Legal Obstacles and Possibilities for Environmental Bargaining in Australia

Introduction

Capital continues to resist environmental regulation in the face of unfolding climate disaster (Wright and Nyberg, 2015) while Australian Federal and State Governments have responded slowly and inadequately. An overwhelming majority of climate emissions, meanwhile, are derived from work performed on behalf of capital (Huber, 2022). Yet it is a social majority of working people who must confront the worst effects of environmental catastrophe. In the face of disaster and regulatory inadequacy, the labour movement has a responsibility to tackle climate change within workplaces, particularly while workers maintain some amount of collective power within them.

Australian industrial relations scholars have proposed the concept of 'environmental bargaining' as a contribution to the current and unsatisfactory environmental regulatory mix (Goods, 2017; Markey and McIvor, 2019). Environmental bargaining involves negotiation between labour and capital regarding productive social relations and the environment - climate emissions reduction in particular. Environmental bargaining has also been recommended to nation states more broadly by the United Nations (2007) and is currently occurring within industries across a range of European, African, North American nation states (Just Transition Centre, 2016; Hampton, 2015) as well as to a limited degree in Australia (Markey and McIvor, 2019). As an industrial relations strategy to combat climate change, environmental bargaining can be located within a wider and rapidly emerging field of labour environmentalism or Environmental Labour Studies (ELS), focussing on strategies of unions and workers to resist environmental degradation and adverse impacts of climate

change on workers (Stevis, Uthzell and Rathzell, 2018; Markey & McIvor, 2019; Goods, 2017; Hampton, 2015; Lipsig-Mumme & McBride, 2015; Rathzell and Uzzell, 2013; Markey, McIvor and Wright, 2014; Stevis and Felli, 2015; Antonioli and Mazzanti, 2017).

Absent from this significant industrial relations literature, is a comprehensive analysis of the current *legal* parameters and possibilities surrounding environmental bargaining in Australia. Over the past decade, commentators have reiterated findings from fledgling doctoral research (Lambropoulos, 2009) that legal arrangements surrounding environmental bargaining are 'ambiguous' (Goods, 2017: 672; Markey and McIvor, 2019: 90; Markey, McIvor and Wright, 2014: 177). While visionary and pioneering, Lambropoulos' 2009 study requires significant updating and elaboration, particularly in light of stark recent climatic developments as well as recent findings in the fields of ELS and health and safety law explored below.

This paper argues that dominant channels of Australian enterprise bargaining law belong to an era of 'fossil capitalist inertia' (Flanagan and Goods, 2022: 479-80) and hence, present a restrictive, weak and unenforceable option for environmental bargaining and decarbonisation. This article does not take the view, however, that the complicity between industrial relations and fossil-capitalism is totalising. Instead, it proposes that alternative avenues within the state itself, in the form of work health and safety (WHS) law, might offer a broader, stronger and enforceable regulatory framework for environmental bargaining. Certainly, environmental bargaining through the enterprise bargaining system is possible in Australia and does in fact occur, albeit under very particular and rarefied circumstances (Markey and McIvor, 2019: 91-94). In legal terms, however, enterprise bargaining law restricts the content of agreements regarding the environment, rendering their outcomes non-binding and unenforceable against

employers. On the other hand, where environmental bargaining is conducted through WHS law, it is likely that WHS Committees within workplaces may make broader agreements and decisions regarding the environment and enforce them against employers, backed by force of law.

This argument is addressed in three Parts. Part I reviews the literature relevant to a legal analysis of environmental bargaining. This includes the industrial relations scholarship on labour environmentalism, prefaced above, which has in turn led the author to investigate two separate legal fields: i) collective bargaining; and ii) occupational health and safety law. Both fields are the subject of doctrinal legal analysis in Part II. Findings from this analysis inform Part III of the paper, proposing alternative legal structures and law reform to enhance environmental bargaining within the terms described by the existing Australian industrial relations literature (Goods, 2017; Markey and McIvor, 2019).

Part I – The Literature:

This paper draws on three sets of literature. First, is ELS, which broadly asks: why should labour take responsibility for environmental problems caused by capital, particularly when doing so might further entrench the precarity of work in ecologically unsustainable industries while intensifying work (e.g. Hampton, 2015)? Industrial relations scholars have responded by generating a secondary literature on the issue of environmental bargaining, discussed below. This paper contributes to this discussion by reviewing a third set of literature regarding WHS law to investigate more effective possibilities for environmental bargaining.

The question as to why the labour movement should take responsibility for the environment, has partly been explored in the Introduction. The answer, however, is increasingly contested among ELS scholars and allied social movements (Doorey and Eisenberg, 2022). As Doorey and Eisenberg explain, terms synonymous with ELS, such as a 'just transition' and 'just transition law' are no longer exclusively associated with restorative justice or compensation for workers affected by environmental regulation and change, as they were between the 1970s and 1990s (pp. 6, 11). Rather, since the early 2000s, ELS has increasingly been co-opted by social movements to include other claims for environmental justice, concerned with distributive justice (involving a redistribution of material resources) and procedural justice (involving participative democracy and worker say) (pp. 10-12). Doorey and Eisenberg are critical of these interventions for complicating environmental and labour policy, which they argue detracts from the original narrow aims of a just transition in supporting workers whose livelihood is threatened by environmental policy (1-3). ELS scholars such as Rathzel, Stevis and Uzzell, by contrast, have taken a more accommodating approach, redefining the field of ELS to cover

> 'all research that analyses how workers in any kind of workplace and community are involved in environmental policies/practices and/or how they are affected by environmental degredation in the broadest sense' (Stevis et al, 2020, 4 in Rathzell, Stevis and Uzzel, 2021, 2).

As Doorey and Eisenberg concede, accommodating procedural justice initiatives within ELS provides workers and their communities 'a seat at the table' through worker participation involving the types of bargaining contemplated by this article. But Flanagan and Goods (2022) suggest, 20th century procedural justice mechanisms of industrial relations, such as bargaining and worker participation, may be inherently imbued with the hallmarks of 'fossil capitalist inertia' and must therefore be carefully considered before being applied to a 21st

century projects of decarbonisation (pp. 480-481). Indeed, this observation necessitates critical analysis of the legal mechanisms presented in this paper.

Aligned with the broad approach taken by Rathzell, Stevis and Uzzell, is the recent scholarship of Matt Huber (2022), who proposes that the labour movement should take responsibility for climate justice because of a range of factors: inaction by the state; the disproportionate effects of climate change on workers; a basic incompatibility between short-term profit (motivating most employers) and long-term investment in environmental sustainability; as well as the underlying significance of productive social relations (as opposed to liberal consumer relations) in generating climate emissions (Huber, 2022: 3-11). Other ELS scholars emphasise, however, that worker agency and co-ordination over transitional arrangements, mitigation measures and processes involved in environmental sustainability are the most significant reasons for labour movement involvement in environmental action (Huber 2022: 87, Hampton, 2015; Stevis and Felli, 2015; Goods, 2017; Markey and McIvor, 2019). They highlight the fact that dominant alternatives presented by the environment movement – green Keynesianism and vague references to 'just transitions' - inadequately address ongoing employment prospects and quality of work (Goods, 2017: 671; Doorey and Eisenberg, 2022). Emphasising the connection between unbridled capitalism and ongoing environmental degradation, these ELS scholars propose that it is only through regulated and / or co-determined industrial relations – relations that afford workers agency over environmental transition - that enduring solutions to environmental disaster will emerge (Markey and McIvor, 2019: 87-91). In other words, enduring environmental action requires consideration of an alternative political economy, in addition to other major environmental policies.

