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Reforming Australian labour law to promote multi-employer bargaining

by Anthony Forsyth

Tag: *#Australia #labourlawreform #FairWork*

In December 2022, the Australian Parliament passed the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. This important reform measure forms a central element of the economic plan of the Albanese Labor Government (elected in May 2022), aimed at lifting workers' real wages in an inflationary environment. The new law takes tentative steps towards transforming collective bargaining in Australia from an enterprise focus (which has failed to overcome wage stagnation) to a multi-enterprise focus (which international evidence shows leads to higher bargaining coverage, productivity and wages).

Historical Background

For most of the 20th century, Australia had a very strong framework of protection for employees and support for trade unions, when compared with many other countries. This began with legislation passed soon after the forming of the Australian nation in 1901. It created a national industrial tribunal, with strong powers to conciliate and arbitrate disputes between employers and unions.

Those disputes were settled by the making of 'awards', i.e. a legal mechanism for setting wages and employment conditions across entire industries. However, from the early 1990s, the award system and the central role of unions came under pressure for reform. In common with many industrialised nations in the neoliberal era, a consensus formed about the need for deregulation to improve the international competitiveness of Australian businesses.

This led to the introduction of a system of enterprise-level negotiation of collective agreements, using awards as a minimum 'safety net' above which enterprise agreements could be made. To some extent, award protections (such as rules relating to working hours and rostering) could be traded off in an agreement (e.g. in exchange for pay increases), as long as employees were not overall disadvantaged. The enterprise bargaining system was also intended to boost the productivity of individual firms.

Under the free market-oriented conservative govt from 1996, more radical reforms were introduced. This marked an even more pronounced shift away from the traditional award system, with encouragement given to non-union bargaining including individual agreements between employers and employees. Significant limits were placed on the capacity of unions to organise at the workplace level and to take workers out on strike.
However, this radical Thatcherite experiment gave way to a return to collectivism under a Labor Government between 2007 and 2013. Its legislation, the *Fair Work Act 2009*, remains in place today, despite a return to conservative rule from 2013 until May 2022.

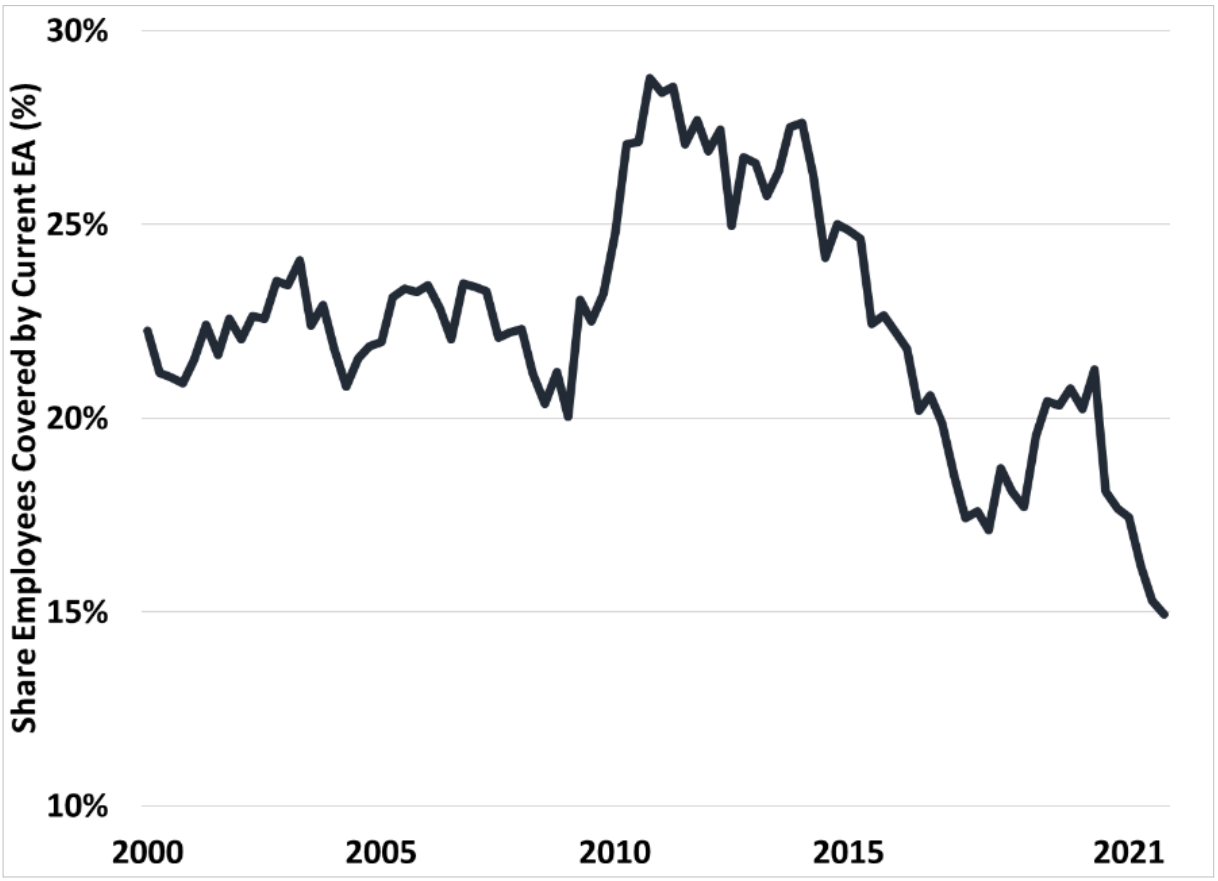
Union Membership and Collective Bargaining Coverage

