Chapter 3

Employers undermining collective bargaining

3.1 It is generally recognised that, barring highly specialised and remunerated individuals, who are in the minority, employees are in a stronger bargaining position when they bargain collectively:

> Without access to collective bargaining, employees bargaining alone are unlikely to be able to bargain on an equal footing with their employer (this is obviously not applicable to high net worth individuals).[1]

3.2 Some employers prefer to bargain with individual employees for this very reason, because doing so distorts the power balance between the two parties in favour of the employer. This is evidenced by some employers' support for statutory individual agreements, known as Australian Workplace Agreements (AWAs). Enshrining this imbalance was the cornerstone of the Coalition's WorkChoices legislation.[2]

3.3 With the introduction of the *Fair Work Act 2009* (FWA, the Act), the former Labor Government set in place provisions which instead promote collective bargaining, the fundamental purpose of which is to minimise the power imbalance between employers and employees during negotiations about wages and conditions.[3] This is so that both sides have the incentive to compromise.

3.4 Ten years after the WorkChoices era, the Australian economy has changed substantially. We have weathered the storm of the Global Financial Crisis but we are not immune to the impacts of it. Economic power and wealth has concentrated and inequality has grown to 70 year highs.[4] Wages growth is at historic lows of just 1.9 per cent per annum.[5]

3.5 In the post-GFC era, mergers, use of subsidiaries, outsourcing, offshoring, labour hire, franchising, competitive tendering, contracting out and the use of short term visa workers are all business strategies regularly used by corporations.

3.6 Although AWAs are no longer allowed under the FWA, some employers are exploiting weaknesses in the Act in order to thwart collective bargaining, 'searching

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1 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

2 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

3 Australian Manufacturing Workers' Union, *Submission 196*, p. 3.

4 Mr Jim Stanford, *'Labour Share of Australian GDP Hits All-time record low'*, Centre for Future Work Briefing Note, 13 June 2017.

5 Australian Bureau of Statistics, *Wage Price Index, Australia*, ABS 6345.0, June 2017.

for opportunities to bargain with employees in circumstances when they are in the weakest bargaining position.'[6]

3.7 The FWA only provides for collective bargaining in the form of enterprise bargaining. This was done to place enterprise bargaining at the centre of the process of preventing the distortions that flow from a substantial power imbalance between employers and individual employees.

3.8 This chapter looks at evidence of a variety of practices that effectively re-open the debate about how to effectively provide collective bargaining in the context of our twenty-first century economy.

Small cohorts of workers signing agreements

3.9 The FWA requires that the FWC be satisfied that groups of employees negotiating an agreement were fairly chosen, and that agreements are genuinely agreed to by employees.[7] Examples provided to the committee call into question the effectiveness of these provisions.

3.10 In practice, employees can be significantly disadvantaged by employers who secure agreements with selectively chosen groups of employees who are not representative of their wider workforce.

3.11 In some cases the use of strategic voting cohorts is elegant in its simplicity. When a company or project is set up, only a small number of workers are employed. These may in some cases be management workers only. They vote on an agreement, and the agreement is made. If the FWC is satisfied that the agreement was made through a fairly chosen group of employees, the agreement is accepted.

3.12 The process is far from simple in practice, however, and there is little clarity around how voting cohorts are to be selected fairly. Despite the fact that the FWA was designed to promote collective bargaining, recent court decisions have endorsed the view that the commission should not 'withhold approval of an agreement on the basis that it would undermine collective bargaining.'[8]

3.13 A submission from the Construction, Forestry, Mining and Energy Union (CFMEU) describes the case of *CFMEU v. John Holland Pty Ltd*, where the Federal Court rejected an appeal against a decision to approve an agreement made by a voting cohort of just three employees. The agreement had the capacity to cover a wide-ranging workforce—workers under 10 different classifications[9]—to be employed in future:

> The Court…did not exclude the possibility that it may not be fair for an enterprise agreement made with three existing employees to cover a wide

6 Australian Manufacturing Workers' Union, *Submission 196*, p. 7.

7 *Fair Work Act 2009*, s. 186.