Industrial relations scholars, Markey and McIvor (2019) and Goods (2013), deploy a typology developed by Richard Hyman (2001), to evaluate worker and trade union responses to environmental-labour policy on the basis of its connection to 'market, society and class' interests. A 'market' approach, they suggest, involves union/employer co-operation to comply with environmental efficiency measures such as carbon pricing and is ultimately a 'passive' environmental response. A 'social' approach involves a defensive union position to state-led green capitalism, invoking labour protection, retraining and consultation, oriented towards 'social' unionism. Meanwhile, a 'radical class' approach involves unions and/or a 'transformative transition' involving unions seeking an alternative political economy through alliances between community organisations by which unions orient themselves towards a 'radical class' or anti-capitalist position (Goods, 2013: 17; Hampton 2015; 2018; Stevis and Felli, 2015). Markey and McIvor suggest that a labour movement environmental strategy that realises the latter approach, or indeed *all three interests together*, will have the most enduring and impactful results. While some have questioned the apparent contradiction between pursuing all three approaches, together (Hampton, 2015), Markey and McIvor (2019: 83) helpfully refer to the classic industrial relations scholarship of Alan Flanders (1970: 15) as an analogy to explain the place of unions in respect to the environment: that unions have always occupied a contradictory role in relation to capitalism, at once maintaining and representing 'vested interests' in its reproduction, while simultaneously operating as 'swords of justice', working towards radical social change.

Similar typologies evaluating environmental-labour strategy have emerged over the past decade (Stevis and Felli, 2015; Hampton, 2015; Kalt, 2022). They consistently prove that the

most effective schemes, realising market, society and class interests, are those involving 'green' or 'environmental bargaining'. In practical terms, environmental bargaining usually involves workers and employers co-operatively negotiating, planning, implementing and monitoring environmentally sustainable change in their own workplaces, preferably with the assistance of trade unions and the state. Goods (2017) studied a number of different environmental bargaining approaches, categorising them into two main strands: 'embedded institutional' or 'voluntary multilateral'. 'Embedded institutional' bargaining involves practices such as general commitments to and consultation surrounding environmental action, predominantly led by management. An advantage of management led environmental bargaining is that it overcomes employer resistance to environmental action. On the other hand, outcomes of such bargaining are unenforceable against employers and often go unimplemented because they fail to sufficiently involve workers and unions. Conversely, 'voluntary multilateral' initiatives involve representatives from management, workers and unions (and in the UK, the state), working together, often via a specialist 'joint consultative committee' (JCC) or 'occupational health, safety and environment' (OHSE) committee within an enterprise, to create and deliver environmental improvements (Hampton, 2015). Problematically, however, the mere voluntariness of such arrangements do not bind the parties to their commitments and have been found to erode over time (Farnhill, 2017; Markey 2014; Wright and Nyberg 2017).

Accordingly, Markey and McIvor (2019: 87-91) have proposed that combining both 'embedded institutional' and 'voluntary multilateral' approaches (observed by Goods (2013; 2017)), may produce the most impactful or meaningful environmental results. In practical terms, combining 'embedded institutional' and 'voluntary multilateral' approaches involves formalising or embedding the co-determination of environmental issues, most often within

collective agreements. In other words, it requires parties to collectively bargain about processes by which they intend to solve environmental problems generated by an industry or enterprise. More often than not, this will mean that the parties agree to use the bargaining process to create a collective agreement that establishes a JCC or OHSE Committee that addresses environmental issues. Markey and McIvor propose that such an approach emphasises Hyman's 'radical class' approach - sharing responsibility with labour over the management of environmental issues. Embedding multilateral strategies within an institutional arrangement in this way overcomes problems of corporate and collective inaction generated by embedded institutional or voluntary multilateral arrangements on their own. Meanwhile, the bargaining process requires parties to renew their commitments to environmental action every four years, while environmental planning and action is assisted in its design, implementation and monitoring by trade unions.

Markey and McIvor point to various sectors and organisations in Australia (such as in the tertiary education sector, involving the NTEU), where practices approximating this approach and its allied strategies are currently underway (2019: 91-5). Their research also shows that the depth of union engagement with environmental concerns mainly reflects industry dependence on environmental degradation. Kalt (2022) has similarly identified 'sectoral interests' as the most important factor influencing environmental strategy of trade unions (503). In other words, the most impactful and consistent use of environmental bargaining clauses were found in agreements between workers, unions and employers in non-carbon-intensive industries such as tertiary education. Agreements from the mining and forestry industries, on the other hand, acknowledged the environment in a more self-interested way or not at all (2019: 84, 91-7; Kalt: 2022: 516-7). Kalt adds that state environmental policy and economic development are not insignificant factors in influencing union attitudes to climate

(513-516). Both additional factors might bode comparatively well for Australian trade union environmentalism, given current political and economic circumstances.

While theoretically sound, the institutionally embedded multilateral approach (suggested by Markey and McIvor) faces a number of legal difficulties. As labour lawyers such as Stewart (2008) and Lambropoulos (2009) have commented, Australian common law has historically subjected collective bargaining to narrow constraints, primarily in the interests of preserving managerial prerogative. Legal tension arises where, as Markey and McIvor comment, the embedded multilateral approach is 'less obviously co-operative' or voluntary, because it requires employers to commit to arrangements for environmental action (p89). Herein lies the difficulty: that 'radical class' approaches, which share power over environmental decisions between workers and employers, stand at loggerheads with the objectives of the common law regarding collective bargaining which preserves managerial prerogative. These constraints, derived from the era of 20th century fossil-capitalism, have been enabled by various legislative industrial frameworks, including the current *Fair Work Act 2009*, enacted by a Labor Government. Current constraints are afforded detailed legal examination in Part II, below.

The sanctity of managerial prerogative to collective bargaining law necessitates legal alternatives that enable environmental bargaining as envisioned by Goods (2013; 2017) and Markey and McIvor (2019). As Goods (2017) suggests, 'questions' as to whether WHS legislation could be utilised as a means to include climate change in workplace agreement(s) …remain under-researched' (672). Indeed, occupational health and safety law is a key alternative to collective bargaining law that, as explained in Part II, may provide a stronger

legal foundation for environmental bargaining. At the very least, it affords a sensible comparator or model for future environmental industrial regulation. Organisational Health and Safety Committees (HSCs) established under WHS law (discussed in more detail in Part II) share most of the characteristics of environmental JCCs, described by the ELS literature – particularly worker participation. It is therefore useful to briefly compare an WHS literature on worker participation in Health and Safety Committees (HSCs) with ELS discourse.

