

Better Bargaining

Developments since Congress 2009

Since Congress 2009, the *Fair Work Act 2009* has gone some way towards restoring the balance in Australian industrial relations. The abolition of AWAs, the re-emphasis on collective bargaining and the increased ability of Fair Work Australia to facilitate bargaining via the good faith bargaining requirements, majority support determination and scope order provisions and the low-paid bargaining stream have improved the ability of unions and workers to bargain for better wages and working conditions.

However, in line with its mandate to advocate for the continuous improvement of the rights and protections of working people, the ACTU seeks further reform to resolve difficulties that have become evident in the implementation of the Fair Work Act laws. The Fair Work Act review in 2011–2012 provided an opportunity to raise key issues which have become evident in the bargaining scheme under the Fair Work Act. The ACTU submitted a comprehensive submission to the review, which is due to report to the Minister for Employment and Workplace Relations by 31 May 2012.

Key Issues

The Fair Work Act has resulted in a marked increase in the number of agreements being approved. Under *WorkChoices*, approximately 8,000 collective agreements were registered each year, on average¹. By contrast, in the 2009-2010 financial year 24,053 agreements were made², and 15,300 were made in the 2011-2012 financial year³. As a result, registered agreement coverage has also increased significantly, from 39.2% of all employees in August 2008, to 43.4% of all employees in May 2010 (the most recent year for which data is available).⁴

Despite the increase in the number of agreements being approved, key issues have arisen relating to the continued restrictions on agreement parties and agreement content, ongoing restrictions on taking protected industrial action, limitations on the Tribunal's capacity to effectively resolve bargaining disputes and deadlocks, and the ability of the good faith bargaining regime to combat a range of unacceptable practices such as 'surface bargaining', replacement labour during strikes, unilateral employer offers, and employer direct-dealing with staff.

¹ DEEWR, Agreement making in Australia under the Workplace Relations Act 2007-09 (2010) 75

² This figure includes 'extension' agreements under the Transition to Forward with Fairness legislation.

³ FWA, Annual Report 2010-11 (2011) 10

⁴ ABS cat 6306.0 (May 10).

Agenda 2012 -2015

Over the next three years, this policy calls for unions to commit to continuing to campaign for improvements to the current legislative framework for bargaining, focussing on:

- expanding the choice of content in agreements. Enterprise bargaining provisions should allow parties to bargain and agree on any matter they choose, subject to the agreement meeting a genuine “better off overall” test, including agreement on matters relating to job security, environmental impact, right of entry, workplace consultation and representation and unfair dismissal protocols;
- extending the same rights and processes which apply to single enterprises to multi-enterprise agreements, including by allowing unions and employers to agree to extend an agreement in the same industry to apply to them where it is not contrary to the public interest to do so, and allowing parties to reach agreement on terms to apply to a particular class of work performed for a particular business irrespective of the employment arrangements utilised in the chain of supply;
- ensuring that flexibilities do not undermine collective bargaining by preventing employers or employees from being able to ‘opt out’ of collective agreements, by ensuring appropriate coverage of agreements, and by making Individual Flexibility Arrangements (IFAs) optional agreements subject to the scrutiny of Fair Work Australia;
- enhancing certainty and participation in bargaining by requiring disclosure of bargaining representatives appointed, permitting unrestricted union representation of independent contractors, and strengthening right of entry provisions during bargaining periods;
- restoring an effective right to strike by removing the necessity of a secret ballot, removing any role for employers other than a positive obligation of non-interference, and requiring three (3) clear days written notice of employer response action;
- giving Fair Work Australia discretionary scope to address identified threats to the life, personal safety, health or welfare of the population, or significant damage to the economy, while allowing the bargaining process to continue unless there is no reasonable prospect of agreement being reached. Fair Work Australia should not be compelled to cancel a union’s industrial campaign as a reward to a significant employer threatening to create significant economic damage, and Fair Work Australia should be empowered to suspend or terminate particular protected action that is giving rise to exceptional circumstances, while allowing the bargaining and other protected action to continue;
- developing more effective remedies to combat surface bargaining;
- facilitating bargaining for employees who have not previously been covered by a collective agreement by establishing a process which allows for arbitration of “first bargaining workplace determinations”; and
- require merits arbitration of all disputes arising while a collective agreement is in operation.