8 Construction, Forestry, Mining and Energy Union, *Submission 200*, p. 18.

9 Mr Giridharan Sivaraman, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 20 April 2017, p. 4.

> range of other classifications and jobs in which they may have no conceivable interest, or that the group thereby constituted may not be fairly chosen.[10]

3.14 This case paved the way for other employers to avoid bargaining with employees by securing agreements with small cohorts before applying them to a broader workforce, and this loophole is being used with increasing impunity.[11]

> Despite the FW Act requirements in relation to bargaining and agreement approval, there are also examples of employees not receiving notices of employee representation rights or a copy of the proposed agreement, or in some cases, not even being given an opportunity to vote on an agreement, let alone be involved in a negotiation process.[12]

3.15 In doing so, employers are circumventing collective bargaining by excluding unions from the process and are seeking to make unilateral decisions on industrial relations in their workplace. As United Voice submitted:

> The now established practice of making agreements with a very small number of employees is fundamentally about excluding unions from the agreement making process and utilising the fact that for the duration of an agreement no bargaining can take place... In United Voice's view, many of these types of agreements are being made to assist labour hire competitively tender for work. This obviously undermines the basis of collective agreement making envisaged under the Act while also providing labour hire with the ability to represent to potential users of its services that it can provide terms and conditions that cannot be disturbed by any form of collective action.[13]

3.16 Several examples are cited below.

3.17 In *Maritime Union of Australia v Toll Energy Logistics*, Maurice Blackburn Lawyers reports that an enterprise agreement was passed by only seven employees and without the union's knowledge:

> The union challenged the approval on the basis that this was an attempt to manipulate the agreement making process as employees were not fairly chosen and the agreement was not genuinely agreed to. Rejecting the appeal, the Full Bench held that in the absence of a suggestion that employees were not employed for bona fide business reasons, there is nothing improper about the use of a small voting cohort to approve broader enterprise agreements.[14]

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10 CFMEU, *Submission 200*, p. 18.

11 United Voice, *Submission 203*, p. 12.

12 CFMEU, *Submission 200*, p. 19.

13 United Voice, *Submission 203*, p. 13.

14 Maurice Blackburn Lawyers, *Submission 157*, p. 10.

3.18 There is a growing number of such cases before the FWC.[15] These agreements, signed by unrepresentative cohorts of workers, are disproportionately favourable to the employer and come at great cost to affected employees. The Australian Workers' Union summed up the practice:

> [A] handful of people in one state are voting for agreements that apply in other states in which they do not work at all, not in the lead-up to the agreement, not when the agreement is made and not when the agreement is live either. We are seeing a number of those sorts of agreements done, national agreements that are voted on by—and this is my term—three men and a dog out the back of Bourke. They then become national agreements and severely undercut our established market rates of pay and conditions.[16]

3.19 In one example provided by United Voice, Broadspectrum Australia Pty Ltd submitted an enterprise agreement—the JBU Agreement—to the FWC for approval in July 2016. The agreement applied to correctional employees within the company's 'Justice Business Unit…in the Commonwealth of Australia', but did not specify a particular workforce. At the time the agreement was made, Broadspectrum was not engaged in any private correctional work in Australia—the company sought to put an enterprise agreement in place before any prospective workforce began operating.[17]

3.20 Similar practices are rampant in the oil and gas industries, manufacturing, metal construction and civil construction, the AWU reports. Agreements reached with small cohorts, the union explains, are used purely to undercut established rates of pay, whether it be in a particular industry or a specific workplace.[18]

3.21 The AWU cited the example of cleaning and catering workers employed by Sodexo in Bass Strait:

> Sodexo had been Esso's offshore caterer in Bass Strait for about 15 years. These are the people who do the cooking and cleaning and household maintenance, for want of a better term, on Esso's offshore oilrigs and gas rigs in Bass Strait. They had been the contractor for 15 years. They had always bargained with their workforce. They had bargained with the union. They, the old contractor, had come to us last year and said: 'We need to tighten the belt. Esso are looking to cut costs.'[19]

3.22 In August 2016, these workers were told that their contract would not be renewed. Instead, the contract was to be awarded to another company, ESS, which

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15 See for example Australasian Meat Industry Employees' Union, *Submission 158*, p. 6.

16 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 34.

17 United Voice, *Submission 203*, p. 15.

18 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 34.