Environmental and WHS regulation share a number of significant similarities. As long ago as the nineteenth century, the Factory Acts in Britain and Australia recognised a public interest served by ideologically separating health and safety from industrial relations, 'indicating that these matters were now the business of the state' (Carson and Henenberg, 1988: 3 in Johnstone et al). The threat of climate disaster clearly warrants similar treatment. Indeed, the historical use of health and safety law to address environmental problems throughout the period of fossil capitalism mean that it contains the seeds of meaningful engagement with environmental concerns on a global scale. Throughout the 20th century, health and safety campaigns led by trade unions and workers have conventionally focussed on forms of toxic environmental pollution and degradation. Examples include: the long-running campaign against asbestos in Australia (between the 1890s and 2005); campaigns against the handling of radioactive materials, chemicals and toxic air-pollution in the US (Snell, 2022), as well as 'the Lucas Plan' - a legendary campaign by workers to convert arms manufacturing to useful and non-destructive ends (Bell, 2022). It is nevertheless true that examples of crossover between environmental and health and safety campaigns, such as these, have mostly been associated with more immediate forms of environmental contamination often by sources within local communities, impacting local communities. Eliding decarbonisation campaigns with health and safety, by contrast, is more challenging because the causes of climate change

are global *as well as* local. By far the most successful and enduring use of health and safety regulation, specifically to address climate justice, however, has involved the Spanish union, *Comisiones Obreras* (CCOO), that merged health and safety with environmental issues, as long ago as 1991 (Rathzell, 2022: 649). Since 2000, the union has trained 60,000 shop stewards and 350 organisers in its decarbonisation strategy, linking the program to job creation through 'green jobs' (Rathzell, 2022: 655). By 2020, a survey of CCOO members showed that 80% believed it was their responsibility, together with their union, to participate and act on climate issues (Rathzell, 2022: 667).

As in bargaining, worker participation in health and safety committees has emerged as one of the most effective means to achieve healthy and safe workplaces, in co-ordination with state inspectorates (Gunningham, 1985; pp47-48; Quinlan, Bohle and Lamm, 2010, Ch 9; Johnstone, Quinlan and Walters, 2005, 94-97; Johnstone, Bluff and Clayton, 2012, Ch 7). Worker participation is crucial to WHS management primarily because: i) managers do not know about or control production in enough detail, requiring the competence of workers to detect and abate hazards; ii) workers are required to monitor and influence the achievement of WHS outcomes; and iii) workers and employers have separately and mutually opposed interests (Walters and Frick, 2000: 43-44; Milgate and O'Loughlin, 2002: 283). All of these observations could just as easily be applied to the relationship between capital and the environment, and are shared by the ELS literature on environmental bargaining (Goods, 2017; Markey and McIvor, 2019; Markey et al, 2016: 3-4). Perhaps the most salient argument for worker participation remains that employers are motivated to maximise profit, while minimising costs, often at the expense of health, safety *and* the environment.

Building on a considerable employee participation literature, Markey et al (2016) refer to Wilkinson et al's (2010) 'escalator of participation' to describe a variety of schemes involving employee participation in carbon emissions reduction (pp. 175-6). This literature identifies practices of 'joint consultation' (provided for in Goods and Markey's (2019) conception of green bargaining through enterprise agreements), as a 'shallower' and more 'limited' form of employee participation, than 'joint decision-making', (proposed here through the notion of addressing climate issues through HSCs) which is a more 'embedded' approach (p. 176).

It is noted that neither form of 'bargaining' discussed here is backed by force of labour withdrawal or strikes. Protected industrial action in support of environmental clauses in agreements is not possible under existing Australian law (discussed below). Similarly, it is unlikely that climate matters pose a sufficiently 'imminent' risk to health and safety to justify a work stoppage organised by workplace HSCs (see, *Fair Work Act*, s19(2)(c)(i)). Rather, as discussed below, HSCs are backed by force of coercive regulatory law'.

In 2013, a survey of international literature on worker participation in HSCs showed that there existed at least thirty-one empirical studies into their efficacy and operation (Yassi, et al, 2013: 424). Common determinants of successful HSCs across these studies included: institutional or management commitment to resolving health and safety issues; union and worker participation; power to make binding decisions; and most importantly, enforcement of committee decisions, backed by legislation or law. Australian studies of HSCs confirm these

international findings (Milgate et al, 2002: 282; Pragnell, 1994; Warren-Langford et al, 1993). These determinants of effective HSCs are remarkably similar to those identified by industrial relations scholars regarding effective environmental bargaining mechanisms. They both work best when institutionally embedded in committees or JCCs, comprised of: workers, union representatives and employers with shared decision-making capabilities. The sole determinant from the WHS literature that has not, before now, been identified by the environmental bargaining literature, is the one that has proved most influential to the experience of HSCs: enforcement of committee decisions by law. Accordingly, it is proposed here, by reference to a practical literature on WHS law (Tooma, 2019; Johnstone and Tooma, 2022) explored in Part II, that law may be just as significant to environmental JCCs as it is to HSCs, despite not having been considered in significant detail by ELS scholars to date. The place of the environment in Australian collective bargaining and WHS law is explored in detail in the next Part of the article.

Part II – The Environment in Collective Bargaining and WHS Law

Enterprise bargaining is the dominant means by which collective bargaining is conducted in Australia. But as this Part of the paper (Part II) shows, enterprise bargaining law is ill-equipped to directly accommodate environmental bargaining. This is because clauses within enterprise agreements requiring employers to take action on environmental issues likely remain unenforceable. They are rendered unenforceable in one of two ways. Either, they are: i) likely to be 'non-permitted matters' within enforceable agreement clauses between employers and employees; or ii) exist as mere consultation clauses between trade unions and employers, permitting enforcement of environmental discussion, rather than requiring environmental action. Both aspects of enterprise bargaining law are features of a conservative

or ‘fossil capitalist’ understanding of industrial relations from the mid-20th century that protect managerial prerogative by locking-out broader social and political concerns from the workplace. The continuing dominance of this view across the caselaw (outlined below) has lead the author to make a case for why WHS law might offer a broader, stronger and enforceable regulatory framework for environmental bargaining.

‘Non-permitted matters’ and the Environment:

Section 172(1)(a)-(d) of the *Fair Work Act 2009* is the key legislative provision applied by the judiciary to determine the legality of matters in enforceable, collectively bargained, enterprise agreements. This provision restricts the content of enterprise agreements to ‘permitted matters’, which it defines as ‘matters pertaining to the relationship between an employer’ and either: i) ‘an employer’s *employees*’ (s172(1)(a)); or ii) ‘an *employee organisation*’ such as a trade union’ (s172(1)(b)). Non-permitted matters have no effect in agreements (s253(1)(a)). They are unenforceable against an employer in Court (s50). Neither can they be the subject of industrial action (s409(1)). A key threshold problem arising from this restrictive collective bargaining legislation then, is whether environmental issues are ‘matters pertaining to the relationship between employers and employees’ (s172(1)(a)).

