*Alysia Blackham**

COLLECTIVE ACTION, VOICE AND EQUALITY: EQUALITY BARGAINING TO ACHIEVE MORE EQUAL FUTURES?

Abstract

Collective action could play a pivotal role in proactively addressing discrimination at work and creating equality-enhancing workplace structures. This article critically considers the extent to which trade unions and collective bargaining are advancing equality in Australia. Drawing on an innovative empirical study of equality provisions included in enterprise agreements recorded on the Australian Fair Work Commission website, this article considers the extent to which trade unions and other collective structures are enforcing equality norms in the workplace, particularly through bargaining. It argues that there are clear signs of equality bargaining emerging in Australia, though it is still underdeveloped, and often prompted by legislative reform. The article therefore argues for training and support within unions, legislative prompts, and legislative mandates to strengthen equality bargaining in Australia.

I Introduction

Equality law largely relies on individual claims to advance equality at work. However, this emphasis on individual action, and individual remedies, has been shown repeatedly to be ineffectual at achieving systemic change: individual action and individual claims alone cannot achieve equality at work.[1] There are significant barriers that may inhibit individual enforcement of workplace rights, including the perceived 'cost' of bringing a complaint, lack of knowledge

* Associate Professor, Melbourne Law School, The University of Melbourne; alysia.blackham@unimelb.edu.au.

1 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990); Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006) 105; Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83.

of rights, and limited access to legal mechanisms.[2] As a result, few discrimination complaints are filed with statutory equality bodies, and significantly fewer complaints progress to the courts to be heard and decided in the public arena.[3] Individual complaints mechanisms are also criticised for being reactive — rather than proactive — in identifying and addressing equality issues, limiting their ability to achieve meaningful structural change.[4]

Instead, then, there is increasing recognition that collective action — through trade unions, groups of workers, and non-governmental organisations — can play a pivotal role in proactively addressing discrimination and creating equality-enhancing work structures.[5] Unions may be increasingly using strategic equality litigation to escalate broader collective goals.[6] There is also significant potential to advance equality through 'equality bargaining', that is, the advancement of equality issues in and through collective bargaining. However, previous scholarship has expressed concern that trade unions are only reluctantly embracing the equality agenda, and that 'equality bargaining' in particular remains underdeveloped (see Part II below). Indeed, empirical work on age equality law has shown that collective enforcement mechanisms remain largely underutilised, in countries such as the United Kingdom, Australia and Sweden.[7]

This article, then, critically considers the extent to which collective action — and collective bargaining in particular — are advancing equality in Australia. 'Equality', in this context, is used in the sense of Professor Sandra Fredman's multidimensional principle of substantive equality, which encompasses: redressing disadvantage; addressing stigma, stereotyping, prejudice and violence; facilitating participation, inclusion, and voice; and accommodating difference and structural change.[8]

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2 See the detailed discussion in Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) 73–85 ('*Reforming Age Discrimination Law*').

3 Ibid; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims Outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31(3) *Australian Journal of Labour Law* 253; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778; Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) *Sydney Law Review* 1.

4 Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60(1) *American Journal of Comparative Law* 265, 266, 271.

5 Blackham, *Reforming Age Discrimination Law* (n 2) ch 9.

6 Manoj Dias-Abey, 'Mobilizing for Recognition: Indie Unions, Migrant Workers, and Strategic Equality Act Litigation' (2022) 38(2) *International Journal of Comparative Labour Law and Industrial Relations* 137.

7 Blackham, *Reforming Age Discrimination Law* (n 2) ch 9; Alysia Blackham, 'Abandoning Individual Enforcement? Interrogating the Enforcement of Age Discrimination Law' (2023) 43(1) *Legal Studies* 3 ('Abandoning Individual Enforcement?').

8 Sandra Fredman, *Discrimination Law* (Oxford University Press, 3rd ed, 2022) 29–44.

Equality, then, goes beyond simply prohibiting discrimination, which might be understood as adverse treatment on the basis of a protected characteristic such as age or gender ('direct discrimination'), or differential impact on certain groups resulting from apparently neutral conditions or terms ('indirect discrimination').[9] 'Equality bargaining' involves the integration and advancement of ideas of equality in the bargaining process. This could occur, for example, via recognition of status-based inequality, enabling voice or participation for under-represented groups in the bargaining process, or through the transformation of existing structures to redress disadvantage.[10]

This analysis draws synergies and links between two of the International Labour Organization's ('ILO') Fundamental Principles and Rights at Work: 'the effective recognition of the right to collective bargaining' and 'the elimination of discrimination in respect of employment and occupation'.[11] Drawing on legal doctrinal analysis of labour laws in Australia, and an innovative empirical study of equality provisions included in enterprise agreements recorded on the Australian Fair Work Commission ('FWC') website, this article considers the extent to which trade unions and other collective structures are enforcing equality norms in the workplace, particularly through bargaining. It argues that there are clear signs of equality bargaining emerging in Australia, though it is still underdeveloped, and often prompted by legislative reform. The article therefore considers how equality bargaining could be strengthened in Australia.

In Part II, I consider how collective action, unions and bargaining might advance equality, and the potential structural barriers in Australia to taking equality-focused collective action. In Part III, I map the legal framework for collective bargaining in Australia, with a particular focus on the federal system, and consider the legal doctrinal limits on equality bargaining. Part IV draws on literature from Australia and overseas to offer a more detailed consideration of 'equality bargaining', what it might entail, and when it might be pursued. Part V, then, presents the method for the empirical study of equality provisions included in enterprise agreements recorded on the FWC website. The findings of this study are presented in Part VI. Given these findings, Part VII considers how equality bargaining might be strengthened in Australia; and Part VIII concludes.

