Australian and Italian Collective Bargaining Regulation: Scope, Operation and Impact

by Anthony Forsyth and Paolo Tomassetti

While grounded in quite distinct historical and institutional features, the Australian and Italian systems of collective bargaining have a number of common aspects which make for an interesting and illuminating exercise in comparison. This is especially so, given that there are moves towards a greater enterprise-level focus for bargaining in Italy. In this regard, much can be learned from the 25-year experiment with enterprise bargaining in Australia.

In particular, this comparative inquiry seek to explore the nature of collective bargaining regulation in Australia and Italy respectively, which will identify the major points of difference and similarity with a particular focus on the provision made in each case for firm-level agreement-making.
The researchers also endeavour to identify how these two national systems have operated in practice, highlighting the outcomes of bargaining through:

- analysis of relevant statistical data (e.g. collective agreement coverage of the workforce, coverage in particular industries, etc.); and
- comparison of agreement clauses in multinational firms with operations in Australia and Italy (e.g. Apple, Ikea, Iveco, ENI, Ferrero and CNH).

The idea is to analyse whether different institutional features affect collective bargaining outcomes at a firm level.

A focus of this study will be to examine the connection between enterprise-based bargaining and productivity. The objective of unleashing productivity, through the flexibility to be obtained from agreements negotiated at firm-level (rather than industry-wide bargaining), was a major rationale behind the introduction of enterprise bargaining in Australia in the early 1990s. Yet the evidence indicates that early gains in labour productivity through the mid-late 90s have not been sustained to the present time. Closer consideration of the Australian case will prove enlightening as Italy takes further steps towards enhancing the availability of enterprise-based collective bargaining with a view to lifting national productivity.

Set out below is a preliminary descriptive comparison of the key features of the Australian and Italian collective bargaining systems, which will provide the basis for the more detailed comparative analysis to be completed in coming months.

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Principal features of the bargaining framework	Australia	Italy
Constitutional right to bargain	No	Not directly regulated, but jurisprudence derives it from trade union freedom of organisation (art. 39)
Statutory source of bargaining rights	*Fair Work Act 2009* (FW Act), especially Part 2-4	No structural regulation, but several legal devolutions of power to collective bargaining to adapt or derogate statutory regulation (so-called opening clauses)
National level wage setting/ wage increases	National minimum wage Annual wage reviews by Fair Work Commission (FWC)	No, but some cross-industry agreements fix the rules for wage bargaining at sectoral (fixed minima linked to the inflation rate) and company level (only variable pay linked to productivity and performances)
Industry level wage determination	122 industry/sectoral awards ('modern awards') Minimum wages in awards reviewed annually by FWC	Yes: minimum wages are set at industry level by NCLAs, mainly taking into account the inflation rate and the characteristic of the sectoral labour market
Industry level bargaining	FW Act allows: • multi-employer agreements • 'single interest employer' agreements (e.g. franchises, religious schools)	No statutory regulation *De facto*: multi-employer bargaining structure, articulated into two levels: national-sectoral and company or alternatively territorial
Enterprise level bargaining	Main focus of Australian regulation since early 1990s: • agreements for all or part of a 'single business' • agreements can depart from industry/award standards, if employees 'better off overall'	Not directly regulated (in terms of contents and procedures), but several normative provisions to promote decentralised bargaining: 1. Art. 8, Law 148/2011: possibility for decentralised bargaining (at firm or territorial level) to derogate, in certain circumstances, a number of standards set by the law and NCLAs (with the exception of minimum wages) 2. Budget Laws (since 2009): fiscal exemptions (10% instead of 35% of fiscal taxation) for variable pay flowing from decentralised bargaining

Type of decentralised collective bargaining	Enterprise bargaining agreements can be made for: • entire operations of a company/business across Australia • different parts of a business, based on occupational functions • different parts of a business in various geographic locations • all or part of a public sector department or agency Firm-level bargaining operates to supplement national awards (rather than acting as an alternative to award regulation). Bargaining proceeds with the applicable industry award as a benchmark – variations can be made to obtain firm-level flexibility/ departure from award conditions (e.g. strict regulation of working time), with offsetting improvements in wages etc. for employees.	Company-level bargaining under multi-employer bargaining in 98% of cases: the firm applies both the NCLA and the company-level agreement Single-employer bargaining in 2% of cases (e.g. Fiat-FCA, which completely left the NCLAs for metalworkers): taking place outside a NCLA, i.e. the firm apply only the company-level agreement
Employee bargaining representatives	Any of the following: • trade union • employee him/herself • other representative appointed by employee(s), e.g. colleague, consultant Union is default representative of any members in the workplace National unions establish parameters for bargaining in their industry/sector – enterprise agreements are usually made within these parameters, with firm-level variations No tradition of alternative employee representative structures (e.g. works councils) – joint consultative	Trade unions confederation at cross-industry level and in tripartite negotiations Trade unions federations in NCLAs Works councils (RSU) at company level or trade unions representatives (RSA)

