**MEMBERS ONLY COLLECTIVE AGREEMENTS:**

**SOME REFLECTIONS**

By

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**SPEAKING NOTES**

The primary reason for the establishment of trade unions is to obtain improved wages and better terms and conditions of employment for trade union members. In Australia, the betterment of conditions of employment has been achieved in two ways. First, by utilising courts and tribunals of conciliation and arbitration and through collective bargaining. These measures have placed legal obligations on employers to pay specific rates of pay and to grant conditions of employment, such as hours of work and holidays to their employees.

The second way is by affiliation to the Australian Labor Party or other political parties, as well as directly lobbying governments of all complexions. The aim here is to encourage the passage of laws favourable to the interests of employees and their families.

My concern today is with collective bargaining. As I shall argue, Australian federal labour law creates impediments which limit the capacity of trade unions to obtain better working conditions for their members. In my view, our laws should be amended to enable trade unions to conclude member’s only collective agreements with employers to ensure better wages and conditions for their members. Such a measure would, I suggest, revitalise Australia’s trade union movement.[[2]](#footnote-2)

**The Legal Impediments**

In 1993, the Keating ALP Government amended federal labour law by establishing two tiers of collective bargaining.[[3]](#footnote-3) Trade unions could make certified agreements with single enterprise employers in two ways. First, as a means of settling labour disputes utilising the conciliation and arbitration power in the Australian Constitution.[[4]](#footnote-4) Second, collective agreements could also be supported by the corporation’s power.[[5]](#footnote-5) However, for the first time in Australian federal labour law, collective agreements could be made by employing undertakings directly with their employees. These collective agreements were somewhat surprisingly called enterprise flexibility agreements. To the best of my knowledge, the granting of power to employers to conclude collective agreements directly with their employees does not exist in any other OECD country.

The co-existence of trade union collective agreements, on the one hand, and non-union collective agreements, on the other hand, was maintained up until the Rudd ALP Government enacted the *Fair Work Act* in 2009.[[6]](#footnote-6) Under this new regime, collective agreements could be made only between employers and their employees.[[7]](#footnote-7) Trade unions were entitled to be bargaining agents for their members and for other employees who gave their consent.[[8]](#footnote-8) Trade Unions who were bargaining agents for an agreement were able to apply to be covered by that agreement. [[9]](#footnote-9) However, the fact remains that collective agreements under the *Fair Work Act* are not made between trade unions and employers.

 When drafting the collective bargaining provisions of the *Fair Work Act,* its framers thought that doing away with the distinction between trade union and non-union collective agreements would be a rather clever way of assisting trade unions. After all, they could be bargaining agents for their members and for other employees in the bargaining unit. Perhaps their coverage might increase.

In my view, however, by relegating trade unions to mere bargaining agents, the *Fair Work Act* has downgraded their status from industrial parties to that of bargaining agent by-standers in the workplace.

Even when trade unions are bargaining agents, the High Court’s *Electrolux Case* of 2004[[10]](#footnote-10) and the *Fair Work Act* itself,[[11]](#footnote-11) make it unlawful for a collective agreement to provide that members and non-members must pay bargaining fees to the union.

The adverse action provisions in the *Fair Work Act[[12]](#footnote-12)* protect the freedom from association of employees and make it unlawful for trade union members to receive any benefits which are not equally bestowed upon non-unionists. [[13]](#footnote-13)

***Why Join A Trade Union?***

Under federal labour law,[[14]](#footnote-14)trade union members must pay union dues which defray bargaining and representation costs. Non-unionists working alongside them often obtain benefits through the bargaining agent work of the union without paying any portion of the costs. Members may not receive any benefits which are not bestowed upon non-unionists. These workers are known colloquially as “free riders”. The only advantage which members derive, is that of being represented by their union in disciplinary or in unfair termination proceedings etc. Little wonder then that many employees decide not to join trade unions.

