REFORMING AUSTRALIAN BARGAINING AND STRIKE LAWS TO MAXIMISE WORKER POWER

ANTHONY FORSYTH* AND SHAE MCCRYSTAL**

Over the past decade, collective bargaining coverage in Australia has declined and workers' real wages have stagnated despite a tight labour market and rising inflation. This article considers the role of the Fair Work Act 2009 (Cth) ('FW Act') in reducing worker power in collective bargaining and limiting workers' capacity to improve their wages and conditions through collective outcomes. The article analyses three features of the FW Act which combine to constrain worker power in bargaining: employer-controlled agreement-making, the enterprise focus of agreements and bargaining, and restricted collective power including a highly attenuated right to strike. The article then considers the changes to these aspects of the FW Act implemented by the Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 (Cth), explores whether the amendments ensure workers have sufficient power to obtain meaningful outcomes in bargaining, and outlines a number of further necessary proposals for reform.

I INTRODUCTION

In September 2022, the newly-elected federal Labor Government convened the 'Jobs + Skills Summit' ('the Summit') in Canberra to 'bring together Australians, including unions, employers, civil society, and government, to discuss our shared economic challenges and … to find common ground on how Australia can build a bigger, better trained and more productive workforce; boost real wages and living standards; and create more opportunities for more Australians'.[1] To find solutions that would assist in achieving these outcomes, one of the five broad themes of the Summit was 'boosting job security and wages'.[2] This focus was necessitated by the

* Distinguished Professor, Graduate School of Business and Law, RMIT University.

** Professor of Labour Law, The University of Sydney Law School. This article draws from Anthony Forsyth and Shae McCrystal, 'Collective Bargaining and Industrial Action Reform' (Policy Brief No 3, Centre for Employment and Labour Relations Law, Melbourne Law School, 2022). The authors thank the participants at the Labour Law Roundtable convened by the Centre for Employment and Labour Relations Law on 12 August 2022 for fruitful conversations in developing the ideas in this article. We also thank the anonymous referees for their helpful comments and attention to detail.

1 Treasury (Cth), 'Jobs + Skills Summit' (Issues Paper, 17 August 2022) 1 ('Issues Paper').

2 Ibid.

previous decade of declining enterprise bargaining coverage and wage stagnation which, despite the presence of a tight labour market and growing inflation, had substantially eroded workers' share of profit, their bargaining power and their purchasing power.[3]

It was clear at the time of the Summit that wages were remaining stagnant *despite* rising inflation and low unemployment. The traditional economic levers considered necessary to boost worker power and incomes in order to maintain pace with economic conditions were not working – wages were not keeping pace with inflation; a tight labour market was not driving a widespread wage recovery. Summit participants were asked to grapple with the question: what else was occurring in the national economy to produce these outcomes? The causes of wage suppression are diffuse,[4] although it is clear that the sharp decline in collective bargaining activity has played a significant role in holding wages down – particularly in the private sector, where agreement coverage now hovers at around just 11% of the workforce.[5] In addition the COVID-19 pandemic, and consequent impacts on the cost and supply of goods through global supply chains, exacerbated pre-existing labour market tensions. For many years, across the globe and in Australia, business restructuring through enterprise fissuring, outsourcing and downstreaming the hiring of labour to enterprises separate from core business activities has had the effect of fragmenting the collective power of workers.[6] This has made it more difficult for workers to exercise their collective power effectively where the enterprise that employs them is a price taker or a small unit in a larger conglomerate, and they are unable to bargain with the entity that actually holds the power over their working conditions.[7]

Although not specifically mentioned in the Government's Issues Paper for the Summit, the legal framework for collective bargaining came into focus as one

---

3 See Mihajla Gavin, 'Unions and Collective Bargaining in Australia in 2021' (2022) 64(3) *Journal of Industrial Relations* 362 <https://doi.org/10.1177/00221856221100381>; Andrew Stewart, Jim Stanford and Tess Hardy, *The Wage Crisis: Revisited* (Report, 11 May 2022); Alison Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33(1) *Australian Journal of Labour Law* 68; Murray Furlong, *General Manager's Report into Developments in Making Enterprise Agreements under the Fair Work Act 2009 (Cth): 2018–2021* (Report, November 2021). See also 'Issues Paper' (n 1) 4, noting that 'the proportion of employees covered by enterprise agreements has decreased from a peak of 43.4 per cent in 2010 to 35.1 per cent in 2021'.

4 See, eg, Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do about It* (University of Adelaide Press, 2018) pt 1 <https://doi.org/10.20851/wages-crisis>.

5 See Pennington (n 3) 73–5.

6 See, eg, David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014); Mark Anner, Matthew Fischer-Daly and Michael Maffie, 'Fissured Employment and Network Bargaining: Emerging Employment Relations Dynamics in a Contingent World of Work' (2021) 74(3) *ILR Review* 689 <https://doi.org/10.1177/0019793920964180>; Timothy J Bartkiw, 'Charting a New Course in a Fissured Economy? Employer Concepts and Collective Bargaining in the US and Canada' (2021) 37(4) *International Journal of Comparative Labour Law and Industrial Relations* 385 <https://doi.org/10.54648/ijcl2021018>.

7 See Anthony Forsyth, Tess Hardy and Shae McCrystal, 'Collective Bargaining in Fissured Work Contexts: An Analysis of Core Challenges and Novel Experiments' (2023) 51(4) *Federal Law Review* (forthcoming).

of the central issues of discussion, indeed controversy.[8] In Australia, collective bargaining for all national system employees is regulated by the *Fair Work Act 2009* (Cth) ('*FW Act*'). Over the past decade it has become increasingly apparent that the legislative architecture of the collective bargaining regime is itself one of the significant factors contributing to a decline in worker bargaining power in Australia. This is due to, amongst other aspects of the legislation,[9] three central features of the *FW Act* regime:

1. Employer-Controlled Agreement-Making – as originally enacted, the *FW Act* created a system of agreement-making between employers and employees rather than a system of collective bargaining between employers and unions; and situated control over all agreement-making processes with employers, not unions or workers.
2. Enterprise Focus – the original *FW Act* agreement-making provisions were focused on single-enterprises, with some scope for employers to seek to create agreements with broader application, but almost no scope for workers to bargain at anything other than the single-enterprise level.
3. Restricted Collective Power – the *FW Act* restricts the capacity of workers to exercise collective power in a variety of ways, particularly through highly constrained provisions regulating the right to strike, and the intersection of provisions relating to agreement termination and the potential arbitration of disputes. In particular, the many restrictions on the use of lawful industrial action to reinforce bargaining claims have had the effect of significantly diluting worker power in agreement negotiations.

The pressing need for reform of the *FW Act* was a key outcome of the Summit. The Government acknowledged the need to work with business and unions to 'revitalise … good faith negotiation and genuine agreement in Australian workplaces', and immediately committed itself to updating the *FW Act* to ensure that 'all workers and businesses can negotiate in good faith for agreements that benefit them'.[10] This involved a range of commitments including increasing the options available to reach agreements, reducing complexity, providing better support to bargaining representatives, and increasing access to multi-employer agreement-making.[11] The first tranche of legislative reform to meet those commitments was passed through Federal Parliament just a few short months later in December 2022, in the form of the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs Act*'). The changes included amendments to the *FW Act* agreement-making and collective bargaining provisions, with important new triggers for employees and unions to initiate the bargaining process at both single-enterprise and multi-enterprise level.

---

8 See, eg, James Elton, 'Employment Minister Tony Burke "Really Interested" in Multi-employer Bargaining Proposal as Jobs Summit Looms', *ABC News* (online, 25 August 2022) <https://www.abc.net.au/news/2022-08-25/730-tony-burke-interested-in-multi-employer-barganing-proposal/101373800>.

9 See generally Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018).

10 Australian Government, *Jobs + Skills Summit*, *Outcomes* (Report, 1–2 September 2022) 6 <https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf>.

11 Ibid 7.

This article will explore these three central features of the *FW Act* collective bargaining regime – employer-controlled agreement-making, enterprise focus and restricted collective power – to identify how these aspects of the legislation have constrained worker power and contributed to wage stagnation. The discussion will explore how each area has been impacted by the *Secure Jobs Act* amendments, and the degree to which these changes are likely to assist in overcoming the barriers that workers face when seeking to lift their wages, improve their conditions, and assert their voice and power more forcefully in the workplace. Where the recent legislative changes have not gone far enough to bolster workers' bargaining power in a meaningful way, further options for reform will be canvassed.

As a preliminary step, and for the purposes of this article, it is necessary to understand what worker power means in the context of collective bargaining. 'Worker power', according to Ioana Marinescu and Jake Rosenfeld, is defined simply as 'workers' ability to obtain better wages and working conditions'[12] and the extent of workers' bargaining power depends on whether unions and other institutions of voice are present or absent within firms.[13] Jane Holgate, describing 'power' as 'the essential factor needed for workers to effect change to improve their terms and conditions of employment',[14] indicates that it takes three forms: 'associational power' (the ability of 'union members and their leaders to act collectively' and alter the power relationship between workers and employers); 'structural power' (arising from workers' position in the economic system, 'their ability to bargain in the labour market and workplace'); and 'institutional power' ('the capacity to hold employers to account through laws and regulations', which might also provide support for workers to organise and take collective action).[15] Trade unions were traditionally the primary vehicle for the expression of worker power in Australia, but union membership has declined dramatically in the last 30 years, in parallel with the progressive imposition of restrictions on the legal rights of unions to organise, bargain and strike. Many analyses (here and overseas) focus on the revitalisation of unions as an essential pathway to challenging the potent accumulation of employer power in the neoliberal era and rebuilding worker power.[16] We have chosen to focus in this article on the legal provisions

12 Ioana Marinescu and Jake Rosenfeld, *Worker Power and Economic Mobility: A Landscape Report* (Research Report, July 2022) 1 <https://www.workrisenetwork.org/sites/default/files/2022-08/correctedworker-power-economic-mobility-landscape-report.pdf>.

13 Ibid 5.

14 Jane Holgate, *Arise: Power, Strategy and Union Resurgence* (Pluto Press, 2021) 16 <https://doi.org/10.2307/j.ctv1v08zcv>.