As in many other countries with enterprise-based (rather than national or industry/sectoral) systems of collective bargaining, the coverage of collective agreements has been falling in Australia in line with trade union membership density. This table compares the USA, Australia, the UK and Italy on these two measures, showing the most recent available data:

	Union Density	Collective Bargaining Coverage
USA	10.1% (2022)	11.2% (2018)
Australia	12.5% (2022)	30.4% (2018)#
UK	23.1% (2021)	26.9% (2019)
Italy	33.4% (2018)*	80% (2018)

** Includes retired members/pensioners (44.1% of total union membership in Italy in 2016)*
 # This figure includes federal and state-registered agreements, and both current and expired (but still in operation) agreements

Importantly, the incidence of collective agreement-making in Australia has been falling over the last decade as shown in the following graph:

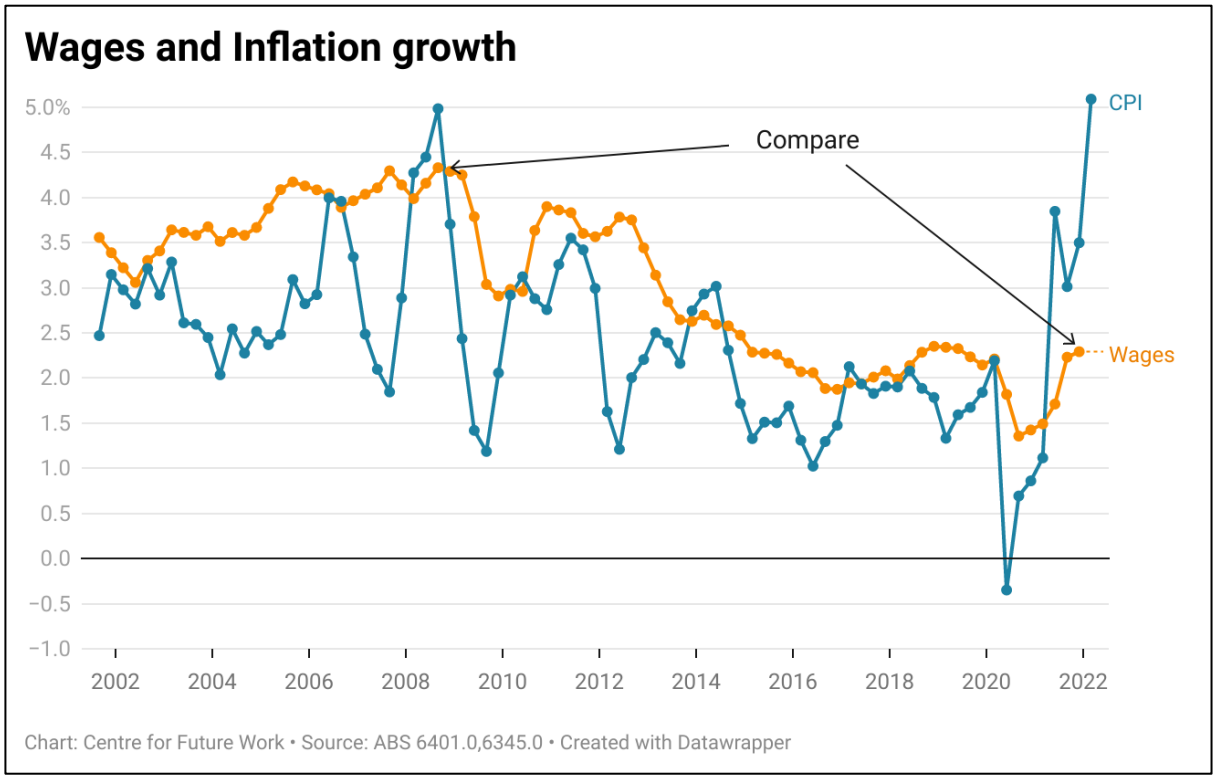


Source: Centre for Future Work, *The Wages Crisis Revisited* (2022)

The graph shows that in 2012, 27% of employees were working under a current collective agreement[1] – but this number had fallen to just 15% of the workforce by 2021. The reasons for the contraction of collective bargaining, especially in the private sector, are varied. Employers argue that the process for making enterprise agreements is overly technical, and they have to wait too long for agreements to be approved by the Fair Work Commission. For unions, the problems are structural: the fact that bargaining is limited to the concept of the enterprise (i.e. the direct employer of a group of employees) and has not kept up with the fissuring of business structures over the last 30 years.

The collapse of enterprise bargaining has been a central factor contributing to wage stagnation. The next graph shows the suppression of wages growth in the last decade, alongside the rapid rise of inflation in the last 12 months (as measured by the Consumer Price Index, reaching 8.4% in December 2022).

[1] Note that the measure is of *current, federal* collective agreements, i.e. those made under the *Fair Work Act* that have not yet passed their expiry date (agreements can have a term of up to 4 years, however they continue to operate after their expiry date until replaced by a new agreement).



