Collective for All? Determining who doesn't collectively bargain

Brigid van Wanrooy
Sally Wright
Workplace Research Centre, The University of Sydney

ABSTRACT
The centrepiece of the Rudd Government's vision for the Australian industrial relations system is collective bargaining. Historically, Australian employees have relied on more centralised forms of pay-setting and currently, there still is a strong reliance on the award system. The focus on enterprise bargaining for determining working conditions relies on an assumption that every workplace is interested in and equipped to bargain collectively. It is more than likely that some employees are not equipped to collectively bargain due to their weak bargaining position and not belonging to a trade union. In other cases, employers may consider their workplaces too small or ill-equipped to initiate collective bargaining.

This paper uses the 2008 Australia at Work survey data to examine who currently bargains, what type of bargaining takes place, and who does not negotiate their pay and conditions. The analysis culminates in a model to determine the personal, employment and workplace characteristics of those who are excluded from bargaining. This paper finds that marginalised workers with little bargaining power and a weak attachment to employment are unlikely to participate in the bargaining process, and in particular, collective bargaining. These employees will continue to rely on the award safety-net for the determination of their wages and conditions. The proposed 'low-paid' bargaining stream is set to cover only limited industries and not all employees who are not engaged in collective bargaining. Thus, it is absolutely vital that the award system continues to be updated and maintained.

THE RISE OF COLLECTIVE BARGAINING IN AUSTRALIA

The centrepiece of the Rudd Government's vision for the Australian industrial relations system is collective bargaining. As the Forward with Fairness policy document states:

> Collective enterprise agreement making and democracy will be the heart of Labor's industrial relations system (Rudd & Gillard, 2007).

The *Fair Work Act 2009* has reversed the strong emphasis on individual bargaining put in place by the Howard Government and has turned the focus back toward collective bargaining at the enterprise level. More centralised forms of wage and conditions setting have been watered down. The award system is in the process of being 'modernised', reducing the number and content of awards. The new collective bargaining agenda prescribed in the *Fair Work Act* does not distinguish between union and non-union collective agreements and relies on a notion of 'good-faith' bargaining.

The focus on enterprise bargaining for determining working conditions relies on an assumption that every workplace is interested in and equipped to bargain collectively. However, it is clear that this is not the case for many workplaces, particularly those with a small number of employees. According to employer reported data registered enterprise agreements determine the pay for 40 per cent of employees. However, a survey of employees finds that nearly half this proportion are aware that this is the case (van Wanrooy et al. 2008:22). The Government has acknowledged some of the difficulties in making collective bargaining widespread and has promised assistance to employers and employees, as well as making some concessions for employees in low-wage sectors.

With the focus on collective bargaining as the means to improve or maintain labour standards, it begs the question: will all employees have the opportunity to collectively bargain? This paper examines the 2008 Australia at Work survey data of more than 5,000 employees to determine who currently is covered by collective bargaining and the characteristics of employees who say that their pay and conditions are not negotiated. From this analysis we can predict which employees may possibly be excluded from the Government's collective bargaining agenda.

Australia's system of compulsory conciliation and arbitration, introduced three years after Federation, set most market wage rates on an industry basis (Cooper & Ellem 2008; Peetz 2008; McCallum 2002). From 1987 onwards, wage setting policies have become increasingly decentralised from the national and industry level, down to the workplace and individual (McCallum 2002; van Gellecum et al. 2008). Federal enterprise bargaining was first introduced in 1992. It was union-based and operated within the confines of conciliation and arbitration and had a number of safeguards for employees including a 'no disadvantage test' and close scrutiny of the content of agreements by the AIRC (Cooper & Ellem 2008). The *Industrial Relations Reform Act 1993* codified union-based enterprise bargaining and introduced a limited right to strike and established a non-union bargaining stream (Briggs & Cooper 2006; Cooper & Ellem 2008; McCallum 2002). The introduction of this stream was criticised at the time for undermining union collective bargaining and for the lack of requirements for the parties to genuinely bargain (Bennett 1994, 1995; Cooper & Ellem 2008; Peetz 2008).

