>145</sup> FW Act, (n 3) s243(2)-(3).

<sup>146</sup> Ibid.

bargaining representatives is manageable, the views of employers and employees, the extent to which the terms of employment in the agreement are influenced by a person other than the employer, and the reasonableness of the applicant in responding to proposals put by the employer.<sup>147</sup> Importantly, a special low-paid determination can only be imposed on employers who have previously not had an enterprise agreement. These provisions were clearly drafted to ensure the determinations were subject to ‘strict criteria’ and thus not easy to access.<sup>148</sup>

## 2 *The Aged Care Case*

United Voice and the Australian Workers Union made an application for LPB with 300 employers, representing over 60,000 employees under the Modern Aged Care Award.<sup>149</sup>

United Voice stressed the ‘very low levels of bargaining power’ of workers in this sector.

These difficulties included:

the nature of residential aged care work means that it is unlikely that workers would engage in protected industrial action... the existence of a significant number of small enterprises in the aged care sector.<sup>150</sup>

In the Aged Care case, the Full Bench of the FWC excluded employees covered under existing enterprise agreements from the multi-enterprise bargaining, at the time and from future low-paid provisions.<sup>151</sup> This meant that approximately two-thirds of the affected employees were ‘locked out’ of future industry bargaining.<sup>152</sup> The decision of the FWC to prevent the majority of aged care workers from participating in multi-employer bargaining drastically reduces the benefits of this provision.

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<sup>147</sup> Ibid; Naughton (n 144)

<sup>148</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, pp 1189–97 (Julia Gillard).

<sup>149</sup> Naughton, (n 144) 232

<sup>150</sup> Ibid, 235.

<sup>151</sup> Ibid, 215.

<sup>152</sup> ‘Bench excludes agreement-covered employees from low-paid industry bargaining’, *Workplace Express*, 5 May 2011.



### 3 *Pattern Bargaining?*

Upon first glance, the LPB provisions appear to be a solution to many of the problems in the Act mentioned earlier in this chapter. They appear to encourage *collective* bargaining in a far less restrictive way. Like other FW Act provisions however, their highly procedural nature ensures they do little to increase the bargaining power of workers. At the time they were written, great pains were taken by Julia Gillard MP (then Industrial Relations Minister) to show that these provisions would not constitute pattern bargaining or increase worker bargaining power.

The Fair Work Bill outlaws pattern bargaining... Industrial action in support of pattern bargaining is clearly prohibited and an injunction can be sought direct from the court to restrain any such industrial action. An employer who does not want to bargain for a multi-employer agreement is protected ... from coercion ... Perhaps one of the most distressing claims made in this debate was that somehow the low-paid bargaining stream is a form of pattern bargaining. These claims are nonsense.<sup>153</sup>

From a policy standpoint, the LPB provisions represent an implicit understanding that enterprise bargaining is failing to produce acceptable outcomes for vulnerable workers, and that a large portion of the work force is effectively locked out of collective bargaining. However, as with other elements of the Act, the strict procedural requirements present obstacles that preclude the provisions having their nominal effect. The LPB provisions have successfully been used only once since the introduction of the Act a decade ago.

### G *Conclusion*

These elements of the FW Act limit the potential of collective bargaining to produce genuine outcomes for employees. Alison Barnes and George Lafferty describe this failing of the Act:

Evidently, the inequality in power relations between most employers and workers, which was ignored by *Work Choices*, is still not addressed systematically in the *Fair Work Act*.

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<sup>153</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, (Julia Gillard).

Encouragement of suitable voice mechanisms, to place some constraint on managerial prerogative, would seem a necessary counterbalance to this power inequality.<sup>154</sup> In aiming for *neutrality* between employers and employees, the former win over the latter. The Act ignores the reality that collective bargaining is an expression of workplace power, and bargaining at the enterprise level, with heavy restrictions on industrial action and a singular focus on adhering to procedural rules, results in a legal scheme heavily bent in favour of employers. The result has been low wage growth and declining conditions. To address these problems changes must be made.

### *CHAPTER 3: PROPOSAL*

#### *A Introduction*

This chapter proposes a set of changes to the FW Act in order to better facilitate collective bargaining in the Australian context. As outlined in chapter one, the ability of enterprise agreements to produce pay increases and improved conditions is deteriorating and agreement coverage is falling across the employment landscape. Chapter two addressed the obstructions to collective bargaining imposed by the FW Act. It is argued that changes must be made to the current enterprise bargaining framework to ensure the future of the bargaining system in Australia. In particular, it is necessary that unions receive institutional support if wages and conditions are to be improved. This chapter will reference developments in New Zealand and propose a multi-enterprise bargaining model, the elements of which will be explained in part C.