15 Ibid 30–3.

16 See, eg, Holgate (n 14); Jane F McAlevey, *No Shortcuts: Organizing for Power in the New Gilded Age* (Oxford University Press, 2016) <https://doi.org/10.1093/acprof:oso/9780190624712.001.0001>; David Madland, *Re-Union: How Bold Labor Law Reforms Can Repair, Revitalize, and Reunite the United States* (Cornell University Press, 2021) <https://doi.org/10.1515/9781501755392>; Anthony Forsyth, *The Future of Unions and Worker Representation: The Digital Picket Line* (Hart Publishing, 2022) <https://doi.org/10.5040/9781509925001> ('*The Digital Picket Line*'). On the ascendancy of business power in the Australian context and its impact in suppressing wage outcomes for workers, see Jonathan Hambur, 'Did Labour Market Concentration Lower Wages Growth Pre-COVID?' (Working Paper 2023-01, The Treasury (Cth), March 2023) <https://doi.org/10.47688/rdp2023-02>.

for collective bargaining and the accompanying regulation of industrial action, as these elements of institutional power set the ground rules shaping the capacity of Australian workers to exercise the associational and structural power needed to reverse declining real wages in an inflationary economy.

II EMPLOYER-CONTROLLED AGREEMENT-MAKING

A Development of the *FW Act* Agreement-Making Provision

One of the most striking aspects of the collective bargaining regime under the *FW Act* is the ability to create collective agreements without any form of negotiation or bargaining, and the degree to which the provisions have enabled agreement-making to be almost entirely employer-controlled. Significantly, with the exception of greenfields agreements created for new enterprises which have not yet engaged any employees, enterprise agreements under the *FW Act* cannot be made with unions or bargaining representatives. Agreements are made between employers and their employees, and neither worker representation nor bargaining have been necessary to create legally binding agreements.[17]

Prior to the introduction of the *FW Act* in 2009, different iterations of the predecessor legislation, variously titled the *Industrial Relations Act 1988* (Cth) ('*IR Act*') and the *Workplace Relations Act 1996* (Cth) ('*WR Act*'), had provided separate streams for the creation of 'union' and 'non-union' agreements. Initially, when the *IR Act* was enacted in 1988, agreements could only be made in very restricted circumstances between employers and unions.[18] However, a stream of non-union agreements, then called 'enterprise flexibility agreements', was introduced in 1993[19] to provide a mechanism for employers to create agreements with their employees that could avoid some of the rigidities in any underlying award that would otherwise apply.[20] Significantly, these agreements would be created not by employers and worker representatives, but through direct employee approval in the form of a ballot of the employees to be covered. At this time it was not intended that these agreements would predominate, and a range of safeguards were established to ensure that the interests of the employees were safeguarded.[21] Over time, however, the non-union agreement-making stream was

17 See Kurt Walpole, 'The Fair Work Act: Encouraging Collective Agreement-Making but Leaving Collective Bargaining to Choice' (2015) 25(3) *Labor and Industry* 205 <https://doi.org/10.1080/10301763.2015.1061817>.

18 *Industrial Relations Act 1988* (Cth) ss 115–17, as enacted ('*IR Act*'). For discussion of the original provision, see Ronald C McCallum, 'Collective Bargaining Australian Style: The Making of Section 115 Agreements under the *Industrial Relations Act 1988* (Cth)' (1990) 3(3) *Australian Journal of Labour Law* 211.

19 *IR Act* (n 18) ss 170NA–170NP, as inserted by *Industrial Relations Reform Act 1993* (Cth) s 31: for discussion, see Richard Naughton, 'The New Bargaining Regime under the *Industrial Relations Reform Act*' (1994) 7(2) *Australian Journal of Labour Law* 147, 156–62.

20 Shae McCrystal and Mark Bray, 'Non-union Agreement-Making in Australia in Comparative and Historical Context' (2021) 41(3) *Comparative Labor Law & Policy Journal* 753, 759–61.

21 Most significantly, these protections included rights for union members at the enterprise to be represented in any negotiations and for unions to participate in those negotiations: see also ibid 759.

expanded as statutory amendments removed the safeguards placed on employer access to non-union agreements[22] and enabled the creation of agreements without union representation or bargaining, irrespective of the presence of a trade union at a workplace that was willing and able to negotiate on behalf of the employees.[23] Where an employer chose to pursue a non-union agreement, they did not have to negotiate or bargain with a union that represented those workers. Furthermore, the notion that an agreement should be endorsed or approved by the employees of an enterprise, irrespective of the degree of involvement of a trade union in its negotiation, or the degree of union density at an enterprise, came to predominate. This meant that although the formal distinction between union and non-union agreements had remained in the *WR Act* right up until the passage of the *FW Act*, the substantive underpinning rules for making those agreements had converged in substance.

When the *FW Act* was introduced in 2009, the distinction between union and non-union agreements was abandoned. Instead, the *FW Act* created three categories of agreements – single-enterprise, multi-enterprise and greenfields. All agreements except greenfields would be made between the employer and the employees to be covered by the agreement through a vote of those employees.[24] However, by contrast with the *WR Act*, where an employer initiated bargaining, or agreed to bargain, the *FW Act* required employers to recognise and bargain with the bargaining representatives of the employees to be covered by the agreement.[25] Where an employer did not initiate bargaining or agree to bargain for a single-enterprise agreement, workers were provided with a mechanism to seek to require employers to commence bargaining – a majority support determination ('MSD') from the Fair Work Commission ('FWC'), affirming that a majority of workers to be covered by the proposed agreement wanted to bargain.[26]

In creating a single system of agreement-making, the drafters of the *FW Act* were attempting to reconcile two competing tensions. First, the goal was to reinvigorate collective bargaining, and remove the stream of non-union agreements which had enabled employers to completely sidestep active negotiations with unions in the creation of agreements. However, given the history of the development of the legislation, they also sought to accommodate non-union employees and provide a mechanism to ensure that all interests were protected in bargaining. To do this, non-union agreement-making was adopted as the mechanism by which

22 The most significant of these changes were made in the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) and the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

23 See Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19(2) *Australian Journal of Labour Law* 183.

24 *Fair Work Act 2009* (Cth) s 182 ('*FW Act*').

25 Ibid ss 173, 228.

26 Ibid s 173(2)(b). Under the *FW Act* from 2009–15, employees could also take protected industrial action to pressure an employer to commence negotiations for a new agreement where it had refused to do so, as held in *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297. However, this avenue was closed off to employees by the insertion of s 437(2A) in the *FW Act* by the *Fair Work Amendment Act 2015* (Cth) which removed access to protected industrial action when agreement-making had not yet commenced under the Act.

agreements would be made, and bargaining with workers was only required when the workers were actually represented in that process. Furthermore, the concept of representation was 'democratised' through the idea that every individual worker was entitled to separate representation in bargaining, and that every worker representative (irrespective of the extent of their representative legitimacy) was entitled to participate equally in collective bargaining.[27]

With the collapse in the distinction between union and non-union agreements, the retention of the ability of employers to make an agreement with their employees in the absence of collective representation or bargaining meant that the agreement-making model was designed by foregrounding the interests of unrepresented employees. Employers were given responsibility for initiating bargaining (even when required to bargain by a MSD),[28] notifying employees of their right to be represented in that bargaining, managing agreement negotiations, explaining the terms of an agreement to workers, and organising and conducting a ballot. This included responsibility for aspects of the process that are potentially contrary to an employer's own interests, like providing employees with notice of the role of unions as default bargaining representatives of their members,[29] or explaining where an agreement would provide less beneficial terms than an award or a previous agreement.[30] It also meant that where no employee representation was involved, the only information received by workers in the agreement-making process was that provided by the employer, who has a clear interest in obtaining worker approval for the agreement as soon as possible. In practice, this has enabled some employers to obtain the benefits of avoiding otherwise applicable award conditions with only the barest of trade-offs for employees. Some of these agreements have been made between a small group of unrepresentative workers and the employer, which subsequently apply to a much larger group of employees, who are then locked out of bargaining for the life of the substandard deal.[31]

---

27 Union bargaining representatives have no greater status in collective negotiations under the *FW Act* than non-union representatives, or employees representing themselves in the process, although there is provision for the Fair Work Commission ('FWC') to assist where multiple bargaining representatives are impeding bargaining: *FW Act* (n 24) s 230(3)(ii). See also Joellen Riley, 'Bargaining Fair Work Style: Fault-Lines in the Australian Model' (2012) 37(1) *New Zealand Journal of Employment Relations* 22; Rosalind Read, 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 69.

28 As to the effect of a majority support determination ('MSD') on the employer's obligations, see Breen Creighton, 'Getting to the Bargaining Table: Coercive, Facilitated and Pre-commitment Bargaining' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 25, 33–5.

29 For example, in *Re ALDI Foods Pty Ltd* (2018) 278 IR 261, 275–6 [27]–[28] a Full Bench of the FWC considered that the employer had modified a notice of employee representational rights 'to alter its effect by explicitly restricting the avenues by which any question to it as the employer might be communicated or directed'.

30 See, eg, *Re Karijini Rail Pty Ltd* [2019] FWC 2907, 3 [14]–[15].

31 See, eg, *Thiess Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* (2018) 277 IR 417 ('*Thiess*'); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Fredon Industries Pty Ltd* [2021] FWCFB 3190. In *One Key Workforce Pty Ltd v Construction Forestry, Mining and Energy Union* (2018) 262 FCR 527 three employees were

Entrenching employer-controlled, non-union agreement-making as the model for agreement-making under the *FW Act* has undermined worker power in three substantive ways.

First, in areas of low union density, the provisions have facilitated 'agreement-making' without bargaining, where employers have been able to pursue agreements with little to no substantial benefits to workers, and significant gains accruing to employers through the avoidance of award regulation.[32] Once created, these agreements have locked workers out of bargaining for better agreements or accessing the right to strike for up to four years, and have set a low benchmark for future negotiations.