Then for nearly 12 years from 1996, the Howard Liberal Government sought to break down structures based on collective bargaining and trade unions (Cooper & Ellem 2008). The *Workplace Relations Act 1996*, among other things, undermined collective bargaining and the award system, diminished the role of trade unions and curtailed the power of the AIRC. The Act also provided for individual statutory agreements - known as Australian Workplace Agreements (AWAs) - which individualised employment relations, excluded unions and undermined some award conditions. Cooper & Ellem (2008) argue that while the take-up of AWAs was slow between 1996 and 2005, their existence threatened collectively bargained and determined rights, conditions and wages as well as union power. At this time, awards were also stripped back to only 20 'allowable matters' undermining the safety net for enterprise bargaining. Non-union collective agreements also became more attractive to employers as they were no longer required to notify the relevant union of their intention to make such an agreement.

The *Workplace Relations Amendment (Work Choices) Act 2005* continued the assault on conditions, rights and unions and to change the face of enterprise bargaining (Cooper & Ellem 2008). Enterprise agreements were no longer required to be certified by the AIRC and a list of 'prohibited content' for agreements was introduced. AWAs remained with fewer controls and employer Greenfield agreements – which employers could make unilaterally – were introduced. The minimum wage-setting function was shifted from the AIRC to the newly created Australian Fair Pay Commission and no new awards could be made, while existing awards were 'rationalised'. So-called 'protected' award conditions such as loadings and penalty rates, overtime rates, incentive payments, and public holiday penalties were frequently removed from AWAs and agreements that were registered during this time. Growing gender inequities were seen under *Work Choices*, where women fared considerably worse than men in pay outcomes under both AWAs and collective agreements (Baird et al. 2007; Cooper & Ellem 2008; Evesson et al. 2007; Peetz 2007, Pocock et al. 2008; van Wanrooy et al. 2007).

Under the *Workplace Relations Act 1996*, enterprise agreements spread slowly, from 35 per cent of employees covered in 1995 to 41 per cent in 2004 (Briggs & Cooper 2006:5). Employees covered by federal awards were also more likely to be covered by enterprise agreements, with 56 per cent covered in 1995 (Boreham et al. 1996:51). However, awareness of enterprise agreement making among employees appears to remain relatively low. Data from the Australia at Work survey shows that while 52 per cent of employees recognise that their pay and conditions are set collectively, they are more likely to attribute the setting of their pay to the award system rather than enterprise agreements (van Wanrooy et al 2008:23).

Historically, collective agreement making has been far more pronounced in the manufacturing and construction industries than in the service industries. The low incidence of collective agreements in service industries (such as retail trade, accommodation and cafes, and personal services) can be attributed to the higher incidence of State award coverage in these sectors (ACIRRT 1999; Smith 2003). The incidence of enterprise bargaining is far greater in the public sector and larger private

sector workplaces than it is in the private sector, particularly, workplaces with less than 100 employees (Smith 2003:96). Many women remain outside the enterprise bargaining stream as they tend to work in poorly paid occupations and industries, in positions of low skill and traditionally have had limited representation in bargaining and minimal access to over-award payments.

Many employers in small workplaces have traditionally relied on the award system to establish conditions of employment and have been reluctant to establish their own agreement-making processes. Many employees, too, have depended on the award system for the provision of a standardised and equitable safety net of working conditions. With a continuing decline in union membership it may be fair to say that many workers do not consider collective bargaining to have a key role in their work environment. Further, small workplaces are much less likely to be unionised primarily due to diseconomies of scale. Employees working in small workplaces are sometimes unaware of which union to join or hold the view that unions are not applicable to them in their workplace (Pocock et al. 2008:485).

