

## **Australian Trade Union Density in Crisis: Precarious work and collective bargaining**

Dr Eugene Schofield-Georgeson (Senior Lecturer)

University of Technology Sydney (UTS), Faculty of Law

In 2022, Australian trade union density declined yet again from 14.5% to 12.5%.<sup>1</sup> This figure is far below the peak of Australian union density at around 65% in 1948,<sup>2</sup> and far below 1970s levels of around 51%.<sup>3</sup> The decline in density correlates with a reduction in the economic and cultural power of trade unions to redistribute wealth through collective bargaining and influence politics through egalitarianism. In fact, record low union density in 2022 paralleled the highest levels of Australian social inequality since 1950.<sup>4</sup> For decades, meanwhile, industrial relations scholars have linked union decline to systemic legal shifts from sectoral to enterprise bargaining, compulsory to voluntary association and increasingly individualised and precarious forms of employment.

Elected in 2022, a Federal Australian Labor Party (ALP) Government has wasted no time enacting a significant volume of reform to mitigate the crisis. These legislative measures include: multi-employer bargaining, ‘gig economy’ regulation, the criminalisation of deliberate underpayment of wages or ‘wage theft’, as well as legally enforceable pathways for conversion from casual to ongoing employment. These measures may have some impact on stemming the decline in union density but are unlikely to generate any significant growth in

---

<sup>1</sup> Australian Bureau of Statistics (ABS), ‘Trade Union Membership’, August 2022:

<https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/latest-release>

<sup>2</sup> Bradley Bowden, ‘The Rise and Decline of Australian Unionism: A History of Industrial Labour from the 1820s to 2010’ (2011) 100 *Labour History* 51, 63.

<sup>3</sup> ABS, n 1.

<sup>4</sup> Australian Financial Review, ‘Australia’s wealth gap on the rise with inequality worst since 1950’ 30 April 2023: <https://www.afr.com/politics/federal/australia-s-wealth-gap-on-the-rise-with-inequality-worst-since-1950-20230428-p5d41b>

union membership. In this respect, trade unions and industrial scholars are practicing and proposing a range of further solutions, variously involving default union membership, a return to sectoral bargaining and co-enforcement of labour law.

In accordance with the conventions of the Japanese Institute for Labour Policy and Training, this paper is largely descriptive. It outlines the causes of declining Australian trade union density; recently enacted legislative solutions; and latest trade union practice and ideas designed to grow union membership once more. Provided here is a snapshot of Australian labour market diversification; collective bargaining and union governance laws; union decline and challenges; along with State, institutional and union strategy in response. Note that most data in this paper is derived from the Australian Bureau of Statistics (ABS), which in turn quantifies data through large household surveys.

## **(1) Labour Market Diversification**

### Overview and trends

From an overall population of 26.6 million, there are 14.36 million people in the Australian workforce.<sup>5</sup> Unemployment sits at a record low of 3.9% (since the 1980s), while the rate of underemployment remains steady at 6.4%.<sup>6</sup>

While work performed by men and women remains starkly gendered in occupational terms, there are currently only 7% more men in the workforce than women. This ratio has steadily declined over the past decade. In 2013, 12% more men were employed than women.<sup>7</sup>