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<sup>154</sup> Alison Barnes & George Lafferty, 'The Fair Work Act: As Good as it Gets?' (2010) 21(1) *The Economic and Labour Relations Review*, 8.

### *1 Rationale for approach taken*

This thesis outlines a proposal that could be implemented within the current legislative framework through legislative amendments. The proposal does not advocate for radical change nor a return to the Conciliation and Arbitration scheme that existed in prior to the 1990s; this would require considerable political capital and is unlikely to occur under the current neoliberal political paradigm. Echoing Kahn-Freund's belief that 'except in marginal situations, conditions of employment cannot be regulated by legislation', the proposed model enshrines the primacy of collective bargaining, acknowledging its necessity in combating the inequality of the employment relationship.<sup>155</sup> It draws from developments in a similar jurisdiction, New Zealand, but contains unique elements to ensure harmonious implementation in the Australian legal context. The goal of these changes is to address the issue of wage stagnation by amending elements of the FW Act that undermine collective bargaining.

### *B Existing Alternate Models: Relevant Developments in New Zealand*

Other jurisdictions are implementing or have implemented sector bargaining schemes that are important references in adoption of an analogous scheme in Australia. New Zealand is a similar jurisdiction, its corresponding legislation is the *Employment Relations Act* (ER ACT) and thus developments in its industrial system are worth considering.<sup>156</sup>

### *1 Scope of bargaining: enterprise, multi-enterprise and industry-wide*

The Ardern Labour Government has created a working group to determine how to implement sector wide bargaining in New Zealand.<sup>157</sup> The proposed system of Fair Pay Agreements

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<sup>155</sup> Otto Kahn-Freund and Bob Hepple, *Laws against Strikes* (Fabian Society, 1972) 7.

<sup>156</sup> *ER Act* (n 86)

<sup>157</sup> Jim Bolger (Chair), *Recommendations from the Fair Pay Agreement Working Group, 2018*, (Final Report, 20 December 2018).

(FPAs) will allow bargaining representatives of employers and employees to create industry-wide agreements that set minimum terms for all employees covered by the scope of the agreement.<sup>158</sup> The FPAs would work alongside enterprise and multi-enterprise bargaining (MECAs), both of which function in the New Zealand system. The changes introduced by the Labour Government also removed the ability for employers to opt out of multi-enterprise agreements, which had existed previously.<sup>159</sup> The FPAs differ from Australia’s award system as they are created through the bargaining process, not mandated by a centralised commission. The bargaining process for an agreement can only be initiated by a union, not by an employer or their employees.<sup>160</sup>

## 2 *Broader good faith requirements*

The good faith requirements and prevention of “surface bargaining” that existed under the previous Labour Government were also restored. As explored in Chapter Two, the ‘compliance-based approach’ of the FW Act’s GFB provisions limit their effectiveness.<sup>161</sup> The ER Act also has good faith provisions, however they are significantly broader in scope.<sup>162</sup> Importantly, the GFB provisions in the ER Act include stronger procedural requirements than the FWA. These differences are relevant to the recommendations made below and should be transplanted to the FWA.

### *C The Proposed Model*

The purpose of the proposed model is to increase the bargaining power of employees and encourage the use of collective agreements to facilitate wage growth in Australia. As argued

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<sup>158</sup> Alison Pennington, ‘Workplace Policy Reform in New Zealand: What are the Lessons for Australia’ (2019) *The Centre for Future Work at the Australia Institute*, 20.

<sup>159</sup> ER Act (n86) s44A (REPEALED 12 December 2018)

<sup>160</sup> *Ibid*, s40

<sup>161</sup> Shaunnagh Dorsett and George Lafferty, ‘Good faith and the Fair Work Act: Its Potential, in Light of the New Zealand Experience’ (2010) 21(1) *The Economic and Labour Relations Review* 55.

<sup>162</sup> See further: the HC rejection of the implied term of trust and confidence in contract law differs from the New Zealand approach which includes the term in its good faith provisions: s4(1)(a)(1A); *Commonwealth Bank of Australia v Barker* [2014] HCA 32

in chapter one, wage stagnation is caused in large part by declining union bargaining power, and this is traceable to specific elements of the FW Act that undermine the ability of unions to bargain effectively on behalf of employees, as outlined in chapter two. A recalibration designed to address the asymmetry of power under the current FW Act will be achieved by removing limitations on multi-enterprise bargaining, introducing reforms to industrial action and changing GFB requirements. These reforms are interdependent and would need to be implemented as a package to achieve the stated outcome.