19 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

would employ a new workforce under an enterprise agreement which had been signed by just six workers, all of whom were based in a different state:

> It was a stunning scenario for the 110 Sodexo workers, many of whom had worked offshore for decades, and virtually all of whom had based their lives in the Gippsland region in order to be close to work. They were given a little over one month's notice of the change and their impending redundancies. They were told they could apply for jobs with ESS, but if successful, would not be working in Bass Strait. To be considered for a job with ESS they would have to relocate their home base to Western Australia at their own expense. This was despite the fact that many of these people had worked for ESS in Bass Strait when the company held the contract for some years before Sodexo took over. They were known as a good workforce; efficient and experienced with a track record of supplying top standard services.[20]

3.23 AWU believes the companies concerned gamed the Fair Work system, because the ESS enterprise agreement, which enabled them to win the contract, was signed earlier, by a small cohort of workers in Western Australia:

> ESS had done an agreement some four months before they won the contract, an agreement with six employees in WA to cover South Australia and Victoria. Those six employees had not worked in South Australia and Victoria either before or when the agreement was made or since then, and yet this agreement, which applies only in South Australia and Victoria, was 'bargained'—which is really, 'Here's a document; we want you to support it'—in Western Australia.[21]

3.24 Reports suggest that only one of the six workers who signed the new, considerably inferior agreement might have started working at the Bass Strait site in subsequent months. Not one of the six had worked in, or made a commitment to work in Bass Strait previously.[22] The agreement nonetheless passed the FWC's 'better off overall' (BOOT) test, even though ESS had undercut established pay and conditions by signing an agreement with workers who would not actually be working in Bass Strait.

3.25 In most contracting situations, the new contractor will 'pick up' the workforce, or a significant portion of the workforce, of the old contractor. ESS managed to avoid any transmission-of-business commitments under the FWA when it won the contract, and achieved this by making clear that existing Sodexo employees—including those who had performed the work for years under various contractors—would not be invited to apply for jobs with ESS:

> So people who had worked in that job for successive contractors—ironically including ESS, before Sodexo—all lost their jobs. They were not

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20 Australian Workers' Union Victorian Branch, *Submission 193*, p. 2.

21 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

22 Australian Workers' Union Victorian Branch, *Submission 193*, p. 2.

> even welcome to apply. They were told that if they wanted a job with ESS they might try to find them something as a lollipop lady in northern Queensland—that is a literal example—or as a canteen attendant in northern Western Australia. That too is a real example. A hundred and 10 people, all of whom lived within an hour of the Longford Heliport, from where they embarked to Bass Strait, all lost their jobs—not on merit. They were told that they could not even bother to apply. And that is because ESS wanted to escape any transmission-of-business commitments on an agreement that quite frankly was shonky, an agreement that was done in Western Australia that does not apply in Western Australia; it only applies in South Australia and Victoria.[23]

3.26 The committee discussed this case with representatives of the ExxonMobil Group of Companies, which includes Esso Australia, who explained that switching contracts from one contractor to another is not unusual. According to these representatives, the practice is geared towards efficiency:[24]

> I think it is very unfortunate if people lost their jobs in this process, but our role is to make sure that we are providing reliable and affordable energy out of Bass Strait. I do know that Sodexo is a very large organisation and I would expect that they have looked at providing jobs elsewhere for those people who were displaced.[25]

3.27 Company representatives further highlighted the need to continually review operations in the interest of providing cost-effective services to Australian customers:

> I would like to reflect back on the business that we are in. Part of that business is maintaining the supply of energy to Australia. We are the largest domestic supplier of gas in Australia. We are running a refinery in Australia. We are providing oil from the Bass Strait operations to our local refinery in Australia. As part of the running of that business, we are very mindful of the needs of all Australians. Part of the process of running those businesses is making sure that they remain profitable. We currently have three platforms in Bass Strait that are shut in because they do not make any money. These are shut in because we have not been able to reduce our operating costs to the extent that we can maintain a profitable business.[26]

3.28 Esso Australia confirmed that the company made an approximate 20 or 30 per cent saving by switching contracts, or around $6 million. Company representatives could not say precisely how many people lost their jobs in the process, suggesting it

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23 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

24 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 2.

25 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 3.

