Collective Bargaining:
Delivering for the public interest?

The Ron McCallum Debate 2018
Discussion Paper

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The 8th Annual Ron McCallum Debate 2018

Discussion Paper

Collective Bargaining: Delivering for the public interest?

Freedom of association is a fundamental human right recognised by international instruments to which Australia is a signatory;[1] the principles of freedom of association are determined by reference to international labour standards, primarily, International Labour Organization (ILO) Conventions No. 87[2] and No. 98[3]. These conventions have been ratified by Australia and reaffirmed by the ILO in its *Declaration of the Fundamental Principles and Rights at Work.*[4] Among the principles of freedom of association, and integral to genuine worker voice is collective bargaining. Collective bargaining is the primary means by which workers can participate in establishing fair wages and conditions of work and ensuring the principles of dignity and equity are reflected in workplaces.

In the Australian context collective bargaining is facilitated at an enterprise level. Agreements made in accordance with the provisions of the *Fair Work Act*[5] may be reached without the involvement of trade unions and absent any actual process of bargaining. Parties to an enterprise agreement may only reach agreement on a prescribed range of issues and are proscribed from bargaining with regard to what are termed 'unlawful' content. The Australian bargaining regime has been subject to repeated criticism by the ILO supervisory bodies.

One marked consequence of ineffective bargaining structures has been wage stagnation, over time Australia has experienced declining wage growth within a productive economic environment recording increasing profits. Further, the failure of the system is evidenced in the declining instance of enterprise bargaining, resulting in increasing reliance on 'safety net' conditions provided by Modern Awards and the National Employment Standards (NES).

In light of this we ask:

Can collective bargaining deliver for employees, employers and the public interest?

If so, what should be the scope, level and mode of bargaining?

If not, what alternatives are appropriate for determining conditions of work?

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 22; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 8.
[2] *Freedom of Association and Protection of the Right to Organise Convention* (ILO Convention No.87), opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950).
[3] *Right to Organise and Collective Bargaining Convention* (ILO Convention No.98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).
[4] International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1998 86th Session, Geneva.
[5] *2009* (Cth) (FW Act).

About the Australian Institute of Employment Rights

The Australian Institute of Employment Rights (AIER) is an independent, not-for-profit organisation with the following objective:

> *Adopting the principles of the International Labour Organization and its commitment to tripartite processes, the Australian Institute of Employment Rights will promote the recognition and implementation of the rights of employees and employers in a co-operative industrial relations framework.*

The AIER seeks to realise its objective with academic rigor and professional integrity. The AIER includes employer and employee interests in its makeup, membership and operation. It is also fortunate to have included in its governance structure an advisory body of representatives from the academic and legal fraternity.

This paper is based on the belief that any systems regulating workplace relations must be founded in principles which reflect:

- Rights enshrined in international instruments which Australia has willingly adopted and which as a matter of international law is bound to observe;
- Values which have profoundly influenced the nature and aspirations of Australian society and which are embedded in Australia's constitutional and institutional history of industrial/employment law and practice. Particularly those values integral to the 'important guarantee of industrial fairness and reasonableness'[6];
- Rights appropriate to a modern employment relationship which are recognised by the common law.

The AIER has developed an instrument, the *Australian Charter of Employment Rights*, based on the three sources of rights identified above. The Charter is a unique and appropriate reference tool for examining the rights and responsibilities of employers and employees in Australia; evaluating the existing system of regulation; and considering the future of workplace relations in the context of global, economic, technological and societal change. With respect to collective bargaining structures the Charter provides the right to fairness and balance in industrial bargaining.

Note: The purpose of this Discussion Paper is to inform the Ron McCallum Debate. It sets out the approach of the Australian Institute of Employment Rights (AIER) to the issues and proposes discussion questions that speakers and participants may wish to reflect upon and discuss during the Debate. The paper represents the views of AIER and its authors and in no way represents the views of any participant.

[6] *New South Wales and Others v Commonwealth* [2006] HCA 52, per Kirby J at [523-5].

