

Workers' Rights and Labour Legislation: Reviving Collective Bargaining in Australia

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In the last generation, in most Anglophone countries, collective bargaining has been massively undermined. In a small number of cases, the election of labour party governments has excited the hope of reversing this trend. Australia has provided a singular example of these phenomena going to so far as to have a general election fought on the issue of industrial relations. Between 2007 and 2009, a new government introduced a system with legislated minimum conditions of employment and collective bargaining. Drawing on employer and union documents, case law, government statistical data, and interviews, we assess the effect of and responses to this policy change. For unions, the new framework is not ideal but the scope of collective bargaining has increased. Many employers have been concerned about the impact of the legislation and have worked within the new law to thwart unions while lobbying hard for a reversion to a system that allows for more individual agreement-making.

Introduction

In Australia, the Labor Government's Fair Work Act, 2009 had the restoration of collective bargaining as one of its central aims. This policy direction was a fundamental change after more than a decade of state-sanctioned anti-unionism and re-regulation which had enhanced managerial prerogative and transformed the regulation of work. This new labour law was part of an attempt to 'modernise' employment relations without returning to traditional forms of centralised regulation or retaining rampant individualism. Therefore, at the heart of this re-regulation lies a system of collective bargaining that is quite distinct from the framework of the previous Government's policies and from anything in a century of labour market regulation before that. Here we seek to understand how this new system is being used by the parties and, in particular, the extent to which it has stimulated collective bargaining. We begin by introducing collective bargaining and go on to locate the Australian system in a comparative and international context.

Collective Bargaining

A reflection on the extant literature on collective bargaining internationally informs our analysis of the developments in collective bargaining in Australia in recent years. Before we begin our discussion, we should recognise that collective bargaining is a term which was coined by the early, pluralist, writers who were among the founders of our discipline (Farnham 2008). It has long been recognised as a process which springs from the power imbalance between the parties to the employment relationship and as a process for resolving disputes of interest (for example, Webb and Webb 1902; Niland 1976; Fox 1985). The majority of scholarly work examining collective bargaining has approached collective bargaining through an institutional of reference. But, as numerous writers have pointed out, a key to understanding collective

bargaining is not simply to see it in these terms but also in terms of the relationships it embodies and produces. For example, collective bargaining may spring from an imbalance in power and this may generate conflict, but the process of bargaining presumes mutual dependence between the parties to it and a willingness of those involved to compromise (Flanders 1970:159; Fox 1985; McKersie et al 2008; Walton and Mackersie 1965). 'Bargaining' also, of course, presumes that one party is attempting apply pressure to the other side for, as Clegg (1976: 5) stated, 'mere representation of views or appeal for consideration is not bargaining'. It is in effect a form of joint regulation of the terms of employment (also Dabscheck 1986).

Volumes of work have been produced examining collective bargaining as a process and institution in industrial relations. We have seen important contributions in relation to the 'rights' basis of collective bargaining, for example in relation to the standing of collective bargaining in international law (Haworth and Hughes 1997). There has been considerable writing on the 'bargaining framework', that is in relation to work on, among other things, the status, level and scope of bargaining processes and outcomes (for Australia see Bray and Waring 1998). Other writers have highlighted the political dimension of collective bargaining (Chamberlain and Kuhn 1965; Flanders 1970). Others have analysed collective bargaining through a power lens (Blyton and Turnbull 2004: 227) and still others have addressed the 'outcomes of bargaining' and its capacity to address issues such as income inequality (Hayter 2011; Traxler and Brandle 2011; Freeman 2011) and efficiency gains (Fakhfakh et al 2011).

Neo-liberal discourse has led to the questioning of the value of collective bargaining, portraying it as blocking labour market flexibility and impacting negatively on the efficiency of enterprises (for an overview, see Hayter 2011). This view has been central to employer strategy and public policy for many years, matters to which we now turn.

Old and new labour legislation

In the many years since the end of the Keynesian era, there have been marked changes in labour legislation, employer strategy, union power and the status of collective bargaining in most market economies, perhaps most particularly in the English-speaking world. In countries such as the United Kingdom, New Zealand and Australia, where union membership, collective bargaining and industry and national level agreement-making had been the norm, major policy transformations from the 1980s and 1990s undid these arrangements. At the same time, in the United States, within a largely stable federal system of labour law, employers and State governments gradually eroded the system of collective bargaining that had been established under the Wagner Act of 1935.

More recently, after these attacks, there were changes to national politics which saw labour parties win office, exciting the hope amongst some that collective bargaining might be restored. This process began in the United Kingdom in 1999, where the 'New Labour' government adopted a model that drew in part on Wagner. The best that can be said of this legislative change, however, is that it might have reduced the rate of decline in collective bargaining. There was no full blown revival of collective bargaining (Ewing 2008). In New Zealand, where arguably the most anti-union laws of any democracy had been introduced in 1991, changes to labour law in 2000 and 2004 promised much but delivered little, perhaps because the unions had been so

weakened in the meantime and, as in other countries, the nature of the labour market had been much altered (Thickett et al 2004). In the USA, there was a brief flurry of hope during the Obama campaign and early months of his Presidency that union power might be enhanced through a proposed Employee Free Choice Act but that momentum died away and unions and their allies were left disappointed (Lichtenstein 2010). At the same time, as in all these countries and others, the credit crisis and high levels of unemployment further undermined the position of organised labour.

In Australia, as had happened earlier in the United Kingdom and New Zealand, a labour government was elected after many years of rule by a conservative, anti-union government. The politics of this development differed from those two countries and from the United States because workers' rights and labour legislation were the central and deciding issues in that election, held in 2007 (Brody 2010; Cooper and Ellem 2008a; Ellem 2012). The key piece of legislation which followed was the Fair Work Act, 2009. This set out to rework the bargaining context and framework in ways which marked it out from both the period after Workplace Relations Act, 1996 and also from the union-based arbitration system of the century before that. We now turn to an assessment the changes made between 1996 and 2005 by the conservative parties before turning to the aims and content of the Fair Work Act.