---

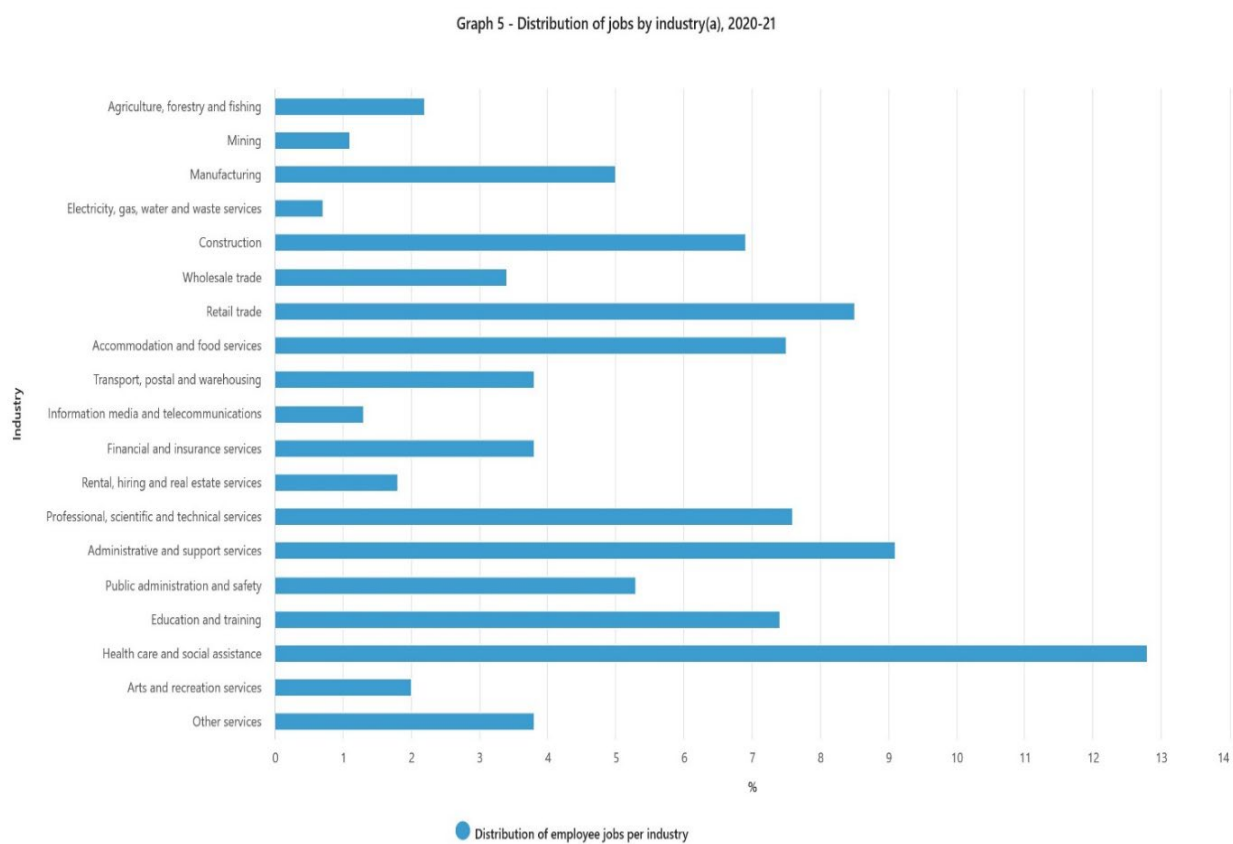
<sup>5</sup> ABS, 'Jobs in Australia', 6 December 2024: <https://www.abs.gov.au/statistics/labour/jobs/jobs-australia/latest-release>

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Work remains concentrated in the services sector with health care and social assistance providing the largest number of jobs (12.8%), well in front of administrative and support services (9.1%) and retail (8.5%), which are the next largest industries.<sup>8</sup> A snapshot of the distribution of jobs by industry, 2020-21, is provided in Figure 1, below.

Figure 1 – Distribution of Jobs by Industry, 2020-2021<sup>9</sup>



Source: Australian Bureau of Statistics, Jobs in Australia 2020-21 financial year

Precarious work, including casual employment, independent contracting, fixed-term contract and labour hire work, has increased at an alarming rate in Australia since the

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

early 1990s. It is part of a market economic policy in which business risk has shifted from capital to labour.<sup>10</sup> With the exclusion of fixed-term employees, workers employed under such precarious arrangements are generally not entitled to paid leave. For the past few years, casual employment has plateaued at a rate of around 20-22.5% of the workforce, while contractors constitute around 7.5% of the labour force.<sup>11</sup> A further 3% of Australian workers are employed on fixed-term contracts, conventionally between 9 months to 1 year in duration.<sup>12</sup> Around 2.3% of workers are employed through labour hire firms, overwhelmingly in precarious employment without leave entitlements.<sup>13</sup> Significantly, the lowest paid 25% of workers (in *Figure 2*, below) are mostly employed casually and rarely have access to paid leave.<sup>14</sup>

There are currently around 1 million independent contractors in Australia. They are most commonly found in the agriculture, forestry and fishing industries (54%) and construction (33%).<sup>15</sup> The Australian Council of Trade Unions has demonstrated that just over half of these are involved in ‘sham contracting’ arrangements and cannot genuinely subcontract out their work – a key indicator of whether a contractor is truly independent.<sup>16</sup> Such workers earn dramatically less than genuine contractors.<sup>17</sup>

The rise in precarious work and the decline in union density, mentioned at the outset, have meant that in 2023, merely 15% of Australian workers had their pay and conditions

---

<sup>10</sup> David Peetz, ‘Are Australian Trade Unions Part of the Problem, or Part of the Solution?’ (2015) *Australian Review of Public Affairs*, <http://www.australianreview.net/digest/2015/02/peetz.html>

<sup>11</sup> ABS, ‘Working Arrangements’, August 2023: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/latest-release>.

<sup>12</sup> Ibid.

<sup>13</sup> Labour hire is measured independently from other kinds of precarious employment. ABS, ‘Labour Hire’, September 2023, <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/latest-release>

<sup>14</sup> Ibid.

<sup>15</sup> ABS, n 11.

<sup>16</sup> Australian Council of Trade Unions (ACTU), ‘Explosion in sham contracting shows reform needed to protect all workers’, Media Release, 25 May 2023.

<sup>17</sup> Workers in sham contracting arrangements earn \$242.80 less per week, or \$12,644 less per annum: *ibid* (ACTU).

set by a collective bargaining agreement.<sup>18</sup> By comparison, in 2000, 36.8% of Australian workers nevertheless enjoyed collectively bargained agreements.<sup>19</sup> Taken together, a trinity of growing workforce precarity, declining bargaining and union density have increased income and wealth inequality.