	committees (JCCs) in some workplaces, often with union involvement	
Employer bargaining representatives	The employer (e.g. Managing Director, HR Manager) and anyone else it appoints: • employer organisation • consultant • lawyer In certain sectors, national or state employers' associations have some involvement in negotiating industry-level parameters for bargaining with major unions	Employers' confederation at cross-industry level and in tripartite negotiations Employers' federations in NCLAs Sometimes, local employers' association assist firms in company-level bargaining
Establishing the right to bargain	Employer initiates or agrees to union request to bargain – OR: Majority support determinations: • employer obligation to bargain collectively where > 50% support of workforce • majority support established mainly through petitions – ballots required in some cases	No obligation to bargain Generally, TUs present a platform with demands to employers or employers' association Many cases of employers activism in the last years, in the form of concession bargaining
Resolving disputes over composition of bargaining unit	Scope orders (on application to FWC)	No formal rules, but strong protocols especially for NCLAs, consolidated in years of negotiations
Duty to bargain in good faith	Specified good faith obligations: • bargaining process (meet, disclose information, respond to proposals, etc) • not undermine bargaining (e.g. avoiding other party's representative or dealing directly with	Yes: it derives from the general principle of good faith in contractual relationships regulated by the civil code Moreover, anti-union behaviours are repressed under art.

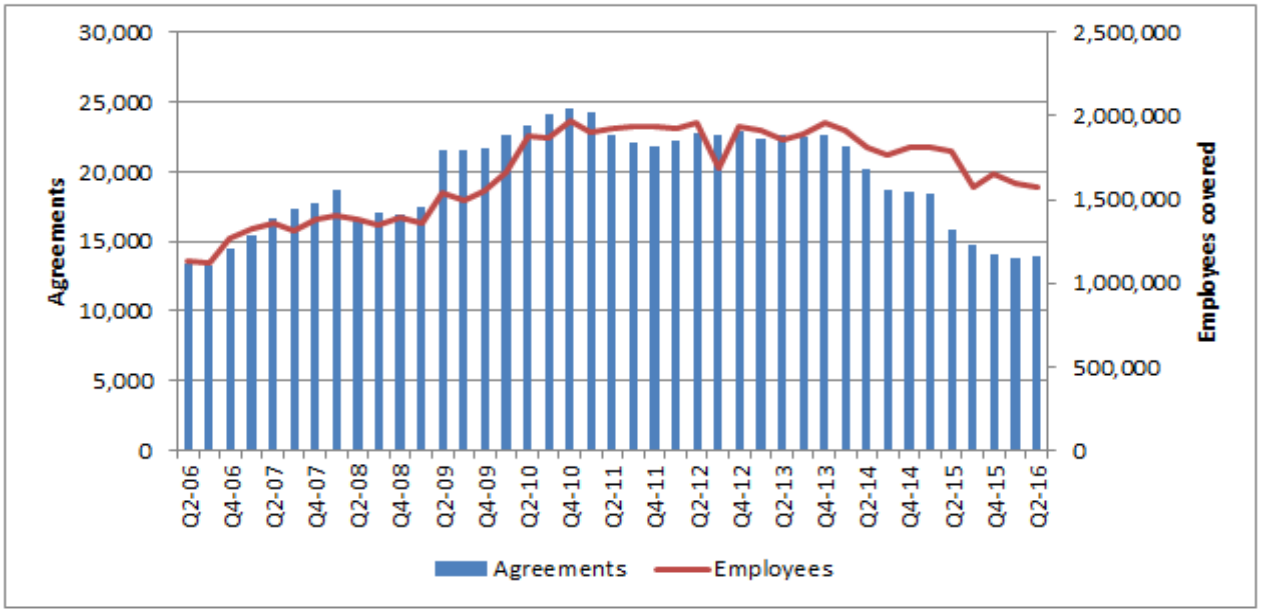
	the workforce instead of union) FWC power to make bargaining orders Serious breach of bargaining orders → arbitration	28 of the Workers Statute
Independent assistance with negotiations	In cases of bargaining impasse, FWC can: • conciliate/mediate on application by one party • arbitrate by agreement of all parties	Some protocols established by social partners provide for conciliation and arbitration procedures to settle conflict of interest and conflict of rights. These procedures are carried out by bilateral committees consisting of workers' and employers' representatives
Right to take industrial action in support of bargaining claims	Employees & union may take 'protected industrial action' (e.g. strike, short stoppage of work, or work bans) to advance claims made in agreement negotiations – many procedural requirements including mandatory ballot of employees Employer may take protected action in form of a 'lockout' (i.e. prevent workers from entering workplace and performing work and use replacement labour) – but only in response to action taken by employees/ union No rights to take industrial action during term of current agreement	Industrial actions in Italy mainly take place through the exercise of the right of strike. The right to strike is an absolute and individual right recognised by the Italian constitution (art. 40). Although it is formally possible to call a strike during negotiations, social partners have autonomously regulated this issue, by establishing peace obligation periods and procedures. In Italy it is also possible to call a strike over conflicts of rights concerned with application and interpretation of collective agreements and the law. Lockout is a freedom (and not a right): can take place in certain circumstances, generally as a response to employees/union's actions
Restrictions on agreement content/subjects of bargaining	Permitted matters (wages & employment conditions) Mandatory terms (e.g. term of agreement, dispute resolution and consultation clauses) Unlawful terms (e.g. discriminatory terms)	Not fixed by the law Social partners at cross-industry level and NCLAs define the so-called "articulation" of the multi-employer bargaining structure, i.e. what is the competence of NCLAs and company-level agreements in terms of subjects