9 That said, preventing and addressing discrimination might be a key means of advancing some dimensions of equality.

10 These ideas are further developed in Part IV.

11 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (10 June 2022, adopted 18 June 1998) 9. See further Adelle Blackett and Colleen Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142(4) *International Labour Review* 419, 419–20.

II Collective Action to Advance Equality: Structural Possibilities and Limits in Australia

Collective action and bargaining could be critical complements to the individual enforcement models embedded in equality law.[12] Bargaining, like other collective enforcement mechanisms, distributes the costs of advancing equality across a broad group of people, taking the burden of enforcement off those who are directly impacted by discrimination and inequality. This redistribution is essential, given those who are directly impacted by discrimination are often the most vulnerable workers who are the least able to make use of legal mechanisms.[13] Approaching issues of inequality collectively also helps to reframe individual experiences of discrimination as systemic issues. Conversely, casting discrimination as an individualised issue is unlikely to identify and address many systemic workplace problems.[14] Bargaining also offers a potential means of proactively addressing discrimination and equality, to identify and change structures and systems that perpetuate inequality and disadvantage before harm occurs.[15]

That said, unions — and collective bargaining conducted by unions — have not always advanced equality (at least, as that idea is articulated in Part I). Collective bargaining might be seen as inherently aiming to address power and material disparities between employers and employees.[16] Bargaining, then, is key to advancing socio-economic equality. 'Equality' bargaining, though, goes beyond the traditional material focus of collective bargaining, to focus on other (non-socio-economic) inequalities, particularly those related to the characteristics protected by discrimination laws (gender, age, ethnicity and so on). Fredman describes these as 'status-based' inequalities.[17] There is likely to be significant overlap between socio-economic disadvantage and other grounds of disadvantage,[18] yet discrimination and equality law

12 As I argue, though, this should be in addition to, not instead of, individual complaints mechanisms: Blackham, 'Abandoning Individual Enforcement?' (n 7).

13 Belinda Smith, 'It's About Time — For a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 132.

14 Ibid 134–5; Bob Hepple, 'Agency Enforcement of Workplace Equality' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart, 2012) 49, 58.

15 In this sense, the potential benefit of bargaining is similar to the potential benefit of positive equality duties, and could complement those duties: see, eg, Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98.

16 Beth Gaze and Anna Chapman, 'The Human Right to Non-Discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia?' (2013) 29(4) *International Journal of Comparative Labour Law and Industrial Relations* 355, 356–7, 362.

17 Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23(2) *South African Journal on Human Rights* 214, 214 ('Redistribution and Recognition').

18 Ibid 214–15.

rarely engage deeply with issues of socio-economic status in Australia.[19] Drawing synergies and links between the material focus of collective bargaining, and the discrimination and status focus of equality laws therefore has potential to strengthen both areas.[20]

The limited focus on status-based equality in collective bargaining may, in part, reflect perceived tensions between individual rights (as, for example, are embedded in equality law) and collective rights in the workplace;[21] individual rights might be seen as undermining collective rights. However, as Professor Alan Bogg argues, individual rights and collective bargaining should not be seen as discrete and separate; what is 'individual' and what is 'collective' can be understood in many different ways, challenging any dichotomy between the two.[22] For example, rights can have individual elements without being individualistic, as is the case where trade unions enforce rights on behalf of members.[23] Professor Edmund Heery's 'recombination thesis' therefore argues that unions can use and incorporate individual legal rights to support and strengthen collective action and bargaining, with individual rights acting 'as a precedent, sanction and standard'.[24] Thus, strong legal regimes tend to have complementary individual and collective rights;[25] they go hand-in-hand, and are mutually supportive.[26] The individual and the collective are therefore deeply intertwined.[27]

And yet, tensions between the individual and the collective can emerge in collective agreements. For example, collective agreements might adopt a 'last-in, first-out'

19 See, eg, Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' [2018] 1 *Anti-Discrimination Law Review* 5.

20 Indeed, Fredman argues it is not tenable to keep them separate: Fredman, 'Redistribution and Recognition' (n 17) 215.

21 Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52(6) *Modern Law Review* 733, 745.

22 Alan Bogg, '"Individualism" and "Collectivism" in Collective Labour Law' (2017) 46(1) *Industrial Law Journal* 72.

23 Ibid 77.

24 Edmund Heery, 'Debating Employment Law: Responses to Juridification' in Paul Blyton, Edmund Heery and Peter Turnbull (eds), *Reassessing the Employment Relationship* (Palgrave Macmillan, 2011) 71, 89–90. That said, this complementarity can be undermined by the legal framework: Linda Dickens, 'The Road Is Long: Thirty Years of Equality Legislation in Britain' (2007) 45(3) *British Journal of Industrial Relations* 463, 483.

25 Bogg (n 22) 100–101.

26 This view is also consistent with the view of union officials: as Michelle O'Sullivan et al conclude, 'while unions view the law as an inadequate substitute for collective bargaining and recognise its individualising effect, they believe, in general, that the law is "complementary to trade union organization as distinct from being a threat"': Michelle O'Sullivan et al, 'Is Individual Employment Law Displacing the Role of Trade Unions?' (2015) 44(2) *Industrial Law Journal* 222, 241.

27 Bogg (n 22) 77.

rule, which gives preferential treatment to long-serving workers in redundancy processes.[28] While these rules are potentially discriminatory on the basis of age (and, in some industries, gender), and may infringe individual rights to age equality, they might be preferred by unions and bargaining teams to other redundancy criteria, as they protect the rights of long-standing union members.

This flags the risk, then, that bargaining might *undermine* equality, rather than being equality enhancing, particularly where collective groups (like unions) favour majoritarian solutions, at the expense of minority groups. There remains a normative question, then, of whether equality rights *should* be subject to bargaining. If collective solutions can actively undermine equality, or perpetuate discrimination, there may need to be absolute or minimum standards imposed on the bargaining process, to protect equality rights. In some cases, individual discrimination rights should prevail over collective rights; collective solutions are not always morally superior.[29] This prioritisation is reflected, for example, in the *Fair Work Act 2009* (Cth) ('*FWA*'), where discriminatory terms cannot be included in enterprise agreements. In approving an enterprise agreement, the FWC must be satisfied that there are no unlawful (including discriminatory) terms.[30] Discriminatory terms in enterprise agreements have no effect[31] (see Part III below).