26 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 3.

might have been 50 or 60.[27] The AWU informed the committee that the number of workers who lost their jobs was in fact 110:

> 110 people who had never been complained about, who were model employees, who their employer was happy with, some of whom had worked there for up to 40 years, lost their jobs and their livelihoods because of a change of contractor and because the new contractor wanted to avoid transmission of business and because the client did not take any sort of pastoral care notions around this new contracted workforce. They had dollar signs in mind and went out and achieved them. Esso did as the client, and ESS did as the contractor who came in. That means that 110 people were unemployed. They had been loyal. They had been productive. They had never had any complaints about their work performance for years. A group of 10-, 20-, 30- and 40-year employees, through no fault of their own, lose their jobs and have no ability to get those jobs back.[28]

3.29 Nor were the fly-in-fly-out workers who replaced those who lost their jobs significantly better off.[29] The committee understands that the new contractor pays wages which are some $40 000 lower per annum, on average, for the same cleaning and kitchen work.[30] The company secured the enterprise agreement setting out those significantly lower wages by using a handful of workers—based in Western Australia—instead of the actual workforce performing the work in Bass Strait.[31]

3.30 Noting Esso Australia's estimated $6 million savings on cleaning and kitchen work, the committee sought advice on Esso's executive wage bill for 2016. The executive wage bill for 2016 exceeded $12 million.[32]

3.31 In fact, the committee heard that Esso Australia's executive employees may have enjoyed a wage increase in 2016:

> In the current cycle, that [increase] varied depending on people's careers from zero to probably two per cent.[33]

3.32 Asked whether any of these employees experienced a $40 000-per-year wage cut in that same year, company representatives confirmed that they did not.[34]

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27 Mr Mike Wells, Area Procurement Manager, *Proof Committee Hansard*, 15 March 2017, p. 3.

28 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

29 Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 36.

30 Wages are lower by $40 000 on average, but may be up to $65 000 lower. See Mr Ben Davis, Secretary, Australian Workers' Union Victoria, *Proof Committee Hansard*, 15 March 2017, p. 35.

31 See discussion, *Proof Committee Hansard*, 15 March 2017, pp. 2–5.

32 ExxonMobil Australia Group of Companies, answer to question on notice, received 6 April 2017, p. 1.

33 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 4.

3.33 It would appear that kitchen and cleaning staff bore the brunt of the efficiencies required to save $6 million.

Committee view

3.34 Those cleaners and kitchen workers—whose number the company they were contracted to work for was unsure of—lost their jobs and their livelihoods so that Esso Australia could boost profits. The workers who replaced them performed the same work for on average $40 000 less per year, their salaries set under an agreement signed by a handful of workers in WA—workers not actually working at the site in Bass Strait. The company secured a 20–30 per cent cut in staffing expenditure by using a small cohort of workers based elsewhere to secure an enterprise agreement. And every bit of this was legal.

3.35 In the committee's view, 'legal' does not necessarily translate to 'ethical'. Businesses will always look for efficiencies, but there have to be limits on how these can be found. In this case those efficiencies were paid for by kitchen workers and cleaners while executive wages rose—there is something profoundly unsettling about this. As long as the law allows it, there will always be corporations who look to squeeze every possible dollar out of workers, who view every dollar paid to staff as an assault against their bottom line. The committee urges the Government to take a long, hard look at the FWA, and recognise that the Act is failing in its objective of protecting ordinary workers.

3.36 That the impacted workers were never in a position to bargain collectively with ExxonMobil who were the ultimate decision makers underscores the limitations of a collective bargaining model that restricts bargaining to the enterprise level between those directly employed and their employer. The evidence received about the flexibility of companies to organise their workforce to achieve business objectives in relation to efficiency and cost control demonstrates that enterprise bargaining is too limiting as the only form of collective bargaining available to the workers. Without a seat at the table these workers are at a significant and unfair disadvantage. The exclusions of other forms of collective bargaining beyond enterprise bargaining puts workers' wages and conditions in competition for a race to the bottom in the name of efficiency and cost reductions in a range of circumstances not considered when the FWA was introduced.

3.37 It is the committee's view that collective bargaining should be open to workers and corporations at the level which allows the workers to negotiate directly with the point of economic power in the same way that Exxon "bargained" with contractors, playing them off against each other, workers and their representatives should be able to bargain in a real sense with the purchaser of their labour. In commerce a range of labour supply relationships exist beyond traditional direct employment. Outsourcing with competitive contracting gives rise to serious and potentially negative consequences for workers' wages and conditions and the FWA

34 Mr Richard Owen, Chairman, ExxonMobil Australia Group of Companies, *Proof Committee Hansard*, 15 March 2017, p. 4.

should be amended to expand the scope of collective bargaining coverage and corporate responsibility to workers beyond direct employees.