## *1 Recommendations*

### *(a) Multi-Enterprise Bargaining*

The privileging of enterprise bargaining over multi-enterprise or industry bargaining has weakened the ability of collective bargaining to achieve results for workers. To address the identified problems, the restrictions placed on pattern bargaining and multi-enterprise agreements must be removed.

### *(b) Creating multi-enterprise bargaining*

A union should be able to initiate the bargaining process with multiple enterprises (and single enterprises) by notice, in line with New Zealand.<sup>163</sup> The current approach adopted by the Act is essentially giving employers as much power as they had in consequence of the 1890 Maritime Dispute; they can decide to negotiate for an agreement or not, with very little recourse for unions.<sup>164</sup> This is an extreme position for the drafters to have taken.

Multi-enterprise agreements should be based on like businesses (e.g. all scaffolding businesses in a geographical) or a supply chain (contractors and subcontractors on a building

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<sup>163</sup> *ER Act* (n 86) s40-42

<sup>164</sup> Creighton (n 96) 43

site). If an enterprise does not wish to be party to a multi-enterprise agreement, it must seek to be exempted by applying to the FWC for an enterprise agreement. The method by which an employer may extricate itself from a multi-enterprise agreement is via a new provision modelled on the MSD or via negotiation with the relevant union. If an employer wishes to bargain at the enterprise level, it must apply for a version of a MSD showing that its employees would rather bargain at the single enterprise level. Union representatives must be given access to the enterprise before this can occur so that employees are informed of the bargaining process to ensure employers do not use this provision to frustrate the bargaining process. This change would be enormously beneficial to the collective bargaining process, because it starts from the premise that bargaining will take place if initiated by a union, the level of which is determined by negotiation or employee vote. This change will still allow businesses the flexibility of enterprise bargaining, but not to the detriment of their employees. It will ensure that single enterprise bargaining cannot easily be used to undermine the multi-enterprise bargaining regime.

*(c) Removal of Non-Union Agreements*

The concept of bargaining representatives should be amended, the starting point for single and multi-enterprise bargaining should be if a union has at least 1 member the union is entitled to bargain as a party principal. To ensure that a multi-enterprise scheme is not used by employers to frustrate the bargaining and organising efforts of unions, the capacity to make agreements without union participation should be repealed. Section 181-182 of the Act has been criticised on the grounds that agreements can merely be ‘an employer simply drafting an agreement that is accepted without discussion by an unorganised group of workers’.<sup>165</sup> This issue could be exacerbated by multi-enterprise agreements if employers

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<sup>165</sup> Bray, M & Stewart, A ‘What Is Distinctive about the Fair Work Regime?’ (2013) 26(1) *Australian Journal of Labour Law*, 26

were allowed to make them unilaterally, without union involvement. The proposed change would require the acceptance of unions as bargaining representatives by default and privilege their position in industrial law. It would be necessary to remove non-union agreements as they would undermine the purpose of these changes. Non-union agreements are a result of the paradigm shift to individualisation in bargaining; they do not reflect the reality of the bargaining process for most workers. The purpose is not to engage individual employees and empower them to represent their interests, it is to allow employers to control employees under the guise of choice.

(d) *Good Faith*

As explored in chapter two, the ‘compliance-based approach’ of the Act’s GFB provisions limits their effectiveness.<sup>166</sup> Vital to the re-emergence of collective bargaining, and the usefulness of multi-enterprise bargaining, are changes to the GFB provisions to stamp out ‘surface bargaining’.<sup>167</sup> Parallel to this, there is a need to address ‘intractable bargaining disputes’, such as in *Cochlear*.<sup>168</sup> Bargaining is frustrated where an employer cannot ‘be required to bargain in any particular way or to put any particular response.’<sup>169</sup> Recent changes to the ER Act in New Zealand significantly strengthened the GFB provisions to address the problem of surface bargaining. Changes to the FWA should echo these developments in New Zealand. Section 32(1)(ca) of the *ER Act* requires that ‘even though the union and the employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain ... about any other matters on which they have not reached agreement.’<sup>170</sup> Thus,

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<sup>166</sup> Dorsett and Lafferty (n 161) 55.