The Rudd Government has claimed that by introducing the *Fair Work Act 2009* they have scrapped *Work Choices*. While some elements of *Work Choices* have remained the main function of the new laws has been to reverse the trend toward individual negotiation back to collective agreements made at the enterprise level. Bargaining agents' capacity to represent the interests of their clients and to initiate bargaining has been improved. The new Fair Work Australia institution can facilitate collective bargaining by making good-faith bargaining orders. In contrast to most industrialised countries where there is no scope for collective agreements that do not involve trade unions, the *Fair Work Act* continues to decouple unions from collective bargaining by providing the option to collectively bargain without a union. So while the focus on collective bargaining potentially provides a greater role for unions, no legal distinction is made between union and non-union collective agreements. The *Fair Work Act* has strengthened the safety net and puts life back into the award system, however, it will be only a fraction of its former self. The 10 National Employment Standards (NES) will apply to all employees and the 'modern' awards will contain a further 10 award-specific matters.

In addition to the standard collective agreements made between employers and employees, Greenfield agreements are also provided for in the Act but these must be made with union involvement. There are also provisions for multi-employer agreements to cover a designated group of low-paid employees and their employers, under the facilitated low-paid bargaining stream. These agreements are intended to assist low-paid workers who have not historically had access to the benefits of collective bargaining and face substantial difficulty in bargaining at the enterprise level. While low-paid sectors are not defined, a Government fact sheet states that there will be strict criteria for access to such a workplace determination and suggests this bargaining stream will help employees who are often paid the award rate (DEEWR 2009). By introducing the low-paid bargaining stream, the Rudd Government acknowledges that employees in these sectors may lack the skills and bargaining power to negotiate improved wages and conditions at the single enterprise level. Similarly, some employers in low-paid sectors may lack the time, skills and resources to bargain collectively with their employees.

There is further recognition by the Government that many workplaces have yet to venture into collective bargaining. Funding has been promised to employer organisations to assist their members with collective enterprise bargaining. Assistance will also be given to both employers and employees in the form of providing sample agreements. However, this is unlikely to build employees' knowledge about their rights and the processes involved in enterprise bargaining.

METHOD

This paper will use findings from the 2008 Australia at Work survey data to answer the following questions: 1) What factors influence whether an employee does not negotiate their pay and conditions compared to those covered by collective bargaining? 2) What are the implications under the *Fair Work Act 2009* for workers who do not currently collectively bargain? To do this a variable will be created that defines the different types of bargaining (or non-bargaining) reported by employees. A

logistic regression model will highlight the characteristics of workers who are not engaged in negotiation compared to those who report being covered by collective bargaining. Australia at Work is a longitudinal study of 8,341 people aged 16–58 years who were in the labour force in March 2006 (prior to the implementation of *Work Choices* on 27 March 2006). It is an Australia-wide telephone survey carried out by a fieldwork company. This paper reports on the second wave of data collection in March to July 2008. In the second wave the sample size achieved was 7,086, with an attrition rate of 15 per cent. The data has been weighted to accurately reflect population estimates across sex, age, location, employment status and union membership. The analysis in this paper focuses on the data for 5,534 respondents who were employees in 2008.

DETERMINING WHO BARGAINS

The first aspect of this analysisis to establish a measure for determining who bargains and doesn't, and the type of bargaining taking place. Australia at Work respondents are asked up to 20 questions about industrial relations and negotiation at their workplace and with their employer, including union membership and presence at the workplace, negotiation of pay and conditions and pay setting. In particular, respondents are asked up to two times about the instrument that determines their pay and conditions. Analysis of these results over two years and comparisons with employer reports collected by the ABS have shown there is a great deal of confusion among employees about how their pay and conditions are set (van Wanrooy et al. 2008:22-27). While respondents appear to be able to recognise their pay and conditions are collectively determined, the main area of contention is distinguishing between an award and a collective agreement. Relying on this measure alone does not provide a reliable indicator of the level and type of negotiation that is actually occurring at the workplace for that individual. A more useful indicator of bargaining comes from the following question:

> Did someone negotiate your wages and conditions with your employer on behalf of you or your workplace?
>
> a. Did you negotiate directly with your employer?
> b. Or was there no negotiation of your wages and conditions?

One-third (35 per cent) of employees report that their pay and conditions are not negotiated, another third (34 per cent) report direct individual negotiation with their employer and 23 per cent of employees say that a union negotiates on their behalf. A minority (4 per cent) of employees report collective negotiation without a union (i.e. a group of employees).