The extent to which collective bargaining is able to advance equality fundamentally depends on union membership, union density and, potentially, the demographics of union members. Trade union density continues to decline in Australia (dropping to 13.7% of employees by 2018),[32] though the number of employees covered by collective agreements as a proportion of the number of employees with the right to bargain has remained fairly stable, at 61.2% in 2018.[33]

The demographics of union members could also limit unions' capacity or inclination to advance equality. For example, if unions are dominated by those who have traditionally benefitted from the standard employment relationship and structural inequality — including, but not limited to, white men — then unions may be less willing to challenge or disrupt the status quo. However, union membership data from the Australian Bureau of Statistics ('ABS') shows that women are *more* likely to be a member of a union in Australia than men.[34] This may reflect women's overrepresentation in industries with high union density, such as education and the

28 See, eg, *Rolls-Royce Plc v Unite the Union* (2010) 1 WLR 318.

29 Bogg (n 22) 77.

30 *Fair Work Act 2009* (Cth) ss 186(4), 194(a), 195 ('*FWA*').

31 Ibid ss 253(1)(b), 194(a), 195.

32 'How Do Collective Bargaining Systems and Workers' Voice Arrangements Compare Across OECD and EU Countries?', *OECD* (Database, 3 October 2023) <https://web-archive.oecd.org/temp/2023-10-03/577157-ictwss-database.htm>.

33 Ibid.

34 Australian Bureau of Statistics, *Trade Union Membership* (Catalogue No 6335.0, 14 December 2022) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/aug-2022>.

public sector. Overall, too, it simply shows that trade union density among women has declined less than among men.[35]

Union membership remains highly exceptional for younger workers: according to the ABS, in August 2022, only 2% of employees aged 15–19 and 5% of those aged 20–24 were trade union members.[36] By contrast, among those aged 55–59, 19% of employees were trade union members; for those aged 60–64, this rose to 21% of employees.[37] Thus, older workers (aged 60–64) are four times more likely to be union members than those aged 20–24. As Professor Adelle Blackett and Professor Colleen Sheppard argue, unequal access to collective bargaining — and unequal access to union membership — poses a fundamental challenge to equality.[38] Equally, though, growing equality in union membership potentially positions unions as key actors in advancing equality at work.

III The Collective Bargaining Framework

In Australia, collective bargaining can be effected through a range of different instruments, which become progressively more organisation-specific. At the federal level, this system has been in place since the commencement of the *FWA*.[39] At the broadest level of abstraction, federal awards provide minimum standards for a particular industry or occupation.[40] Awards are made by the FWC, following submissions by interested stakeholders (including unions and employer groups). Modern awards (made under the new workplace relations system) contain standard terms, including terms relating to award flexibility, termination of employment, redundancy and allowances. As modern awards are specifically limited to these standard terms,[41] there is perhaps less scope to include additional provisions relating to equality.[42]

35 This gendered shift is not a new trend; Barbara Pocock observed the same in 1997: Barbara Pocock, 'Gender, Strife and Unions' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 9, 16.

36 Australian Bureau of Statistics (n 34).

37 Ibid.

38 Blackett and Sheppard (n 11) 421–2.

39 Though many of these collective mechanisms existed in some form before the *FWA* (n 30). Note, too, the changes effected by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), which expanded options for multi-employer bargaining.

40 See *FWA* (n 30) ch 2, pt 2-3.

41 See ibid s 136.

42 Note, though, that a model anti-discrimination clause was historically included in awards: Australian Industrial Relations Commission (1997) *Award Simplification Decision* H0008 Dec 1533/97 M Print P7500. Further, new standard terms might be added, including following legislative edict: see, eg, *Variation of Modern Awards to Include a Delegates' Rights Term* (AM2024/6) [2024] FWC 1699.

Collective bargaining can also be effected through single-enterprise or multi-enterprise agreements ('EAs'). These operate instead of the award,[43] however employees must generally be 'better off overall' under the EA than under the award for the agreement to be approved.[44] Draft EAs are submitted to a vote of employees who will be covered by the terms of the agreement, and are then lodged with the FWC for approval. EAs may only cover 'permitted matters', which include:

- 'matters pertaining to the relationship between an employer' and their employees;
- 'matters pertaining to the relationship between the employer' and the employee organisation(s); and
- 'how the agreement will operate'.[45]

Terms relating to equality are not required to be contained within an EA; equally, however, they are not prohibited. Thus, if equality was to be included in a collective instrument, EAs would be the likely forum. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Amendment Act*') pt 9 has clarified that 'special measures' necessary to achieve substantive equality are 'matters pertaining to the relationship between an employer' and their employees.[46] The *Secure Jobs, Better Pay Amendment Act* has also introduced changes focused on gender equality and to create a supported bargaining stream of multi-employer bargaining, which may address some of the barriers to effective collective bargaining in feminised industries.[47]

Equality is also embedded in the process of approving an EA: as noted above, in approving an EA, the FWC must be satisfied that an EA does not include any unlawful terms.[48] An unlawful term includes a discriminatory term,[49] being a term that:

> discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.[50]

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43 See *FWA* (n 30) ch 2, pt 2-4.

44 See ibid ss 186, 189, 193, 193A. For further discussion of the bargaining process, see Andreas Pekarek et al, 'Old Game, New Rules? The Dynamics of Enterprise Bargaining under the *Fair Work Act*' (2017) 59(1) *Journal of Industrial Relations* 44.