**Members-Only Collective Agreements: Why Not?**

In my view, our labour laws should enable trade unions, if they choose to do so, to bargain with employers and conclude collective agreements which only cover their members in the relevant workplace. After all, this is no more than what occurred under federal compulsory conciliation and arbitration which operated for the first nine decades of the twentieth century. Federal awards which were made in settlement of industrial disputes applied directly to the relevant trade union and its members, and the respondent employers. Under the Metal Trades Doctrine of 1935,[[15]](#footnote-15) employers were obliged to pay the same rates of wages to their non-union employees, but those non-unionists were not parties to these awards. Eighty years ago, this doctrine was formulated to protect union members by preventing employers from hiring non-union labour at cheaper rates. [[16]](#footnote-16)

Interestingly, in 1997, the Health and Research Employees’ Association applied to the New South Wales Industrial Relations Commission for a member’s only award. In New South Wales, awards applied to all employees, whether or not they were members of the relevant trade union. The Industrial Relations Commission of New South Wales declined to make a members only award, mainly to prevent wage differentials in the public sector.[[17]](#footnote-17)

Across the Tasman in New Zealand, collective employment agreements are made between trade unions and employers, and they may only prescribe wages and terms and conditions of employment for the members of the trade union who are employed by the employer. [[18]](#footnote-18) Non-unionists may only conclude individual employment agreements with their employer.

**Freeing Up the Labour Market**

 In order to enable trade unions to fully represent the working interests of their members, in my view trade unions should be given the capacity to conclude collective agreements with employers which only prescribe the wages and conditions of employment for their members or for future members. If a trade union chose to go down this path, then in my opinion employers should be free to decide whether or not to pay the same wages and grant the same conditions of employment to those of their employees who are not members of the trade union. In other words, the Metal Trades doctrine should have no application to member’s only agreements.

If a trade union did not have as members a majority of the employees in the bargaining unit, then it would be up to the employer to agree or not to agree to conclude a member’s only collective agreement. On the other hand, where a trade union could show that its members made up a majority of employees in the bargaining unit, then it would be open to the trade union to compel the employer to bargain for a members-only collective agreement by seeking to obtain a majority support determination from the Fair Work Commission.[[19]](#footnote-19)

**Conclusion**

In these reflective speaking notes, I have argued that federal labour law should be amended to enable trade unions to fully represent their members by entering into members only collective agreements with employers. In my view, this would not simply revitalise the trade union movement, but it would enable members to obtain full representation of their interests. A by-product would be that this extra element of choice would free up the labour market where the requirements for collective agreements are tightly constrained.

1. Emeritus Professor University of Sydney, and consultant HWL Ebsworth LAWYERS. I thank my wife, Professor Mary Crock for assisting me in proofing these speaking notes. [↑](#footnote-ref-1)
2. My interest in members-only collective agreements was aroused when I read the work of the American labour law scholar Charles Morris. See Charles J Morris, “Members-Only Collective Bargaining: Get Ready for an Old Concept with a New Use”, (Charles J Morris blog on labor relations, 1 August 2013). [↑](#footnote-ref-2)
3. The *Industrial Relations Reform Act 1993* (Cth) inserted a new Part VIB into the *Industrial Relations Act 1988* (Cth). [↑](#footnote-ref-3)
4. *Australian Constitution,* s 51(xxxv). [↑](#footnote-ref-4)
5. *Australian Constitution,* s 51(xx). [↑](#footnote-ref-5)
6. *Fair Work ACT 2009* (Cth), (the FW Act). [↑](#footnote-ref-6)
7. *FW Act,* Part 4-2. [↑](#footnote-ref-7)
8. *FW Act*, Part 4-2 Division 3. [↑](#footnote-ref-8)
9. *FW Act*, s 183. [↑](#footnote-ref-9)
10. *Electrolux Home Products Pty Ltd* v *Australian Workers’ Union* [2004] HCA 40. [↑](#footnote-ref-10)
11. *FW Act*, s 47(b)(vi). [↑](#footnote-ref-11)
12. FW Act Part 3-1. [↑](#footnote-ref-12)
13. FW Act 2009 Part 3-1 Division 4, and see *Klein* v *Metropolitan Fire and Emergency Services Board* [2012] FCA 1042. [↑](#footnote-ref-13)
14. *Fair Work (Registered Organisations) Act 2009* (Cth). [↑](#footnote-ref-14)
15. This doctrine was enunciated by the High Court in *Metal Trades Employers Association and Ors v Amalgamated Engineering Union and Ors* (1935) 54 CLR 387. [↑](#footnote-ref-15)
16. For comment on recent aspects of the Metal Trades Doctrine, see Karen Wood and Ron McCallum, “Crafting the Law: The High Court and Superannuation as an Industrial Matter”, (1995) 8 *AJLL*, 121. [↑](#footnote-ref-16)
17. *Re Hospital Employees; HREA Award* (1997) 75 IRE 7. I gave affidavit evidence in this matter in support of a members-only award. [↑](#footnote-ref-17)
18. *Employment Relations Act 2000* (NZ) Part 5. [↑](#footnote-ref-18)
19. *FW Act*, ss 236-237. [↑](#footnote-ref-19)