In cases where employees report that negotiation is not occurring, this may be because they and their employer are relying on previously determined award conditions. Therefore, it is important when examining whether bargaining is taking place to account for any role the award system is playing in the determination of pay and conditions. More than half (55 per cent) of employees say that an award plays a role in their pay and conditions. The degree of this role can range from directly determining how much they are paid to providing a base for further individual or collective negotiation. Further, there may be employees who report individual negotiation or none taking place but may be covered by a collective agreement. Employees may perceive they have no role in the negotiation of a collective agreement or may try to individually negotiate a better outcome within the terms of the collective agreement.

To describe the type of bargaining that an individual employee reports a variable was created using award role in pay and conditions, negotiation behalf and, in certain cases, self-reported agreement type. Using these variables six categories to describe bargaining were developed:

- Employees who don't bargain and award plays a role
- Employees who don't bargain and no award role
- Individual bargaining with an award role
- Individual bargaining with no award role
- Collective bargaining with a union (and a group of employees).
- Collective bargaining with a group of employees.

As the purpose of this analysis is to determine who is covered by collective bargaining, those who don't report collective negotiation occurring on their behalf but do report being covered by a collective agreement will be classified as the latter. Among these employees who are covered by a collective agreement, those who did not know whether a union was involved with that agreement were assigned to the category of collective bargaining with a group of employees. Table 1 displays the incidence of the different types of bargaining reported by employees. The most common forms of bargaining vary from 'not bargaining but with an award in place' (19 per cent); to 'individual negotiation and no award' (20 per cent); and 'collective bargaining with a union' (24 per cent). It is probably these three groups that people mostly think of when analysing employees' industrial relations arrangements. Where bargaining does not take place it is often because there is an underlying 'safety-net' in the form of the award. Where collective bargaining takes place it is usually because it has been initiated by a union. And individual bargaining usually occurs for those employees in a stronger bargaining position where an award is not deemed necessary, resulting in an individual contract based on the common law.

Table 1 Self-reported bargaining of pay and conditions, 2008, per cent

	Population estimate	Percent	*n*
No negotiation and Award role	1,657,111	19	1,036
No negotiation and no Award role	1,214,038	14	686
Individual negotiation and Award role	1,060,866	12	600
Individual negotiation and no Award role	1,730,626	20	953
Collective negotiation with a union	2,047,403	24	1,686
Collective negotiation with employees	749,134	9	430
Other	168,516	2	95
Don't know	80,279	1	48
Total	8,707,972	100.0	5,534

Population: Employees only ('Refused / missing' have been excluded).
Source: Australia at Work W2
Weight: Cross-sectional 2008

There is another group who appears not to be bargaining and unaware if they are captured by the award safety-net; this 'no negotiation and no award role' group make up 14 per cent of employees, equivalent to more than 1 million people. Analysis of these employees shows that many of them should technically be covered by an award. That is, young employees and those from a non-English speaking background in low-skilled jobs are more likely to report that no negotiation takes place and there is no award role. However, awards generally cover low-paid employees. There are two likely scenarios here for the employees with an applicable award. First, the employer may not be adhering to the applicable award. For example, they may be taking advantage of their employees' limited knowledge of their employment rights or paying cash-in-hand to escape the formal system. Alternatively, these employees may not be aware that their employer is in fact paying them the award rate. Young employees are more likely to report no knowledge of how their pay and conditions are set. As mentioned in the introduction, the award system has been scaled down substantially. So when looking at the impact of the *Fair Work Act* and the emphasis on collective bargaining it is useful to examine all employees who report no negotiation, as one group.

Another 12 per cent of employees say that they negotiate directly with their employer but an award plays a role. These employees are likely to have over-award arrangements in place. While collective bargaining accounts for nearly a third (33 per cent) of employees, a minority of these employees collectively bargain without a union. The Government has advocated for employers and employees to take up bargaining at the enterprise level regardless of whether a union is present. However, the results from 2008 suggest that there will be need to be major incentives or assistance for collective bargaining to occur without a union.