Collective Bargaining: Delivering in the public interest?

In previous years the Ron McCallum Debate has explored the instance and impact of inequality and insecurity within Australian workplaces and society, as well as the extent to which our workplace relations system is failing to deliver fair and equitable outcomes for workers.

This year our debate examines collective bargaining, a key mechanism for setting wages and conditions of employment and for facilitating worker voice. For the purposes of informing the debate this paper will briefly examine the history of collective bargaining in Australia before turning to bargaining as facilitated by the *FW Act.*

This paper advances the argument that the current Australian system of bargaining is failing. Increasingly private sector employers, are walking away from bargained outcomes. Bargaining facilitated by the *FW Act* does not comply with collective bargaining principles as understood by reference to international standards. Further, ineffective bargaining is evidenced in the Australian experience by wage stagnation, and the decreasing number of enterprise agreements being made under the system.

This paper supports the proposition that collective bargaining can deliver fair outcomes for employers, employees and the public interest but that in order to do so it must be undertaken in accordance with those principles set out in international standards to which Australia is a party.

Collective Bargaining in Australia: A brief history

Until the early 1990s, the setting of Australian wages and conditions of employment occurred primarily through the making of Awards. Awards were the result at State and Federal level of disputes settled via the processes of conciliation and arbitration. An element of collective bargaining existed under this system with respect to enterprise awards as well as 'over award' bargaining which often resulted in agreements devoid of any statutory underpinning and as such were not easily enforced.

In the late 1980s, large employers began to agitate for the creation of a system of enterprise bargaining. The Business Council of Australia (BCA) released a major report in 1989 calling for the introduction of enterprise bargaining, claiming such a system would result in a 25% boost in enterprise productivity.[7]

[7] Industrial Relations Study Commission, Business Council of Australia, *Enterprise-Based Bargaining Units a Better Way of Working Report* (1989) part 1; and Yi-Ping Tseng and Mark Wooden, 'Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey' (Working Paper No 8/01, Melbourne Institute Working Paper No. 8/01, Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, July 2001).

The *Industrial Relations Reform Act 1993* (Cth) (IR Reform Act) provided for the negotiation of both union and non-union enterprise level collective agreements,[8] 'with awards now treated as creating a "safety net" of minimum conditions and the AIRC discouraged from arbitrating disputes that might be resolved through enterprise bargaining'.[9] The *IR Reform Act* also enacted Australia's first legal right to strike, with application limited to the negotiation of enterprise agreements and during the recognised bargaining period. Phillipa Weeks described the *IR Reform Act* as 'undeniably contributing to the cultural, paradigmatic change — by reducing the role of arbitration, by admitting non-union parties to bargaining, and … by weakening legal supports for union security and union recognition'.[10]

The *Workplace Relations Act* 1996 (Cth) (WR Act) took further steps to promote enterprise level collective bargaining as well as introducing individual workplace agreements. The principles of conciliation and arbitration were abandoned with the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices), which shifted the constitutional basis for the federal workplace relations system to the corporations power.[11] Under *Work Choices* terms and conditions of employment were now negotiated at an enterprise or individual level, no longer subject to a no disadvantage test and underpinned by a reduced safety net.

The *FW Act* abolished individual workplace agreements and retained enterprise level collective bargaining at the heart of the system. The objects of the *FW Act* include 'achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action'.[12]

This paper will now examine collective bargaining under the *FW Act* in terms of the parties to agreement making and the role of trade unions, as well as the process, level and scope of bargaining. The paper will assess these areas against international standards and the Charter before moving to a discussion of the success or otherwise of the system.

[8] Breen Creighton, Anthony Forsyth and Shae McCrystal, 'Evaluating the Australian Experiment in Enterprise Bargaining' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 1, 2.
[9] Mark Bray and Andrew Stewart, 'From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work (2013) 34 *Adelaide Law Review* 21, 26.
[10] Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, 1995), 200 cited in Mark Bray and Andrew Stewart, 'From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work (2013) 34 *Adelaide Law Review* 21, 27.
[11] *Australian Constitution* s 51(xx).
[12] *FW Act* s 3(f).