Figure 2 shows low, median and high-income earnings. Median employee earnings were \$1300 per week or \$67,600 (¥6,559,803) per annum.<sup>20</sup> The disparity between the top 90<sup>th</sup> and bottom 10 percentiles of income earners was \$2,408 per week. These disparate patterns of income reflect a growth in social inequality, with the wealthiest 1% of individuals in Australia owning upwards of \$8.25 million in assets – an amount that has doubled since 2021 and is set to increase by a further 40% by 2027.<sup>21</sup> The poorest 20%, meanwhile, own negligible assets and earn an average of \$419 per week in social security payments, suffering poor health and educational outcomes.<sup>22</sup> Placed in historical perspective, mid-20<sup>th</sup> century Australia saw the bottom 90 per cent enjoy 96% of Australia’s economic growth, with 4% going to the top 10%. Over the last decade, the bottom 90th percentile have enjoyed around 7 per cent of the country’s economic growth, with 93% hoarded by the top 10%.<sup>23</sup>

---

<sup>18</sup> Jim Stanford, ‘Paying for Collective Bargaining’, 13 December 2023: <https://futurework.org.au/post/paying-for-collective-bargaining/>

<sup>19</sup> David Peetz and Serena Yu, ‘Research Report 4/2017: Explaining recent trends in collective bargaining’, Fair Work Commission, 2017, 7.

<sup>20</sup> Or \$1,300 per week. ABS, ‘Employee Earnings’, 13 December 2023: <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/employee-earnings/latest-release>

<sup>21</sup> Sydney Morning Herald, ‘How much do you need to be in Australia’s wealthiest 1%?’ 17 May 2023; Knight Frank, *The Wealth Report 2023*.

<sup>22</sup> Actuaries Institute (Aus), *Not A Level Playing Field*, Green Paper, 20 May 2023, pp 20-26.

<sup>23</sup> David Richardson and Matt Grudnoff, ‘Inequality on Steroids: The Distribution of Economic Growth in Australia’, 11 April 2023: <https://australiainstitute.org.au/report/inequality-on-steroids-the-distribution-of-economic-growth-in-australia/>

Figure 2 – Low, Median and High Weekly Earnings<sup>24</sup>

August 2023	
10th Percentile	\$412
25th Percentile	\$820
50th Percentile	\$1,300
75th Percentile	\$1,975
90th Percentile	\$2,820

### Expansion of ‘new forms of work’?

Contrary to popular belief about the extensive scale of the gig economy in Australia, the latest ABS data shows that contractors in the digital platform economy comprise just under 1% (0.96%) of the workforce.<sup>25</sup> Further data reveals that the average gig economy worker is male, does not rely on gig work for their main source of income, and performs gig work for less than one year.<sup>26</sup> Only 10% of gig economy workers operated outside transport and delivery sectors. Around half of these workers report that they regularly earn less than minimum wage.<sup>27</sup> Until recent legislative change in February 2024, it has been legal for gig platforms to evade paying minimum rates by lawfully classifying these workers as ‘contractors’, rather than ‘employees’. In sum, the emergence of gig work is problematic not

---

<sup>24</sup> ABS, n 20, ‘Distribution of Weekly Earnings in Main Job’.

<sup>25</sup> Ibid. This statistic is supported by the annual Australian HILDA Survey 2022, (Roger Wilkins et al, *The Household, Income and Labour Dynamics in Australia Survey*, 2022) which records 0.8% of workers, employed within the gig economy, p. 89.

<sup>26</sup> Ibid.

<sup>27</sup> McKell Institute Queensland, ‘Tough Gig: Worker Perspectives on the Gig Economy’, April 2023: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiYj\\_oPd8aaEAXVUS2wGHZ\\_NCjEQFnoECCIQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2023%2F03%2FMcKell-Tough-Gig-Report.pdf&usg=AOvVaw0Oq48SoNvPhm8gOkHtNTEA&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiYj_oPd8aaEAXVUS2wGHZ_NCjEQFnoECCIQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2023%2F03%2FMcKell-Tough-Gig-Report.pdf&usg=AOvVaw0Oq48SoNvPhm8gOkHtNTEA&opi=89978449)

because of its scale, but rather due to its potential to reshape the labour market in its own image, normalising the evasion of labour law.

### Diversification of workers' attitude to work

Almost half of women employed as digital platform workers have expressed a preference for more stable ongoing waged employment (42%), compared to 19% of men. Over a third (37%) of all platform workers would have preferred a more stable combination of waged and gig work.<sup>28</sup> These sentiments were shared by a similar proportion of casual workers, with around a third (29%-32%) wanting to shift to non-casual, ongoing employment.<sup>29</sup> These preferences are confirmed by a trade union study in the transport industry showing that only 47% of unionised contractors would prefer to be ongoing employees, with access to paid leave and other entitlements.<sup>30</sup>

## **(2) Basic Structure of Collective Labour Relations Law**

### Overview of Trade Union Organising and Collective Bargaining Laws

Freedom of Association and collective bargaining have been enshrined in Australian legislation since 1904. The original 'conciliation and arbitration' system from this period required trade unions to register with the State to participate in a State-brokered system of compulsory collective bargaining at an industry-wide level. This system benefited trade unions and workers by compelling employers to bargain and ensuring that gains won by strong unions, representing workers in big business, were 'flowed-on' to non-unionised workers in

---

<sup>28</sup> ABS, Platform Economy Motivations, Nov 2023: <https://www.abs.gov.au/articles/digital-platform-workers-australia>

<sup>29</sup> ABS, n 11.