Second, by entrenching equality of representation for each individual employee at an enterprise, the provisions fracture worker representation. Workers do not have to engage collectively to establish their priorities in bargaining and present a united front to the employer. They can form single interest bargaining groups and actively advocate against the interests of other employee groups. Furthermore, employers can entrench such divisions by keeping employee representatives separate in bargaining processes.

Third, employers are able to decide when to initiate bargaining, and when or even if to go to a ballot of employees on a proposed agreement, despite the views of bargaining representatives.[33] MSDs have been an effective mechanism to bring some employers to the bargaining table,[34] but they can be challenging to obtain, particularly in larger workplaces. For example, in 2022 and early 2023, management representatives at a number of institutions in the higher education sector refused to commence bargaining for replacement enterprise agreements. Establishing majority support to commence bargaining at enterprises with many thousands of employees is an especially difficult and expensive (in time and resources) exercise for the unions concerned. Furthermore, once negotiations commence, the good faith bargaining requirements have not been as effective in ensuring that agreements subsequently eventuate. The focus of the requirements on ensuring a commitment to the processes, rather than the outcome of bargaining,

---

asked to approve an agreement which, 12 months later, covered over 1000 employees. Ultimately, the agreement was found by the Full Court of the Federal Court of Australia not to have been validly made. It is unclear just how many other agreements made in similar circumstances were approved by the FWC and remain unchallenged. So called 'small cohort' agreement-making is discussed in Umeya Chaudhuri and Troy Sarina, 'Employer-Controlled Agreement-Making: Thwarting Collective Bargaining under the *Fair Work Act*' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 138.

32 As to the prevalence of non-union agreement-making under the *FW Act*, see Mark Bray, Shae McCrystal and Leslee Spiess, 'Why Doesn't Anyone Talk about Non-union Collective Agreements?' (2020) 62(5) *Journal of Industrial Relations* 784 <https://doi.org/10.1177/0022185619899419>.

33 The parties are expected to bargain at least to an impasse before the employer puts the agreement to a ballot: *Construction Forestry, Mining and Energy Union (Mining and Energy Division) v Tahmoor Coal Pty Ltd* (2010) 195 IR 58.

34 Anthony Forsyth et al, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's *Fair Work Act* a More Effective Form of Union Recognition?' (2017) 46(3) *Industrial Law Journal* 335 <https://doi.org/10.1093/indlaw/dww040>.

has proven to be ineffective in practice to force reluctant employers to finalise an agreement.[35]

B *Secure Jobs Act* Amendments

In respect of single-enterprise agreement-making, the *Secure Jobs Act* made only a couple of changes of significance to address the difficulties identified above. First, the amendments provide bargaining representatives with the ability to initiate bargaining where an existing single-enterprise agreement has passed its expiry date. New *FW Act* section 173(2A) enables a bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (but not a greenfields agreement) to give the employer a request in writing to bargain, where the proposed agreement is replacing an expired agreement that will cover the same, or substantially the same, group of employees, if the notice is provided within five years after the nominal expiry date. Once the notice is given, the employer must commence the process of bargaining for a new agreement by issuing notices of representational rights to the relevant employees and complying with the good faith bargaining provisions.

This change overcomes the problem that occurs where employers refuse to initiate negotiations for a new enterprise agreement when an existing agreement has expired. However, this change is limited in scope and works mainly to the advantage of unions and employees in workplaces with existing union representation and enterprise agreements. It does little to encourage worker power outside of those contexts. Further, it does nothing to counter employer control of the processes of agreement-making.

The second change relates to the provisions that apply where employers and their employees make an agreement. The *Secure Jobs Act* repealed a number of the substantive statutory requirements that must be met in making an agreement, and shifted the focus to the concept of 'genuine agreement' by the employees requested to vote. Under section 186(2) of the *FW Act*, to approve an agreement, the FWC must be satisfied that the agreement has been 'genuinely agreed to' by the employees covered by it. The definition of genuine agreement in section 188 of the *FW Act* was repealed and replaced with a more prescriptive set of requirements including that:

- the FWC has taken into account a statement of principles made under section 188B (section 188(1));
- the employees requested to approve the agreement 'have a sufficient interest in the terms of the agreement' (section 188(2)(a)); and
- the employees requested to approve the agreement 'are sufficiently representative, having regard to the employees the agreement is requested to cover' (section 188(2)(b)).

35 See, eg, Anthony Forsyth and Bradon Ellem, 'Has the Australian Model Resisted US-Style Anti-union Organising Campaigns? Case Studies of the Cochlear and ResMed Bargaining Disputes' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 45; Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining under the *Fair Work Act 2009*' (2012) 25(2) *Australian Journal of Labour Law* 130.

The 'statement of principles' made under section 188B is a legislative instrument made by the FWC covering aspects of agreement-making that were previously contained in the *FW Act*, including the employer's obligations to provide employees with access to a copy of the agreement and information about the time and place of the vote. The *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Cth) published by the FWC took effect on 6 June 2023 and for the most part, reflects the former statutory regime for agreement-making. However, one substantive difference is the inclusion of a principle that the vote for an agreement be conducted in a manner which protects the secrecy of each employees' vote, removing the ability of employers to conduct agreement ballots by show of hand or email vote.[36]

The new 'sufficiently representative' requirement in section 188(2)(b) will prevent the practice of small cohort agreement-making by ensuring that where employees are requested to vote on a proposed agreement, the employee cohort is sufficiently representative of the groups of employees to be covered by the agreement. Therefore, if an agreement covers workers across a variety of different occupational groups covered by different awards, the employer should have included employees from all of those groups when the employer seeks to make an agreement.

The impact of the new requirement that employees 'have a sufficient interest in the terms of the agreement' in section 188(2)(a) is somewhat less clear. It appears to be directed at cases where employees asked to vote on an agreement could be said not to have had sufficient interest in the terms of the agreement because they were being paid substantially above the agreement rates, or were shortly to be moved to other roles.[37] However, the Explanatory Memorandum to the Bill states that this provision is 'directed at ensuring that employees must have a "sufficient stake" in the terms of the agreement', and provides an example: 'employees would not have a sufficient interest in the terms of an agreement if no genuine collective bargaining in good faith occurred as part of the agreement-making process'.[38] If this approach is consistent with the wording of the *FW Act*, it has the potential to ensure that all single-enterprise agreements are the product of some form of bargaining between an employer and the relevant employees, overcoming a significant flaw within the *FW Act* processes and preventing the practice of agreement-making without bargaining. However, the words of section 188(2)(a) are not consistent with that interpretation. An employee whose employment will be covered by an enterprise agreement, where they will be paid at agreement rates and remain in their role for a reasonable period after the vote, could be said to have 'a sufficient interest' in the terms of that agreement, irrespective of whether there was 'genuine' or indeed any bargaining. If this latter interpretation prevails, the provisions will assist in overcoming one major flaw in the agreement-making provisions, but will not require that agreements be the product of bargaining.

---

36 *Fair Work (Statement of Principles on Genuine Agreement) Instrument 2023* (Cth) sch 1 para 15(a).

37 See *Thiess* (n 31); *United Workers' Union v Hot Wok Food Makers Pty Ltd* [2023] FWCFB 4.

38 Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) 129 [726].

The changes to single-enterprise agreement-making introduced by the *Secure Jobs Act* target significant problems with the *FW Act*, but in a way that is unlikely to shift the underpinning fundamental problems. Where bargaining is already a feature of agreement-making at an enterprise, unions will be able to get bargaining started again without the obstacle of an MSD. If the changes to agreement-making do mean that agreements must be the product of 'genuine collective bargaining in good faith', then this will operate as a substantive barrier to the creation of substandard non-union agreements, and represents a major shift in the operation of the *FW Act*. However, such an approach seems unlikely to be supported by the text of the *FW Act* in practice. The *Secure Jobs Act* did introduce more substantial and potentially far reaching changes to multi-enterprise agreement-making, which are described below. However, real change for single-enterprise agreements to reinvigorate worker power requires a more fundamental rethink of the basis upon which the provisions operate.

In building an effective model of collective bargaining, the problem of declining union density must be considered. However, creating a model that is built on non-union agreement-making reinforces trends towards declining density, creating a vicious circle. We cannot exclude non-unionised workers from our thinking, but equally if all models of regulation are built around them, then we are not creating a collective bargaining system but merely entrenching a model of agreement-making. Where employers are seeking to create collective agreements at sites where employees are not seeking bargaining, they are generally doing this because they want to reduce award inflexibilities, increase productivity, gain certainty over future costs, and obtain the cost savings and efficiencies of dealing collectively with workers. However, what has not been adequately considered is why the collective bargaining system supports employers dealing with their employees collectively without those employees being appropriately represented in genuine negotiations. If employers want to obtain the benefits outlined above, they should have to bargain for them – safety net conditions should not be traded away without representation and negotiation.

Instead of legislating a contestable statutory provision requiring employees to have an interest in the agreement they are asked to vote on, the legislative regime should require agreements actually to be the product of bargaining, created through genuine negotiations with a trade union. This approach would require a shift in thinking – away from the underpinning idea of the *FW Act* that each employee is entitled to individual separate representation, and instead towards a model where employees act collectively when negotiating an agreement with their employers. Ideally, collective participation by workers should be encouraged through union membership. Union membership and participation allows for differences in employee viewpoints to be resolved in order to consolidate worker bargaining power at an enterprise. This would also allow unions to make agreements with employers without the necessity of an employee ballot (although if necessary this could be retained as a failsafe to ensure that the workers – both union and non-union – agree with the changes negotiated on their behalf). It must also be acknowledged that union membership levels remain persistently low, and other forms of collective

worker voice may also need to be considered in order to facilitate meaningful collective engagement. However, without changes to the underpinnings of the *FW Act*, union membership and collective engagement are likely to stay low and for change to occur, a bolder approach is needed. One of those bolder approaches is facilitating sectoral or multi-employer agreement-making – as union membership is generally known to follow bargaining coverage.