Reforming Collective Bargaining Law

One of the Labor Party's key election commitments was to ensure the wages of employees at least keep pace with rising inflation. The first step taken by the new government was to formalize its support for wage increases in a submission to the Fair Work Commission's Annual Wage Review Case (the primary mechanism for workers not covered by enterprise agreements to obtain a pay rise). In June 2022, the Commission awarded a 4.6% pay increase for award-covered employees and 5.2% for those on the national minimum wage.[2]

The Government then began work on legislative reforms to increase the take-up of collective agreements, as a basis for extending wage increases across the workforce. This process involved consultation with stakeholders (in some ways similar to the European process of social dialogue), including a Jobs and Skills Summit held at Parliament House, Canberra on 1-2 September 2022 with representatives from all levels of government, unions, business, academia and community organizations.

This was followed by the introduction into Parliament of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill* on 27 October; a rapid inquiry by the Senate Education and Employment Legislation Committee; and intensive negotiations between the Government and several Greens and independent Senators whose support was required for the Bill to pass into law on 2 December. The provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* relating to multi-employer bargaining[3] will take effect on 6 June 2023.

[2] *Annual Wage Review 2021-22* [2022] FWCFB 3500, at: https://www.fwc.gov.au/documents/wage-reviews/2021-22/decisions/2022-fwcfb-3500-decision.pdf.

[3] The amending legislation also includes provisions to advance gender equity, prohibit pay secrecy clauses in employment contracts, provide stronger protections against sexual harassment in the workplace and introduce new restrictions on fixed-term contracts (including an upper limit of 2 years). See the Australian Government Department of Employment and Workplace Relations website at: https://www.dewr.gov.au/secure-jobs-better-pay.