Process for employee approval of agreement	Employees must be given: • information about proposed agreement & voting process • opportunity to vote (agreement approved if >50% of those voting support it)	Cross-industry agreements regulating the multi-employer bargaining system provide that NCLAs are valid and produce effect if voted by 50%+1 of workers. For validity of NCLAs there are also rules established by social partners autonomously, related to representativeness of the parties to the collective agreements. However these rules are not implemented yet
Independent authority approval of agreement	Agreement must be approved by FWC to have legal effect: • many statutory tests (principally, ensuring employees are better off overall cf. the applicable modern award) • maximum 4-year term • agreement continues to operate after expiry, until terminated or replaced	No fixed term of efficacy. Generally 3 years. Agreement continues to operate after expiry only if there is an explicit clause establishing so
Resolution of disputes arising under agreement	Agreement must have dispute resolution clause Dispute resolution of matters arising under the agreement (rights disputes) by FWC or another independent body (e.g. private mediator/arbitrator)	Some collective agreements provide for mechanisms of dispute resolution related to conflicts of rights (interpretation and application of collective agreement) and/or peace obligation clauses. Dispute resolution mechanisms generally involve social partners at national level, or bilateral commission consisting of workers' and employers' representatives Peace obligation clauses have only an obligatory effect, i.e. they cover just the parties to the contract (and not the single workers).
Variation of in-term agreement	Majority employee approval & FWC approval	If the parties to the contract agree so

Termination of agreement	By agreement with employees & FWC approval Unilaterally after expiry (subject to FWC approval, based on 'public interest' test)	By mutual agreement if the collective agreement has a term If the agreement has not a term, each party can terminate it at any time
Workforce coverage of enterprise agreements (cf. other methods of setting minimum wages & conditions)	Australian Bureau of Statistics data, May 2016 – employees covered by: • awards & collective agreements = 59.2% (likely that employees covered only by award = approx. 20%) • individual arrangement (e.g. contract of employment) only = 37.3% See also figure 1 at the end of the table	See figure 2 in the end of the table
Industries with highest proportions of agreement coverage	Education & training Public administration Health care & social assistance Electricity, gas, water & waste services	Public administration: all sectors covered by NCLAs with erga omnes power Private economy: highest coverage in terms of employees covered: metalworking industry; food industry; banking sector; commerce and retail sector; tourism sector
Industries with lowest levels of agreements	Retail, hospitality & food services	All the industries are covered by one or more NCLA
Incidence of union cf. non-union agreements	30% = non-union agreements (covering 10% of employees)	Not applicable
"Pirate" NCLAs, i.e. collective agreements signed by non-representative organisations	Not applicable	Widespread in commerce and tourism sectors, as well as in cooperatives

Figure 1:

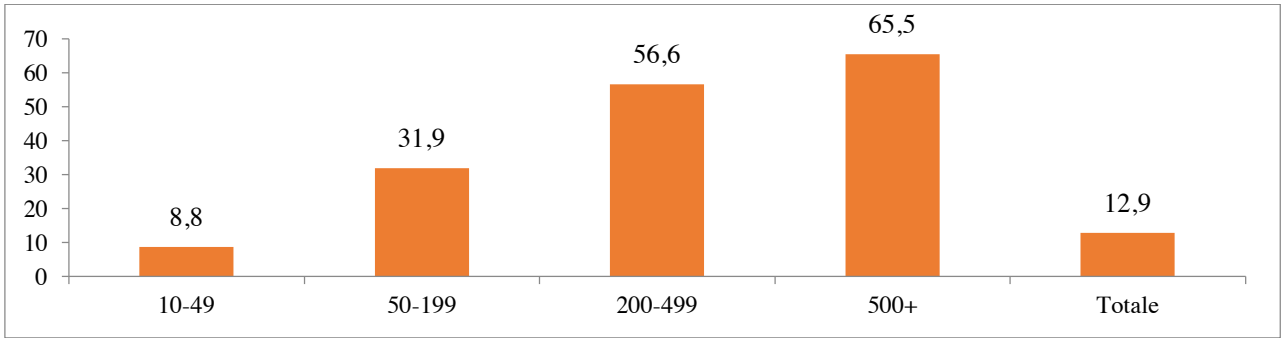
Australia - Current private sector agreements and employees covered by these agreements, 2006-2016



Source: Department of Employment, *Report on Enterprise Bargaining* (February 2017), Chart 1

Figure 2:

Italy - Percentage of businesses (with at least 10 employees) covered by collective bargaining per employee category (2012-2013)



Source: Fondazione Di Vittorio (FDV) on Cardinaleschi e De Santis (2016), ISTAT-CNEL