‘Matters pertaining’ to the employment relationship have a lengthy history in Australian labour legislation (see, for instance, *Conciliation and Arbitration Act 1904,* s2*; Workplace Relations Act 1996,* s170LI). Over time, this legislation has been subject to competing ‘restrictive’, ‘formalist’, and ‘conservative’ judicial interpretation, as well as ‘expansive’, ‘realist’ and ‘progressive’ interpretation. On the one hand, the High Court has mostly relied upon a ‘formalist’ legal interpretive method, resulting in a narrow and restrictive reading of

'matters pertaining' that is likely to deny the legality of environmental clauses. On the other, the Federal Court and its Full Bench, have mostly relied upon a 'realist' interpretative method, resulting in a broad and permissive reading of collective bargaining legislation that might accommodate environmental matters within enforceable agreement clauses. Adding further complexity is that recent High Courts have failed to definitively overrule prior contradictory approaches to matters pertaining clauses, leaving them open for future application (Stewart, 2016: 366-7). Such competing interpretation has led Stewart (2008; 2016) and Lambropolous (2009) to conclude that collective bargaining law remains a minefield of ambiguity and confusion.

Illustrative of the narrow conservative view is that matters within managerial prerogative are not 'matters pertaining' or 'directly' impacting upon the employment relationship (*R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443 at 451. In the mid-twentieth century, the Dixon High Court constrained the notion of 'matters pertaining' to such a degree that even shop trading hours were restricted from the bargaining table (see, *R v Kelly; Ex parte Victoria* (1950). Similarly narrow decisions followed so that methods of production, business decisions relating to financial investments, the hiring of independent contractors, deduction of union dues from wages, bargaining agent's fees as well as 'demands of an academic, political, social or management nature' (per McHugh and Callinan JJ in *Electrolux* (2004)) were all excluded – the latter of which would almost certainly include environmental matters. Evolving at the height of extractivism in the mid-twentieth century, the environment was far from the minds of High Court judges in formulating this doctrine. To perpetuate this doctrine, however, under the circumstances of the current climate emergency could well prove

catastrophic due to its effect of displacing and negating employer responsibility for intensifying carbonisation.

As Stewart explains (2008), a key policy reason for excluding environmental matters from agreements is that their inclusion would enable workers to take lawful industrial action in support of environmental causes. And while Stewart supports the inclusion of environmental matters within agreements, he is nevertheless of the view that environmental clauses should not be subject to industrial action (2008).

Expansive realist interpretation of 'matters pertaining' to the employment relationship, on the other hand, has rejected the distinction between industrial matters and matters of managerial prerogative. On this view, labour and management have a 'mutual interest' in many aspects of organisational decision-making (*Re Cram; Ex parte NSW Colliery Proprietors Association Ltd* (1987) 163 CLR 117). Such interpretation has meant that matters like staffing and recruitment levels, consultation over technological change and redundancy as well as superannuation have been considered 'matters pertaining', throughout the 1980s. Arguably, agreement clauses requiring employers to take environmental action might fit within an expansive view of 'matters pertaining' to the employment relationship.

Indeed, the Australian Federal Court frequently adopts the expansive view. In 2021, Justice Flick applied an expansive view of 'matters pertaining', permitting an agreement clause providing a dispute settlement procedure regarding a broad and unspecified array of 'unresolved matters' within the workplace (*NSW Trains v Australian Rail, Tram and Bus Industry Union* ('NSW Trains') FCA 883 [44]-[45]). Equally, this case saw the Court adopt a

broad view of WHS issues in agreements that permitted parties to formulate their own WHS clauses, consistent with state health and safety legislation [170]-[172] (discussed further below). Other recent cases concerning recruitment and position descriptions within agreements have also seen the Federal Court and Fair Work Commission adopt an expansive interpretation, permitting such matters within agreements (*UFUA v Metropolitan Fire and Emergency Services Board* [2016] FWCFB 2894; *Australian Maritime Officers Union v Sydney Ferries Corp* (2009) 190 IR 193). These cases suggest the possibility of judicial tolerance towards enforceable environmental action clauses.

It is noteworthy that the expansive view was only ever entertained by the High Court during a brief and anomalous historical window when a progressive majority occupied the bench from the early 1980s until the late 1990s – overlapping with the longest period of federal Labor Government in Australian history. This expansive and enlightened interpretation of 'matters pertaining' was quickly forgotten by a conservative High Court in the *Electrolux Case* in 2004. It was here that, as discussed above, the Court failed to mention or overrule the expansive view from the *Cram* case, less than two decades earlier, when reinstating the conservative formalist approach, increasing the legal ambiguity surrounding 'matters pertaining'.

As the superior or appellate institution within the common law hierarchy, the High Court's conservative approach is likely to resolve any ambiguity in favour of employers and against environmental bargaining. In this respect, a conservative High Court majority (5:2) has recently 'nailed its colours to the mast' by restating this narrow formalist approach across three prominent employment law decisions: *Workpac Pty Ltd v Rossato & Ors* [2021] HCA

23; *Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1; and *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors* [2022] HCA 2 (Schofield-Georgeson, 2023 (forthcoming); Schofield-Georgeson and Riley, 2023 (forthcoming)). Three of the majority judges in these cases will remain on the bench for at least one to two decades into the future. Meanwhile, the views of two recent appointments to the bench (Jagot and Gleeson JJ) on the issue of 'matters pertaining', as well as that of another impending appointment in 2023, remain uncertain and guided perhaps by the non-binding Fair Work Bill Explanatory Memorandum 2009. As the EM explains (2009: 673), 'terms that would require an employer to engage or not engage environmental or ethical standards … would not be intended to be within the scope of permitted matters for the purpose of paragraph 172(1)(a)'. Clearly, the classification of clauses requiring employers to take action on environmental issues - as 'matters pertaining' to the relationship between employees and employers - remains unstable and ambiguous and, if appealed by employers to the current High Court will likely be rendered 'non-permitted matters'.

As Lambropolous concluded in 2009, 'requirements for employers to introduce new equipment which are energy or water efficient or clauses obliging an employer to meet a specific CO2 target would be unenforceable' (189). More likely, are environmental clauses linked to established employment or industrial concerns such as bonuses or wages' (Senate Committee Report, [4.55-4.60]). Problematically, such clauses are unlikely to result in meaningful organisational change towards the environment because they are not institutionally embedded multilateral initiatives such as those recommended by the literature (Goods, 2017).