The Workplace Relations Act, 1996 and the Work Choices amendments of 2005, along with many other initiatives of the Howard Government together constituted the most far-reaching transformation of national industrial relations policy since 1904. In making these changes, the Howard Government's orientation was in accord with pressures from business lobby groups and that of conservative governments in the United Kingdom and New Zealand from 1980s on and fulfilled policies presaged in most of the Australian States in the 1990s (summarised in Cooper and Ellem 2008a). Combined with interventions in industries ranging from the waterfront (Trinca and Davies 2000), to tertiary education (Barnes 2006: 373-74) and construction (Riley and Sarina 2006: 352-3; Creighton and Stewart 2010: 838-80), and a major campaign of privatisation (Barton and Teicher 1999; Fairbrother et al 2002), the Government oversaw a fundamental change in the industrial relations landscape. Central to this political agenda was the attempt to 'unmake' labour market regulation based on state-sanctioned compulsory conciliation and arbitration. For nearly a century, arbitration tribunals had settled industrial disputes between employers and unions by making industry-wide 'awards' that applied, in effect, to almost all employees, whether or not they were members of a union. Compulsory union membership through various means was also sanctioned by the state (Cooper and Ellem 2011).

The changes between 1996 and 2005 which are most important for assessing how the Fair Work Act was designed and has come to operate were those that altered bargaining arrangements and other changes which reduced union effectiveness. We briefly address each before dealing with the Fair Work Act itself.

First, to bargaining: the most profound and controversial changes to bargaining itself were the statutory individual employment agreements known as Australian Workplace Agreements (AWAs). Introduced in 1996, these agreements – the first ever such individual contracts under national labour law – could override awards and collective agreements. The courts ruled that entering such an agreement could be a pre-condition of employment. Although AWAs never covered more than between 5%

and 7% of the workforce (see Creighton and Stewart 2010: 297-98 for a summary of debate on this figure), they had important impacts upon union coverage in many areas (notably mining, telecommunications and finance) and, especially under Work Choices, upon wages and conditions among some low-paid workers (Hearn McKinnon 2007 and Ellem 2006, on mining industry; van den Broek 2003 on telecommunications; Baird et al 2009 on low-paid workers; for AWAs more generally, Peetz 2006; Peetz and Preston 2009). The laws also allowed for non-union collective agreements. These had been available under national law since 1993 but they were much more widely used after 1996 (Briggs and Cooper 2006). Work Choices introduced still more varieties of agreement of which the 'employer greenfield agreements', in effect allowing an employer to make an agreement with him/herself was the most unusual (Cooper and Briggs 2009).

Second, there were increasing restrictions on how unions operated. If collective bargaining did take place, it was only to be at the enterprise level: the Government imposed sanctions against pattern bargaining (where unions seek common outcomes in more than one agreement). The Government also imposed limits to what terms could be in those enterprise agreements (Lee and Peetz 1998; Ross et al 2006). The major targets for those restrictions were items that had underpinned 'union security' measures: trade union training leave, the re-negotiation of workplace agreements, and union involvement in dispute settling procedures. Other limits were placed around union rights of entry and enforcement capacity. Many unions reported that their monitoring and organising capacities had been severely compromised (summarised in Cooper and Ellem 2008a).

Union officials believed that effective freedom of association was compromised by these changes and that there were still other, more explicit ways in which those freedoms were undermined. The core problem was that although the laws appeared to recognise the rights of employees to belong to a union, they did little to make that right an effective one (Ross et al 2006; Whittard et al 2007; Cooper and Ellem 2008a, 2008b; Cooper et al 2009). This was highlighted in the important BHP-Billiton case where, the Federal Court ruled that the company's offer of individual contracts and its publicly stated reluctance to negotiate with unions did not mean that the company was unlawfully interfering with workers' rights to belong to a union (Ellem 2006). In this overall context, it was little wonder that union density declined from 31.1% to 18.9 between 1996 and 2007 (ABS 6310.0).

The design of the Fair Work Act walked a line between the demands of unions for fundamental change and opposing pressures from employers. The political strength of the latter was for a time limited by electoral hostility to Work Choices but many aspects of the proposed legislation were modified during a long period of consultation. The Government did seek to get rid of Work Choices but it was also explicit in its intention that it would not be reinstating the union-based regime that had been in place until 1996 (see for example, Schneider 2008).

The Government moved quickly to address the most glaring problem of Work Choices: it passed legislation banning any new AWAs from being made. It then designed and introduced a new system which located collective bargaining as a 'top up' in the context of prescribed minimum conditions of employment. To do so, it legislated for a set of minimum conditions through the National Employment

Standards (FW Act, Part 2-2) and a system of 'modern awards' (FW Act, Part 2-3) and introduced a 'better off overall test' to try ensure that these minima would be preserved when collective agreements are made.

In practice, this means that under the current regime, collective bargaining is an individual right usually to be exercised by employees at the enterprise level, involving bargaining agents that are not necessarily unions. Unions' roles are not taken for granted, and indeed protected, as they were under the arbitral system, nor as constrained as under Work Choices. Collective bargaining has a heavy weight to bear: it is envisaged as the means to workplace change, greater productivity and higher earnings (Gillard 2008; FW Act, s 3(f)). At its heart lies good faith bargaining, the process that marks the system out compared to both the Howard era and arbitration:

Genuine, good faith bargaining at the enterprise level allows employees and employers to examine the way they work, discover new ways to improve productivity and efficiency, and share ideas that make workplaces more harmonious and flexible. And by doing so it will help lift national productivity (Gillard 2008).

Relatively new in national law (Rathmell 2008; Cooper and Ellem 2008b; Creighton 2010; Bukarica and Dallas 2010; Forsyth 2011), 'good faith bargaining' is defined in the Act thus:

- a) attending, and participating in, meetings at reasonable times;
- b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
- e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- f) recognising and bargaining with the other bargaining representatives for the agreement (s 228(1)).

These requirements may be enforced by bargaining orders issued by Fair Work Australia (FWA) on application by parties to bargaining. In turn, a breach of these orders may lead to civil penalties being imposed and the making of a 'serious breach declaration' by FWA (FW Act, s 235). Although the tests for making such a declaration are quite stringent, if one is made it may lead to arbitration of a bargaining dispute.