45 *FWA* (n 30) s 172(1).

46 Now contained in ibid ss 172A, 195(4).

47 Sara Charlesworth and Fiona Macdonald, 'Collective Bargaining and Low-Paid Women Workers: The Promise of Supported Bargaining' (2023) 65(4) *Journal of Industrial Relations* 403.

48 *FWA* (n 30) s 186(4).

49 Ibid s 194(a).

50 Ibid s 195(1).

A term is not discriminatory if:

- the reason for the discrimination is the inherent requirements of the position; or
- it discriminates in relation to employment in a religious institution, and is done in good faith to avoid injury to the religious susceptibilities of adherents of that religion;[51] or
- it provides for wages for junior employees, employees with a disability, or employees to whom training arrangements apply.[52]

These exceptions are potentially wide-ranging, and may serve to undermine protections afforded under state and territory discrimination laws. Amendments effected by the *Secure Jobs, Better Pay Amendment Act* have further clarified that special measures to achieve equality are not discriminatory terms to the extent they are not unlawful under any relevant anti-discrimination law.[53]

In *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd*,[54] Flick J noted, in relation to other sections of the *FWA*, that 'the term "discriminate" should be given its normal and ordinary meaning. … the term "discriminate" simply means to treat employees differently'.[55] It is unclear whether the prohibition of discriminatory terms extends to indirectly discriminatory provisions. Overall, though, it appears that indirectly discriminatory provisions are not unlawful,[56] reflecting a focus on achieving formal rather than substantive equality in EA terms. A focus on formal equality is less likely to disrupt measures that benefit the 'paradigmatic' employee.[57]

Commission and court decisions relating to discriminatory EA terms have largely focused on three areas: more generous parental leave provisions for women, which have generally been found to be non-discriminatory; terms that disadvantage part-time workers; and age-based redundancy pay, where the decisions are more mixed. First, in relation to parental leave, in *Sunrise Christian School*[58] an EA term

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51 See, eg, *Catholic Commission for Employment Relations through its Executive Director Anthony Farley* [2012] FWAA 2536.

52 *FWA* (n 30) s 195(2)–(3).

53 Now contained in ibid s 195(2)(c).

54 (2014) 232 FCR 560.

55 Ibid 575 [58].

56 *The University of Melbourne* [2014] FWCA 1133, 10 [54]; *Re Application by Metropolitan Fire and Emergency Services Board* (2019) 284 IR 239, 279–80 [119]–[120], citing binding precedent in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227, 239 [52]–[56] (Tracey J); *Construction, Forestry, Maritime, Mining and Energy Union v Svitzer Australia Pty Ltd* [2023] FWC 55, 22 [134]; *Minister for Industrial Relations (Cth) v Metropolitan Fire and Emergency Services Board* (2019) 291 IR 1, 24–6 [67]–[73].

57 Gaze and Chapman (n 16) 361–2, 364.

58 [2019] FWCA 7429. See also *Sunrise Christian School Whyalla* [2019] FWCA 7423; *Adelaide Christian Schools Early Learning Centres Inc* [2019] FWCA 7432.

providing for parental leave for women only was held to not be discriminatory, as it fell within an exception to the *Sex Discrimination Act 1984* (Cth).[59] In *The University of Melbourne*, provision of a return-to-work bonus after maternity or adoption leave was held to not be discriminatory, even if a partner returning from partner leave was not entitled to the same bonus.[60] In *Australian Nursing and Midwifery Federation v Domain Aged Care (Qld) Pty Ltd*,[61] a reduction in additional paid parental leave for any period of paid 'no safe job' leave was held to not be discriminatory on the basis of sex or pregnancy, as the overall effect of the clause was to limit total paid parental leave to eight weeks.

Second, in relation to provisions affecting part-time workers, in *Re Application by Metropolitan Fire and Emergency Services Board* the FWC was asked to consider whether agreement terms that disadvantaged part-time employees were 'unlawful terms' as they were indirectly discriminatory on the basis of sex and family and parental responsibilities.[62] Being bound by Federal Court precedent, the FWC held that s 195 of the *FWA* did not extend to indirectly discriminatory provisions; but the FWC indicated that, had it not been bound by precedent, it would have found otherwise.[63] In the earlier case of *Qantas Airways Ltd*,[64] a clause which prioritised full-time employees for overtime was held to not be discriminatory; however, Fair Work Australia considered whether the clause was indirectly discriminatory. On the facts presented, though, it was found that the clause did not disadvantage women.[65]

Third, in relation to age-based redundancy payments, in *Virgin Australia Regional Airlines Pty Ltd*[66] a provision of the EA provided that severance payments were not to exceed the amount an employee would have earned if their employment had proceeded to the employee's normal retirement date. The parties did not seek to challenge the term. The FWC did not see the clause — which likely discriminates on the basis of age — as a barrier to approving the agreement.[67] Rather, the FWC flagged that the term was likely not enforceable.[68]

The clear problems with this approach — approving the agreement, with a (likely) discriminatory clause retained — are revealed in other decisions: a similar clause was challenged as discriminatory in *Australian Municipal, Administrative, Clerical*

59 *Sex Discrimination Act 1984* (Cth) s 31: it is not unlawful to 'discriminate against a man on the ground of his sex by reason only of' granting a woman 'rights or privileges in connection with pregnancy, childbirth or breastfeeding'.

60 *The University of Melbourne* (n 56).

61 [2019] FWCFB 1716.

62 *Re Application by Metropolitan Fire and Emergency Services Board* (n 56).

63 Ibid 279–81 [119]–[122], 281 [125]–[126].

64 [2011] FWA 3632.

65 Ibid [41]–[48].

66 [2021] FWCA 204.