III THE ENTERPRISE FOCUS OF AGREEMENTS AND BARGAINING

A The Case for Sectoral or Multi-employer Bargaining

A reflection of the dilution of collective worker power in Australia is the falling level of collective agreement coverage.[39] This is partly explained by the parallel decline of trade union membership.[40] However, another major factor in the precipitous drop in collective bargaining coverage has been the enterprise focus of the legal framework for bargaining. The centring of formalised collective bargaining on negotiations for agreements at the level of the enterprise was a deliberate design feature of the early 1990s bargaining reforms, aimed at boosting the productivity of individual firms.[41] However, in the 30 years since this system was created, major structural changes have transformed the nature of employing enterprises. The global phenomenon of fissuring noted in Part I has been evident in Australia, with widespread adoption of business models such as labour hire, franchising, outsourcing and supply chains, creating challenges for labour regulation including the system of bargaining.[42] Until the *Secure Jobs Act* amendments, with a few limited exceptions[43] collective bargaining could only take place between employees and their direct employer, and could not encompass lead firms which often exercise influence over wages and employment conditions 'down the chain'.[44] This led to union demands from around 2017 for legal reform to enable workers to choose the level at which they want to bargain: across industries, supply chains or wherever the locus of business power lies.[45] Tom Roberts contends that

39 See nn 3–5.

40 See, eg, Forsyth, *The Digital Picket Line* (n 16) 17–18; Australian Bureau of Statistics, *Trade Union Membership, August 2022* (Catalogue No 6335.0, 14 December 2022) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/aug-2022>, showing union density in Australia fell from 14.3% in 2020 to 12.5% two years later.

41 Tom Roberts, 'Sector-Wide Bargaining: Problems and Prospects in the Australian Case' (2021) 31(3) *Labour and Industry* 217, 221 <https://doi.org/10.1080/10301763.2021.1953222>.

42 See, eg, Tess Hardy, 'Reconsidering the Notion of "Employer" in the Era of the Fissured Workplace: Traversing the Legislative Landscape in Australia' in Roger Blanpain et al (eds), *The Notion of Employer in the Era of the Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?* (Kluwer Law International, 2017) 53.

43 For example, multiple franchisees who obtained an authorisation from the FWC to bargain together.

44 See also Anthony Forsyth, 'Ten Years of the *Fair Work Act*: (More) Testing Times for Australia's Unions' (2020) 33(1) *Australian Journal of Labour Law* 122, 129–30.

45 See, eg, 'Bargaining Should Extend across Industries: ACTU', *Workplace Express* (online, 16 April 2018) <https://www.workplaceexpress.com.au/nl06_news_selected.php?2&selkey=56673&hlc>.

widening the options for bargaining in this way 'is a necessary counterbalance to current economic circumstances where capital is highly concentrated, but working arrangements are increasingly fractured'.[46]

The Australian position prior to the recent amendments stands in contrast to other industrial relations systems which facilitate bargaining beyond the enterprise level, whether that means enabling agreements to be made covering two or more employers (multi-employer bargaining) or for all or part of an industry (sectoral bargaining) – or some combination of these options.[47] International evidence clearly shows that countries with multi-employer bargaining at the sectoral or national level have much higher rates of collective agreement coverage than countries with single-employer bargaining at enterprise level.[48] In the former category, bargaining coverage ranges from 49.6% in Switzerland to over 90% in Austria, Belgium, France and Finland, compared with countries in the latter category like the United States ('US') (11.2%) and New Zealand (19.8%).[49] According to a paper by Jelle Visser, Susan Hayter and Rosina Gammarano, published by the International Labour Organization: 'the level of bargaining (national, sectoral, or enterprise) is the single-most important predictor of bargaining coverage. Multi-employer bargaining at the sectoral or national level is the most inclusive form of collective bargaining.'[50]

Overseas collective bargaining systems which allow for multi-employer or sectoral bargaining are useful to demonstrate the *need* to move beyond enterprise bargaining. However, their utility as *models or blueprints* for reform in the Australian context is limited, given the significant differences in industrial relations histories, traditions and culture between Australia and, in particular, continental European countries founded on social partnership.[51] Significant lessons can be found, though, in the consideration of options for sectoral and multi-employer bargaining emanating from unions, think tanks, academics and policy-makers in countries like

---

46 Roberts (n 41) 222. See also Senate Education and Employment Legislation Committee, Parliament of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 [Provisions]* (Report, November 2022) 29–31.

47 See, eg, Jelle Visser, Susan Hayter and Rosina Gammarano, 'Trends in Collective Bargaining Coverage: Stability, Erosion or Decline?' (Issue Brief No 1, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office, 1 November 2017) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_409422.pdf>.

48 See, eg, Claus Schnabel, 'Union Membership and Collective Bargaining: Trends and Determinants' in Klaus F Zimmermann (ed), *Handbook of Labor, Human Resources and Population Economics* (Springer, 2020) 29 <https://doi.org/10.1007/978-3-319-57365-6_202-1>. See also Organisation for Economic Co-operation and Development, *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (OECD Publishing, 2019) 44–6.

49 Schnabel (n 48) 23–4, 38–9.

50 Visser, Hayter and Gammarano (n 47) 6. See also Jim Stanford, Fiona Macdonald and Lily Raynes, *Collective Bargaining and Wage Growth in Australia* (Report, The Centre for Future Work, The Australia Institute, 15 November 2022) 18–24 <https://futurework.org.au/report/collective-bargaining-and-wage-growth-in-australia>.

51 See, eg, Forsyth, *The Digital Picket Line* (n 16) 10–11. For a comparison of industrial relations systems relevant to the subject of this article see Søren Kaj Andersen, Chris F Wright and Russell D Lansbury, 'Defining the Problem of Low Wage Growth in Australia and Denmark: From the Actors' Perspectives' (2023) 29(2) *European Journal of Industrial Relations* 177 <https://doi.org/10.1177/09596801221132424>.

Australia with enterprise-based bargaining systems. One major preoccupation of this discourse has been the optimal shape of sectoral or multi-employer bargaining units, while another has been the question of how the right to bargain is established in sectoral or multi-employer contexts. Focusing on these two issues, we will now assess the provisions for multi-employer bargaining introduced by the *Secure Jobs Act* amendments to the *FW Act*.

B Designing Sectoral or Multi-employer Bargaining Units

Dealing first with bargaining unit configuration, a 2018 proposal from the United Kingdom ('UK') Institute of Employment Rights ('IER') and the 2020 report of the Harvard 'Clean Slate for Worker Power' Project ('Clean Slate') were both premised on the notion of sector or industry-wide collective bargaining. The IER proposed that the UK Secretary of State could designate an industry, trade or occupation to constitute a sector for purposes of collective bargaining through National Joint Councils comprised of employer and worker representatives.[52] This model informed the 2017 and 2019 election policies of the UK Labour Party,[53] and a more recent policy commitment by current Labour Leader Sir Keir Starmer.[54] Clean Slate proposed the establishment of sectoral bargaining panels by the US Secretary of Labor, which could be configured for an entire industry like the fast-food sector, although a union would first need to demonstrate that it represents at least 5,000 members or 10% of the relevant sector (whichever is lower).[55] However, in the heavily contested labour law policy terrain in the US, sectoral bargaining has not gained as much traction as in the UK. For example, the Protecting the Right to Organize Act proposed by House Democrats and supported by the American Federation of Labor and Congress of Industrial Organizations, the US's largest union federation, would not alter the enterprise-centred framework of bargaining under current US law.[56] In contrast, a system of sectoral bargaining has recently been introduced in New Zealand ('NZ').[57] The new legislation enables a government body to declare that bargaining for an

52 KD Ewing, John Hendy and Carolyn Jones (eds), *Rolling Out the Manifesto for Labour Law* (Institute of Employment Rights, 2018) 18–21 <https://www.ier.org.uk/wp-content/uploads/RollingOutTheManifestoForLabourLaw.pdf>.

53 See Labour Party (UK), 'For the Many Not the Few: The Labour Party Manifesto 2017' (Manifesto, 2017) 47, 51 <https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf>; Labour Party (UK), 'It's Time for Real Change: The Labour Party Manifesto 2019' (Manifesto, 2019) 59–64 <https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf>.

54 Labour Party (UK), *Employment Rights Green Paper: A New Deal for Working People* (Report, 2022) 5–6 ('*Employment Rights Green Paper*').

55 Sharon Block and Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* (Labor and Worklife Program, Harvard Law School, 23 January 2020) 39–41 <https://clje.law.harvard.edu/app/uploads/2020/01/Clean-Slate-for-Worker-Power.pdf>. See also below.

56 See Protecting the Right to Organize Act of 2021, HR 842, 117th Congress (2023).

57 *Fair Pay Agreements Act 2022* (NZ) ('*Fair Pay Agreements Act* (NZ)'). See, eg, Avalon Kent, 'New Zealand's Fair Pay Agreements: A New Direction in Sectoral and Occupational Bargaining' (2021) 31(3) *Labour and Industry* 235 <https://doi.org/10.1080/10301763.2021.1910899>.

industry-based or occupation-based 'fair pay agreement' may occur,[58] based on the satisfaction of a 'public interest test'[59] or a 'representation test'.[60]

Beyond a sectoral approach to bargaining, the framing of options for moving from enterprise to multi-employer bargaining has included consideration of the need for bargaining units to counter the various forms of fissuring discussed earlier. For example, in the US context, Mark Barenberg has formulated proposals to configure bargaining units which track the business structures of 'disintegrated employers'.[61] These might include 'employers and other firms in a single-product supply chain; production and distribution networks (eg, those utilised by major retailers); "hub and spoke" systems covering the suppliers of services to a lead firm … and "pyramid" arrangements (eg, a fast food brand operating a chain of franchise stores)'.[62] These kinds of 'indirect employers' could be required to negotiate with unions, where they possess 'sufficient bargaining power' over the direct employer, including the power 'to determine the terms and conditions of all the employees in question, even if the [indirect employer] is not currently exercising such power'.[63]

Writing in an academic journal in 2021, two officials of the United Workers Union ('UWU') and their co-authors adapted Barenberg's approach to the Australian context and in particular to the UWU's areas of industrial coverage, contending that they could

> foresee utility in (for example) horizontal configurations (eg, all poultry producers in Australia); vertical configurations (as adopted by the UWU in the Fresh Food Campaign, taking in the major supermarkets, the logistics companies that service them, and the growers of fresh produce at the supply end); and something like Barenberg's production and distribution networks (eg the multiple distribution, transport and other businesses that feed into the operations of mega-retailers like Amazon and Costco).[64]

The *Secure Jobs Act* amendments to the *FW Act* widen the circumstances in which the FWC may allow bargaining for enterprise agreements covering multiple employers who have an interest in common, although probably not as far as the Barenberg or UWU proposals would extend. Prior to the amendments, an agreement could be made between two or more single interest employers and their employees, where the employers were involved in a joint venture, were related

---

58 *Fair Pay Agreements Act* (NZ) (n 57) s 32.