Collective Bargaining under the *Fair Work Act*

Parties to an agreement and the role of trade unions

Traditionally collective bargaining is understood as a process of 'voluntary negotiation between employers or employers' organisations and workers' organisations'[13] for determining the terms and conditions of work. In accordance with this understanding trade unions are an essential party to the process of collective bargaining; unionisation providing the mechanism by which worker power may be bolstered to match that of the employer. Further, bargaining conducted through trade unions ensures employee interests are represented by parties with the skill and knowledge to achieve favourable outcomes.

Non-union enterprise agreements have been a feature of the Australian system since the introduction of enterprise bargaining. Collective bargaining under the *FW Act* occurs, with little exception, at a single enterprise level, with trade unions relegated to the role of bargaining representatives rather than acting as a party to the agreement. Unions are assigned under the *FW Act* as default bargaining representatives and may seek to be covered by agreements even where they have had little role in the making of the agreement. However, the *FW Act* does not require that employers notify relevant unions of intended negotiations. The absence of such a requirement results in agreements negotiated directly with employees without union involvement or knowledge. In response to this, a recommendation was made as part of the 2012 review of the *FW Act*[14], that bargaining notices issued by employers should be lodged with the Fair Work Commission (FWC) for publication on the FWC website. Rosalind Reed notes that this recommendation was not taken up.[15]

One challenge to the relevance of collective bargaining as an approach to wage and conditions setting is the engagement of workers on an independent contract basis in the gig or platform economy. While very real questions around the true status of workers in the gig economy exist, the continued treatment of such workers as independent contractors leaves the terms and conditions under which they work generally unregulated and not subject to the general protection of a safety net.[16] One response to this this has been by way of

[13] *ILO Convention No. 98*, art 4.
[14] Ron McCallum, Michael Moore, John Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Commonwealth of Australia, 2012) 145.
[15] Rosalind Reed, 'The Role of Trade Unions and Individual Bargaining Representatives' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 69, 75.
[16] For discussion of the difficulties faced by independent contractors bargaining under the *Competition and Consumer Act 2019* (Cth) see Shae McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 139.

agreements between Unions NSW and the Airtasker platform in which conditions including recommended rates, insurance and safety requirements have been set.[17]

The bargaining process

The ILO describes collective bargaining processes as ensuing employers and workers have 'an equal voice in negotiations…[allowing] both sides to negotiate a fair employment relationship and [prevent] costly labour disputes'.[18] The terms of the *FW Act* provide that enterprise bargaining be conducted by the parties in 'good faith' and sets out six principles to be followed.[19] These principles require that parties attend meetings, disclose relevant information, respond and give consideration to proposals, refrain from unfair conduct and recognise and bargain with each other. These principles do not require parties to make concessions nor do they require parties to conclude an agreement, essentially providing a framework for agreement making in which no actual bargaining, in the ordinary sense of the word, need occur. When coupled with the limited circumstances under which workers may engage in strike action the 'bargaining' process provided by the *FW Act* cannot be said to provide workers and employers an 'equal voice' in negotiation. Chaudhuri and Sarina describe this process as one facilitating 'agreement making by informed consent' as opposed to 'collective bargaining'.[20]

The *FW Act* further provides that following the nominal expiry date of an agreement, a party to negotiations for a new agreement may apply to the FWC, in a circumstance of deadlock to have the existing agreement terminated.[21] The effect of terminating agreements in accordance with these provisions is that the terms and conditions of employment revert to those of the safety net provided by the relevant Modern Award and NES. Where these conditions are substantially below those of the agreement in question, the negotiating power of the workforce is significantly reduced; 'Before termination of an agreement, a no vote to a proposed enterprise agreement by an employee means that they retain…existing conditions. After termination…a no vote becomes a vote for retention of safety net terms and conditions.'[22] The effect of these provisions goes further than simply failing to deliver an equal voice in negotiation; it unreasonably bolsters the already more powerful voice of the employer.