67 Ibid [5].

68 Ibid.

and Services Union v John Sands Australia.[69] Ms King was made redundant at age 67. Clause 29.7.3 of the relevant EA read: 'No employee will receive more in redundancy pay than they would have received had they remained in employment up to normal retirement date i.e. 65 years of age.' If this clause was unlawful, Ms King would have been entitled to 105 weeks' redundancy pay; if the clause was valid, she would be entitled to 12 weeks' redundancy pay under the National Employment Standards.[70] The FWC held that, given the agreement had been approved previously, it was not able to review the validity of the term, as it was not a court. Rather, the FWC could only consider the term's application to Ms King.[71] The clause was held to apply to Ms King, even if she had passed the 'normal retirement age'.[72]

A court had the chance to consider a similar term in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)*.[73] The *Centennial Northern Mining Services Enterprise Agreement 2011* cl 30.8 provided that: 'The amount of retrenchment payment due to an employee is not to be more than the employee would have received had the employee remained in employment with the Company until the age of sixty (60) years.' The mandatory retirement age for coal workers in NSW — 60 — was abolished in 2006.[74] The Federal Court of Australia ('FCA') held that cl 30.8 was clearly discriminatory:

> the effect of cl 30.8 is stark from age 60 on: no retrenchment payment is available no matter what the length of service. The reason for that difference in outcome is the employee's age. In my view, the conclusion is inescapable that the term of the Agreement having that effect (cl 30.8) is a discriminatory term (s 195 of the FW Act) and therefore an unlawful term (s 194(a) of the FW Act).[75]

The FCA noted that, when concerned with the 'proper meaning and effect of a term of an enterprise agreement … That meaning and effect is to be discerned primarily from the text of the provision, not neglecting the illumination available from context and history'.[76] Here, that context and history included previous attempts to amend such a provision in the award system. In March 2004, the Australian Industrial Relations Commission ('AIRC') declined to change a standard clause in the Commonwealth's safety net awards which limited severance payments for those nearing

69 [2013] FWC 9033.

70 John Sands made a payment of 52 weeks' pay, based on the scale for non-award employees: ibid 2 [4].

71 Ibid 8 [34].

72 Ibid 9 [41].

73 (2015) 247 IR 350.

74 *Coal and Oil Shale Mine Workers (Superannuation) Amendment Act 2006* (NSW) s 3, sch 1 cl 4.

75 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 358 [42]–[43].

76 Ibid 358–9 [45].

retirement age.[77] The standard clause read: 'Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.'[78] The AIRC held that, 'despite the passage of age discrimination legislation, the concept of a normal retirement date will continue to be relevant where a particular occupation or industry continues to have a fixed retirement date'.[79] In the AIRC's view, the standard clause would continue to be relevant to ensure that (older) employees did not receive a 'windfall' when being retrenched.[80] As the FCA later rightly noted, though, this reasoning no longer holds where fixed retirement ages have been abolished, as is now the case for most jobs and professions.[81] Indeed, the *Age Discrimination Act 2004* (Cth), which commenced on 1 July 2004, provides that '[i]t is unlawful for an employer … to discriminate against an employee on the ground of the employee's age … by dismissing the employee'.[82] In the FCA case, then,

> [s]o far as employees of the applicant are concerned, from the time they were permitted to continue working after 60 years of age a provision which subjected them to disadvantage by reference to attaining that age was directly discriminatory against them on the ground of their age within the meaning of s 195 of the FW Act.[83]

The clause was therefore an unlawful term.

Other EA clauses have also been considered as potentially discriminatory: in *Eastern Australia Airlines Pty Ltd*,[84] a clause referring to pilots as 'he' was found to be a typographical error, and not discriminatory.[85] In *ALDI Foods Pty Ltd*,[86] a clause requiring staff to submit to a medical examination where there were concerns they could not fulfill the inherent requirements of their role was held to not be discriminatory.[87] However, in *Mulgoa Quarries Pty Ltd*,[88] a clause requiring staff to submit for medical assessments at different frequencies based on age was held to be discriminatory and an unlawful term.[89] The employer was invited to provide an

77 *Redundancy Case* (2004) 129 IR 155.

78 Ibid 199 [159].

79 Ibid 200 [164].

80 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 360 [51].

81 Ibid 360 [51]. On an exception to this, see Alysia Blackham, 'Judges and Retirement Ages' (2016) 39(3) *Melbourne University Law Review* 738.

82 *Age Discrimination Act 2004* (Cth) s 18(2)(c).

83 *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)* (n 73) 360 [52].

84 [2011] FWA 4261.

85 Ibid [63]–[64].

86 *ALDI Foods Pty Ltd* [2013] FWC 3495.

87 Ibid 22 [91].

88 [2020] FWC 1063.

89 Ibid 16 [41].

undertaking that the discriminatory term would be removed.[90] In *Commissioner for Public Employment (NT)*,[91] it was argued that pay scales were indirectly discriminatory against those with family or carer responsibilities, particularly in single-income families, who found it harder to make ends meet. Fair Work Australia assumed, without deciding, that s 195 encompassed indirect discrimination,[92] but found the clause to not be discriminatory.[93]

Once approved by the FWC, all EAs are published on the Commission's website. This public database has the potential to offer critical insights into the agreements that are being made, and their contents and gaps. This article builds on that potential, as discussed in Part V.

Awards and enterprise agreements may also be made at state level for employees who are not covered by the federal workplace system (such as state and local government employees in many states).[94] State awards are not limited to standard terms, meaning there is more scope to accommodate equality within their provisions than at the federal level.[95]

IV Equality Bargaining: Potential and Challenges

A *Defining 'Equality Bargaining'*

Within this statutory framework, how do unions go about bargaining? And, in particular, are unions engaging in 'equality bargaining'? First, though, it is critical to consider what we mean by 'equality bargaining', and to evaluate its potential and limits. Trevor Colling and Professor Linda Dickens define 'equality bargaining' as that which:

> encompasses the collective negotiation of provisions that are of particular interest or benefit to women and/or are likely to facilitate gender equality ('special measures'); equality awareness on the part of negotiators in handling commonplace bargaining agenda items such as pay and pay opportunities ('gender-proofing'), and the injection of an equality dimension (specifically, addressing gender disadvantage) to the negotiation of change, for example reforming a grading structure.[96]

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90 Ibid 16 [42].