Environmental Consultation Clauses

While environmental matters are likely to be excluded from agreements between employers and *employees* under s172(1)(a), they are nevertheless permissible within agreements to the extent that they pertain exclusively to the relationship between employers and *trade unions* under s172(1)(b) of the Act. To this extent, unions and employers are permitted to bargain about the environment, albeit in a way that involves mere employer *consultation* with trade unions (EM, 2009: 676; Lambropoulos, 2009: 190). While this permits unions to require employers to consult them regarding environmental issues (s50), the subject of this consultation – environmental action - remains entirely unenforceable. Rather, this option is reliant on employer benevolence or managerial prerogative to realise environmental protection. Consultation embodies what Markey et al (2016: 3-4) and Wilkinson (2010: 11) have considered to be the most 'shallow' and 'limited' form of employee participation.

Indeed, the experience of the BLF in the 1970s highlighted that environmental matters pursued by unions must relate to the union's 'legitimate role in representing employees' and must not exceed consultation. In the *BLF Case,* the union was deregistered for exceeding its role by acting as a 'town planning authority' or environmental watchdog (*Master Builders' Association of NSW v BLF* (1974) 3 ALR 305. Accordingly, s172(1)(b) does not take the issue of environmental bargaining any further than mere consultation.

The right to mere consultation regarding workplace 'change', such as that associated with climate and environmental reform, is hardly world-changing. In fact, it has been permitted in Australian awards and agreements since the *Termination, Change and Redundancy Case* in 1984 (see also, *FW Act*, s389(1)(b)). In that case, a Full Bench of the AIRC held that

employers must communicate in writing to employees or their representatives regarding 'major changes in production, program, organisation, structure or technology which are likely to have significant effects on employees' (pp. 686-688). More recently, a Full Bench of the Fair Work Commission determined that 'consultation is not an exercise in collaborative decision-making', reiterating that 'all that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made' by the employer (*CFMMEU v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [108]; *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [211]). Indeed, existing studies on consultation from related industrial fields such as work health and safety (where duties to consult are enforced by penal sanction) show that between 40-65% of employers fail to automatically consult workers unless requested to do so by a health and safety representative and that others refuse to consult at all (Johnstone, 2009: 38-41). Averting climate disaster demands enforceable action rather than mere consultation. Proposed and explored in Part III below, are enforceable arrangements that overcome the problem of 'permitted matters' and its restrictions on environmental bargaining.

WHS Law and Environmental Bargaining

If environmental bargaining remains unsatisfactory through conventional channels of collective bargaining, another option exists under state WHS law. It is proposed here that the existing statutory WHS framework offers worker and management representatives more scope to reach consensus on environmental issues, affording their agreements greater protection from legal challenge and tangible power to enforce their decisions against employers. More specifically, Health and Safety Committees (HSCs) consisting of worker and management representatives and established under WHS law, could act as the specific

legal vehicle of environmental bargaining. It is acknowledged here that this proposal challenges the scope and limits of current WHS frameworks, which remain mostly untested in the High Court. Nevertheless, WHS law has been the subject of some litigation in the federal and superior industrial courts, discussed below. In this respect, it is argued that the limits of WHS law are more certain than those surrounding conventional forms of collective bargaining. A further issue arising from using HSCs in the service of environmental bargaining, is that it risks detracting from their existing work and resources, also discussed below.

HSCs are a key WHS management strategy, reliant on worker participation. They require workers to detect, prevent and monitor hazards in the workplace, backed by force of law. Historically, HSC powers were merely consultative and non-binding on employers. As such, a significant WHS literature demonstrated their inefficacy as they were 'frequently frustrated by a lack of response and action by senior management in respect to committee recommendations' (Walters, 1985; Yassi et al, 2013: 431). Accordingly, it is only within the past decade that the powers of HSCs have been enshrined in WHS law across most Australian jurisdictions (e.g. the national uniform *Work Health and Safety Act 2011* (NSW)) and given legally enforceable powers. Workers within HSCs now have the power to issue Provisional Improvement Notices (PINs) to their employer, requiring the employer to obey a direction of the HSC (s60) to resolve a safety issue. If an employer fails to comply with a PIN, the inspectorate may fine them up to $55,000 (s62). The WHS Act also regulates the composition of HSCs, along with the appointment, election, training and payment of committee members and time allocated to their work (Div 4). Significantly, the Act requires employers to pay committee members regular wages for committee work (s79(2)) while affording them 'reasonably necessary' time to perform their role (s79(1)). In this respect, the

Act specifically addresses a concern raised by ELS scholars: that environmental bargaining might simply result in labour intensification (Markey and McIvor, 2019: 84; Flanagan, 2022). Far from it, HSCs may prove to be one relic from the era of fossil-capitalism, well worth preserving for the cause of decarbonisation. Indeed, the embeddedness of worker participation that they enshrine through joint decision-making appears to be unsurpassed by any other industrial relations apparatus in contemporary Australia.

HSCs are effective in achieving their goals but are underrepresented in the workplace. Johnstone, Bluff and Clayton (2012: 518) have found that it is unclear how many HSCs or even Health and Safety Representatives (HSRs) currently exist in Australia. Although in 1995, 43% of Australian workplaces had HSCs (Moorehead et al: 1995), while 66% contained HSRs. Indeed, HSCs grew significantly in number between 1990 and 1995 and, in 1995, were mostly found in larger workplaces with high union density (AWIRS, 1995). A similar number of HSCs existed one decade later when another study showed that 59% of workplaces contained an HSC (ACTU, 2005). 68% of HSCs were reported to function 'properly or well' under non-binding WHS provisions that existed at that time, while 13% of respondents were unsure how their HSC worked (ACTU, 2005). Their efficacy appears to increase in proportion to their binding and enforceable power in respect to employers. Two studies of Victorian HSCs endowed with such powers showed that while only 11%-25% of HSRs had issued a PIN, once issued, PINs were 91% effective in resolving a health and safety issue (Johnstone, Bluff and Clayton, 2012: 526). The Victorian HSC model became a template for national uniform health and safety laws in 2011. Further studies have shown that employers are concerned about the abuse of PINs (Johnstone, Bluff and Clayton, 2012: 526). But this research might also be read as demonstrating the deterrent effect of such powers in compelling employer compliance and co-operation with HSCs.

It appears that HSCs are currently being used to address environmental concerns, yet the scale of this practice remains unknown. Markey and McIvor nevertheless give some indication of the scale of the practice, reporting that of the 7% of Australian enterprise bargaining agreements containing environmental clauses (2,427 out of 35,000), 45% of these linked WHS or OHS to the environment, (usually through the acronym, Occupational Health Safety and Environment - 'OHSE', 2019: 91-94). An incrementally smaller 17% of such OHSE clauses concerned the development and implementation of practical strategies associated with recycling, waste reduction and / or improved materials efficiency, commitments to implement environmentally friendly technology or equipment, specific work practices or continuous improvement initiatives or reduced energy usage (94).