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[17] Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions NSW' (2017) 28(3) *Economic and Labour Relations Review* 438.
[18] International Labour Organization, *International Labour Standards on Collective Bargaining* https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/collective-bargaining/lang--en/index.htm.
[19] *FW Act* s 228.
[20] 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, 139.
[21] *FW Act* s 226.
[22] 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, 134.

In recent times the FWC has moved to improve bargaining processes and the relationship between employers and unions by the introduction of interest-based bargaining via their *New Approaches* jurisdiction. Interest based bargaining is a process by which parties are assisted in identifying their individual or shared interests and working towards a means by which the interests of each party may be met without injuring the other. This approach is not limited to the making of agreements and can be used to assist with change management and to develop cooperative and productive relationships. This approach was criticised by the Productivity Commission in its 2015 review of the workplace relations system for being time consuming and costly.[23] Bray, Stewart and Macneil argue for continued investment in in interest-based approaches and a greater commitment by the FWC to the *New Approaches* jurisdiction.[24]

The scope of bargaining

In accordance with ILO principles the content of collective agreements may include broadly defined terms and conditions of work and the relationship between employers, workers and their organisations.[25] In this sense:

> "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are not normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.).[26]

The *FW Act* limits the allowable content of enterprise agreements to those matters genuinely 'pertaining to the employment relationship'.[27] This limitation is problematic, firstly in that it is difficult to apply in any practical sense, the scope of matters found to genuinely pertain to the employment relationship is confusing and nuanced. Since the commencement of the *FW Act*, the CEACR have twice noted the difficulties around the notion of matters pertaining[28] and requested the provisions be review in consultation with the social parties to expand the scope of bargaining.

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[23] Productivity Commission 2015, *Workplace Relations Framework*, Final Report, Canberra, 171-2.
[24] Mark Bray, Andrew Stewart, Johanna Macneil, 'Bargaining, Cooperation and 'New Approaches' under the Fair Work Act' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018) 93, 116.
[25] Bernard Gernigon, Alberto Odero, and Horacio Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *International Labour Review* 33, 39-40.
[26] International Labour Office, *Giving Globalization a Human Face, General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 101st Session 2012, Report III (Part 4B), Geneva [215].
[27] *FW Act* ss 172, 186.
[28] CEACR *Direct Request concerning Convention No. 87 (Australia)*, 2011; CEACR *Direct Request concerning Convention No. 87 (Australia)*,2013.

To this end the CEACR have also been critical[29] of the of prohibition of 'unlawful' content[30]. Such content includes extending unfair dismissal protections or right of entry provisions beyond that of the *FW Act*. As well as clauses allowing for strike pay or union bargaining fees. The Committee has noted that:

> legislation or measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention, and that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties.[31]

The limiting provisions of the *FW Act* do not serve to meet Australia's obligations as an ILO member state to respect, promote and facilitate free and voluntary collective bargaining. In order to affect a true right to freedom of association the Australian Government should, as requested by the CEACR, review the restrictions to bargaining content and in consultation broaden the scope of collective bargaining.

The scope of enterprise agreements in the construction and building industry is even further restricted following the introduction of the *Code for the Tendering and Performance of Building Work 2016* (Cth).[32] This code provides general restrictions on the content of agreements for enterprises tendering for Commonwealth projects. The restrictions include clauses that impose limits on the right of the enterprise to manage its business or improve productivity, discriminate against classes of employees or subcontractors or are inconsistent with the 'freedom of association' provisions of the code. These restrictions are broadly defined and are in direct violation of Australia's international obligations to upholding the right to freedom of association.