59 Ibid s 29(1), requiring consideration of factors including whether the relevant employees are low-paid or inadequately paid or have minimal bargaining power.

60 Ibid s 28. See also Part III(C).

61 Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-employer Organizing, Bargaining and Striking* (Report, Roosevelt Institute, 7 October 2015) 15–16.

62 Forsyth, *The Digital Picket Line* (n 16) 211, summarising Barenberg (n 61) 3–7.

63 Barenberg (n 61) 14. The 'indirect employer' concept is developed further at 15–26. See also Bartkiw (n 6) 390–4, discussing contributions from various scholars seeking to develop broader conceptions of the 'employer' for collective bargaining purposes by reference to considerations such as the extent of subordination, control or dependency between business entities; Anner, Fischer-Daly and Maffie (n 6).

64 Tim Kennedy et al, 'Rebuilding Worker Power in Australia through Multi-employer Bargaining' (2021) 31(3) *Labour and Industry* 225, 230 <https://doi.org/10.1080/10301763.2021.2009628>. On the United Workers Union's approach to bargaining in the fresh food supply chain, see Elsa Underhill et al, 'Organising across Borders: Mobilising Temporary Migrant Labour in Australian Food Production' (2020) 62(2) *Journal of Industrial Relations* 278 <https://doi.org/10.1177/0022185619879726>.

entities, were franchisees, or were otherwise considered to have the required common interest. While leaving that form of agreement available to certain types of related employers,[65] the amended *FW Act* also allows the making of a 'single interest employer agreement'[66] if the FWC grants an authorisation for bargaining on this basis to occur.[67] Among the factors which the FWC must consider in deciding whether to grant an authorisation is whether the various employers 'have clearly identifiable common interests', determined by reference to matters such as: '(a) geographical location; (b) regulatory regime; (c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises'.[68] Where the common interests requirement is met, it must also be shown that 'the operations and business activities of each of [the relevant] employers are reasonably comparable with those of the other employers that will be covered by the agreement'.[69]

The concept of 'clearly identifiable common interests' could potentially enable multi-employer bargaining involving (for example) a group of brand-owned and franchised stores in a fast-food or convenience store chain. However, it would be unlikely to extend to situations where functions have been completely outsourced by a lead firm to external service providers (as has been common in aviation),[70] or to business networks or supply chains like those operating in the production and distribution of fresh food or the various entities in Amazon's logistics network.[71] The difficulty for unions of meeting the common interests test, combined with the other detailed requirements for obtaining a single interest employer authorisation – including a public interest test,[72] a majority approval requirement[73] and the exclusion of businesses with less than 20 employees (unless the employer consents)[74] – are likely to limit the effectiveness of single interest employer bargaining in practice. These provisions provide many opportunities for employers to obstruct union bargaining efforts, including through strategic litigation, and are a long way from the ready access to multi-employer bargaining which is needed to rebuild worker power.

---

65 *FW Act* (n 24) s 172(5A), as inserted by *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 item 627C ('*Secure Jobs Act*').

66 *FW Act* (n 24) s 12, as inserted by *Secure Jobs Act* (n 65) sch 1 item 627. A single interest employer agreement is actually one kind of multi-enterprise agreement available following the amendments.

67 Either an employee bargaining representative (eg, a union) or the relevant employers can apply for such an authorisation: *FW Act* (n 24) s 248(1), as inserted by *Secure Jobs Act* (n 65) sch 1 item 633.

68 *FW Act* (n 24) ss 249(3)(a), (3A), as inserted by *Secure Jobs Act* (n 65) sch 1 item 634A.

69 *FW Act* (n 24) s 249(1)(b)(vi), as inserted by *Secure Jobs Act* (n 65) sch 1 item 633A. This requirement is presumed to be satisfied in cases where a union has sought the authorisation, in respect of any of the employers that has at least 50 employees, unless the contrary is proved: *FW Act* (n 24) s 249(1AA), as inserted by *Secure Jobs Act* (n 65) sch 1 item 633A.

70 See, eg, 'Qantas Not for Turning on Outsourcing Strategy', *Workplace Express* (online, 14 October 2021) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=60551>; Senate Education and Employment Legislation Committee (n 46) 30.

71 See, eg, 'Amazon on the IR Frontier: Labor', *Workplace Express* (online, 3 February 2023) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61929>.

72 *FW Act* (n 24) s 249(3)(b), as inserted by *Secure Jobs Act* (n 65) sch 1 item 634A.

73 See further in Part III(C).

74 *FW Act* (n 24) s 249(1B)(a), as inserted by *Secure Jobs Act* (n 65) sch 1 item 633A.

In response to business concerns that the *Secure Jobs Act* amendments would enable industry-wide collective bargaining,[75] the Labor Government was adamant that 'the concept of the [amended legislation] is multi-employer, not industry-wide, so you never get to say "because you're in the industry, everybody is in"'.[76] That is clearly accurate in relation to the single interest employer agreement stream discussed above. However, the amendments also introduced a 'supported bargaining' stream which could facilitate bargaining with multiple employers in all or part of an industry.[77] Access to supported bargaining also requires FWC authorisation, but unions have to meet fewer requirements than those applicable to single interest employer bargaining. The FWC must be satisfied that it is appropriate for (some or all) of the employers and employees to bargain together,[78] taking into account: prevailing pay and conditions in the relevant industry or sector, including whether low pay rates prevail;[79] whether the employers have clearly identifiable common interests (such as their location, similar terms and conditions of employment, or being substantially funded, directly or indirectly, by government);[80] whether the likely number of bargaining representatives would be consistent with a manageable bargaining process;[81] and any other matters the FWC considers appropriate.[82] In some instances, even these tests need not be satisfied: the FWC must authorise supported bargaining where the relevant employees are specified in 'an industry, occupation or sector declared by the Minister' under section 243(2B) of the amended *FW Act*.[83]

These features of the supported bargaining stream, along with the absence of a majority employee support requirement,[84] are likely to assist the workers who the Government intends to benefit from this measure. These include employees 'in low-paid industries such as aged care, disability care, and early childhood education and care who may lack the necessary skills, resources and power to

75 See, eg, James Massola and Angus Thompson, 'New IR Laws Drive Wedge between Government and Business over Strike Fears', *The Age* (27 October 2022) <https://www.smh.com.au/politics/federal/new-ir-laws-drive-wedge-between-government-and-business-over-strike-fears-20221027-p5bte8.html>.

76 Minister for Employment and Workplace Relations, the Hon Tony Burke MP, quoted in 'Labor Strikes Deal to Secure IR Bill's Passage', *Workplace Express* (online, 27 November 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&&selkey=61787>.

77 This replaces the former low-paid bargaining stream in the *FW Act*, which did not operate effectively to help lift low-paid workers off award wage levels: see, eg, Fiona Macdonald, 'A Mandate for Multi-employer Bargaining? Without It, Wages for the Low Paid Won't Rise', *The Conversation* (online, 14 November 2022) <https://theconversation.com/a-mandate-for-multi-employer-bargaining-without-it-wages-for-the-low-paid-wont-rise-193829>.

78 *FW Act* (n 24) s 243(1)(b), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611.

79 *FW Act* (n 24) s 243(1)(b)(i), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611.

80 *FW Act* (n 24) ss 243(1)(b)(ii), (2), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611.

81 *FW Act* (n 24) s 243(1)(b)(iii), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611.

82 *FW Act* (n 24) s 243(1)(b)(iv), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611. Under section 243(1)(c), the FWC must also be satisfied that at least some of the employees who will be covered by the proposed agreement are represented by a union.

83 *FW Act* (n 24) s 243(2A), as inserted by *Secure Jobs Act* (n 65) sch 1 item 611. Such a declaration may be made by the Minister if this is consistent with the objects set out in amended section 241.

84 See further in Part III(C).

bargain effectively'.[85] Supported bargaining therefore offers a more viable basis for employees and unions to obtain multi-employer agreements than the heavily compromised single interest employer bargaining stream. In our view, the common interests test is the major impediment to the likely effectiveness of single interest employer agreement-making. This test should be reoriented so that the FWC considers factors more relevant to the formulation of bargaining units tailored to fissured business structures, including:

- the nature of the corporate or legal relationship between the various business entities;
- whether one of them supplies labour, services or products to others;
- whether they are competitors or operate in the same market;
- whether the operations of any lead firms and their relationships with direct employers have an impact on the wages and conditions of the workers in question;
- the common interests of the relevant *employees* including their occupations and types of work performed; and
- whether a multi-employer bargaining structure would maximise worker empowerment (see Part III(C)).

C Establishing the Right to Bargain on a Sectoral or Multi-employer Basis

We now turn to the question of how the right to engage in sectoral or multi-employer bargaining might be founded. According to Barenberg, another relevant factor in the determination of multi-employer bargaining units would be the concept of 'maximum potential for worker empowerment': that is, a single employer configuration could 'be aggregated into a multi-employer unit in cases where intervening or ongoing organizing shows that workers will be most empowered by such a sequence'.[86] The UWU proposal maintained that 'any legislative framework must put *workers at the centre* of determining the focus and scope of multi-employer bargaining'.[87] In such a system, however, there may need to be a mechanism to determine workers' preferences regarding the level at which collective bargaining should take place. For example, (as noted in Part III(B)) under the US Clean Slate proposal, a union would have to show support from 5,000 employees or 10% of those working in the sector; while a lower threshold to trigger sectoral bargaining has been set in the representation test in the NZ fair pay agreements legislation (1,000 employees or 10% of the sector).[88]

These approaches adopt more achievable levels of employee support than have traditionally been applied in enterprise-based bargaining systems premised on majoritarian principles. In one form or another, the collective bargaining regimes of the US, UK and Australia require a union to demonstrate that it has support from a majority of employees in the relevant bargaining unit, in order to obtain

85 Revised Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth) xi [37].
86 Barenberg (n 61) 29.
87 Kennedy et al (n 64) 230 (emphasis in original).
88 *Fair Pay Agreements Act* (NZ) (n 57) s 28.

recognition from an employer for purposes of bargaining.[89] This '50% plus 1' requirement is commonly posited on democratic principles,[90] but employers in all three countries (especially the US) have frequently engaged in practices to thwart union recognition and bargaining campaigns, thereby frustrating the attainment of any democratic objective.[91] The impact of these anti-union tactics therefore justifies lowering the required threshold of employee support which a union should be required to pass in sectoral or multi-employer bargaining, taking into account as well the difficulties unions inevitably face in organising employees across many disparate locations in those contexts.