Employers must not refuse to bargain with an employee's representative (FW Act, s 228(1)(f)) and they must have notified employees of their right to have a bargaining representative. To the dismay of many employers, an 'employee organisation' (in effect a union) is the default bargaining representative for any employees who are members of that organisation (s 176(2)).

Does this amount to union recognition? In itself the good faith bargaining process does not. The vital mechanism is in another part of the Act, that dealing with Majority Support Determinations (MSDs). A bargaining representative may apply to FWA for an MSD. FWA must make such a determination if it is satisfied that a majority of the employees to be covered by the proposed enterprise agreement want to bargain and that the employer is resisting this (see sections 236, 237). The making of such a determination is vital because this ‘triggers the obligation to notify employees of their representation rights, and also leaves the way open for bargaining orders to be sought’ (Stewart 2009: 33).

The Fair Work Act has opened up some opportunities for unions but has by no means guaranteed them a place at the bargaining table. Unions are not ‘parties principle’ to agreements as they were under the old system and MSDs do not of themselves confer union recognition. However, there is more scope for de facto recognition than under the Howard Government. We turn now to an examination of how these processes have played out overall and in particular industry settings.

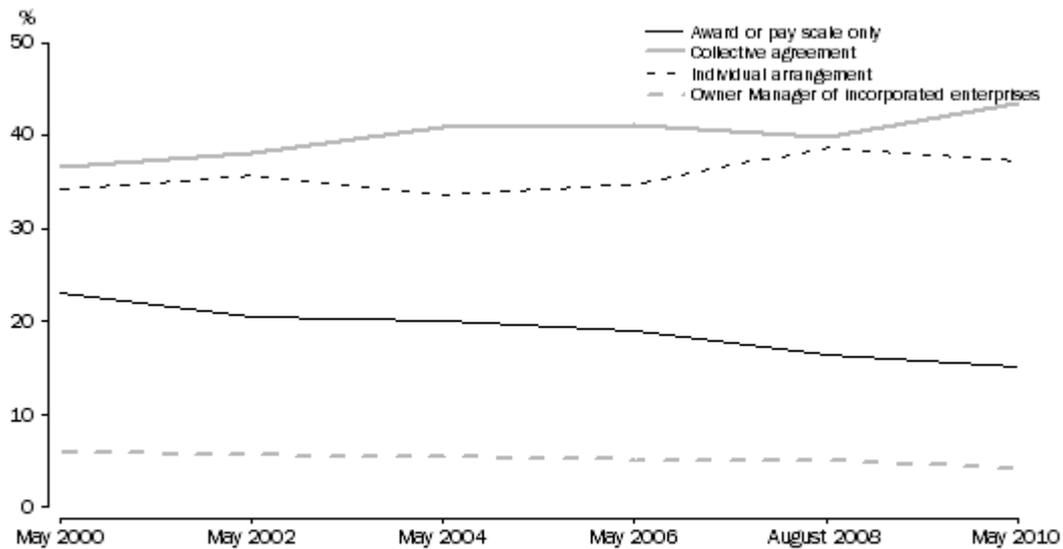
Trends in Bargaining under the Fair Work Act

If the Fair Work Act 2009 was envisaged as a stimulant to bargaining by its authors (Cooper and Ellem, 2009), then it has succeeded in its task. However, as we shall see, it has done so in, at times, perverse ways. This section of the paper discusses trends in enterprise bargaining, during the two years for which we have data, under the Fair Work Act, 2009. It draws upon ABS data on methods of setting pay in Australia and on the only other data source in relation to bargaining, the Department of Employment and Workplace Relations’ (DEWR) ‘Trends in Enterprise Bargaining’ report which draw upon DEWR’s Workplace Agreements Database (WAD) database (eg DEEWR 2011).

In October 2010, the ABS reported a significant increase in collective bargaining coverage. Using data from May 2010, the ABS reported that enterprise agreements were the most common method of setting pay for employees, reflecting a trend for over a decade. At this time, 43% of employees had their pay set this way. Coverage during the decade from May 2000 to May 2010 had increased by 7 percentage points. The ABS data reported an increase during the same decade of employees covered by individual arrangements, although of a lesser magnitude than in collective agreement coverage (it increased 3 percentage points in this period, 34% to 37%). On the other hand, the proportion of employees whose pay was set by an industry award decreased substantially, by 8 percentage points (from 23% to 15%) during the same period. Figure A demonstrates these trends.

Figure A, Methods of setting pay – proportion of employees 2000-2010

METHODS OF SETTING PAY, Proportion of employees—May 2000 - May 2010



Notes: The biennial Survey of Employee Earnings and Hours was not designed as a time series, so caution should be exercised when comparing data between different years.

The 2008 Survey of Employee Earnings and Hours was collected in respect of August.

Source: *Employee Earnings and Hours, Australia* (cat. no. 6306.0)

What does the DEWR data tell us about bargaining under Fair Work? The first observation is that the Fair Work Act seems to have stimulated a significant amount of bargaining activity. Interestingly, some of the increase in bargaining (as measured by increases in agreements lodged and in relation to ‘current’ agreements) was seen *prior* to the new Act’s bargaining framework coming into force. Figure A shows that there was a significant spike in agreement making in the last quarter of the Workplace Relations Act, the June quarter of 2009. In relation to agreement lodgement, we see a spike of 5,386 agreements in the June 2009 quarter, representing approximately 2.5 times as many lodged agreements than in the previous quarter and 3.7 times as many as for the same quarter in the previous year. This lodgement rate compares with an average of 1,810 for all other quarters over the previous three years. The June 2009 spike was even more marked in certain sectors, and these were in areas which are not typically the sites of bargaining activity, for example in retail.