The difficulty with this measure is that it does not provide an indication of whether the negotiation is genuine nor does it provide an indication of the types of matters being negotiated (i.e. start date,

remuneration, hours of work, attendance pattern, leave arrangements). However, the main focus of the analysis is to determine whether any bargaining is taking place at all. The advantage of this measure is that it examines employees' perspectives of bargaining and not employer reports, which may account for some aspect of 'genuineness'.

The public sector is the primary domain of collective bargaining: 53 per cent of employees in this sector report collective bargaining with a union, and another 7 per cent with a group of employees. A lot more work will need to be done if collective bargaining is to become main stream in the private sector, as currently only 21 per cent of private sector employees report collective bargaining. Collective bargaining does occur in the private sector but it is more common in larger enterprises. Two-fifths of employees in large enterprises of more than 100 employees report collective bargaining compared to only 16 per cent in small enterprises.

WHO DOESN'T BARGAIN?

To understand the factors that contribute to employees being excluded from collective bargaining a logistic model was developed to compare employees who do not negotiate their pay and conditions with employees covered by collectively bargaining. This model establishes the main demographic, employment and workplace characteristics that explain if an employee is not negotiating. All variables in the model are dummy variables, except for two categorical variables for industry and income, displayed in Table 2. Results of the model are provided in Table 3.

Table 2 Categorical variable descriptions

Variable	Description
Industry	Industry employed in main job categorical variable: Base: Blue collar industries consisting of agriculture, forestry and fishing; mining; manufacturing; electricity, gas, water and waste services; construction; wholesale trade; transport, postal and warehousing. 1) 'Pink' collar services: retail trade; accommodation and food services; administrative and support services; health care and social assistance; arts and recreation services; other services. 2) White collar: information, media and telecommunications; finance and insurance services; rental, hiring and real estate services; professional, scientific and technical services; public administration and safety.
Income	Yearly salary in main job categorical variable: Base: less than $48,000 per year; 1) $48,000 to less than $100,000 per year; 2) $100,000 or more per year

The model shows that females are more likely not to negotiate than be covered by collective agreements. This is once skill level, pay, part-time hours, female-dominated industries, union membership and small enterprises have all been accounted for. Thus, it appears that women are just less likely to be involved in collective negotiation. Women have traditionally relied on the AIRC to settle pay equity disputes or to obtain better working conditions. Previous analysis of the data has found that regardless of their position in the labour market, women are less likely to participate in bargaining and more likely to rely on more centralised pay-setting arrangements. Under the new system it is likely that women will be relying on multiple employer bargaining facilitated by Fair Work Australia under the low-paid bargaining stream (van Wanrooy, forthcoming).

Young people are also less likely to be involved in collective bargaining and more likely to report no negotiation. We already know that young people have limited experience in and knowledge of how their pay and conditions are set and it is likely that they may be accepting the pay and conditions that are offered to them on a 'no questions asked' basis. Analysis of employees on registered individual agreements found that young employees were much more likely to say their pay was not negotiated (van Wanrooy et al. 2007:52). Young employees' lack of experience and knowledge appears to preclude them from bargaining collectively.

Casual employment is another factor that can be attributed to an employee not collectively bargaining. Casual employees' weaker attachment to the workplace may mean that they are not

involved in bargaining at the workplace and are not aware that it is taking place. It is harder to involve casual employees who may be at the workplace for fewer hours and may have other commitments which they are focussed on such as study or the care of children.

Table 3 Logistic regression model of employees who do not negotiate

		Model
Demographics	Female	0.470**
	Aged under 25 years	0.551**
Employment characteristics	Low-qualified job	0.038
	Usually works part-time (>35 hours per week)	0.157
	Casual employee	0.476**
	Employee reports award plays a role in pay and conditions	-0.112
	Union member	-1.436**
Workplace characteristics	Small enterprise (>100 employees)	0.637**
	Public sector	-0.554**
Industry	'Pink' collar services	0.362**
(base: Blue collar)	White collar	0.131
Income	$48,000 > $100,000	-0.383**
(base: >$48,000 p.a.)	$100,000 or more	-0.069
	n	3577
	Nagelkerke R Square	0.333

Notes: ** $p<0.01$; * $0.01< p <0.05$

Award role in pay and conditions was not significant as to whether an employee collectively negotiates. Awards can be the reason why employees do not negotiate but they can also underlie collective agreements. Not surprisingly, union members are strongly associated with collective bargaining. Traditionally there has been a strong link in Australian labour law between unions and enterprise bargaining. As mentioned previously, this link hasbeen weakened with the *Fair Work Act* promoting collective bargaining between employers and employees more generally. Time will tell whether this will lead to more collective bargaining in non-union workplaces.