The level of bargaining

At international law, the level at which collective agreements are negotiated is to be determined by the parties to the negotiation, the ILO Committee on Freedom of Association has said:

> According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.[33]

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[29] CEACR *Observation concerning Convention No. 87 (Australia)*, 2009; CEACR *Observation concerning Convention No. 87 (Australia)*, 2011; CEACR *Observation concerning Convention No. 87 (Australia)*, 2013; CEACR *Observation concerning Convention No. 87 (Australia)*, 2016.
[30] *FW Act* ss 186(4), 194, 353, 470-5.
[31] CEACR *Observation concerning Convention No. 87 (Australia)*, 2016.
[32] For further discussion, see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 2 of 2018* (2018) 48-72.
[33] International Labour Organization, 1998a, Case No. 1887 (Argentina) [103].

As discussed earlier, the Australian experience of collective bargaining is primarily one of enterprise level bargaining. In accordance with the principle described above, bargaining at an enterprise level is in conformity with ILO principles where that level of bargaining has been freely determined by the negotiating parties. The issue at play with regard bargaining under the *FW Act* is not that multi-enterprise agreements cannot be made, but that industrial action may not be utilised to support bargaining at this level. Without the coercive lever of industrial action there is no means by which an employer is compelled, outside of the low-wage bargaining stream, to bargain at a multi-employer or industry level.

The low-wage bargaining stream[34] enables employers in enterprises with no history of agreements to be compelled to engage in bargaining for a multi-employer agreement. Again however, there is no recourse to industrial action in support of employee claims, in circumstances where no agreement is reached the FWC is empowered to impose a 'workplace determination'.[35] These provisions have proven ineffective, only two applications for a declaration under this section have been made in the last five years and both were rejected by the Commission.[36]

One consequence of single enterprise bargaining has been record-low wage growth. The OECD recently observed 'bargaining systems that coordinate wages across sectors tend to be linked with lower wage inequality'.[37] Additionally, research undertaken by the Centre of Future Work[38] indicates a close statistical relationship between reduced strike activity and the deceleration of wage growth. To address the issue of rising inequality and stagnating wages Australia must embrace effective bargaining structures, implementing mechanisms to facilitate industry level bargaining and where necessary industrial action to support claims at this level.

Enterprise level bargaining creates two particular challenges for trade unions. Firstly, it is resource heavy, requiring bargaining to be undertaken with each individual enterprise. Secondly, the lower numbers of workers and certainly union members at enterprise level cannot deliver adequate bargaining power to establish an equal negotiating voice, thus delivering lesser outcomes for the employees. In the Australian context the restrictions on a union's ability to mobilise employees through industrial action further weakens this position, failing to address the inherent power imbalance between employers and their employees.

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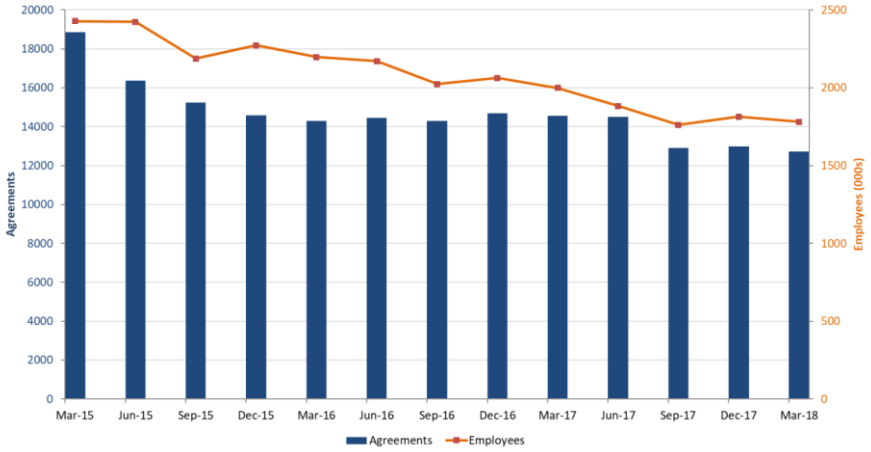
[34] *FW Act* s 243.
[35] *FW Act* ss 262-3.
[36] *United Voice* [2014] FWC 6441 (29 September 2014); *Australian Nursing Federation v IPN Medical Centres Pty Ltd and Others* [2013] FWC 511 (17 June 2013).
[37] Workplace Express, *Industry Wide Bargaining a Cure for Wage Stagnation: OECD* (6 July 2018) https://www.workplaceexpress.com.au.
[38] Jim Stanford 'Historical Data on the Decline in Australian Industrial Disputes' (Briefing Note, Centre for Future Work, The Australia Institute 2018) https://www.futurework.org.au/decline_in_strike_frequency.