Figure B: Lodgement of agreements in the Federal jurisdiction March 2000-June 2011

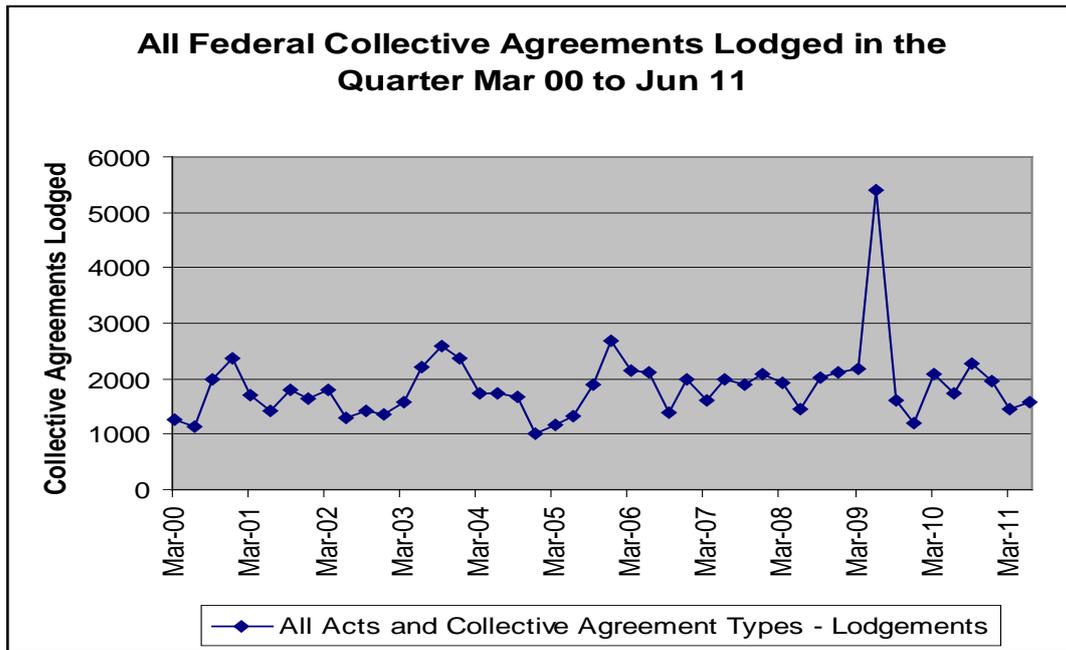
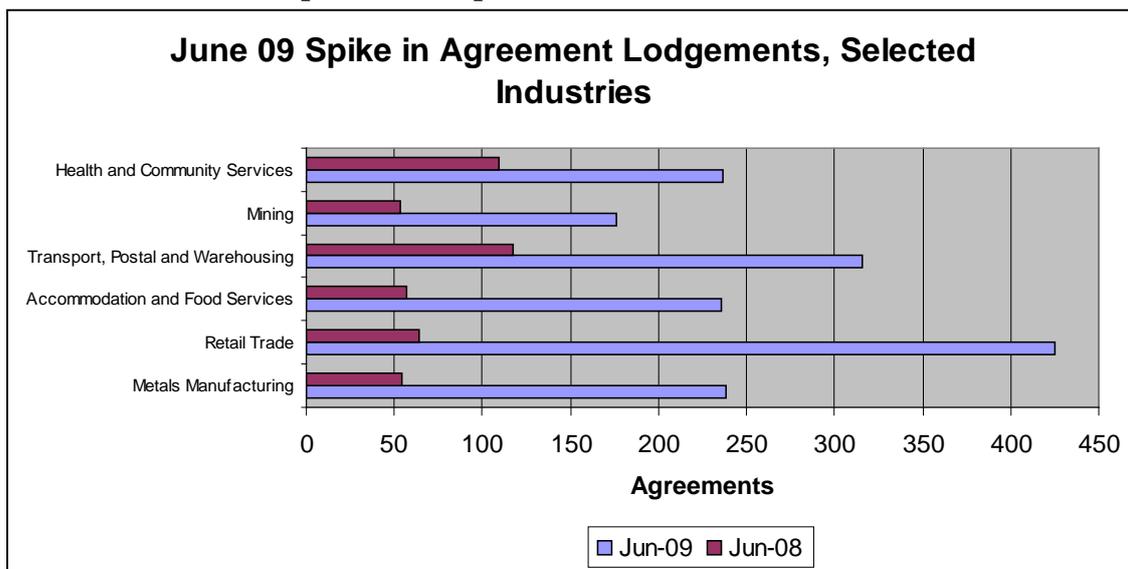


Figure C: Lodgement of agreements in the Federal jurisdiction in selected industries in June 09 quarter (compared to June 2008)



Agreement making *since* the Fair Work Act bargaining framework has been in place, has been strong, although the increase in lodgements has not been as marked as in the June 2009 quarter. DEWR data suggests that the ‘current’ - that is agreements which are approved, in operation and before their nominal expiry date - agreements reached their highest level since the introduction of enterprise bargaining in 2010 and 2011, after the Fair Work Act was in place. The record of 25,226 ‘current’ agreements was set in the December 2010 quarter, and the second highest was for the ensuing quarter, March 2011.

In terms of employees who were covered by federal jurisdiction enterprise agreements, we can detect significant growth since the Fair Work Act became operational. DEEWR data suggests that an extra 627,100 employees were covered by

enterprise agreements in June 2011, than were covered by agreements in September 2009. At the end of June 2011, some 2.57 million employees were covered by 23,403 enterprise agreements.

There are some strong variations in agreement making by sector. Table A notes the change in the number and % of current agreements in various industries.

Table A: Change in current agreements September 09 to June 2011.

	Sep-09	Jun-11	Change #	Change %
Education	686	581	-105	-15.31
Construction	7155	6173	-982	-13.72
Information Media and Telecommunications	252	222	-30	-11.90
Transport, Postal and Warehousing	1510	1515	5	0.33
Non-metals Manufacturing	2127	2185	58	2.73
Public Administration and Safety	720	751	31	4.31
Electricity, Gas, Water and Waste Services	367	388	21	5.72
Financial and Insurance Services	312	334	22	7.05
Accommodation and Food Services	1533	1719	186	12.13
Retail Trade	1763	1997	234	13.27
Mining	565	644	79	13.98
Metals Manufacturing	1186	1387	201	16.95
Art and Recreation Services	303	363	60	19.80
Administrative and Support Services	671	835	164	24.44
Other Services	422	556	134	31.75
Professional, Scientific and Technical Services	331	451	120	36.25
Health and Community Services	1216	1725	509	41.86
Wholesale Trade	311	448	137	44.05
Agriculture, Forestry and Fishing	448	669	221	49.33
Rental, Hiring and Real Estate Services	291	450	159	54.64
All Industries	22169	23403	1234	5.57
Source: Table 4, Enterprise Bargaining Trends, DEEWR, March quarter 2011				