<sup>30</sup> Transport Workers' Union Study, cited in Michael Rawling and Joellen Riley, *Proposal for legal protections of on-demand gig workers in the road transport industry*, Transit Education Audit Compliance Health Organisation Final Report, 2021, 14.

small business. This had the effect of incentivising union membership for small business employees, increasing union density to historically high levels across the workforce.<sup>31</sup>

The current Australian collective labour relations framework is known as the *Fair Work Act 2009 (Cth)*. Under this scheme, unions continue to benefit from registration with the state in order to compel employers to bargain. Following neoliberal structural adjustment policies from the early 1990s, however, bargaining devolved from an industry to an enterprise level. Since this time, collective bargaining has mostly been conducted at arms-length from the state, between trade unions and individual employers. And, without gains being flowed-on from strong unions to workers in a weaker bargaining position within a sector, the transition to enterprise bargaining has witnessed a largescale decline in union membership and collective bargaining across the workforce.<sup>32</sup>

Declining union density since the early 1990s, has also been accompanied by union regulation. ‘Voluntary association’ laws have effectively outlawed ‘closed-shop’ practices (prohibiting non-union members from working) since 1996.<sup>33</sup> The closed-shop was a staple of Australian industrial relations since the early 20<sup>th</sup> century. Indeed, it had been recognised by some of Australia’s most conservative judges as serving a significant regulatory purpose in upholding a corporatist or tri-partite system of labour law enforcement premised upon bargaining between labour and capital, adjudicated by the state.<sup>34</sup>

From 2022, the Labor Government has revised the enterprise bargaining system by introducing multiple-enterprise agreements covering multiple employers. This system also enhances the recognition rights of trade unions, permits industrial action in respect to multiple

---

<sup>31</sup> Joe Isaac, ‘Why Australian wages are lagging and what can be done about it?’ (2018) 51(2) *Australian Economic Review*, 175, 182-3.

<sup>32</sup> *Ibid*, 179.

<sup>33</sup> *Workplace Relations Act 1996 (Cth)*, Part 16; *Fair Work Act 2009 (Cth)*, s340 and s772.

<sup>34</sup> Eugene Schofield-Georgeson, *Contract, Labour Law and the Realities of Working Life* (Routledge, forthcoming, 2024), Chapter 5.



employers and subjects intractable bargaining disputes to arbitration.<sup>35</sup> This revised system of multiple-enterprise bargaining might be seen as a half-way point between single employer enterprise bargaining and a return to industry-wide bargaining.

### Worker Representation Other than Trade Unions

Significant decline in union density since the 1990s has corresponded with a decline in the enforcement of labour law. Unprecedented levels of ‘wage theft’ and ‘vulnerable worker exploitation’ scandals, alongside plummeting wages, have been frequent themes in Australian news-cycles for over a decade. In mid-20<sup>th</sup>-century Australia, trade unions enforced labour standards by prosecuting errant employers, but moreover, by deterring underpayment through strongly unionised workplaces. Over the past decade, such ‘collective’ enforcement has largely been replaced by a system of individual labour law enforcement, policed by a state regulator, the Fair Work Ombudsman, in conjunction with trade unions, community legal centres and private legal representation.<sup>36</sup>

Individual enforcement is further entrenched by labour market fragmentation and the transition to precarious forms of work. Combined with institutional diversity in the enforcement ‘mix’, worker representation is chaotic and disorganised. Adding to the chaos is that underpayment claims and other monetary breaches of labour law can be pursued in multiple different state and federal jurisdictions from local, district and federal civil claims courts to industrial tribunals. Skyrocketing volumes of ‘wage theft’<sup>37</sup> and soaring social inequality attest to the inefficacy of individual enforcement of labour law, particularly when

---

<sup>35</sup> *FW Act*, Part 2-4.

<sup>36</sup> Eugene Schofield-Georgeson, ‘Organisational Co-Enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman’ (2022) 35 *Australian Journal of Labour Law* 52.

<sup>37</sup> An estimated one-third of Australian workers are underpaid: Select Committee on Wage Theft in South Australia, Interim Report, Parliament of South Australia, Adelaide, 2020, at 6. These results have been replicated in similar studies across a variety of Australian jurisdictions.