3.38 The committee would like to thank ExxonMobil Australia Group of Companies for readily engaging with this inquiry, and notes that the company appears to have complied with the law throughout. Corporations are not obliged to turn a blind eye to opportunities available to them under the law—it is clearly the law that is lacking.

3.39 It is the committee's view that the FWA must be amended to ensure that workers are protected in situations where a company replaces one provider of contract labour with another. These workers, who will often have worked on the site for many years, are not a supplementary workforce; they have all the features of employees and must be protected under the Act.

Use of subsidiaries for agreement approval

3.40 The committee heard evidence concerning a number of companies which had allegedly set up new subsidiaries with the purpose of using small numbers of employees to secure enterprise agreements.

3.41 Australian Institute of Marine and Power Engineers (AIMPE) recounted its experience with an operator in the offshore oil and gas sector, MMA Offshore Ltd:

> The MMA originally stood for Mermaid Marine Australia. They have two wholly owned subsidiaries: MMA Vessel Operations Pty Ltd and MMA Offshore Logistics Pty Ltd. The case study will identify for you that certain employees in one of the subsidiaries were asked to vote on an enterprise agreement even though they did not realise that their employment had been transferred to another subsidiary of the group. The intention, it appears to us, was that the enterprise agreement that had been approved by a small subset was then to be applied to a larger group by changing contractual arrangements between the various subsidiaries of the larger parent group.[35]

3.42 AIMPE was contacted by MMA employee members who had heard that an agreement was being voted on, but had not been given the opportunity to vote. Employees who were part of the same group had effectively been split into two groups, with a small subset of employees assigned to a new corporate entity established for the purpose of avoiding further enterprise negotiations and instead quickly securing an agreement:[36]

> Mermaid Marine has circumvented the two ballots of its seafarers rejecting its proposed Agreements by corporate malfeasance. By selecting a very small group (five seafarers) employed by a wholly-owned subsidiary, it has defied the views of its broader workforce.[37]

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35 Mr Martin Byrne, Federal Secretary, AIMPE, *Proof Committee Hansard*, 18 April 2017, p. 26.

36 Mr Martin Byrne, Federal Secretary, AIMPE, *Proof Committee Hansard*, 18 April 2017, p. 27.

37 AIMPE, *Submission 204*, p. 13.

3.43 The committee invited the company to address these allegations, but the invitation was declined.

3.44 The Victorian Private Sector Branch of the Australian Services Union (ASU) discussed the case of Dnata Australia, a ground handling company owned by the Emirates Group. The company had reportedly set up a subsidiary company, Airport Handling Services Australia Pty Ltd (AHSA), in order to bid for work using this new entity and have enterprise agreements voted on by only two employees:[38]

> Only 2 people are employed by AHSA and only 2 people voted to approve the AHSA proposed agreement. Evidence gathered by the ASU casts doubt as to whether the 2 employees are genuine employees or have been 'fairly chosen' to vote on the proposed agreement. For example employees have been told by senior management that as there is currently no work associated with AHSA the two employees are not being paid.[39]

3.45 Dnata's intention, the ASU submitted, was through AHSA to use workers to perform the same work for inferior wages secured under the new agreement.[40]

3.46 The committee approached Dnata regarding these allegations. Dnata submitted that AHSA had been established:

> …to provide another entity in the market to successfully retain current client airlines should dAS [Dnata Australia Services Pty Ltd] be unsuccessful in retaining those client airlines, and/or to attract new client airlines that dAS would not otherwise be able to effectively compete for.[41]

3.47 Dnata added that there was nothing unusual about this in industry terms, confirming that the AHSA enterprise agreement had 'been set up as a different operating model to the current dAS employment terms and conditions.[42]

3.48 The committee explored this further with Dnata at a public hearing. The company outlined the reasons for its business strategy:

> This organisation is facing a stark reality: Dnata is unable to match on price as a result of our uncompetitive cost base…something has to happen.[43]

3.49 To address its 'uncompetitive cost base', the company decided to maintain its existing dAS business, along with its workers and their existing pay and conditions. The new subsidiary, AHSA, is intended to as a more cost-competitive alternative.