Model 1 confirms that employees who do not negotiate are more likely to be employed in small enterprises. As discussed previously, employers in smaller businesses are less likely to have the time and resources to initiate bargaining with their employees. There will have to be significant incentives and resources given to these employers if collective bargaining is to be practiced in these areas. Further, the public sector is also a significant factor determining whether an employee is covered by collective bargaining. Unions have a much higher density in the public sector. It was also in the public sector where enterprise bargaining first 'took off'. Keen to show the rest of the labour market how it was done, government employers were strongly encouraged to introduce collective bargaining into their workplaces.

The industry an employee works in has been divided into three groups that account for female-dominated service industries and the more male-dominated production and manufacturing industries. It was also necessary to distinguish between the more 'professional' services from the more female-dominated service industries. The model shows that employees in the lower paid, female-dominated industries such as retail, accommodation, administration and health care are less likely to negotiate their pay and conditions compared to employees in the male dominated industries such as construction and manufacturing who are more likely to collectively bargain. The low paid bargaining stream is aimed at employees in these lower paid service sectors. While low paid sectors have not been defined by the Act, some examples of industries that may be assisted by this provision include child care, community services, security and cleaning (DEEWR 2009).

It is important that the model accounts for income as some provisions in the *Fair Work Act* have income thresholds. The first category of less than $48,000 per year was based on the fact that the

average weekly earnings of all employees are $912.40 (ABS 2009) and the second category of $100,000 per year was chosen as this is the income threshold for award covered employees. Both skill level and part-time work is not significant in Model 1, but pay is. Part-time hours were significant until the model controlled for income. Employees who earn between $48,000 and $100,000 are more likely to be covered by collective bargaining compared to those who are earning less than average weekly earnings on an annual basis. It is difficult to determine the direction of the causal relationship. Employees who earn more may do so because of collective bargaining. But it is also possible that collective bargaining has not been initiated among lower-earning employees due to their weaker bargaining power.

CONCLUSION

The focus of the new industrial relations system, under the *Fair Work Act*, on collective bargaining to improve pay and conditions beyond the award safety net is likely to disadvantage some employees who are currently not covered by collective bargaining and do not participate in negotiation. According to employers registered collective agreements cover 40 per cent of the workforce but only 23 per cent of employees perceive this to be the case (van Wanrooy et al. 2008:22). This indicates that collective bargaining is not widely known among employees as a method for improving pay and conditions. This paper has shown that there is a large proportion of the workforce for whom collective bargaining is not practiced. There appear to be two main factors contributing to this outcome: workplace practices, and employee voice and bargaining power. In the first instance small, particularly private, enterprises do not practice collective bargaining and tend to rely either on the award system or individual negotiation. In these workplaces, employers are unlikely to have the time and resources to instigate workplace bargaining and employees tend not to be unionised. The Government has promised greater assistance to employers to commence collective bargaining. In the second instance, the analysis shows that employees who do not negotiate tend to be from the more marginalised sectors of the workforce including the low-paid, those in precarious employment, young employees and women. These are all groups that have traditionally relied (whether they know it or not) on more centralised systems of pay and conditions setting. The outcomes for these workers under the *Fair Work Act* will rely heavily on the degree of success and coverage of the low-paid bargaining stream.

The reliance of both employers and employees on the award system means that it is absolutely vital that it continues to be updated and maintained until we can be sure that the extra assistance and provisions the Government has put in place to increase the incidence of collective bargaining have been effective across all sectors of the workforce.

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