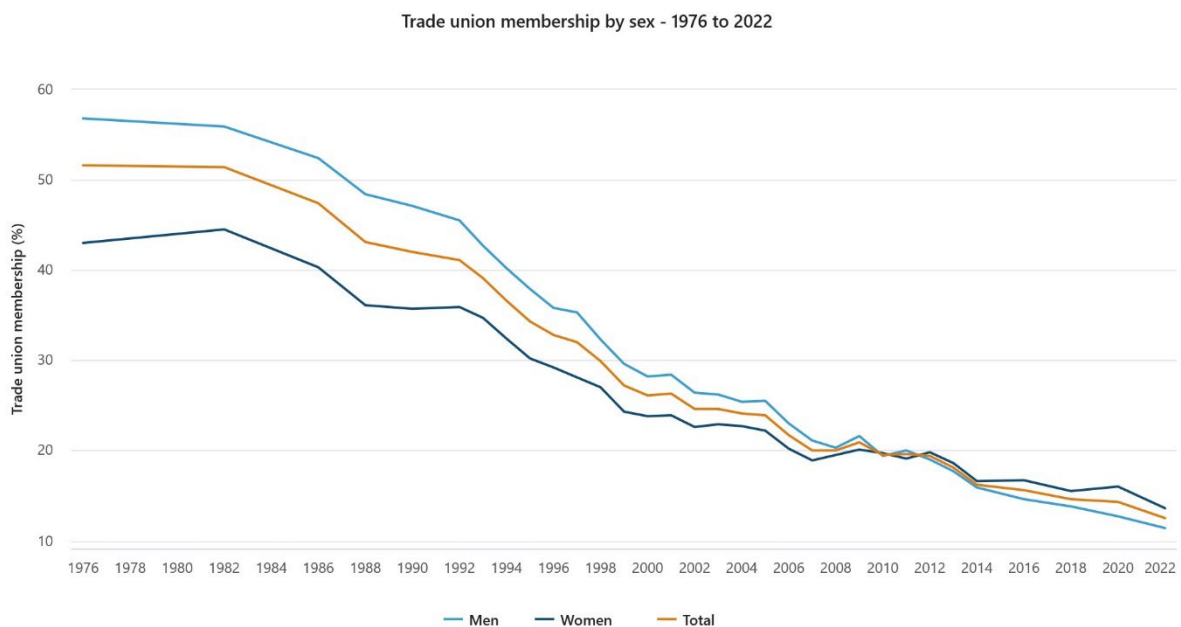
compared to the former system of collective enforcement underpinned by industry-wide bargaining.

### (3) Decline and Challenges

#### Current status and trends in unionization rates

As mentioned at the outset, the most recent survey of Australian trade union density in 2022 showed that 12.5% of employees were trade union members.<sup>38</sup> As Figure 3 shows (below), Australian trade union density has decreased from 41% to 12.5% since 1992.

Figure 3. Trade union membership by sex – 1976 to 2022<sup>39</sup>



Source: Australian Bureau of Statistics, Trade union membership August 2022

Currently, educated professionals, more women than men, have the highest rates of union membership (e.g. education and training industry (30%)).<sup>40</sup>

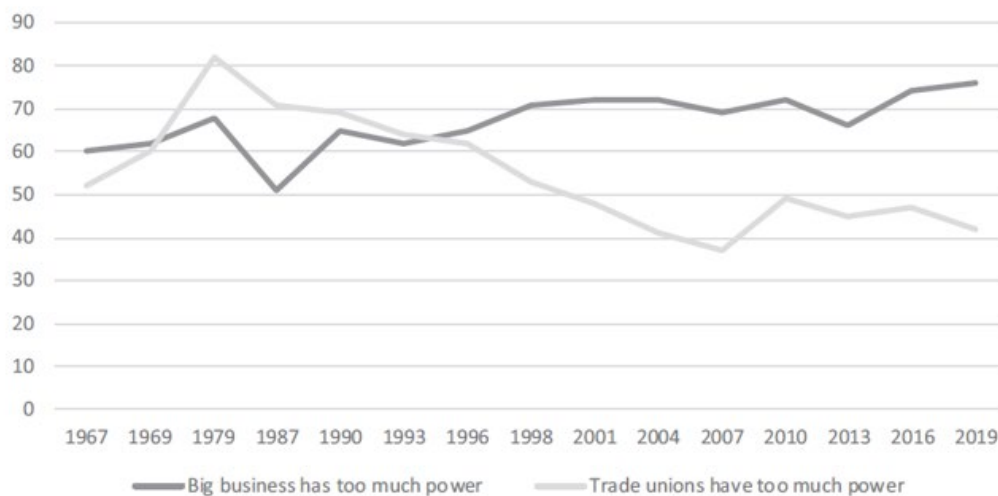
<sup>38</sup> ABS, n 1.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

A great paradox surrounding the drastic decline in union density is that popular support for trade unions remains high, along with suspicion of corporate power, as shown by a recent Australian Electoral study in Figure 4, below.

Figure 4 – Voter’s Perceptions of the Power of Trade Unions and Big Business, Australia, 1967-2019<sup>41</sup>



These results were confirmed in 2020, by another poll showing that half of all Australians believed that workers would be better off with stronger unions.<sup>42</sup> Despite two decades of government sponsored anti-union campaigns since 1996, together with the establishment of entire government departments (such as the notorious Australian Building and Construction Commission) established for the purpose of busting the country’s strongest trade unions, public support for and understanding of the legitimate role of trade unions remains high. What has changed, is the shift from industry to enterprise level bargaining along with an increase in precarious work.