A fundamental question remains, however, as to whether HSCs are lawfully permitted to address and enforce environmental issues within their statutory terms of reference under ss 19, 77 and 81 of the Act. HSCs appear to be permitted to regulate environmental issues, including climate related issues under s77(c) of the Act. This section allows HSCs to oversee and administer 'any other functions *as agreed* between employers or 'person(s) conducting the business or undertaking' and 'the committee' (emphasis added). In other words, it subjects the environmental activities of HSCs to managerial prerogative. Nevertheless, the process of agreement involved with expanding the scope of HSCs to consider environmental issues in this way is probably more reflective of the notion of 'bargaining', discussed by ELS scholars (Goods, 2017; Markey and McIvor, 2019). And unlike the position of general environmental clauses within enterprise bargaining agreements, the outcome of an agreement to expand the scope of HSC functions binds an employer to decisions of HSCs under the

WHS framework described above. This, in turn, enables the use of PINs and other regulatory enforcement against non-compliant employers.

While never tested in the High Court, the *NSW Trains Case* (2021), discussed above, gives some indication of the breadth of enterprise agreement clauses regarding 'health and safety', similar to those contemplated by s 77(c). In this case, an employer challenged a dispute resolution clause within a federal enterprise bargaining agreement that purported to cover all workplace issues, including health and safety ([157]). The employer argued that the federal clause was inconsistent with, and in fact ousted NSW WHS jurisdiction, which exists as a 'carve out' or remaining area of state industrial jurisdiction under the federal Fair Work Act (s27(2)(c)). However, the Federal Court found that this very broad dispute resolution clause was entirely consistent with NSW WHS legislation (at [171]) and industrial disputation procedures. The decision signals an expansive approach to agreements surrounding health and safety that are likely to accommodate environmental matters in a manner that permits their enforcement against employers.

More contentious, is whether HSCs may consider and enforce environmental issues as a matter of routine committee business under s77(a) of the Act, that is *without* a formal agreement to expand the scope of the health and safety committee under s77(c). Section 77(a) provides that the functions and activities of HSCs are confined to 'measures designed to ensure ... workers' health and safety *at work*' (emphasis added). This provision suggests that HSCs are restricted to considering matters of immediate concern to the workplace as opposed, perhaps, to matters of global significance such as climate change. Confirming this narrow interpretation is s81, which defines a 'health and safety issue' as 'a matter about work

health and safety arising at a workplace or from the conduct of a business or undertaking'. A Senate Committee Report into the drafting of this provision concluded that 'an OHS concern or issue will ordinarily be restricted to those involved at a workplace' (Australian Government, 2009: 127-148 (27.69)). The narrow construction is further supported by the Act's 'Objects', defining the Act to cover 'workers and 'workplaces' (s3) where 'workplace' is defined as 'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work' (s4).

Nevertheless, broad agreement between employers and HSCs over the scope of the Committee to cover environmental issues is certainly entertained by s77(c). The literal words of this clause (extracted above) may well overcome narrow interpretation – indeed, expansive interpretation of WHS legislation has prevailed to date, as the *NSW Trains* case illustrates. Further, s77 must be read in conjunction with the Act's 'primary duty of care' (s19) requiring employers to ensure the 'health and safety of *other persons* (ie those outside the workplace) is not put at risk' (s19(2)).

While most serious environmental offences are dealt with by penalty provisions under state environmental protection legislation (e.g. *Protection of the Environment Operations Act 1997 (NSW)*, Chapter 5), WHS litigator Michael Tooma has shown that WHS law overlaps with environmental protection law (2019: 76) and holds significant potential to regulate environmental harm. Clearly, the s19 general duty to ensure health and safety requires employers to minimise *risks* to health and safety, so far as is reasonably practicable (WHS Act, s17(a)-(b)). Injuries or indeed, 'future harm', are unnecessary for a breach of the duty to occur (Tooma, 2017: 112-117). Rather, mere exposure to risk breaches the duty, broadening

the reach of WHS legislation (Tooma, 2019: 72-75) compared to the general law. Tooma illustrates the breadth of this notion of 'risk' and its potential to extend to environmental issues by reference to the leading UK case of *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853. In this case, the air conditioning unit at a science museum contained bacteria causing Legionnaires' Disease. The Museum's Board of Trustees was convicted of a WHS breach for risking public health outside the museum, resulting from unsafe environmental emissions. Parallels to climate emissions here are obvious. As Tooma comments, 'it is not difficult to see how environmental emissions which have detrimental public health effects … may be brought under the scope of safety risks' (2019: 76). If that is true, HSCs may well have authority to consider and enforce environmental decisions within workplaces, without the need for prior agreement by an employer.

The Court's broad approach to 'risk' in *Board of Trustees of the Science Museum* was the subject of intensive legal argument and was eventually 'preferred' to a narrow approach which would have 'substantially emasculate(d)' the 'role' of the OHS Act in 'protecting public health and safety' (Lord Steyn J at 858-859). This broad approach has since been adopted in Australia by a Full Bench of the New South Wales Industrial Relations Commission in *Abigroup Contractors Pty Ltd v Inspector Maltby* [2004] NSWIRComm 270. And, lest it be thought that such a proposition is only restricted to workplaces that effectively constitute public space – such as a science museum; or railway station and amusement centre in *Abigroup Contractors* - the NSW Court of Appeal has held that exposure to a health and safety risk may occur by mere proximity to a risk even in the absence of any mechanism by which risk could have eventuated (*Thiess Pty Ltd v Industrial Court (NSW)* [2010] NSWCA 252; Johnstone and Tooma, 2022: 39). An OHS charge involving risk to 'people (other than

those of the employer)' was proven in circumstances involving a death in a cordoned-off area of a workplace, behind a sign reading 'Strictly No Admittance' (at [4] and [11]).

Incidentally, the broad approach to risk under WHS law can be contrasted with the narrow approach to risk or 'negligence' taken by Australian courts under the common law of tort. In 2022, a Full Bench of the Federal Court held that negligence does not extend to future harm stemming from Ministerial decisions about the environment, such as approving a new coal mine (*Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65 ('The Children's Climate Change Case')).

Another remaining question is whether HSCs *should* address environmental issues. As it stands, 55% of HSC members complain of having insufficient time to satisfactorily complete their important existing work of improving health and safety in their workplace (ACTU, 2005 – JBC 519). This is despite a statutory requirement that employers afford HSCs 'reasonably necessary' time to fulfill their role (s79(1)). Adding environmental issues to the existing work of HSCs may therefore compromise their existing role in identifying and preventing health and safety incidents. It is against this risk of a lapse in immediate health and safety that policymakers must weigh the benefits of implementing environmental bargaining through HSCs – entities which appear to be the most effective existing mechanism to regulate the relationship between industry and the environment. If the successful environmental health and safety campaigning of the Spanish *Comisiones Obreras* (discussed above) can be emulated in Australia, perhaps by aiding and informing the decisions of HSCs, then adding environmental issues - including decarbonisation - to the work of HSCs, seems to be a risk worth taking'.

This model of environmental bargaining and others are compared in the following Part of the paper (Part III).