The state of enterprise bargaining in 2018

Enterprise bargaining has now been a formal part of the Australian industrial relations system for about 25 years. There is evidence that the system has now begun to run out of steam and that 'bargaining fatigue' has set in. The number of agreements made, and employees covered by those agreements has continued to decline over recent years. In March 2018 there were 12,733 current agreements (not yet expired or terminated), covering slightly below 1.8 million employees.

Chart 4 - Current agreements and employee coverage – March 2015 to March 2018[39]



The table below extends this time frame and shows the number of agreements current on the last day of selected quarters from September 2010 to March 2018 [the latest figures available]:

Table 1: Number of agreements and employees covered, all sectors, selected quarters

[Source: Trends in Enterprise Bargaining, various issues]

	Sept 2010	Sept 2011	Sept 2012	Sept 2013	Sept 2014	Sept 2015	Sept 2017	Mar 2018
All industries agreements	24711	22692	23220	23060	19049	15229	12913	12733
All industries Employees ('000)	2424.0	2493.5	2327.7	2485.5	2318.5	2254.5	1759.6	1781.8

[39] *Trends in Federal Enterprise bargaining*, March 2018, Chart 4.

It can be seen from this table, that enterprise bargaining both in numbers of agreements and employees covered peaked in 2011-12 and has been in steady decline since with more rapid decline over the past couple of years. There are now about half the agreements in force now as there were in 2010 and the number of employees covered is about 700,000 fewer in an economy that has continued to expand.

The industry sector figures as at March 2018 are set out in Table 2

Table 2 – Number of agreements and employees covered, Agreements current on the last day of the quarter.

[Source: Trends in Enterprise bargaining, March quarter 2018, Table 8]

Industry	No. of agreements	Employees covered (000)
Agriculture, Forestry and Fishing	140	12.5
Mining	360	38.9
Manufacturing	1992	126.1
Non-metal manufacturing	1287	82.8
Metal manufacturing	705	43.3
Electricity, Gas, Water, Waste Services	345	39.5
Construction	4285	95.0
Wholesale Trade	459	29.3
Retail Trade	200	41.4
Accommodation and Food Services	296	23.5
Transport, Postal, Warehousing	1023	149.7
Information, Media, Telecomm	68	42.5
Financial and Insurance Services	113	141.1
Rental, Hiring, Real Estate	228	8.7
Professional, Scientific, Technical Services	359	27.7

Administrative and Support Services	454	34.2
Public Administration and Safety	536	289.5
Education	434	250.8
Health and Community Services	980	360.1
Arts and Recreation Services	136	40.4
Other Services	325	30.9
All sectors	**12733**	**1781.8**

As can be seen from Table 2, the Construction sector accounts for about a third of all agreements but for less than 100,000 of all employees covered. There are a significant number of agreements in the metal and manufacturing sectors. There are almost as many agreements in the combined metal and manufacturing sectors as in construction and they cover some 252,000 employees. Agreements in other private industry sectors, with the exception of Financial services [just 113 agreements but a respectable 141,000 employees], cover relatively few employees.

The bulk of employees covered by agreements are in public service sectors such as Public Administration and safety [289,000], Education [250,000] and Health and Community Services [360,000]. Together, these three sectors contain about half of all employees covered by agreements.

The concentration of agreements in the construction, metal and manufacturing sectors reflects longstanding bargaining practices in those industries. The dominance of the public sector in terms of the number of employees covered by agreements may reflect the strength of union density in the public sector, compared to that in the private sector [now 10% or less].