<sup>41</sup> Sarah Cameron and Ian McAllister, ‘Trends in Australian Political Opinion: Results from the Australian Electoral Study 1987-2019, Australian National University.

<sup>42</sup> ACTU, ‘Support for unions at historic high: Essential poll’, 16 June 2020: <https://www.actu.org.au/wp-content/uploads/2023/05/media1449148actu-media-release-200616-final-essential-poll.pdf>

Decentralisation of bargaining, precarious work and declining density has impacted union representation. The switch from industry to enterprise bargaining means that union-bargained pay and conditions no longer extend to small business employees. Traditional trade union organising models are rarely compatible with a highly mobile workforce of casual workers and dependent contractors.

#### Organising workers in 'new' forms of work and challenges to determining worker status

Nevertheless, the Transport Workers Union (TWU) has been waging a long-term campaign to ensure union coverage of digital platform workers in the transport industry. The union has been supported in its work by a number of Australian labour lawyers who have variously called for the regulation of 'gig economy' work through collective bargaining and industry standards.<sup>43</sup> Collective bargaining for independent contractors in the road transport industry (owner-driver truck drivers) has been a feature of Australia's largest state industrial jurisdiction of New South Wales since the mid-1990s. The *Industrial Relations Act 1996 (NSW)*,<sup>44</sup> permits drivers, organised by the TWU, to collectively bargain with large freight and haulage companies within the supply chain, to whom they supply their services. The outcome of such negotiations has been to set fair industry-wide rates for haulage services between particular destinations. This has produced safer outcomes for truck drivers and road users, producing reliable outcomes for consumers and drivers, and reducing the 'cut-throat' nature of sourcing fairly-paid work within the industry.<sup>45</sup>

Between 2021 and 2022, union efforts to organise such workers were dealt a setback, however, when a conservative Australian High Court delivered three decisions,

---

<sup>43</sup> Joellen Riley Munton and Michael Rawling, *Regulating Gig Work Decent Labour Standards in a World of On-demand Work* (Routledge, 2023); Anthony Forsyth, *The Future of Unions and Worker Representation: The digital picket line* (Bloomsbury, 2022).

<sup>44</sup> Chapter 6.

<sup>45</sup> Michael Rawling et al, 'Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness', Draft Report on Road Transport Sector Regulation, 2017.

dramatically redefining the employee-contractor distinction and casual employment.<sup>46</sup> In respect to the employee-contractor distinction, the Court decided that only the employer's contract was determinative of employment status. Previously, a worker's perception of the employment relationship, objective reality, together with the employer's contract determined work status. Casual employment was also to be determined on the basis of the employer's label or 'offer of employment'.

However, in the latter half of 2023 and in early 2024, the Federal Labor Government reversed these decisions through legislation. This 'closing loopholes' legislation has made the following additional interventions on behalf of precarious workers:

- Codifying the former legal test to distinguish between employees and independent contractors on the basis of 'reality', the employer's contract and the employment 'relationship';<sup>47</sup>
- Introducing collective bargaining rights and minimum standards for 'employee-like' gig or platform economy workers; as well as dependent contractors in the road transport industry;<sup>48</sup>
- Codifying the former legal test to distinguish between casual employees and ongoing employees on the basis of a 'firm advance commitment to continuing and indefinite work';<sup>49</sup>

---

<sup>46</sup> *Workpac Pty Ltd v Rossato* (2021) 271 CLR 456; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165; *ZG Operations v Jamsek & Ors*, [2022] HCA 2.

Technically, the 'employer-friendly' definition of casual employment triggered by one of these cases, *Rossato*, was enacted by a conservative Federal Government, shortly before the High Court delivered a similar judgment on the matter.

<sup>47</sup> *FW Act*, s15AA.

<sup>48</sup> *FW Act*, s15P and s15Q; s536JD and s536JL.

<sup>49</sup> *FW Act*, s15A.

- Providing conversion rights from casual to ongoing employment after 6 months of ongoing casual employment;<sup>50</sup>
- Establishing an ‘unfair contracts’ jurisdiction in which contractors can meaningfully challenge the terms of their engagement;<sup>51</sup>
- Imposing criminal penalties of up to 10 years imprisonment for deliberate underpayment of wages (wage theft laws);<sup>52</sup>
- Regulating labour hire on a national scale.<sup>53</sup>

The most significant of these changes concern casual work. In this respect, the Australian Department of Employment and Workplace Relations anticipates that 10% of all regular casual employees (85,000 per year) will seek conversion to ongoing employment in the first five years, with 5% in the following five years.<sup>54</sup>

### Challenges in collective bargaining and labour-management consultations

In 2021, an administrative regulator agreed to relax anti-cartel and competition laws to enable contractor bargaining.<sup>55</sup> Yet outside of the Australian transport industry, contractor bargaining has not yet met with widespread success. This is due to a host of legal and non-legal factors. Foremost, is the difficulty faced by miscellaneous workers’ unions (for example, the United Workers’ Union (UWU)) in organising irregular, mobile and transient workers performing casual and seasonal work. Another problem is the way in which

---

<sup>50</sup> *FW Act*, ss66AAB-66AAC.