Figure C: Current agreements in the Federal jurisdiction March 2000 to March 2011

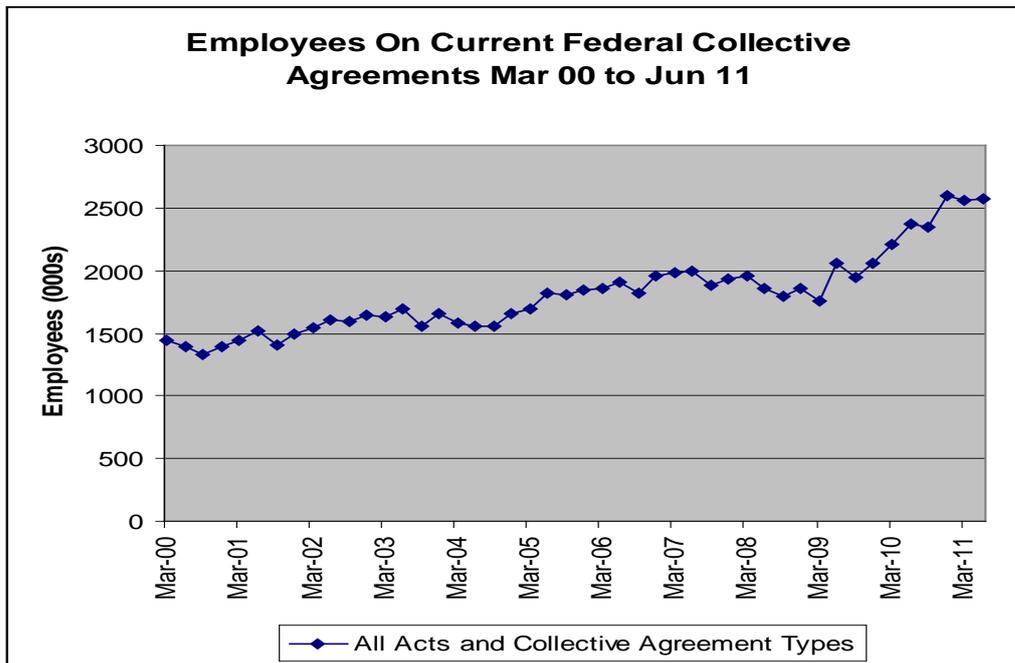
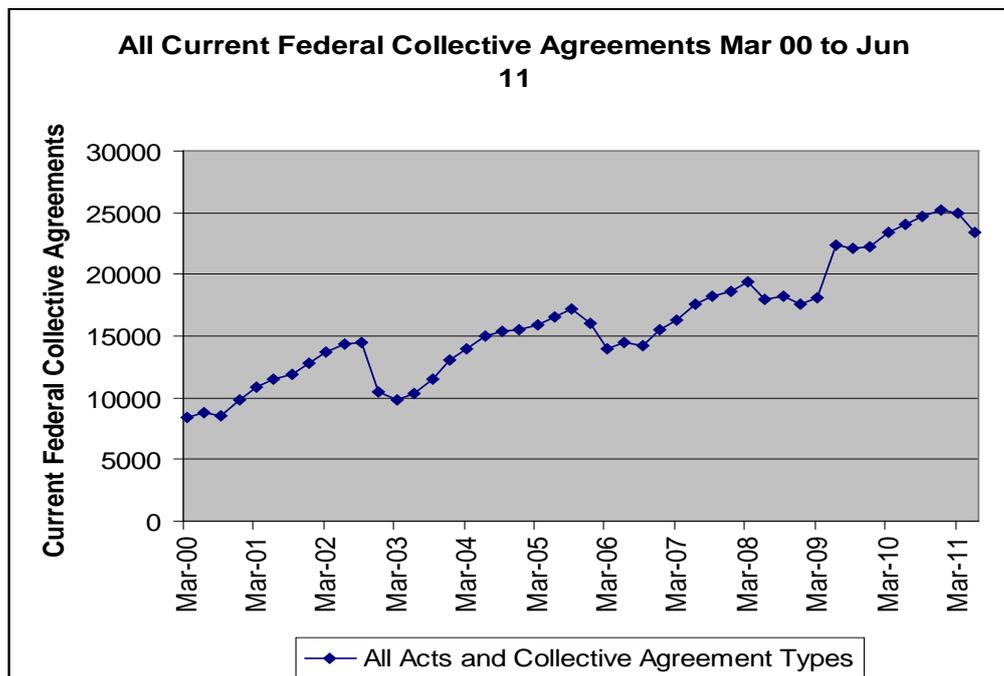


Figure D: Employees covered by current agreements in the Federal jurisdiction March 2000 to March 2011