Part III – Policy Options for Environmental Bargaining

Legal models of environmental bargaining are presented below and divided into two categories: 'existing' (see *Table 1*) and 'proposed' (see *Table 2*). Each model is briefly assessed for its 'effectiveness'. 'Effective', in this context, means the extent to which models of environmental bargaining: i) create enforceable or binding environmental obligations upon employers; and ii) are likely to withstand legal challenge.

Existing Models

Four existing policy options for environmental bargaining were outlined in Part II (see *Table 1* for descriptions). Models 1 and 2, involve environmental Joint Consultative Committees (JCCs) between workers or trade unions and management within workplaces, established through enterprise agreements under s172(a) or (b) of the FW Act. These are the least effective models because they either invite employer challenge on the basis that they introduce 'non-permitted matters' into agreements or are simply consultative in their effect, without any enforcement mechanism.

Model 3 involves negotiation between employers and workers (usually during enterprise bargaining) to establish HSCs with specified additional powers to cover environmental issues (as per s77(c) of the WHS Act). It is likely to be the most effective existing model. Established under the WHS Act, HSCs enable committees to make *and enforce*

environmental policy within workplaces, albeit with initial employer consent. Model 3 is also relatively safe from common law challenge by an employer. As creatures of state WHS jurisdiction, HSCs bypass 'matters pertaining' restrictions under s172(a) of the Federal Fair Work Act and its restrictive common law interpretation (as per Flick J in *NSW Trains Case* 2020). While HSCs may be negotiated during rounds of enterprise bargaining under the federal Act, WHS law exists as a 'carve-out' from federal law, retained as a matter of state jurisdiction and protected from federal interference by virtue of the FW Act (s27(2)).

Model 4, meanwhile, involves HSCs relying on their existing powers under s77(a) of the WHS Act to make and enforce environmental policy. Unlike Model 3, workers do not negotiate expansion of HSC powers to cover environmental issues, under s77(c). This lack of managerial prerogative affords less legal certainty, so that employers could more readily challenge environmental orders or PINs issued by an HSC under Model 4. They might do so on the basis that the WHS Act does not specifically authorise HSCs to make environmental policy under WHS law. Indeed, indirect 'environmental' hazards such as climate emissions have not yet been the specific subject of a WHS case. It should be added that neither is Model 3 entirely safe from challenge on the same basis but that specific agreement between the parties, authorised by Model 3, offers substantially more protection than Model 4. This is because the agreement implicitly requires employers to have exercised their managerial prerogative, expressly authorising an HSC to exercise additional environmental powers. Risks associated with both Models 3 and 4 include: a lapse in work health and safety resulting from HSC inattention to WHS issues while covering environmental issues; as well as the possibility of work intensification for worker representatives of HSCs.

Proposed Models

Risks associated with existing models of environmental bargaining inspire three proposals for legislative change, outlined in *Table 2*. Model 1 in Table 2 has been conceived by Stewart (2008). It responds to the problems caused by 'matters pertaining' provisions of the FW Act (s172). Stewart suggests that 'the real concern' of policymakers 'about allowing parties to make agreements about climate change initiatives and the like relates to the possibility of unions taking protected industrial action over such matters' (2008: 7). Accordingly, Model 1 involves amending the FW Act to permit parties to negotiate and agree on any matter, including environmental matters, during enterprise bargaining, while banning strikes associated with 'incidental claims' such as those involving environmental matters. This could be accomplished, Stewart explains, by removing any reference to 'permitted matters' from the Act and adding a new subclause (s3A) to s409, prohibiting industrial action in respect to environmental matters. While this Model permits environmental bargaining (Stewart, 2008: 7), it is the least effective proposed Model in that employer environmental commitments cannot be enforced other than through litigation (under the FW Act, s50), which is an unlikely and costly affair for workers and unions. Further, it relies on a significant and unlikely amendment to a long-established industrial law (see for instance four separate Government Inquiries in favour of either retaining or strengthening 'matters pertaining' under s172 of the FW Act: McCallum et al, 2012: 159; Productivity Commission, 2015: 817, 958; Trade Union Royal Commission, 2015 Vol 5: 382-90; Competition Policy Review, 2015: 392-6).

Model 2, is probably the most pragmatic and effective. Essentially, it replicates existing Models 3 and 4 from the previous table, involving environmental bargaining through HSCs, but removes their defects. In particular, Model 2 attempts to place HSCs beyond common law

challenge by giving them express statutory authority to act in relation to 'environmental issues, including climate-related matters'. This phrase could readily be inserted into s77(a) and s81 of the WHS Act.

Model 2 would also require the addition of a definitional clause (under s4 of the Act), clearly defining environmental and climate issues as risks to public health and safety. Such a definition might prove crucial to averting a s109 constitutional challenge in which state environmental laws, enacted under a WHS Act, might otherwise be characterised as falling under a separate 'field' to that of WHS (as per *Ansett Transport Industries v Wardley* [1980] HCA 8) – 'environmental law', perhaps. As environmental laws, rather than WHS laws, these provisions would no longer be protected from Commonwealth jurisdiction under s27(2) of the FW Act (as per *Metwally v University of Wollongong* [1985] HCA 25). Model 2 also seeks to minimise a lapse in work safety and work intensification resulting from diverting HSC resources to environmental issues. It suggests amending s79(1), to require employers to provide HSC committee members additional 'reasonably necessary time to consider environmental concerns'.

Model 3 proposes to remove environmental matters from the WHS Act and place them under the jurisdiction of state environmental agencies (e.g. the Environmental Protection Agency (EPA) in NSW). It replicates the powers and responsibilities of HSCs in an environmental context, permitting organisations to create Environmental Committees (ECs), independent from HSCs. ECs might be backed by the force of the EPA inspectorate instead of health and safety regulators. It is designed to nullify any legal challenge to its institutional arrangements.

Due to its complexity, however, Model 3 probably ranks second, behind Model 2. While amending state law (*Protection of the Environment Operation Act 1997 (NSW)*) to implement these changes is relatively simple, it would require a co-ordinated federal amendment to the *FW Act*, to add 'environmental matters' to the list of 'carve-outs' or exclusions from federal industrial jurisdiction under s27(2) of the FW Act. Model 3 would also require modest additional state funding to the EPA for a small workplace inspectorate (a handful of officers), to whom ECs could report employer non-compliance.

Conclusion

Legal options for climate and environmental bargaining explored in this article have been led by a growing volume of industrial relations scholarship and evidence. As this paper has shown, environmental bargaining cannot be readily accommodated within conventional channels of enterprise bargaining. The existing bargaining framework is fraught with legal ambiguity, connected with its evolutionary association with 'fossil capitalism'. Accordingly, it may invite employer challenge to the authority of environmental committees within workplaces resulting in resort non-binding and unenforceable environmental obligations. Instead, this paper has explored circumventing mainstream collective bargaining law through WHS law. More specifically, it has proposed extending the operation of HSCs to cover environmental issues, or using them as a template in the realm of environmental law to create binding environmental obligations upon employers that are beyond common law challenge.