<sup>51</sup> *FW Act*, Part 3A-5.

<sup>52</sup> *FW Act*, s327A.

<sup>53</sup> *FW Act*, Part 2-7A.

<sup>54</sup> Workplace Express, ‘85,000 a year set to use casual conversion laws: DEWR’, 23 January 2024: [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=63031&utm\\_source=instant+email&utm\\_medium=email&utm\\_campaign=subscriber+email&utm\\_content=article+headline&utm\\_term=85%2C000%20a%20year%20set%20to%20use%20casual%20conversion%20laws%3A%20DEWR](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=63031&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=article+headline&utm_term=85%2C000%20a%20year%20set%20to%20use%20casual%20conversion%20laws%3A%20DEWR)

<sup>55</sup> Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020, s7. The exemption permits clusters of small businesses to bargain with a large business, after notifying the Australian Competition and Consumer Commission (ACCC). The ACCC made the determination under the *Competition and Consumer Act 2010* (Cth), s95AA.

contractors understand the social relations of production, with many or most preferring not to be formal employees.<sup>56</sup> Yet another key issue inhibiting contractor bargaining is that contractors have no right to take industrial action to enforce their demands.

### Organising Precariously Employed Workers

Union campaigns to organise irregular and precarious workers have taken two key forms, involving flexible union membership on the one hand and migrant worker legal services on the other. Flexible membership has involved a host of reduced fee, subsidised, ‘on-demand’ or monthly union membership plans, such as those introduced by Australia’s miscellaneous workers’ union, UWU. Migrant worker legal services, meanwhile, are designed to address core legal problems facing an overwhelming majority of low-paid and precariously employed workers in Australia who are also temporary or recent migrants. Many of these workers struggle to remain in the country against strict immigration laws, particularly if they report violations of labour law to federal regulatory authorities. By providing migrant workers with legal services for immigration matters, Unions NSW and a strong Victorian State Labor Government, have supported these workers, in turn securing a steady recruitment stream.<sup>57</sup>

Overwhelming numbers of non-unionised precarious and migrant workers approach community legal services, rather than unions, for legal advice in employment matters.<sup>58</sup> Community legal centres in Australia have been chronically underfunded and short-staffed for many decades. Accordingly, recent work by the author and others in NSW and Victoria, has involved the trial of American ‘co-enforcement’ practices in Australia.<sup>59</sup> In

---

<sup>56</sup> Transport Workers Union, n 30.

<sup>57</sup> Unions NSW and Migrant Workers Centre Inc., *Not Just Numbers: A blueprint for Visa Protections for Temporary Migrant Workers*, 2023: [https://www.unionsnsw.org.au/wp-content/uploads/2023/08/Not-Just-Numbers\\_Report\\_FA4\\_WEB.pdf](https://www.unionsnsw.org.au/wp-content/uploads/2023/08/Not-Just-Numbers_Report_FA4_WEB.pdf)

<sup>58</sup> Schofield-Georgeson, n 36, 55.

<sup>59</sup> *Ibid*; An American literature discusses ‘co-enforcement’: see, for instance, Janice Fine et al, *No One Size Fits All: Worker Organization, Policy, and Movement in a New Economic Age* (Labour and Employment Relations Association, 2018).

practice, this involves the referral of clients from community legal centres to trade unions, as well as trade union organising within community legal centres.

#### **(4) The State, Institutions and Union Strategy**

##### Addressing the dual structure of labour market

The Australian State's most recent attempts to address precarious work or dual labour market structure are outlined above. These laws will likely reduce precarious work to a small degree. Union density may fractionally increase or, at least, plateau. A return to medium or high levels of union density, meanwhile would most likely involve a return to industry-wide bargaining and change to voluntary association laws to permit default union membership.<sup>60</sup>

Unions nevertheless remain oriented towards organising and collective bargaining, rather than servicing the needs of workers on an individual basis. Accordingly, the shift towards recategorizing certain groups of contractors as 'employee-like' workers will assist the organisation and collective representation of these workers by trade unions. But individual enforcement will remain difficult for unions while membership remains low, diminishing union resources. The UWU remains at the forefront of Australian union campaigns to organise and represent precariously employed and miscellaneous workers across a range of diverse industries. Within the past five years it has tirelessly cycled through at least half a dozen approaches to appeal to this cohort of vulnerable workers.

Individual enforcement by the Government watchdog, the FWO, remains patchy and small-scale compared to the size of the problem. Its recent successful results have largely been premised upon self-reporting of underpayments by large corporations.

---

<sup>60</sup> Isaac, n 31; Mark Perica, 'A Fair Say All Round', in James Fleming (ed.), *A New Work Relations Architecture* (Australian Institute of Employment Rights, 2022) 132, 144.