The Secure Jobs, Better Pay Act: Overcoming Fissuring through Multi-Employer Bargaining

The major point of difference between the collective bargaining systems of continental Europe and the Australian position is that the focus of bargaining in many European countries is at the national, industry or sectoral level – whereas in Australia, it is focused on the level of the enterprise or firm.

The policy problem which the *Secure Jobs, Better Pay Act* tries to address is that enterprise-level bargaining is not functioning as an effective mechanism for workers to obtain wage rises. And as noted earlier, one of the major impediments to bargaining for unions is fissuring: a concept US scholar David Weil[4] has used to explain how major corporations have hived off 'non-core' business functions to smaller firms, which engage in fierce competition to obtain services contracts (therefore driving down labour costs).

Fissuring also distances lead businesses from responsibility for minimum employment standards, and having to deal with unions. Further, because unions can only negotiate an agreement under Australian law with direct employers, they cannot bargain with the lead firms that control the ultimate cost of labor through outsourcing, labor hire, franchising, supply chains and other business models that have proliferated since the 1990s.

In response to these problems, the *Secure Jobs, Better Pay Act* provides new options for multi-employer bargaining. The idea here is to match bargaining units with the business structures adopted by what another US labor law academic, Mark Barenberg, calls 'disintegrated employers'[5] – e.g. a shopping centre or building owner and all the firms that supply services to keep it running (such as cleaning, security, maintenance, etc), and the employees of these separate businesses and the lead firm, could form one bargaining unit for purposes of negotiating a multi-employer agreement. A union's objective in that instance would be to prevent the lead firm from forcing labour costs down among the employees of the previously dispersed service firms.

There are two new avenues or 'streams' for multi-employer bargaining in the *Secure Jobs, Better Pay Act*: one is aimed at assisting low-paid workers predominantly in government-funded services; and the other at facilitating bargaining with two or more employers, mainly in the private sector.

1. Supported Bargaining Stream[6]

Unions will be able to access Supported Bargaining on approval from the Fair Work Commission. The statutory tests which the tribunal will apply include:

- whether it is appropriate for (some or all) of the employers and employees to bargain together;
- prevailing pay and conditions in the relevant industry or sector, including whether low pay rates prevail;
- whether the employers have clearly identifiable common interests, for example (a) geographical location (b) nature of the enterprises and the terms and conditions of

[4] D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).
[5] M Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining and Striking* (Roosevelt Institute, 2015).
[6] *Secure Jobs, Better Pay Act*, Part 20.

employment in them (c) being substantially funded, directly or indirectly, by government.

Under these tests, unions are likely to be able to negotiate Supported Bargaining Agreements covering multiple employers:

- for workers in industries such as aged care, disability care, and early childhood education and care, who lack the necessary skills, resources and power to bargain effectively – service delivery by employers in these sectors is heavily supported by federal government funding through programs like the National Disability Insurance Scheme;
- in the university sector which is almost totally government-funded in Australia;
- perhaps also in low-paid parts of the private sector, such as cleaning and security, where the ultimate source of funding is from government but the work has been outsourced over many years to service providers (e.g. in state government schools and hospitals).

2. Single Interest Bargaining Stream[7]

Fairly open access is given for unions to seek an agreement in this stream with multiple businesses which are all:

- franchisees of the same franchisor (e.g. all of the franchised stores in a chain like McDonalds or 7-Eleven);
- related entities within a corporate group structure.