There are, of course, other creative legal options for regulating organisations and their emissions, including the use of corporate directors' duties (McConvill and Joy, 2003) as well as consumer-based strategies involving corporate social responsibility (e.g. Rishi, 2022).

These strategies do not involve the sphere of production, nor workers and trade unions, who, as the environmental bargaining literature shows (Huber, 2022), are key stakeholders, critical to the industrial change required to avert environmental disaster. Environmental bargaining, by contrast, brings workers and unions to the table to face-down the challenges of industrial change required to save and protect our environment. It further recognises them as able stakeholders in a clean and safe environment who can be mobilised as primary drivers of environmental change in a way that affords them agency and delivers meaningful outcomes over industrial change.

Table 1

Existing Legal Models:	**Advantages**	**Disadvantages**
1. JCC established through employer-employee bargaining (s172(1)(a) *FW Act*)	• May achieve environmental action, at the discretion of employers;	• Environmental issues are 'non-permitted' matters under s172(1)(a) rendering consultation clauses unenforceable if challenged by employers; • Industrial action taken in pursuit of non-permitted matters is unlawful, subjecting workers to the possibility of dismissal. Trade unions and workers may be subject to fines and civil prosecution in tort and contract; • Mostly restricted to medium to large employers.
2. JCC established through union-employer bargaining (s172(b) *FW Act*)	• Achieves consultation on climate issues; • Achieves monitoring of climate issues in workplaces by trade unions; • May encourage trade union membership.	• Outcomes of consultation do not bind employers; • Restricted to unionised workplaces; • Industrial action cannot be taken in pursuit of union-employer clauses; • Mostly restricted to medium to large employers.
3. HSC established though negotiation between the committee and employer to extend the existing statutory	• Achieves consultation on climate issues; • Outcomes of consultation bind employers; • Binding outcomes of consultation may ultimately be enforced by fines from the inspectorate; • Achieves worker and union monitoring of climate issues;	• Detracts from consideration of OHS issues by HSCs, possibly contributing to a lapse in immediate workplace safety; • HSCs are not widely established; • Union bargaining over the powers of HSCs is not widely practised (if at all);

ambit of the HSC to cover environmental issues (s77(c) WHS Act).	• May encourage trade union membership; • Unrestricted to unionised workplaces; • Probably overcomes 'matters pertaining' restrictions from the FW Act; • Lawful industrial action may be taken in pursuit of environmental WHS issues; • Writing this model into an agreement may also be possible under s172(1)(a) FW Act); • Workers are paid their regular wages to perform the work of environmental recovery within their organisations.	• Mostly restricted to medium to large employers.
4. HSC established by employer under the WHS Act (s77(a))	• Achieves consultation on climate issues; • Outcomes of consultation might bind employers; • Binding outcomes of consultation might ultimately be enforced by fines from the inspectorate; • Achieves worker and union monitoring of climate issues; • May encourage trade union membership; • Unrestricted to unionised workplaces; • Probably overcomes 'matters pertaining' restrictions from the FW Act; • Workers are paid their regular wages to perform the work of environmental recovery within their organisations.	• Detracts from consideration of WHS issues by HSCs, possibly contributing to a lapse in immediate workplace safety; • Existing legal scope of HSCs to monitor and enforce environmental issues (beyond the immediate workplace) remains unclear under s77(a) of the WHS Act. • HSCs are not widely established; • Union bargaining over the powers of HSCs is not widely practised (if at all); • Detracts from consideration of WHS issues by the HSC; • May contribute to a lapse in immediate workplace safety; • Mostly restricted to medium to large employers. • Writing this model into an agreement might invite a challenge to its legitimacy under both s77(a) of the WHS Act and s172(1)(a) FW Act. • Lawful industrial action taken in pursuit of environmental WHS issues might invite a challenge to this model's legitimacy under s77(a);

Table 2

Proposed Legal Models:	Advantages	Disadvantages
1. Reformulate 'matters pertaining' by deleting s172 and reinstating it under s409(1) of the FW Act, thereby precluding industrial action over 'incidental claims' such as those related to	• Supports JCC model, established through employer-employee bargaining (s172(1)(a) *FW Act*); • Achieves consultation on climate issues; • Achieves monitoring of climate issues in workplaces by trade unions; • May encourage trade union membership; • A simple legislative fix, requiring few additional state resources;	• Outcomes of consultation do not bind employers; • Industrial action cannot be taken in pursuit of union-employer clauses; • Significant Federal

environmental bargaining (Stewart, 2008).		amendment, difficult to pass; • Mostly restricted to medium to large employers.
2. Add 'environmental Issues, including climate-related matters' to s77(a) and s81 of the WHS Act. Add 'environmental and climate risks' to the definition of health and safety under s4 (definitions) of the Act. Amend s79(1) to emphasise that 'additional reasonably necessary' time should be provided by employers to committee members to consider and resolve environmental concerns.	• Supports both HSC models (i.e. those established by employees and employers or simply by employers under the WHS Act); • Achieves consultation on climate issues; • Outcomes of consultation bind employers; • Binding outcomes of consultation may ultimately be enforced by fines from the inspectorate; • Achieves worker and union monitoring of climate issues; • Overcomes conflict with WHS prerogatives of HSCs, minimising any possible lapse in immediate workplace safety; • A simple legislative fix, requiring comparatively few additional state resources; • May encourage trade union membership; • Unrestricted to unionised workplaces; • Probably overcomes 'matters pertaining' restrictions from the FW Act; • Lawful industrial action may be taken in pursuit of environmental WHS issues; • Writing this model into an agreement may also be possible under s172(1)(a) FW Act).	• HSCs are not widely established; • Union bargaining over the powers of HSCs is not widely practised (if at all); • Mostly restricted to medium to large employers.
3. Replicate the legal powers and processes of HSCs in state environmental protection legislation (perhaps as 'environmental committees'), enforced and regulated by environmental protection agencies, rather than WHS regulators. Amend FW Act to add 'environmental matters' to the list of 'non-excluded matters' under s27(2) of the FW Act.	• Supports both HSC models (i.e. those established by employees and employers or simply by employers under the WHS Act); • Achieves consultation on climate issues; • Outcomes of consultation bind employers; • Binding outcomes of consultation may ultimately be enforced by fines from the inspectorate; • Achieves worker and union monitoring of climate issues; • Overcomes conflict with WHS prerogatives of HSCs, minimising any possible lapse in immediate workplace safety; • A simple legislative fix, requiring comparatively few additional state resources; • May encourage trade union membership; • Unrestricted to unionised workplaces; • Provides complete certainty in overcoming 'matters pertaining' restrictions from the FW Act; • Lawful industrial action may be taken in pursuit of environmental WHS issues; • Writing this model into an agreement may also be possible under s172(1)(a) FW Act).	• A difficult amendment to co-ordinate between state and federal governments; • Modest additional resources would likely be required to expand the regulatory jurisdiction of the EPA inspectorate to enforce the powers of environmental committees within workplaces.

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