91 [2010] FWAA 9372.

92 Ibid [8].

93 Ibid [9].

94 See the summary at 'Fair Work System', *Fair Work Ombudsman* (Web Page) <https://www.fairwork.gov.au/about-us/workplace-laws/fair-work-system>.

95 See, eg, *Industrial Relations Act 1979* (WA) pt II div 2A; *Fair Work Act 1994* (SA) ch 3 pt 3.

96 Trevor Colling and Linda Dickens, 'Selling the Case for Gender Equality: Deregulation and Equality Bargaining' (1998) 36(3) *British Journal of Industrial Relations* 389, 390.

This definition could usefully be extended to encompass protected characteristics beyond gender, though most research to date has focused on gender equality bargaining specifically.[97] Linda Briskin distinguishes 'equity bargaining' — that is, the process of bargaining and bargaining strategy — from 'bargaining equity' — that is, 'issues on an equity agenda'.[98] Briskin sees 'equity bargaining' as involving three initiatives or stages:

> first, the introduction of increasingly complex 'no-discrimination' clauses in collective agreements; second, the identification of specific platforms of concerns which address the needs of each equity-seeking group; and third, the recognition of the equity implications in the entire range of traditional collective agreement provisions, what could be called equity mainstreaming.[99]

General 'non-discrimination clauses' are potentially important additions to collective agreements, as they enable those who experience discrimination to raise a dispute in relation to the agreement.[100] Workers may be more likely to raise a dispute than to approach an independent statutory agency and file a complaint under discrimination law, for example.[101] That said, these broad clauses are insufficient to meaningfully address inequality, as they essentially replicate an individual complaints model: 'more is needed' to address problems proactively and systematically.[102]

'Equity mainstreaming', then, arguably requires a 'transformation' of existing structures and practices that disadvantage people with certain protected characteristics. Mainstreaming is critical to avoid the 'compartmentalisation of equality within bargaining' to consider only specific 'women's measures' or equality measures.[103] As Dickens argues,

> developing a positive link between equal opportunities and collective bargaining calls for an equality dimension in all bargaining; a gender perspective on all issues. In this sense there is not necessarily an 'equality agenda' separate from the bargaining agenda. 'Core' negotiating issues such as working time, wage adjustment, flexibility,

97 Sue Williamson and Marian Baird, 'Gender Equality Bargaining: Developing Theory and Practice' (2014) 56(2) *Journal of Industrial Relations* 155, 161.

98 Linda Briskin, 'Equity Bargaining/Bargaining Equity' (Working Paper No 2006-01, York University Centre for Research on Work and Society, July 2006) 12 <https://www.yorku.ca/lbriskin/pdf/bargainingpaperFINAL3secure.pdf>.

99 Ibid 32.

100 Blackett and Sheppard (n 11) 439. See *FWA* (n 30) s 186(6).

101 Blackett and Sheppard (n 11) 439.

102 Ibid 440.

103 Linda Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work: Opportunities and Challenges for Trade Unions' (2000) 6(2) *Transfer: European Review of Labour and Research* 193, 200 ('Collective Bargaining and the Promotion of Gender Equality at Work').

restructuring, etc, which do not come brandishing an equality label, are of central importance to the promotion of equality.[104]

B *The Unrealised Potential of Equality Bargaining*

Scholars are generally optimistic about the potential for bargaining to advance equality.[105] As discussed in Part II, equality bargaining could be an important complement to individualised statutory equality regulation. Dickens sees distinct advantages in equality bargaining over legal regulation, as bargaining offers increased flexibility to develop targeted and tailored approaches suited to local circumstances, which are more likely to be seen as acceptable and legitimate to those involved, and enforceable via existing collective mechanisms.[106] Collective bargaining — built upon representative structures — also enables employee voice; it 'provides a way of giving women a voice; an ability to define their own needs and concerns and to set their own priorities for action'.[107] Indeed, if we define 'equality bargaining' as relating to protected characteristics beyond gender, bargaining can give voice to a broader range of workers, who would otherwise often remain marginalised in the workplace. Blackett and Sheppard similarly see collective bargaining as having 'great potential to enhance equality'[108] if there is a strong commitment on the part of the social partners to advance equality.[109]

However, despite writing more than 20 years apart, both Professor Linda Dickens (in the European context)[110] and Professor Gill Kirton (in the UK) see equality bargaining as remaining 'underdeveloped'.[111] The extent to which equality bargaining is 'underdeveloped' may reflect perceived tensions between equality rights and collective rights, and the view that equality is divisive not solidaristic (discussed in Part II).[112] It also reflects the historical exclusion from collective bargaining of those who are also over-exposed to discrimination,[113] and a history of bargaining

104 Ibid 201.

105 See, eg, ibid 196; Blackett and Sheppard (n 11) 421.

106 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 196.

107 Ibid 197.

108 Blackett and Sheppard (n 11) 421.

109 Ibid.

110 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 194.

111 Gill Kirton, 'Union Framing of Gender Equality and the Elusive Potential of Equality Bargaining in a Difficult Climate' (2021) 63(4) *Journal of Industrial Relations* 591, 592.