These lower employee support hurdles may also be sustainable if we reframe the conceptual basis for establishing the right to bargain from a democratic notion to one centred more on *legitimacy*.[92] Alan Bogg and Tonia Novitz have argued for 'a "regulatory" conception of collective bargaining [which] conceives of it as a public regulatory activity conducted at sectoral or national levels' and as 'a mode of public governance akin to lawmaking'.[93] Contending further that this idea of regulatory bargaining requires a different approach to union representation,[94] they introduce the concept of 'performance legitimacy' which centres on the 'factors [which] provide an indication of the trade union's actual bargaining capabilities, namely the capacity to make a genuine difference which adds value to workers' agreed terms and conditions'.[95] Adopting a legitimacy lens, the nature of the inquiry shifts from whether a union has more than 50% support in the bargaining unit, to considering the extent of support the union should have to prove in order to be the legitimate representative of a group of employees within the proposed bargaining configuration they have decided upon.

In contrast, however, the single interest employer bargaining provisions introduced by the *Secure Jobs Act* apply a majoritarian basis for establishing the

89 See Forsyth, *The Digital Picket Line* (n 16) ch 3.

90 See, eg, Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Publishing, 2009) <http://dx.doi.org/10.5040/9781472564887>; Susan Orr, 'Is Democracy in the Cards? A Democratic Defense of the Employee Free Choice Act' in Nelson Lichtenstein and Elizabeth Tandy Shermer (eds), *The Right and Labor in America: Politics, Ideology and Imagination* (University of Pennsylvania Press, 2012) 296 <https://doi.org/10.9783/9780812207910>.

91 See, eg, Charlotte Garden, 'Tactical Mismatch in Union Organizing Drives' in Richard Bales and Charlotte Garden (eds), *The Cambridge Handbook of US Labor Law for the Twenty-First Century* (Cambridge University Press, 2020) 199 <https://doi.org/10.1017/9781108610070.022>; Forsyth, *The Digital Picket Line* (n 16) 45–46; Bogg (n 90) ch 5. The UK Labour Party has expressed a commitment to lower the threshold for statutory recognition, 'which is too high in many large firms': Labour Party (UK), *Employment Rights Green Paper* (n 54) 11.

92 See, eg, Forsyth, *The Digital Picket Line* (n 16) 213; New Zealand Ministry of Business, Innovation and Employment, 'Fair Pay Agreements: The Nature of "Support" for the Representation Test' (Briefing, 3 May 2021) <https://www.mbie.govt.nz/dmsdocument/23628-fair-pay-agreements-the-nature-of-support-for-the-representation-test>, discussing legitimacy in the context of the requirement for 'a positive, or active, indication of support from at least 1,000 employees' to satisfy the proposed representation test.

93 Alan Bogg and Tonia Novitz, 'The Politics and Law of Trade Union Recognition: Democracy, Human Rights and Pragmatism in the New Zealand and British Context' (2019) 50(2) *Victoria University of Wellington Law Review* 259, 261 <https://doi.org/10.26686/vuwlr.v50i2.5745>. See also Kate Andrias, 'The New Labor Law' (2016) 126(1) *Yale Law Journal* 2, 68.

94 Bogg and Novitz (n 93) 262, 278.

95 Ibid 279–80.

right to engage in multi-employer bargaining. Under the original Bill, it would have been necessary to show that a majority of the employees who would be covered by the agreement wanted to bargain with the employers who would also be covered.[96] This requirement would have been difficult enough: taking one of the examples considered earlier, in a group of brand-owned and franchised stores in a convenience store chain, majority support of the employees across all of the enterprises would have been needed. If we assume the total number of employees in the chain of stores was 50,000, the threshold of 25,001 would be very hard to meet. Exacerbating this problem, an amendment to the Bill was adopted as part of the Government's negotiations to win Senate support for its passage.[97] As a result, the provisions now require a union to show majority support among the employees of *each employer* that will be covered by the single interest employer agreement.[98]

In the above example, for a union to succeed in having *all* of the enterprises in the convenience store chain included in one agreement, it would need to show overall support from even more than 25,001 employees *and* win the support of employees at each separate business. Alternatively, the union might lower its ambition, and take the view that it has 'succeeded' by obtaining a majority at each of a smaller number of stores in the chain (leading to a multi-employer agreement covering fewer employers and employees). However, this simply highlights another critical shortcoming of the single interest employer bargaining provisions: they reinforce the atomised approach which has long plagued *enterprise* bargaining. Unions should not have to win a series of workplace contests, with all the opportunities these provide for employer opposition tactics, to earn the right to bargain across multiple employers. Lower thresholds of employee support of the kind discussed earlier are appropriate. Another option would be to dispense with any employee support requirement altogether, the approach adopted in the supported bargaining stream made available by the *Secure Jobs Act*.[99] Or, finally, the NZ fair pay agreements model could be followed: access to sectoral or multi-employer bargaining could hinge on a union clearing a realistic employee support hurdle, *or* the satisfaction of a public interest test based on the necessity of providing employees with the opportunity to improve their wages and working conditions.

IV RESTRICTED COLLECTIVE POWER

A Restricted Employee Access to Protected Industrial Action

The primary mechanism through which workers can exercise power in collective negotiations to counter the property, contractual and managerial power of employers is through the credible threat of strike action, or action short of

96 Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (First Reading) (Cth) sch 1 item 634.

97 'Burke Offers Concession on Multi-employer Deals', *Workplace Express* (online, 7 November 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61713>.

98 *FW Act* (n 24) s 249(1B)(d), inserted by *Secure Jobs Act* (n 65) sch 1 item 633A. See also s 249(1C).

99 See Part III(B).

a strike, such as work to rule or work bans. The role that strike action plays in collective bargaining is recognised in the *FW Act* through provisions which allow employees and their bargaining representatives to take 'protected industrial action' during negotiations for a new enterprise agreement.[100] Employers can also engage in protected industrial action, through the ability to lockout employees to support their claims in bargaining, but only where employees have first notified their intention to take industrial action.[101]

However, while the scheme of the *FW Act* provides access to protected industrial action as the mechanism for the expression of worker power in collective bargaining, the ability of employees actually to take lawful industrial action is entirely circumscribed under the *FW Act*. The legislative regime is highly complex and challenging to navigate. As Shae McCrystal has previously observed:

> It is very hard for Australian workers to take industrial action when they need to. The range of circumstances under which they can take lawful strike action are very narrow: when those circumstances arise it is technically difficult to engage in lawful strike action and easy to get it wrong, and when lawful strike action does occur the action may be stopped.[102]

Further exacerbating these difficulties has been the impact of restrictive judicial interpretation of the protected industrial action provisions, which have tended to treat workers' capacity to take industrial action as a 'privilege' rather than as a right, resulting in a narrowing of the scope of the legislative regime in practice.[103] For example, the outcome of the High Court litigation in the *Esso Australia Pty Ltd v Australian Workers' Union* dispute had the effect that any inadvertent or unintentional breach of a FWC or court order made by a bargaining representative in the protected industrial action process would render the relevant action unprotected, and furthermore would constitute contravention of the prohibition on coercion in section 343 of the *FW Act* and potentially be subject to civil penalties.[104] Another example is a shift in interpretation of the provisions that allow the FWC to suspend or terminate industrial action on the basis of a threat to the 'welfare' of the population or part thereof, making termination or suspension of effective industrial action more likely.[105] The relative ease with which a threat to welfare can now be demonstrated has led to unions using less impactful industrial action in their industrial campaigns,

---

100 *FW Act* (n 24) pt 3-3. The definition of industrial action includes both strike action in the sense of a total withdrawal of labour for a period of time, and action short of a strike: at s 19. See further Breen Creighton, Catrina Denvir and Shae McCrystal, 'Defining Industrial Action' (2017) 45(3) *Federal Law Review* 383 <https://doi.org/10.22145/flr.45.3.2>.

101 *FW Act* (n 24) s 411.

102 Shae McCrystal, 'Why Is It So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129, 130 <https://doi.org/10.1177/0022185618806949>.

103 See *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, 583 [53] (Kiefel CJ, Keane, Nettle and Edelman JJ) ('*Esso*').

104 See, eg, *Esso* (n 103). See also Shae McCrystal, 'The Right to Strike and the "Deadweight" of the Common Law' (2019) 50(2) *Victoria University of Wellington Law Review* 281 <https://doi.org/10.26686/vuwlr.v50i2.5746> ('The Right to Strike'); Breen Creighton and Shae McCrystal, '*Esso Australia Pty Ltd v The Australian Workers' Union*: Breaches of Orders, Coercion and Protected Industrial Action under the *Fair Work Act 2009* (Cth)' (2017) 39(2) *Sydney Law Review* 233.