## Responses to technological innovation and digital technologies (e.g., generative AI)

While the Australian Government has recently moved to regulate ‘platform’ work, little has been accomplished in response to other technological innovations, such as generative AI that are set to augment or replace substantial numbers of jobs over the next couple of decades. Labour commentators responded by calling upon the State to prepare for digital disruption by enhancing redundancy laws in line with international standards such as those of German automotive union in the 1990s.<sup>61</sup> One Australian trade union has so far succeeded in bolstering redundancy clauses in collective agreements, in response to automation.<sup>62</sup> Another union in the Australian entertainment industry (the Media, Entertainment and Arts Alliance (MEAA)) have responded to technological change involving the influx of streaming services (eg Netflix, Amazon, Disney, etc) by campaigning to change Australian media content laws. They demand that streaming services ensure that a fair percentage of content is Australian made and produced.<sup>63</sup>

## Protection of freelancers through unionization: Conflict between collective bargaining and competition law

The MEAA is also spearheading a campaign to represent media freelancers, offering model services and insurance contracts, legal advice and minimum rates.<sup>64</sup> Other measures to address collective bargaining for contractors have already been mentioned. These include: classifying platform workers and road transport workers as ‘employee-like’ workers,

---

<sup>61</sup> Eugene Schofield-Georgeson, ‘Regulating the Automation of Employment through Redundancy Law: A Comparative Policy Approach’ (2020) 32 *Australian Journal of Labour Law* 263; McKell Institute, ‘Rethinking Redundancy for the Automation Age’, 2021: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiV3YGslayEAXWdh1YBH8bCbEQFnoECBgQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2022%2F02%2FMcKell-Institute-Rethinking-Redundancy-2021.pdf&usq=AOvVaw2l0DGV\\_Oqvyby8A4d1BxZm&opi=89978449](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiV3YGslayEAXWdh1YBH8bCbEQFnoECBgQAQ&url=https%3A%2F%2Fmckellinstitute.org.au%2Fwp-content%2Fuploads%2F2022%2F02%2FMcKell-Institute-Rethinking-Redundancy-2021.pdf&usq=AOvVaw2l0DGV_Oqvyby8A4d1BxZm&opi=89978449)

<sup>62</sup> Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021, Cl 8.4.

<sup>63</sup> MEAA, ‘Make it Australian’, 2017: <https://www.meaa.org/campaigns/make-it-australian/>

<sup>64</sup> MEAA, ‘We Are Stronger Together’, 2021: <https://freelancers.org.au/>

endowing them with collective bargaining rights; providing such workers access to an ‘unfair contracts’ jurisdiction; and relaxing competition or ‘cartel conduct’ laws for against other types of contractor bargaining (such as dependent contractors who seek to bargain with labour hirers).

### Flexible Working Hours

Around a third of the Australian workforce work flexible hours on the basis of a formal agreement or request to do so.<sup>65</sup> Around the same number work from home, and this percentage is only 4% above pre-pandemic levels.<sup>66</sup> The Government’s latest reforms also permit employees to seek administrative review of an employer’s decision to decline a request to work flexible hours or from home.<sup>67</sup> As for other ‘flexible’ or individual agreements, such as Australia’s notorious ‘Australian Workplace Agreements’ or AWAs, designed by the Howard Government in the 1990s to undercut collective bargaining terms and conditions, these were abolished in 2008 by a Labour Government. Similar individual agreements (known as ‘Individual Flexibility Agreements’) are now determined through collective bargaining, covering a mere 5% of the workforce.<sup>68</sup>

### **Conclusion**

Within the last year, the Australian State has made an effort to broaden the collective bargaining process, away from isolated enterprises and singular workplaces, toward multiple enterprises. This expansion is designed to alter the course of single-enterprise bargaining and its correlative impact on declining union density, labour market precarity and

---

<sup>65</sup> ABS, n 11.

<sup>66</sup> Ibid.

<sup>67</sup> *FW Act*, ss65B-65C.

<sup>68</sup> FWC, ‘General Manager’s report into individual flexibility arrangements under section 653 of the Fair Work Act 2009’, 2021, 10.

social inequality. This step may also represent a renewed openness to industry-wide bargaining, a system that witnessed peak union density, job security and lower rates of social inequality during the mid-20<sup>th</sup> century.

The prospect of industry-wide bargaining nonetheless remains a long way off. Its realisation will be contingent upon a confluence of factors, not least of which will rely on strong trade union influence with government as well as alliance-building with like-minded community organisations and social movements. The capacity for trade unions to do so will involve trade unions organising precariously employed workers and vulnerable migrant workers and continuing to service existing members. These aspects of trade union work have been assisted by other significant legislative changes affecting the classification and bargaining rights of workers classified as independent contractors and casuals. The introduction of default union membership would also greatly enhance union efforts. Accordingly, it is clear that neither labour, nor the state can act alone in increasing union density, to ensure a fairer distribution of Australian wealth.