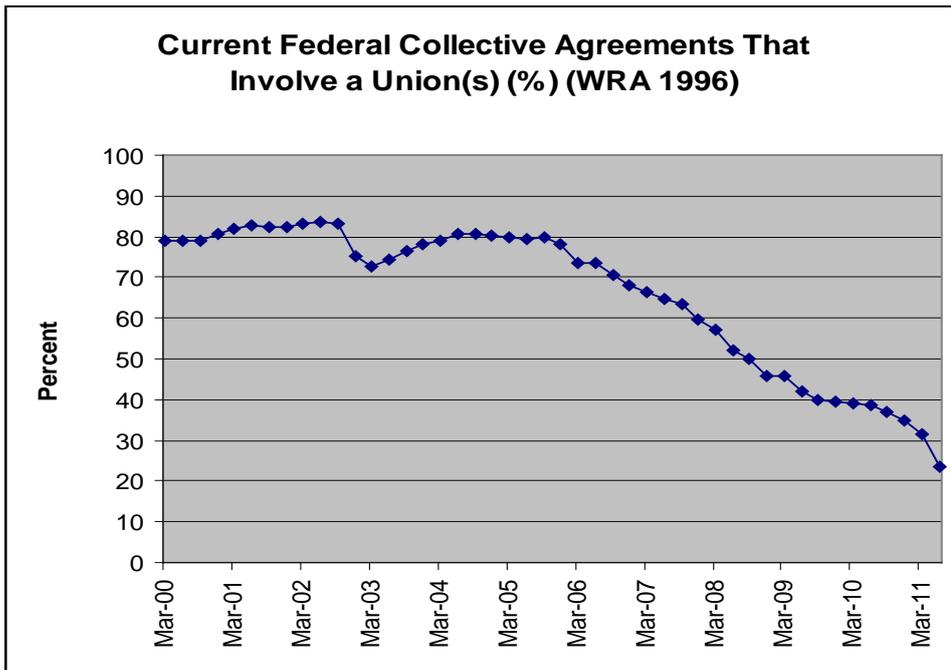


‘Non-union’ and ‘union bargaining’ under the Fair Work Act

The Fair Work Act, 2009 removes the distinction between ‘union’ and ‘non-union’ agreements evident in the Workplace Relations Act, 1996. There are four types of agreements set out in s172 of the Fair Work Act (single enterprise non-greenfields; single enterprise greenfields; multi-enterprise non-greenfields; multi-enterprise greenfields), with the distinction between streams focussing on whether agreements cover multiple or single enterprises. In the Workplace Relations Act framework, even after the Work Choices amendments, the distinction lay in the involvement of unions in agreement making and in relation to whether the agreement was a ‘prestart’ or ‘Greenfields’ agreement or not (see Cooper and Briggs 2009, and s327-330 WRA, 1996).

Due to this restructuring, there is limited capacity to measure the extent of union involvement in bargaining over agreements. The only indicator we can draw upon is in relation to union ‘coverage’ in agreements. Although this data needs to be approached with some caution. Agreements are coded as ‘covering’ unions if a union which was a bargaining representative in the making of an agreement gives Fair Work Australia written notice that that union wants the enterprise agreement to ‘cover’ it (s183, s53). This is then noted in the approval decision (s201 2) and this gives the union some rights to notice and the like in relation to the operation of the agreement. It is the noting of ‘coverage’ in the *approval* process by Fair Work Australia that DEWR codes in its database. However, this ‘coverage’ cannot be taken as a proxy for union involvement in the making of an agreement. This is because it is possible for a union to be involved in the negotiation of an agreement and not to be ‘covered’ by an agreement, and it is also possible for a union not to have been involved deeply in the negotiation of an agreement and for them to apply to be ‘covered’ by an agreement. This means that it is both difficult to gauge the extent of union involvement in agreement making under the new framework and it makes undertaking comparisons across the two most recent frameworks difficult to do. Nevertheless, Figure E uses DEWR WAD data on ‘current’ agreements and shows the proportion of agreements made under the Workplace Relations Act, 1996 which were made with unions (as opposed to direct with the workforce). It shows that the percentage of agreements made with unions dropped significantly during the 2000s.

Figure E: Current Union Collective Agreements made under the WRA



If we investigate the ‘coverage’ of these agreements, as depicted in Figure F, that the bulk of employees covered by enterprise agreements during the 2000s were covered by a ‘union’ collective agreement. However, this dropped noticeably as the Workplace Relations Act researched its end.

Figure F: Employees (covered b federal system agreements) covered by Current Union Collective Agreements made under the WRA (%)

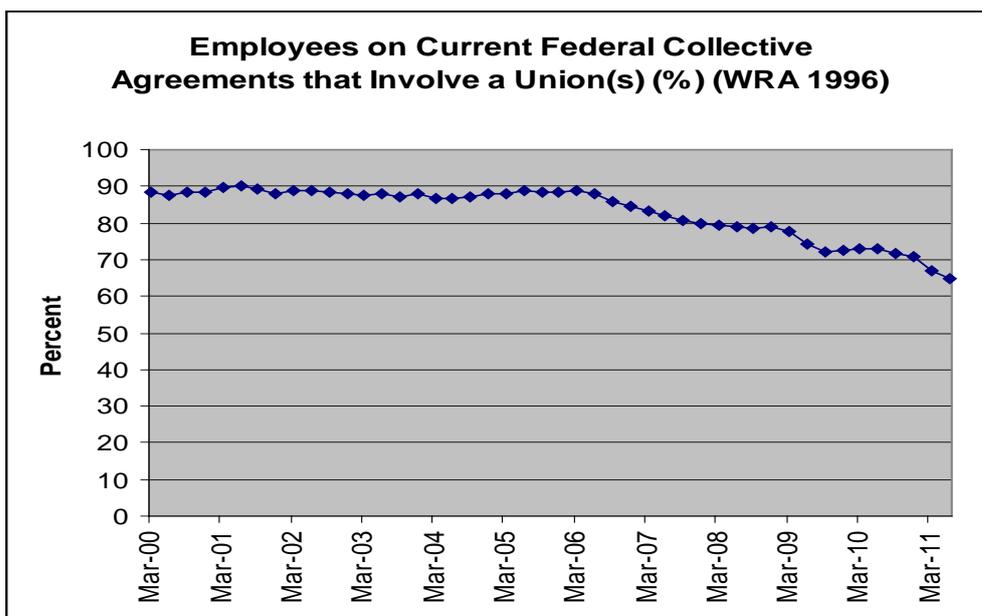


Figure G notes the proportion of agreements approved in each quarter of the operation of the Fair Work Act, in which a union is ‘covered’.