Table 3 – Agreements current at the end of the end of the March qtr 2018

[Source: Trends in Enterprise bargaining, March quarter 2018, Table 14]

Agreements – union covered	
No. of agreements	8249
AAWI (%)	2.8
Employees ('000)	1619.4
Agreements – no union covered	
No. of agreements	4484
AAWI (%)	2.6
Employees ('000)	162.4
All agreements	
No. of agreements	12733
AAWI (%)	2.8
Employees ('000)	1781.8

This table suggests that despite union members being very much in the minority in the workforce, union agreements are dominant in terms of the number of agreements [2:1] and in terms of employees covered [10:1]. However, the use of the term 'union covered ' agreements needs to be treated cautiously.

As the Trends in Federal Enterprise Bargaining report notes:

> Data about unions covered by agreements made under the Fair Work Act 2009 may not provide an accurate reflection of union involvement in bargaining for agreements. Under the Fair Work Act 2009 it is possible for a union to have been involved in bargaining for an agreement and then not be covered by the approved agreement. It is also possible for a union to be covered by an agreement because they were a bargaining representative, even if they did not take an active role in the negotiations.

Thus this term tells us little about the actual involvement of unions in the initiation of, bargaining for and overall influence of a union or unions in the making of any particular agreement.

An important question is whether employees are benefitting from enterprise bargaining and, if so, are they benefitting equitably? Also, are the productivity benefits claimed for enterprise bargaining delivering for industry and the nation as a whole?

The ABS Employee Earnings and Hours survey contains tables which provide information by method of pay setting; that is, by whether employees were paid by award only, by collective agreement or by individual arrangement [e.g. over award pay and or conditions].

The 2014 survey [released January 2015] data is as follows:

Employee Earnings and Hours, Australia, May 2014

[Table 4 NON-MANAGERIAL EMPLOYEES, Number of employees, Average weekly total cash earnings, Average weekly total hours paid for, Average hourly total cash earnings–Method of setting pay, Industry]

	Award only	Collective agreement	Individual arrangement	All methods of setting pay
	AVERAGE HOURLY TOTAL CASH EARNINGS ($)			
Mining	27.80	53.10	58.60	56.20
Manufacturing	22.90	33.70	36.40	33.50
Electricity, gas, water and waste services	26.10	45.90	44.90	44.20
Construction	21.20	49.40	36.90	39.00
Wholesale trade	24.30	34.70	35.80	34.20
Retail trade	22.60	22.40	29.50	24.90
Accommodation and food services	22.80	21.80	25.20	23.10
Transport, postal and warehousing	26.90	37.70	32.30	34.70
Information media and telecommunications	24.20	42.70	42.50	41.80
Finance and insurance services	23.20	38.40	40.80	38.70
Rental, hiring and real estate services	21.90	33.00	34.30	31.50
Professional, scientific and technical services	23.90	40.60	41.00	39.60
Administrative and support services	25.40	34.70	36.60	32.40
Public administration and safety	39.90	39.90	35.80	39.60
Education and training	27.70	41.60	36.00	40.60
Health care and social assistance	32.80	38.40	34.20	36.50
Arts and recreation services	23.40	31.50	34.30	31.20
Other services	23.80	33.60	29.70	28.70
All industries	**25.90**	**37.80**	**36.70**	**35.30**

This table shows that in most industries [ignoring public administration and safety] employees covered by collective agreements are paid significantly better than those on awards.

There were two significant exceptions to this: retail and accommodation and food services [hospitality]. In the retail sector, agreement paid employees earned 20 cents per hour **less** than employees in this sector paid by award only. In the hospitality sector, the position was even worse: agreement covered employees were being paid $1.00 per hour **less** than those on awards.

How is this possible? Under the Act, employees are supposed to be "better off overall" on an agreement than on an award. The outcomes in the retail sector may well reflect what the Fair Work Commission has now determined in relation to the Coles Agreement[40] and other agreements:[41] that the agreements did not provide terms and conditions better than the award for all employees.