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38 Ms Ingrid Stitt, Secretary, Victorian Private Sector Branch, Australian Services Union, *Proof Committee Hansard*, 18 May 2017, p. 40.

39 Victorian Private Sector Branch, Australian Services Union, *Submission 205*, p. 3.

40 Victorian Private Sector Branch, ASU, *Submission 205*, p. 3.

41 Dnata Australia Pty Ltd, *Submission 209*, p. 3.

42 Dnata Australia Pty Ltd, *Submission 209*, p. 3.

43 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 47.

3.50 The committee asked Dnata to confirm how many are employed by AHSA, and was told that the new company employed two workers as of the date of the hearing, 18 May 2017. Both, Dnata confirmed, are senior employees with many years' experience and are commensurately paid at a very high level.[44]

3.51 These two AHSA employees, the committee put to Dnata, were not representative of those who were yet to be employed, and who would be employed at various classifications—most of them not senior. Dnata did not offer a view on whether this was a fair way to select a cohort of employees to secure an agreement, offering instead that its approach complied with the provisions of the FWA.[45]

3.52 The committee notes that AHSA's application to the FWC had been withdrawn in the days preceding the committee's public hearing, and that Dnata's intention was to re-negotiate the agreement with new employees. Asked whether Dnata would recognise the union as being a negotiating body for the new agreement, company representatives replied:

> If that is a provision under the act, then we would comply with the provisions under the act.[46]

Casual employees

3.53 Submissions also noted that employers are increasingly seeking to negotiate with casual workers, who are in a relatively weaker bargaining position, to secure agreements.

3.54 One such strategy involves using voting cohorts to rubberstamp agreements with wider application. The Australian Manufacturing Workers' Union provided several examples of this. In *McDermott Australia Pty Ltd v AWU, AMWU* [2016], a full bench decision of the FWC allowed casual workers the company had on the books to approve an agreement even though they were not performing any work at the time:

> The FWC Full Bench considered that the words "employees employed at the time" referred to in the Act, include any casuals who were on the payroll and engaged to perform casual work. The Full Bench also reasoned that it would have resulted in disenfranchisement to not allow the casual employees a vote on an agreement that might regulate their terms and conditions of employment. The FWC Full Bench did not consider that there was anything unusual about a business choosing not to engage any permanent employees for the four years the enterprise agreement was to operate.[47]

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44 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, pp. 50–51.

45 See discussion with Dnata Australia, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 51.

46 Mr Robert Larizza, Head of Human Resources, Dnata Airport Services Pty Ltd, *Proof Committee Hansard*, 18 May 2017, p. 51.

47 AMWU, *Submission 196*, p. 9.

3.55 This case shows that employers can avoid entering into Greenfields agreements by engaging casual workers without protection from unfair dismissal. What protection from unfair dismissal exists for casuals generally requires enforcement through court. A casual employee is highly unlikely to pursue court action against a former employer whilst looking for a new job.[48]

Equal work for equal pay

3.56 In Queensland's aged care sector, home to arguably the lowest paid health workers in the state, the Queensland Nurses Union (QNU) reports a considerable problem with employers seeking to disadvantage groups of workers by securing enterprise agreements which set out differing rates of pay for similar work:

> Assistants in Nursing (AiNs) and Personal Care Workers (PCWs) are the lowest paid of the direct aged care workforce with AiNs generally receiving marginally more than PCWs. The QNU has consistently argued that any of these workers who perform nursing duties must be classified as such i.e. an AiN and paid accordingly… In our experience, employers will engage PCWs to perform nursing work, often amongst other duties, with the express aim of keeping wages low.[49]

3.57 Essentially, employers push down rates of pay by putting in place separate agreements for groups of workers who perform the same work. In practice this means that two, three or more groups of employees can perform the same work, in the same workplace, for different levels of pay. Gradually, the employer will then recruit new workers into the cohort covered by the most disadvantageous agreement:

> That is what Blue Care/Wesley Mission has done in Queensland. They have two enterprise agreements. One applies to registered nurses, enrolled nurses and assistants in nursing. The assistants in nursing do the same work as a personal carers, but personal carers are under a separate enterprise agreement and get around $1.50 less per hour for the same work. Blue Care/Wesley Mission made a decision some years ago not to recruit any new assistants in nursing who are on the higher wages. So every person who has commenced employment with that organisation in the last few years has been engaged with the label of personal carer and paid the lower rate of pay. The only people who remain on the higher rates of pay are those who commenced employment several years ago.[50]

Workers residing overseas

3.58 The Australian Council of Trade Unions (ACTU), describes another 'species of strategic voting cohort', which involves employers deliberately making agreements with a small, temporary, start-up workforce consisting of visa workers who are asked to 'vote' on collective agreements as part of their sponsorship and employment

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48 AMWU, *Submission 196*, p. 10.

49 Queensland Nurses' Union, *Submission 192*, p. 12.

50 Mr Kevin Crank, Industrial Officer, Queensland Nurses and Midwives' Union, *Proof Committee Hansard*, 20 April 2017, p. 9.

requirements. These agreements are signed before the visa workers begin working in Australia, and are then used to lock in conditions in the company's entire workplace, or even a number of workplaces, and 'are exploitative by reason of information asymmetry and the economic dependence of the worker on the offer of work.'[51]

3.59 Multiple submitters voiced concerns about operators in the Australian maritime industry, such as Inco Ships Pty Ltd.[52] Inco is alleged to have secured an enterprise agreement which covers both Australian seafarers and foreign seafarers working on 457 visas by using only a particular cohort—foreign workers—to approve the agreement:

> We understand that no bargaining happened in Australia. The bargaining happened overseas, and approval for the agreement was made overseas… The agreement Inco is seeking to put in place is one that our members have had no input into and, as far as we know, certainly has not been negotiated in Australia.[53]

3.60 This was borne out by evidence from AIMPE. AIMPE submits that Inco's enterprise agreement was signed by an employee representative residing in Odessa, Ukraine, while the signing was witnessed by a person residing in the Philippines.[54] The Australian Maritime Officers Union (AMOU) described this particular company as having 'a record of employing foreign seafarers on 457 visas in place of Australian seafarers.'[55]

When negotiations reach impasse

3.61 Part 2-4 of the FWA regulates the actions of the parties to facilitate enterprise bargaining negotiations. There are times when these negotiations do not end in an agreement. With a decline in the number of workers covered by enterprise agreements[56] and historically low wage growth,[57] the options available to the parties to bring the collective bargaining process to a successful end must be considered.

3.62 In the long running bargaining dispute between AMWU and Cochlear (*AMWU v Cochlear Limited*) Commissioner Cargill analysed the evidence in detail and concluded:

> Cochlear, and the other bargaining representatives, cannot be required to make concessions during bargaining or reach agreement on terms which are

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51 ACTU, *Submission 182*, p. 20.

52 Australian Institute of Marine and Power Engineers, *Submission 204*, p. 16; Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

53 Mr Jarrod Moran, Industrial Officer, Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

54 AIMPE, *Submission 204*, p. 16.

55 Mr Jarrod Moran, Industrial Officer, Australian Maritime Officers Union, *Proof Committee Hansard*, 18 April 2017, p. 42.

56 'Fall in collective agreements blamed on union coverage', *The Australian*, 1 June 2017.

57 Australian Bureau of Statistics, *Wage Price Index, Australia*, ABS 6345.0, June 2017.

> to be included in an agreement… I accept that Cochlear has taken its stance in relation to this issue as part of its bargaining strategy. However frustrating this may be it is not unfair or capricious conduct.[58]

3.63 Despite having achieved majority support to commence bargaining, won good faith bargaining orders against the employer and taking protected industrial action in support of claims for a new Enterprise Agreement, Cochlear workers to this day, some five years after the FWC made bargaining orders, do not have an enterprise agreement.

3.64 Part 2-5 of the FWA allows for limited scope for workplace determinations through arbitrated decisions but this Part of the Act does not address the need for arbitral powers to resolve intractable bargaining disputes beyond the limits of the underutilised low paid bargaining stream.

3.65 It is the recommendation of the Committee that the Fair Work Commission be given the power to resolve intractable collective bargaining disputes through arbitration.

58 *AMWU v Cochlear Limited* [2012] FWA 5374.