Figure G: Agreements approved in quarter the ‘cover a union (FWA (%)) September 2009 to June 2011

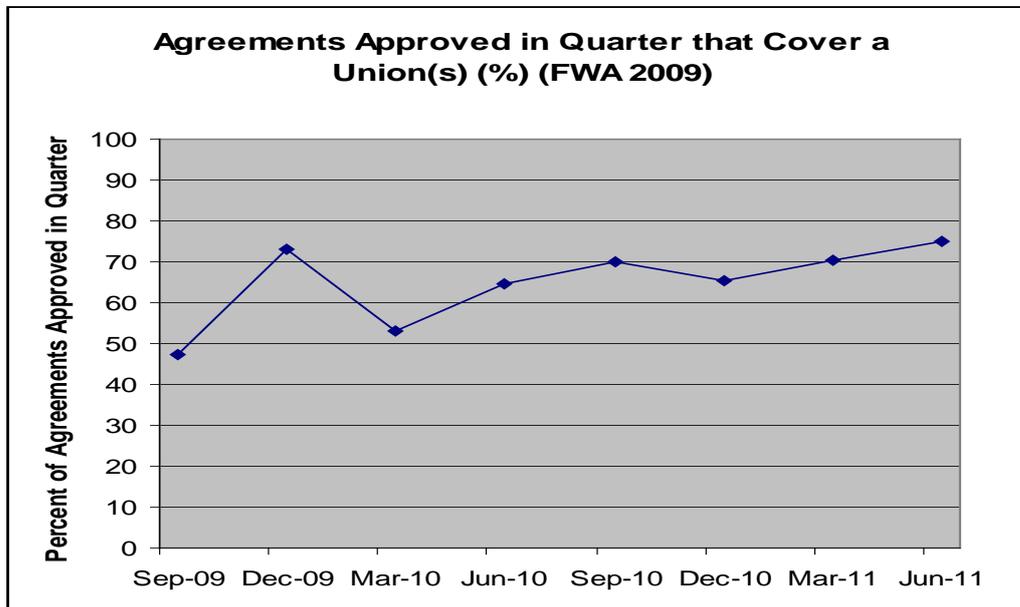
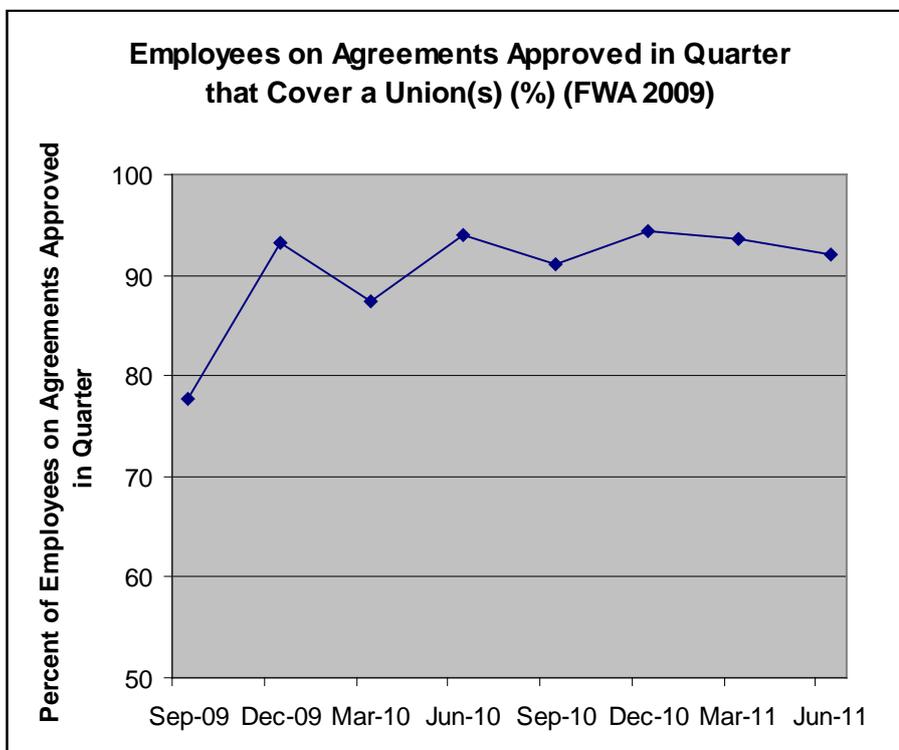


Figure H: Notes the proportion of Employees (covered by federal system agreements) covered by ‘union covered’ Collective Agreements made under the Fair Work Act, 2009



(%)

NB: These figures reflect agreements approved by Fair Work each quarter since it’s commencement in September 2009. Approvals data is used as DEEWR data about current agreements with union(s)

covered/involved could not be disaggregated to show just Fair Work agreements, as there remain in operation agreements made under WorkChoices and the transition to Fair Work.

Responses of the Actors

These data show that there has clearly been an increase in the percentage of employees whose pay and conditions are being determined by collective agreements; they also suggest that unions have been able to ‘open the door’ in some workplaces that had been closed to them previously. It is not clear whether this increase reflects greater willingness by employers to bargain with unions or employee representatives so as to ensure joint regulation of the terms of employment. In considering the responses of the actors, we know that the unions have been using the Fair Work Act to engage employers in bargaining where possible; many constraints exist including pre-Fair Work Act agreements in place, limited union resources, lack of previous union presence in workplaces, and employer resistance. Much more detailed research is essential to analyse union activity under the Fair Work Act. Given that the decline in collective bargaining in the past several decades was primarily as a consequence, however, of employers eschewing it, this sub-section will focus on managerial attitudes and policies towards collective bargaining.

Historically there has been a diversity of management approaches in Australia to collective bargaining. The differing responses have been evident at an industry level in terms of how wages and conditions came to be determined (Bray and Waring 2010). For example, in 2008 66.1% and 49.1% of employees in the mining and construction sectors respectively were on individual agreements compared with only 9.7% in education and training (ABS 6306 p.29). So we should not be surprised to find that there has been an array of responses from management to the legislative changes advocating collective bargaining, ranging from complete acceptance to absolute rejection:

- many employers continue to bargain collectively with unions as they had done historically;
- reports continue of employers who had previously relied on individual contracts (statutory or common law) now engaging in collective bargaining with their employees; for example, Virgin Australia’s agreement with long-haul pilots and flight attendants (Workplace Express, 2011a).
- similarly, unions have been able to use the provisions of the Fair Work Act to persuade some employers who had previously had non-union collective agreements to bargain with them; for example, Kalgoorlie Consolidated Gold Mines Pty Ltd’s enterprise agreement negotiated with the Australian Workers’ Union.
- some employers are making agreements without union involvement.
- some are not choosing to engage in collective bargaining.