105 In *National Tertiary Education Industry Union v Monash University* [2013] FWCFB 5982, a Full Bench of the FWC found that under section 424 of the *FW Act*, the FWC only had to be satisfied that there was a

which take longer to have the same effect as potentially more disruptive action. This approach seeks to avoid the protected industrial action being suspended or terminated by the FWC.[106] These restrictions on the ability of employees to exercise industrial power through effective strike action have had an effect on agreement outcomes. Research by Jim Stanford explicitly links wage stagnation with historically low levels of strike action and the denial of workers' rights to take industrial action, showing a 'close statistical relationship between the near disappearance of strike activity and the deceleration of wage growth' in Australia.[107]

B Enhanced Industrial Power for Employers

Restricted employee access to protected industrial action is one part of the puzzle of restricted collective power under the *FW Act*. The other part is the increased range of opportunities experienced by employers to exert additional industrial power (beyond the advantages accrued through managerial prerogative and ownership of business assets) and impact bargaining outcomes.

First, employers have been able to utilise the credible threat of agreement termination to impact their progress in negotiations for a new agreement.[108] As enacted in 2009, the agreement termination provisions provided that one party to an enterprise agreement that had passed its nominal expiry date could apply to the FWC to terminate that agreement where it was not contrary to the public interest to do so, and it was appropriate in all the circumstances.[109] Initially, the provisions were interpreted in such a way that it would not be appropriate in all the circumstances to terminate an agreement while active negotiations for a new agreement were ongoing.[110] This was because of the potential for termination of the agreement to enhance the bargaining power of the employer by removing the existing agreement

---

relevant threat to the welfare of the population or a part thereof, not that the threat had to be significant as had been the previous approach to the section: at [18]–[21].

106 One example of behaviour modification emerges from consecutive bargaining rounds at Sydney Trains in Sydney, NSW. During negotiations for a new enterprise agreement in 2018, the relevant unions notified a 48-hour shutdown of the Sydney train network. This quickly led to an order by the FWC suspending the relevant industrial action: *Re Sydney Trains* (2018) 277 IR 389. Four years later, the parties were negotiating again and unable to reach agreement. In this instance, the relevant unions took significantly lower level industrial action to avoid crossing the threshold for a suspension or termination, and the dispute itself dragged on for over 500 days: see 'FWC to Arbitrate NSW Rail Dispute after Minister's Serve', *Workplace Express* (online, 28 November 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61788>.

107 Jim Stanford, *Historical Data on the Decline in Australian Industrial Disputes* (Briefing Note, The Australia Institute, Centre for Future Work, 30 January 2018) <https://futurework.org.au/report/historical-data-on-the-decline-in-australian-industrial-disputes>.

108 See Michael McGowan and Tamsin Rose, '"This Ends Today": NSW Premier Says as He Threatens to Tear Up Industrial Agreement over Sydney Rail Strikes', *The Guardian* (online, 31 August 2022) <https://www.theguardian.com/australia-news/2022/aug/31/this-ends-today-nsw-premier-threatens-to-tear-up-industrial-agreement-over-sydney-rail-strikes>; 'Esso, AWU Slog on towards New Deal as Termination Threat Hovers', *Workplace Express* (online, 27 November 2018) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=57382>.

109 *FW Act* (n 24) ss 225–6, as enacted.

110 *Re Tahmoor Coal Pty Ltd* (2010) 204 IR 243, 256–8 [55], [59], [65] (Lawler VP); *Re SDV (Australia) Pty Ltd* [2013] FWC 5385, [41]–[42] (Sams DP); *Metropolitan Fire & Emergency Services Board v United Firefighters' Union of Australia* [2014] FWC 7776, 107 [276] (Commissioner Wilson).

rights, leaving the employees concerned with only their contractual and award rights. However, this approach was expressly overturned in *Re Aurizon Operations Ltd* where it was found there were no such public interest considerations, a finding which effectively opened the door to employer applications for termination of existing agreements as a bargaining tactic.[111] This tipped the scale further in favour of employers in bargaining because the mere threat of an application to terminate an agreement (irrespective of the likelihood of success) raised the spectre of workers' terms and conditions reverting to contract and award rights, and although such a threat had reputational consequences, the tactic could be used by employers at relatively little cost or inconvenience.[112] However, the stakes for employees were raised considerably. When an agreement is put to an employee ballot and a majority vote no, the terms of any existing enterprise agreement continue in effect. However, if, during bargaining, an employer raised potential agreement termination and then requested employees to vote for a new agreement, a majority no vote could result in the employer seeking termination of the existing agreement. If such an application was successful, this could mean a reduction in pay and work conditions until such time as a new agreement was made. This fundamentally changed the context of the ballot vote, increasing the pressure on employees to vote in favour of the proposed agreement.

Second, employers have had success using the provisions that promote suspension and termination of industrial action to achieve outcomes that were unattainable in bargaining or by going to a ballot of employees. The most prominent example of this was the Qantas lockout in 2011. Unable to obtain agreement from the unions or employees to the removal of existing agreement provisions impacting its capacity to outsource work, Qantas notified a lockout of their staff, and initiated a global shutdown of their operations. This led quickly to a FWC order terminating all industrial action relevant to the negotiations (by both Qantas and the unions),[113] and a subsequent FWC determination of the matters outstanding in the dispute.[114] That determination did not contain restrictions on outsourcing. Although it had suffered significant reputational harm, Qantas was widely considered to have won the dispute and achieved its objectives.[115] Similarly in 2022, during protracted

---

111 (2015) 249 IR 55 ('*Aurizon*'), affd *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union v Aurizon Operations Ltd* (2015) 233 FCR 301. After *Aurizon*, cases where employers successfully sought agreement terminations in the context of active and contested agreement bargaining included *Re The Griffin Coal Mining Company Pty Ltd* [2016] FWCA 2312; *Re REMONDIS Australia Pty Ltd* [2017] FWCA 254; *Re Murdoch University* [2017] FWCA 4472.

112 See Shae McCrystal, 'Termination of Enterprise Agreements under the *Fair Work Act 2009* (Cth) and Final Offer Arbitration' (2018) 31(2) *Australian Journal of Labour Law* 131; Pennington (n 3).

113 *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367, upheld in *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200.

114 *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd* (2012) 218 IR 165.

115 See Joellen Riley, 'A Safe Touch Down for Qantas?' (2012) 25(1) *Australian Journal of Labour Law* 76; Anthony Forsyth and Andrew Stewart, 'Of "Kamikazes" and "Mad Men": The Fallout from the Qantas Industrial Dispute' (2013) 36(3) *Melbourne University Law Review* 785; Shae McCrystal, 'Deadlocked Bargaining Disputes: Industrial Action, Agreement Termination and Access to Arbitration' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 117, 126–7.

agreement negotiations and low level employee industrial action, the tugboat operator Svitzer notified an indefinite national lockout of around 600 employees across 17 ports, triggering immediate intervention by the FWC to suspend the industrial action, and that of the union, for six months.[116]

C The *Secure Jobs Act* Amendment Impacting Collective Worker Power

The regulation of industrial action has been a political Achilles heel for the Australian Labor Party ('ALP'), with the Coalition parties routinely raising the threat of increased industrial action and community disruption under any proposed Labor reforms.[117] In introducing the *FW Act* in 2009, the ALP retained the various restrictions on strike action that had accumulated during the preceding 11 years of Coalition led legislative changes, and adopted bright-line rhetoric about 'clear, tough' rules for strikes.[118] Reflecting these political sensitivities, and despite mounting evidence about the impact of the restrictive regulatory regime on worker bargaining power and the flow on effect for wages, when introduced into Parliament, the Bill that would become the *Secure Jobs Act* included relatively few proposed changes to the industrial action provisions.

The three primary changes proposed by the Bill to protected industrial action involved a change to the balloting rules, the introduction of mandatory conciliation and expansion of access to protected industrial action in support of bargaining in certain multi-enterprise agreement contexts.

The balloting changes proposed removal of the 30 day rule – an onerous statutory provision which requires a bargaining representative and the employees they represent to take at least one instance of every form of industrial action approved in an industrial action ballot in the first 30 days from the declaration of the vote or lose the ability to use that form of industrial action without reballoting.[119] This 'use it or lose it' rule has driven artificial behaviours in bargaining where industrial action is deployed to meet the statutory timetable rather than when it is most industrially appropriate.[120] Accompanying this was a proposal to introduce a

116 *Re Svitzer Australia Pty Ltd* [2022] FWCFB 209; *Re Svitzer Australia Pty Ltd* (2022) 320 IR 91. The Full Bench suspended industrial action in this case for six months, ending both the ability of the employer and the unions to take industrial action. However, it did not agree to Svitzer's request for termination of the action which would have sent the parties to arbitration if they could not reach an agreement.

117 The political pressures in this respect in the lead up to the passage of the *FW Act* are outlined in Andrew Stewart and Anthony Forsyth, 'The Journey from Work Choices to Fair Work' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 1, 7–8. Similarly, in hearings by the Education and Employment Legislation Committee considering the terms of the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Cth), witnesses were repeatedly asked about the likelihood of increased industrial action under the Bill: see, eg, Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Sydney, 4 November 2022, 8 (Matthew O'Sullivan and Jacqui Lambie), 32, 38 (Matthew O'Sullivan).

118 See Shae McCrystal, 'A New Consensus: The Coalition, the ALP and the Regulation of Industrial Action' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 141, 159.

119 *FW Act* (n 24) s 459(1)(d).

120 See Catrina Denvir and Shae McCrystal, 'Researching Labour Law "In Practice": Challenges in Assessing the Impact of Protected Industrial Action Ballot Procedures on Enterprise Bargaining

new three month mandate on industrial action ballots. This would have required bargaining representatives to return to the FWC, obtain permission for a new ballot, have a ballot agent run a fresh ballot, and undergo compulsory conciliation, every three months during agreement negotiations to retain the ability to strike lawfully. This requirement to reballot three monthly was proposed despite extensive evidence suggesting that the existing *FW Act* ballot processes operate as a substantial impediment to access to protected industrial action with very little, if any, beneficial effect on union democracy.[121]

In the end, the repeal of the 30 day rule and the introduction of a ballot mandate were dropped from the Bill during its passage through Federal Parliament.[122] However, the compulsory conciliation requirement did form part of the amendments that passed through Parliament in the *Secure Jobs Act*,[123] imposing yet another hurdle on bargaining representatives seeking to take protected industrial action during bargaining for a new agreement. Rather than seeing some enhancement of worker power in this respect, the amendments continued the trend of legal change effectively weakening worker access to the right to strike. By contrast, the ALP did retain the expansion of access to protected industrial action in the context of negotiation for certain multi-employer agreements – specifically single interest employer agreements and supported bargaining agreements.[124] While all of the obstacles and legal complexities in taking protected industrial action remain, this change does have the potential to allow for workers at different enterprises to co-ordinate and combine their industrial power in a new context – the success of which will ultimately depend on the accessibility of these new models of agreement-making for workers.[125]

Another win for workers was achieved in respect of the agreement termination provisions. While the *Secure Jobs Act* did not make it easier to take strike action, the ability for employers to access agreement termination as a bargaining tactic was effectively closed off. The amendments changed the basis on which the FWC can terminate agreements on unilateral application by an employer to circumstances where the 'continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer', and terminating the agreement would reduce the likelihood of termination of the employment of employees covered by the agreement.[126] Furthermore where an application is brought during bargaining for a replacement agreement, the FWC

Processes' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 161, 174.