<sup>167</sup> Note: Anthony Forsyth and Andrew Stewart, to Department of Employment, *Review of the Fair Work Act 2009*, February 2012, at [https://docs.employment.gov.au/sites/docs\\_employment/files/submissions/43021/forsyth\\_anthonyandstewart\\_andrew.pdf](https://docs.employment.gov.au/sites/docs_employment/files/submissions/43021/forsyth_anthonyandstewart_andrew.pdf)

<sup>168</sup> Richard Naughton ‘Public Interest in Australian labour law – reshaping an old concept in the enterprise bargaining era’ (2014) 27 *Australian Journal of Labour Law*, 128

<sup>169</sup> *Cochlear* (n 92); *Hargraves v AMWU* (2012) 231 IR 1 [545]

<sup>170</sup> ER Act (n 86) s 32(1)(ca).

included in the GFB should be a requirement to reach an agreement; to this end, s228(2) should be repealed.

(e) *Accessing arbitration*

Matters that parties cannot reach agreement on should be referred for arbitration with the FWC for determination and finalisation of the agreement. Currently, access to arbitration is very limited. In the absence of an agreement to arbitrate,<sup>171</sup> the FWC can arbitrate only where parties fail to reach an agreement in a LPB authorisation, or a party has effected a serious or sustained breach of good faith orders,<sup>172</sup> or there has been industrial action that ‘satisfies the legislative threshold for FWC intervention.’<sup>173</sup> At the time of writing, no ‘egregious’ breach of GFB (to trigger arbitration) has been found to have occurred.<sup>174</sup> Therefore, in cases such as *AMWU v ResMed*, bargaining can continue for eight years without an outcome, and without recourse to arbitration because s269 is to higher threshold to meet.<sup>175</sup> The failure of this provision to be used at all is an indication of the ‘excessively conservative and complex’ drafting of provisions supposedly designed to give access to arbitration.<sup>176</sup>

Mandatory last-resort arbitration should be implemented (as was included and then abandoned by the Labor Government in 2012 as part of FWA reforms) in a similar way to North American collective bargaining systems. If the employer refuses the final bargaining offer, arbitration should be triggered.<sup>177</sup> Alongside this, encouraging union access to employees throughout the bargaining process will strengthen the employee bargaining

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<sup>171</sup> FW Act (n 3) S240

<sup>172</sup> Ibid s235, s269

<sup>173</sup> Shae McCrystal, ‘Deadlocked Bargaining Disputes: Industrial Action, Agreement Termination and Access to Arbitration’ in Shae McCrystal, Breen Creighton & Anthony Forsyth (eds) *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 119

<sup>174</sup> Forsyth & Ellem, (n 99) 65.

<sup>175</sup> ResMed (n 102), Ibid.

<sup>176</sup> Creighton (n 96) 43.

<sup>177</sup> Ibid, 66.



position and also ensure protracted bargaining is less common. These changes would also resolve the current doctrine of *impasse*, where employers unilaterally put an agreement to an employee vote when no agreement can be reached with the union, undermining the bargaining process.<sup>178</sup> The FWA's restriction of access to arbitration, combined with the restriction on industrial reaction, are indicative of its hostility to the encouragement of true collective bargaining, as defined in Clegg's definition. The Act articulates a style of bargaining where employees ask for wage increases and then the benevolent employer grants them. The ability of employees to demand wage increases, whether through industrial action or arbitration, is stifled.

(f) *Industrial Action*

The current restriction on protected industrial action creates an unnecessary procedural burden on unions and employees. Not only can protected industrial action be suspended or terminated, there are steep legislative hurdles to protected industrial action in the first place. McCrystal asserts that 'the inability ... to industry wide or multi-employer bargain...through protected industrial action compounds the difficulty of spreading the gains made through bargaining'.<sup>179</sup> Employees must be able to take protected strike action in broader circumstances, not just during the enterprise bargaining process. Broader, positive rights to participate in industrial action should be added to the Act. Employees should be able to take PIA in support of multi-enterprise agreements. Taking PIA at the enterprise level is limited in its effectiveness as it cannot counter the markets ability to choose alternative businesses. At the industry level however, industrial action overcomes market choice, amplifying the

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<sup>178</sup> Kurt Walpole, 'The Fair Work Act: Encouraging Collective Agreement-making but leaving collective bargaining to choice' (2015) *Labour and Industry: a journal of the social and economic relations of work*, 214

<sup>179</sup>Shae McCrystal, 'Protected Industrial Action and Voluntary Collective Bargaining Under the Fair Work Act 2009' (2011) 21(1) *The Economic and Labour Relations Review*, 48.

collective power of employees/unions. PIA should be allowed at any time in cases of safety concerns or entitlement breaches, not merely during the bargaining period. Intention to undertake PIA should be an assumption, and a mistake in implementing industrial action should not trigger s343, as was decided in *Esso*.