Beyond those situations, Single Interest Bargaining will be more difficult for unions to access than Supported Bargaining, as there are many more requirements that have to be met for approval by the Fair Work Commission (just to begin negotiations for a multi-employer agreement) including the following:

- *Majority support test* – a union must prove that a majority of workers *at each of the relevant businesses* supports going into a multi-employer agreement. This presents significant challenges, as it invites US-style 'union busting' tactics from employers because a union must win a majority vote (or petition) of employees at every business in the proposed multi-employer agreement. In comparison, a union only needs to show support from 1,000 employees or 10% of an entire industry to instigate New Zealand's new system of sectoral bargaining for Fair Pay Agreements.[8]
- *Public interest test* – this provides the Fair Work Commission scope to consider all the relevant circumstances and the broader public interest, e.g. the economic ramifications of allowing Single Interest Bargaining. According to the Labor Government, the public interest is likely to favour multi-employer bargaining authorisations 'that inhibit a "race to the bottom" on wages and conditions, while discouraging [this form of bargaining] if it could adversely affect competition on the basis of factors such as quality (including service levels) and innovation'.[9]
- *The common interests of the various employers* – including (a) geographic location (b) whether they are subject to a specific regulatory regime (c) the nature of the enterprises and the terms and conditions of employment in them. This common interests test is likely to be the most difficult hurdle for unions to overcome in seeking to initiate Single

[7] *Secure Jobs, Better Pay Act*, Part 21.
[8] *Fair Pay Agreements Act 2022* (NZ).
[9] Australian Government, *Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill*, para [1023].

Interest Bargaining, as its wording provides fertile ground for employers to argue against its application in cases before the Fair Work Commission.

One example where the common interests test *might* be satisfied:

- A fast-food chain like McDonalds which includes company-owned and franchised stores: the nature of the enterprises and terms/conditions of employment are the same across all stores, although franchised stores might be able to argue they are subject to a different regulatory regime (the specific laws in Australia applying to franchised businesses).

However, the common interests test will be more difficult to meet in the following situations:

- The fresh food supply chain, including growers/farms and their labour providers, logistics companies (warehousing/transport) and the major supermarkets – different geographic locations, and the various enterprises and terms/conditions of employment are very different especially at each end of the supply chain (even though the market power of lead firms influences the price for labour at each level below).
- Similar problems are likely to be encountered in attempting to bargain for one agreement covering the various companies in Amazon's logistics and distribution network – including Amazon Flex (delivery drivers) and the many labour hire agencies Amazon uses to staff its Australian warehouses.
- Outsourced business functions, e.g. the national airline Qantas and firms like Dnata and Swissport to which it has outsourced ground services including cleaning, catering and baggage-handling – Australian aviation unions want to bargain for agreements covering these types of operators and the airline, however it is unclear whether this would meet the common interests test if Qantas does not retain some direct employees performing similar work.

Conclusion

The Labor Government argued in support of the *Secure Jobs, Better Pay Act* that urgent action was needed because Australians have waited 10 years 'to get wages moving and end the era of deliberate wage stagnation'.[10] The Government also maintained that: 'The urgency of getting wages moving is most acute in feminised industries. The gender pay gap still sits at an unacceptable 14.1 per cent.'[11] The new multi-employer bargaining options are intended to address the near-absence of collective bargaining in various forms of care work performed overwhelmingly by women.

Employer groups argued very strongly against the new legislation, claiming that it would 'take Australia back' to the industry-wide strikes of the 1970s. The *Secure Jobs, Better Pay Act* does open up access for employees and unions to lawful industrial action in support of multi-employer bargaining. However, this can only occur once the Fair Work Commission authorizes such bargaining to commence, which is subject to the series of rigorous tests explained earlier – especially in the Single Interest Bargaining Stream.
In addition to the limited circumstances in which multi-employer bargaining may occur in practice under the new law, the current economic and industrial relations context is vastly different from the 1970s. In particular, union membership has fallen from over 50% of the workforce, to 12.5% overall and only 8.2% in the private sector.

[10] Hon Tony Burke MP, Minister for Employment and Workplace Relations, *Second Reading Speech on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill*, House of Representatives, 27 October 2022.
[11] Ibid.

Some unions, like the United Workers Union which covers both funded services (e.g. aged care, child care) and private sector workplaces (e.g. casinos), may be well-positioned to organise and run cases testing the new opportunities for multi-employer bargaining. Other unions will have less capacity and resources to do so, and to resist the inevitable litigation from employers to obstruct efforts to extend collective bargaining more widely.

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