112 Ibid 594.

113 Blackett and Sheppard (n 11) 422. As those authors argue, '[i]n the design and application of machinery to give effect to the right to collective bargaining, certain categories of worker were forgotten, overlooked or quite simply excluded because they were not part of the dominant paradigm': at 422.

in which collectively negotiated solutions have sometimes been equality *detracting*, not equality enhancing.[114] This includes where collective solutions privileged the 'male breadwinner' model,[115] and excluded those who did not meet the normative standards of the (white, male) 'universal worker'.[116] As Barbara Pocock has argued, 'Australian unions have been no friends to women on many occasions in their history', including through fierce defence of the 'family wage' that privileged the interests of men.[117] For Professor David Peetz, then, '[d]iscrimination against women was as much a result of union pressure as it was of employer decisions'.[118] As Blackett and Sheppard argue, collective bargaining is '[p]aradoxically … part of the problem and part of the solution to the elimination of inequality and discrimination at work'.[119]

Equality bargaining therefore has the potential to fundamentally challenge and disrupt the status quo, which may be indirectly or directly discriminatory and privilege certain groups of workers.[120] Indeed, enterprise-level bargaining in Australia was originally sold to women as a way to improve their workplace conditions.[121] However, mapping the shift towards enterprise-level bargaining in Australia since 1991, Claire Thomson and Barbara Pocock note that wages remained a dominant focus of unions' industrial agendas at the enterprise level; despite a shift from reliance on awards to enterprise bargaining, the agenda remained 'in men's hands'.[122] Women's interests actually appeared to be *disadvantaged* in this shift towards workplace bargaining; indeed, bargaining in the workplace served to widen the disparity between women's and men's wages,[123] in part because women-dominated industries were more likely to be reliant on an award, and to not have access to enterprise bargaining.[124] Women were unlikely to be included on bargaining committees; in 1994, there were no women on bargaining committees in 56% of workplaces with some women employees.[125] As a result, perhaps, clauses addressing equality

114 Ibid 433.

115 David Peetz, 'Regulation Distance, Labor Segmentation, and Gender Gaps' in David Peetz and Georgina Murray (eds), *Women, Labor Segmentation and Regulation: Varieties of Gender Gaps* (Palgrave Macmillan, 2017) 3, 10.

116 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 199. See also Blackett and Sheppard (n 11) 426.

117 Pocock (n 35) 9.

118 Peetz (n 115) 10.

119 Blackett and Sheppard (n 11) 433.

120 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 202.

121 Claire Thomson and Barbara Pocock, 'Moving on from Masculinity? Australian Unions' Industrial Agenda' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 67, 83.

122 Ibid 68.

123 Ibid 70, 83.

124 Ibid 83–84.

125 Ibid 84.

issues remained exceptional in enterprise agreements.[126] In 1994, for example, 9% of 1360 enterprise agreements included an equal employment opportunity (EEO) or affirmative action provision; 5% included an anti-discrimination or harassment provision; 2% contained individual grievance procedures; and 1% included a representative consultative provision, to ensure employee representation with gender and ethnicity balance.[127]

For bargaining to become part of the solution to inequality requires both unions and employers to commit to the idea of equality.[128] This involves extending the conceptual frame of bargaining — which has traditionally emphasised economic and industrial issues — to also see equality as a critical aspect of the union bargaining agenda.[129] This conceptual shift has arguably started to occur, at least to some extent, in the UK union movement, where union officers have been appointed with national responsibility for equality, and unions have adopted national equality strategies (see Part VII(A)).[130] Despite this, equality officers — and their concerns — might be siloed and sidelined, limiting their ability to set and influence the bargaining agenda.[131] Further, union equality training is sometimes criticised for its de-emphasis on bargaining, and strong emphasis on individual complaints; and failure to reach those most in need of up-skilling.[132]

A lack of equality bargaining may also reflect an ongoing lack of diversity in the union movement itself. As discussed in Part II, union membership is increasingly diverse in Australia, at least in relation to gender. However, Kirton maps how, in the UK, while union members are more diverse, union leadership is not.[133] This limited diversity is reflected in the Trades Union Congress's ('TUC') *Equality Audit 2022*: data on official union roles (where available) show that membership diversity is still not trickling up to official union positions.[134]

Briskin also raises concerns that women might be excluded from union bargaining teams; that said, having women present in bargaining does not necessarily mean that

126 Ibid.

127 Department of Industrial Relations (Cth), *Annual Report 1994: Enterprise Bargaining in Australia* (Parliamentary Paper No 162, 1995) 145.

128 Blackett and Sheppard (n 11) 437.

129 Kirton (n 111) 595. As Dickens argues, an equality lens is also likely to broaden the issues that are seen as being 'legitimate' member interests: Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 201.

130 Kirton (n 111) 597–8.

131 Ibid 601.

132 Ibid 605.

133 Ibid 594. Dickens notes the same, writing 20 years earlier: Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 202–3. Pocock notes the same in Australia: Pocock (n 35) 13, 17.

134 Trades Union Congress, *TUC Equality Audit 2022* (Report, 2022) 22 <https://www.tuc.org.uk/sites/default/files/2022-09/TUCEqualityAudit2022.pdf>.

equality issues will be raised or advanced.[135] Drawing on a survey of 538 paid union officials involved in collective bargaining in the UK, Heery argues that equality bargaining — and, more specifically, equal pay bargaining — reflects women's voice in unions, the characteristics and preferences of bargainers and the public policy environment, and is more likely to occur in centralised, multi-employer bargaining.[136] Most respondents in Heery's survey reported some degree of bargaining around equal pay: only 26.6% of respondents reported no equality bargaining.[137] Heery also found that equality bargaining was more common for respondent members in public administration, including central and local government.[138] That said, when Dr Sian Moore, Dr Sonia McKay and Helen Bewley analysed a sample of 213 voluntary trade union recognition agreements reached in the UK between 1998 and 2002, equal opportunities were stated as being an issue for bargaining in only 8% of agreements, and specifically excluded in 31% of agreements.[139] Overall, then, Kirton still sees equality bargaining in the UK as being 'underdeveloped'.[140]

In the Australian context, Professor Marian Baird, Ludo McFerran and Ingrid Wright seem more optimistic about the scope for equality bargaining.[141] Mapping the spread of paid leave and other entitlements for those subjected to domestic violence, Baird, McFerran and Wright emphasise the importance of a 'model clause' for enabling the spread of equality bargaining across employers and agreements. In that specific instance, the model clause was developed by advocates from the Australian Domestic & Family Violence Clearinghouse ('ADFVC'), who initiated discussions with the trade union movement, and built on existing work by the UK union UNISON.[142] ADFVC continued to advise and train the union throughout bargaining.[143] As Baird, McFerran and Wright conclude, this case study 'demonstrates the importance of external activists for initiating and including domestic violence claims in bargaining',[144] as well as the bargaining relationship between the parties, organisational and negotiator characteristics. Indeed, since that research,

135 Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 43–8. See also Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 203.