The proposed changes would increase the bargaining power of unions by increasing their access to industrial action. Firstly, s422 prohibiting industrial action if the bargaining representative is engaged in pattern bargaining should be repealed. Section 413 must be amended to allow protected industrial action for multi-enterprise agreements. Section 426 requiring the FWC to suspend protected industrial action to prevent third party harm should be repealed. Exerting pressure by causing economic distress is a crucial element of successful industrial action. For the same reason, s431 should be repealed. To remove the unnecessary procedural requirements, s409 requiring a PABO should be repealed. Requiring a vote of employees is unnecessarily restrictive and involves complying with the statutory test, and the participation of the majority of the workforce, of which a majority must then vote in the affirmative. Evidence has shown it is often difficult to get a quorum on votes, although when they are obtained they almost always pass.<sup>180</sup> Employees should be able to take action without organising a PABO, as industrial action itself is most effective when done by the collective.

To allow unions and employees to engage in multi-enterprise bargaining, the restrictions on secondary boycotts under s45 of the *Competition and Consumer Act 2010* (Cth) should also be amended to exclude circumstances in which a union is in negotiation for a multi-enterprise agreement, or seeking to join a new business to an existing multi-enterprise agreement.

Unions must be able to use industrial mechanisms to pressure businesses in the context of

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<sup>180</sup> Ibid 136.

negotiating multi-enterprise agreements. As such, union industrial action should be able to target multiple enterprises without running afoul of these provisions, including enterprises within a supply chain.

#### *D Conclusion*

Alan Bogg notes the need for legislation ‘to identify the State’s positive role in constructing and supporting bargaining institutions.’<sup>181</sup> These changes will help address this flaw in the FW Act and strengthen the capabilities of unions to collectively bargain. They are not a drastic redefining of the current legal paradigm, but amendments that sit within the current framework. All of these changes are necessary, as the recommendations are connected and essential. A multi-enterprise bargaining system would help workers and their unions bargain more effectively for wage increases. Strengthening the GFB provisions would ensure that obstructionist employer behaviour is reduced. Removing the excessive restrictions on protected industrial action will increase employee voice in the bargaining process. These changes together will address the continuing crisis of wage stagnation now threatening to damage Australia’s economy.

#### *CONCLUSION*

Justice Higgins, the ‘father’ of the arbitration system, observed that ‘the war between the profit-maker and the wage-earner is always with us.’<sup>182</sup> The conflict between employer and employee is an inherent part of the industrial system. To echo Kahn-Freund, the purpose of industrial legislation is to manage the inequality of that conflict. The FW Act seeks to ignore this ‘truth’ of the industrial system in favour of ‘neutrality’. However, neutrality in legislative

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<sup>181</sup> Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 21.

<sup>182</sup> H. B. Higgins, *A New Province for Law and Order* (Melbourne, 1922) 1;

terms has the effect of favouring the employer. An Act that is ‘largely indifferent to the success or failure of trade-union organisations’ is not neutral.<sup>183</sup> The neoliberal individualist ideology prevalent throughout the Act has ensured the continued de-unionisation of the work force and resulted in stagnation of wages and loss of conditions. Only with legislative changes such as those recommended in chapter three, will there be any change in this economic trajectory. As Hugh Boulton noted:

Each wave of reform to pass through the industrial relations system carries with it the introduction, expansion or dismantling of institutions tasked with the law’s implementation. Should not unions be credited as essential institutions in the system and receive the support they need to keep the wheels of bargaining turning?<sup>184</sup>

If these problems are to be addressed, an amended FW Act must address the inequalities of the bargaining relationship, and proactively favour unions and collective voice. Only proactive legal change will address the crisis of wage stagnation and reverse the increasing income inequality now observed in Australia.

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<sup>183</sup> Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 21

<sup>184</sup> Hugh Boulton, ‘Collective Bargaining and Protected Industrial Action Under the Fair Work Act: Is There Tension?’ (Student Working Paper No21/2017, Centre for Employment and Labour Relations Law, The University of Melbourne) 19.

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