Focusing on the last group, clearly many employers are not choosing to negotiate collective agreements (Todd 2011). Union avoidance is a major factor cited by many such employers as to why they will not embark on enterprise bargaining; that is, fear that this would provide an opening for union involvement in their workplaces. For others, there is a lack of interest or resources to engage in collective bargaining. For small and medium enterprises (SMEs) which are unlikely to have the expertise

inhouse, to negotiate an enterprise agreement can be costly or as one employer described it 'scary'. While the major employer associations continue to recommend enterprise-level bargaining as the means by which individual employers may bring about desired changes and maximise productivity, some employers are simply seeking a mechanism to set wages and conditions, an outcome that can be achieved through the modern awards or common law contracts.

Employer associations and many individual employers have criticised the form, process and outcomes of bargaining under the Fair Work Act. At the heart of many of the complaints has been the Act's emphasis on collective bargaining and the enhanced rights for unions in the bargaining process, many do not want to negotiate a collective agreement and simply do not want to bargain with unions (Todd 2012). ACCI (2011:57) questioned the appropriateness of the emphasis on collective bargaining for the private sector with low union density: 'The assumed or dominant paradigm of collectivism in the new system does not reflect the contemporary reality of the majority of Australian service industry workplaces.'

The major employer bodies have called for a broader range of agreement making options, in particular, the re-introduction of statutory individual agreements (Ridout, 2011; CCIWA, 2011; AMMA 2011). AMMA has also advocated strongly for the reinstatement of non-union greenfield agreements in response to unions forcing concessions in enterprise agreements in research projects. Employers and employer associations have expressed dissatisfaction with a number of aspects of the bargaining process. For SMEs the complexity of the bargaining framework can be an issue but, in the main, employer association concerns focus around enhanced union capacity in the bargaining process. The implementation of the Fair Work Act has resulted in a number of process-related complaints by employers including being forced to bargain when they had no desire to negotiate an enterprise agreement, union involvement in the bargaining process when they represented only a small minority of employees in the workplace, aspects of the majority support determination provisions, and the scope of agreements being extended beyond the intention of the employer. Employer groups have also indicated a number of concerns in relation to the outcomes: the lack of productivity trade-offs, clauses restricting the engagement of contractors and labour hire employees, the lack of 'meaningful' flexibility clauses, and the inclusion of a wider array of union-related clauses in agreements (Workplace Express, 2011b; Ai Group, 2011; AMMA 2011). In sum, these employers resent the increased difficulties they are encountering negotiating under the Fair Work Act; this was always going to be the outcome given that employers could previously opt for AWAs or non-union greenfields agreements with minimal bargaining involved and unions had greater restrictions on their ability to get to the bargaining table.

There is an interesting question emerging in relation to some enterprise agreements and that is 'who are employers negotiating their agreements with?' In some workplaces the union may be the sole representative of the employees in the bargaining process, other examples are emerging of employers negotiating with a mix of union officials and other employee representatives around the bargaining table. Of more concern are reports of agreements being negotiated with a handful of 'company-loyal' employees and then applied subsequently across the workplace. In such instances, enterprise agreements are being used to keep unions out of the workplace.

Turning to the political parties and their stances, there has been much interest in the attitudes of the Labor Government and the Liberal Party-led Opposition largely due to the fragile political situation. The Labor Party has been governing as a minority government with the consequence that both parties are in ongoing election mode. Both major parties have been reluctant to commit to any change in the Fair Work Act despite the very public lobbying of the major employer associations for changes. The Federal Government has indicated that it has no intention of making major changes to the Fair Work Act, the Liberal Party has been less unified in its stance. While the parliamentary leaders of the Liberal Party appear to be motivated by political pragmatism in their reluctance to identify any changes that they would advocate for the Fair Work Act, some party members outside the parliament have advocated strongly for fundamental changes including the re-introduction of individual statutory agreements and more restrictions on union activity. At the other end of the political spectrum, the Greens, holding the balance of power in the Senate, are strong supporters of collective bargaining.

Conclusions

The decline in collective bargaining in Australia after 1996 occurred due to a combination of change in management strategies away from joint regulation and developments in labour law enabling this. Neo-liberal discourse portrayed collective bargaining as blocking labour market flexibility and impacting negatively on efficiency in enterprises. The decline in collective bargaining paralleled the decrease in union membership. The declining union density together with the undermining of labour's power by globalisation shifted bargaining power in favour of employers enabling many of those who so chose to opt for unilateral decision making over joint regulation. The FW Act's preference for collective bargaining challenges these trends. Under the FW Act wages and conditions can be determined solely by the National Employment Standards and modern awards, it is not necessary to engage in collective bargaining, thus collective bargaining is positioned as a 'top up'.

The new Act has resulted in an increase in enterprise agreements and in the percentage of employees covered by enterprise agreements in Australian workplaces. Thus, in general, it has served as a stimulus to collective bargaining but not in all workplaces and sometimes not in the way that might have been intended. As was noted, there was a flurry of agreements registered in the 2nd Quarter of 2009 so as to avoid the Fair Work Act provisions but there has also been growth in agreement making since the introduction of the Act. The level of growth varies markedly by sector.

What have been the reactions? For some employers the modern awards suffice as a wage determination mechanism. Many employers who opted for unilateral decision-making over joint regulation are resisting engaging in collective bargaining. To such employers, collective bargaining is an exercise which presumes compromise and an element of power sharing. The Act has opened up opportunities for unions but not guaranteed them a place at the bargaining table. The notion of a bargaining representative focuses on representation of an individual, allowing for a multitude of outcomes, and is contrary to the norm of collective representation associated with collective bargaining. It is difficult to estimate the extent of union involvement in the negotiation of enterprise agreements albeit that it is much more difficult now for employers to exclude them; extensive workplace-based research is needed.

Reflecting on the earlier discussion on the literature on collective bargaining, many employers in Australia do not perceive collective bargaining to be in their interests or to be necessary at all. There continues to be strong resistance from some individual employers and the employer associations to collectivism and engaging with unions. The latter are lobbying strongly for legislative change to include the options of individual statutory agreements and non-union collective agreements. The Federal Government is showing no sign of moving from their philosophical commitment to collective bargaining but unions would have major concerns about the longevity of the current preference for collective bargaining should there be a change of government, given the strong push within sections of the Liberal Party to revert to something akin to the legislation of the period between 1996 and 2007..

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