The 2016 EEH survey data shows the following:

Average hourly total cash earnings–Method of setting pay, Industry

[Employee Earnings and Hours, Australia, May 2016 Table 4 NON-MANAGERIAL EMPLOYEES]

Industry	Award only	Collective agreement	Individual arrangement	All methods of setting pay
Mining	*	*	*	56.60
Manufacturing	23.70	35.30	36.20	34.10
Electricity, gas, water and waste services	27.70	48.50	47.40	46.80
Construction	23.60	49.30	39.10	38.70
Wholesale trade	24.30	36.40	35.30	34.00
Retail trade	23.60	24.20	30.00	26.20
Accommodation and food services	**23.60**	**22.00**	26.80	23.90
Transport, postal and warehousing	29.60	39.20	33.90	36.30
Information media and telecommunications	26.60	44.20	47.80	45.50
Finance and insurance services	*	42.90	*	43.30
Rental, hiring and real estate services	25.10	30.90	35.60	32.70
Professional, scientific and technical services	*	*	*	43.50
Administrative and support services	26.30	32.80	38.60	33.00
Public administration and safety	41.90	41.90	35.20	41.70
Education and training	40.90	44.90	41.90	43.60
Health care and social assistance	38.00	41.30	38.00	39.80
Arts and recreation services	24.50	30.40	36.60	31.70
Other services	24.70	33.30	32.60	30.20
All industries	**29.60**	**39.60**	**38.50**	**37.00**

* Data not available for publication

For 2016, retail employees have improved their position, those paid by collective agreement now earn on average 60 cents per hour [2.5% more] above those who were paid by the award only.

By contrast, agreement covered workers in the hospitality sector have gone backwards: award-based workers now earn $1.60 per hour [7%] more than their colleagues on agreements which are supposed to ensure that they are better off overall. How is this possible?

In the hospitality industry, many agreements are non-union agreements which 'roll up" weekend and evening penalty rates into one loaded award rate payable for all hours

[40] https://www.fwc.gov.au/documents/decisionssigned/html/2016fwcfb2887.htm
[41] https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb3610.htm#P27_1245

worked. Based on the 2014 and 2016 EEH surveys these agreements have not being doing this in a way sufficient to provide that employees were better off under the agreement.

In a recent decision – the 'Loaded Rates Agreements' case handed down in June this year, the Commission looked at the amount by which rates of pay would need to be increased to compensate employees for the elimination of penalty rates of pay. Five agreements in all were considered: three in the security industry and two retail agreements.

The required increases in loadings were substantial. Even for 'permanent', i.e. non-casual employees, the loadings were required to be up to 49% above the award rate to pass the BOOT depending on the pattern of hours worked. For some casual employees, the loading required was up to 87% of the award rate. It is likely that few, if any, agreements have contained such loaded rates although the requirements of the Fair Work Act have been clear from the beginning: that each employee must be better off under an agreement. The implications of this decision for bargaining are likely to be significant.

Note also that the overall margins for agreement-covered employees over those on awards has narrowed between 2014 and 2016. In 2014, agreement paid employees earned – across all industries – 46% more than those on awards. By 2016, this margin had narrowed to 34% on average.

Conclusion

The Australian model of enterprise bargaining is failing, producing fewer enterprise agreements. *FW Act* bargaining structures do not address the power imbalance inherent in the employment relationship and as such fail to realise the Charter right to fairness and balance in industrial bargaining. A significant consequence of this has been wage stagnation.

The AIER maintains that collective bargaining can deliver fair outcomes for employers, employees and the public interest but that to do so it must be undertaken in accordance with those principles set out in international standards to which Australia is a party. Simplification of the *FW Act* to provide free and voluntary negotiation of the level and scope of industrial agreements in one step toward improving the effectiveness of Australian bargaining structures. In recognising the reduced power of workers bargaining at all levels must be supported by an effective and genuine right to strike.

The AIER advocates for genuine cooperation at the workplace between employers, employees and their unions. A greater commitment to the FWC *New Approaches* jurisdiction and interest-based bargaining would facilitate this culture of cooperation. This approach recognises the legitimacy of all parties to the process and encourages the genuine consideration of interests.