121 Breen Creighton et al, *Strike Ballots, Democracy, and Law* (Oxford University Press, 2020) ch 6 <https://doi.org/10.1093/oso/9780198869894.003.0007>.

122 Although changes to the ballot agent provisions that removed the Australian Electoral Commission as the 'default' ballot agent were retained in the *Secure Jobs Act* (n 65).

123 *FW Act* (n 24) s 448A, inserted by *Secure Jobs Act* (n 65) sch 1 item 585.

124 See *FW Act* (n 24) s 437A, inserted by *Secure Jobs Act* (n 65) sch 1 item 577.

125 See above Part III.

126 *FW Act* (n 24) s 226(1)(c), inserted by *Secure Jobs Act* (n 65) sch 1 item 471. Note also that agreements can be terminated where the continued operation of the agreement would be unfair to the employees concerned (s 226(1)(a)) and where the FWC is satisfied that the agreement does not cover any employees (s 226(1)(b)).

must also have regard to the impact of the termination on the bargaining position of the employees.[127]

Mention must also be made of the new intractable dispute mechanism introduced in Part 2-4, Division 8, Subdivision B. The *Secure Jobs Act* repealed effectively defunct provisions allowing for FWC intervention where a bargaining representative was engaged in a serious and sustained breach of a bargaining order, and replaced them with a mechanism to enable the FWC to intervene by making an 'intractable bargaining declaration', leading to arbitration in the form of an 'intractable bargaining workplace determination'. Unlike the provisions for arbitration in the event that protected industrial action is terminated by the FWC, the intractable bargaining provisions are a part of the FWC's general powers to 'facilitate bargaining' and can be exercised whether industrial action is involved or not. The mechanism allows for FWC intervention where an application is made by a bargaining representative in connection with negotiations for single-enterprise agreements, supported bargaining agreements or single interest employer agreements, as long as nine months have passed from the later of the nominal expiry date of an existing agreement or the commencement of bargaining.[128] Provided that the FWC has already dealt with the dispute under the dispute resolution provision in section 240 and the bargaining representative has participated in that process, a declaration can be made if 'there is no reasonable prospect of agreement being reached' without it, and 'it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement'.[129] Once a declaration is made, the parties lose the ability to take protected industrial action,[130] and the process is set in motion for a Full Bench of the FWC to make an intractable bargaining workplace determination to resolve the matters remaining in dispute between the parties.[131]

The inclusion of this new intractable dispute mechanism in the *FW Act* pulls in two directions. The mechanism responds to a number of high profile disputes over the preceding few years which parties have struggled to resolve through bargaining supported by industrial action.[132] It also opens up the possibility of arbitration for workplaces where industrial action has not taken place, because the complexities of the industrial action provisions have made it too difficult for unions in those workplaces to run a successful campaign, or where there has been no history or experience with more robust industrial campaigns. This can be seen as a positive step that will be likely to increase collective bargaining coverage, particularly at workplaces where bargaining has stalled.[133] However, it is also the

127 *FW Act* (n 24) s 226(4), inserted by *Secure Jobs Act* (n 65) sch 1 item 471.
128 *FW Act* (n 24) ss 234, 235(5), inserted by *Secure Jobs Act* (n 65) sch 1 item 543.
129 *FW Act* (n 24) s 235(2), inserted by *Secure Jobs Act* (n 65) sch 1 item 543.
130 *FW Act* (n 24) s 413(7)(c), inserted by *Secure Jobs Act* (n 65) sch 1 item 553.
131 *FW Act* (n 24) s 269, inserted by *Secure Jobs Act* (n 65) sch 1 item 546.
132 In particular, the recent high-profile disputes at Sydney Trains described above at n 106 and Svitzer (involving tugboat operators at multiple Australian ports) at n 116.
133 For example, collective negotiations at Cochlear, which commenced after the relevant union obtained a MSD, failed to produce a collective agreement despite years of negotiations: see Forsyth and Ellem (n 35).

case that the inclusion of this mechanism has been necessitated by the complex provisions regulating protected industrial action because workers are unable fully to exercise their industrial power through accessible and impactful collective action. This means that an increasing number of disputes will now be resolved through state facilitated arbitration, rather than through the processes of bargaining and collective voice. This may tend over time to diminish rather than enhance worker power, particularly if the arbitrated outcomes are seen to benefit employers over employees.

Ultimately, the *FW Act* must also be reformed to provide workers with easier access to effective industrial action to ensure that workers are able to engage effectively in collective bargaining and have meaningful input into the agreements that will govern their employment without the necessity for state intervention. The full details of such reforms are outside the scope of this article, but at minimum should include a codification of the law of industrial action (including penalties for unlawful industrial action) with a clear direction to the judiciary that the right to strike is a legitimate worker right, not a privilege, and should not be constrained through narrow judicial interpretation of the provisions.[134] Furthermore, the balloting provisions, including the requirements to apply to the FWC for a ballot order before a ballot can be run, the 30 day rule, and associated rules around notice and the action having been authorised in the ballot, all require reform. Introduced in 2005, the balloting provisions were ostensibly designed to prevent unions from pressuring unwilling union members into taking strike action and to facilitate union democracy. However research by Breen Creighton et al has demonstrated that they do not promote substantive democratic outcomes, and provide numerous opportunities for employers to derail or obstruct the process (or trade off a promise not to obstruct for gains like additional notice of industrial action).[135] The *FW Act* should not require unions to seek permission from a state agency before they can ballot their members, or provide a mechanism that effectively allows employers to have input into union decisions in this respect. Unions should be permitted to authorise proposed industrial action in accordance with their own rules and democratic processes.

V CONCLUSION

This article has examined three central features of the original *FW Act* framework for bargaining – employer-controlled agreement-making, the overwhelming enterprise focus of the system, and restrictions on collective power – which have constrained the ability of workers and unions to build and exercise the force needed to contest employer power in the workplace. We examined relevant amendments to the *FW Act* effected by the *Secure Jobs Act*, concluding that while these address some of the problems we identified in our three areas of

134 See also McCrystal, 'The Right to Strike' (n 104).
135 Creighton et al (n 121).

focus, the new provisions have major shortcomings which will prevent them from being utilised as an effective basis for expanding worker power. In each of the three areas, we articulated further reforms which would contribute to the goal of enabling workers to develop the power required to bargain and strike for improved wages and employment conditions. These include reinforcing the agreement-making rules to ensure that agreements are the product of genuine negotiations between employers and the collective representatives of employees; reorienting the common interests test for access to multi-employer bargaining in the single interest employer stream so the FWC is able to consider factors relevant to fissured business structures; lowering or removing the employee support threshold for accessing bargaining in that stream; and substantially overhauling the protected industrial action provisions, to remove complexities and unnecessary obstacles for workers to exercise this crucial right and expression of worker power.

Reform in at least two other, related areas is also necessary. First, because agreements made under the *FW Act* apply to all employees at a particular workplace, unions must give away one of their main 'products' for free. The legislation precludes unions from charging bargaining or service fees to non-members.[136] This prohibition should be removed, enabling unions to counter non-member 'free riding' and ensuring they are rewarded for the considerable effort involved in running bargaining campaigns.[137] Second, the *FW Act* unduly restricts union access to workplaces for the purposes of organising, recruiting and communicating with employees,[138] frustrating the project of forging the connections from which collective strength is built. Loosening some of these legal limits on union rights of access to the workplace would complement the reforms of bargaining and industrial action regulation we have suggested are needed to enable Australian workers to maximise power.

We observed in the Introduction to this article that legal reforms of the kind we have considered fall within Holgate's conception of institutional power. However, the effectiveness of even the most favourable laws relating to collective bargaining and industrial action would depend on the capacity of workers also to deploy associational and structural power: being able to utilise the legal rules as a basis for strategically mobilising workers into countering managerial power, including through the 'power of disruption'.[139] Or, as Jane McAlevey and Abby Lawlor put it: 'Like all institutions of democracy, collective bargaining depends on active, mass participation, whether it happens at a national, sectoral, or enterprise level.'[140]

---

136 *FW Act* (n 24) ss 186(4), 194(b), 353.

137 See, eg, Angus Thompson, 'Unions Push for a Wage Deal Levy for Non-members', *Sydney Morning Herald* (online, 11 January 2023) <https://www.smh.com.au/politics/federal/unions-push-for-a-wage-deal-levy-for-non-members-20230109-p5cbbv.html>.

138 See *FW Act* (n 24) pt 3-4. See also *Communications Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Austal Ships Pty Ltd* [2022] FCA 1462, for one example of the many judicial interpretations reading down these already heavily circumscribed provisions.

139 See Holgate (n 14) 31–2.

140 Jane F McAlevey and Abby Lawlor, *Rules to Win By: Power and Participation in Union Negotiations* (Oxford University Press, 2023) 212–13 <https://doi.org/10.1093/oso/9780197690468.001.0001>.

However, the interrelationship between these various forms of worker power is complex. Rebuilding the associational and structural capacity of Australian workers – greatly diminished by decades of declining union membership – is essential if the elements of institutional power we have examined are to have any chance of success. Equally, the ground rules for bargaining and industrial action have an important effect on whether workers have any opportunity at all to build and assert power – and thereby maximise their return on the labour they perform.