136 Edmund Heery, 'Equality Bargaining: Where, Who, Why?' (2006) 13(6) *Gender, Work & Organization* 522 ('Equality Bargaining').

137 Ibid 528.

138 Ibid 529.

139 Sian Moore, Sonia McKay and Helen Bewley, 'The Content of New Voluntary Trade Union Recognition Agreements 1998-2002: Volume One — An Analysis of New Agreements and Case Studies' (Employment Relations Research Series No 26, Department of Trade and Industry (UK), August 2004) 53, 55.

140 Kirton (n 111) 592.

141 Marian Baird, Ludo McFerran and Ingrid Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56(2) *Journal of Industrial Relations* 190.

142 Ibid 198.

143 Ibid 199.

144 Ibid 200.

paid leave for family domestic violence has been added to the National Employment Standards.[145]

C *The Role of Law and Regulation*

Equality bargaining is not necessarily an easy or straightforward process. It could be prompted or limited by many factors, including government policy. For Colling and Dickens, deregulation and reduced state intervention means that equality — and the advancement of equality — can become privatised, and 'recaptured within managerial prerogative', rather than being seen as a matter for joint regulation.[146] It is important, then, to recognise the role of law and regulation in supporting, prompting and acting as a regulatory backstop for equality bargaining. Colling and Dickens argue for 're-regulation', both in equality law, and in relation to state support for collective bargaining.[147] This might include, for example, measures to enable multi-employer bargaining.[148] Further, this flags the need for a shift in how equality is conceived: as being a common concern for all parties, rather than a matter for management. This can be achieved, in part, through equality bargaining itself. As Colling and Dickens argue,

> [e]quality bargaining offers the potential to amplify, extend and underpin the business case for equality. Working within the business case logic, unions may affect an employer's cost–benefit analysis of taking equality action (by increasing the cost of not doing so). Because the process of interest definition is a political one, not simply an economic one, unions can help shape the definition of what is in the employer's business interest. Further, through collective bargaining, a different logic for equality may be imported from that of the 'business case' concern with the bottom line, which does not guarantee equality action.[149]

As Colling and Dickens argue, unions 'play a role in translating formal legal rights into substantive outcomes, both through facilitating employees' use of legal procedures and through collective bargaining'.[150]

There is a need, too, to ensure that equality bargaining is intersectional,[151] not just targeted at specific, siloed equality grounds like gender or race.[152] Intersectional

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145 *FWA* (n 30) s 106A.

146 Colling and Dickens (n 96) 403.

147 Ibid 406.

148 Ibid.

149 Ibid 405 (emphasis omitted).

150 Ibid 394.

151 Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 34–5.

152 On intersectionality generally, see Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] (1) *University of Chicago Legal Forum* 139; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

equality bargaining is perhaps an ambitious ask, particularly in jurisdictions like Australia where the idea of 'intersectionality' is often misunderstood,[153] and where the legal framework does not generally make provision for intersectional discrimination.[154]

Finally, in the Australian context, the largely decentralised nature of bargaining — with bargaining predominantly happening at the single-enterprise level — may reduce the power and impact of bargaining. That said, in the 1940s and 1950s, scholars wrote about concerns of 'pattern bargaining', where unions imposed uniform bargaining terms across different employers, regardless of their individual circumstances or needs.[155] This was seen as monopolistic behaviour on the part of unions. However, considering the case of steel workers in the USA, George Seltzer argues that collective bargaining serves to supplement market forces and government action.[156] For Thomas A Kochan, pattern bargaining acts as an 'informal substitute' for centralised, multi-employer bargaining, enabling the spread of terms and conditions from one formal bargaining structure to another.[157] Scholarship on pattern bargaining has typically focused on wages and pay,[158] perhaps because it is a measurable and quantifiable indicator of divergence and similarity between and across agreements. In this study, though, I consider the extent to which more qualitative indicators of pattern bargaining — like equality terms — might disperse and diffuse across negotiated agreements in different enterprises. We can do this by considering the actual EAs being negotiated, as illustrated in the sections that follow.

V Method

Drawing on this rich literature on equality bargaining, in this article I seek to start to map the field of equality bargaining in Australia, and to consider whether it remains 'underdeveloped' in Australia (as in the UK). I start, though, by recognising the sheer scale and practical limits of this task: as described in Part IV(A), equality bargaining can take many forms, not all of which will be evident in the terms of written collective agreements. For example, equality mainstreaming might lead to

153 Alysia Blackham, Lauren Ryan and Leah Ruppanner, 'Enacting Intersectionality: A Case Study of Gender Equality Law and Positive Equality Duties in Victoria' (2024) 49(3) *Monash University Law Review* 40.

154 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.

155 George Seltzer, 'Pattern Bargaining and the United Steelworkers' (1951) 59(4) *Journal of Political Economy* 319, 319.

156 Ibid 325.

157 Thomas A Kochan, *Collective Bargaining and Industrial Relations: From Theory to Policy and Practice* (RD Irwin, 1980) 113.

158 See, eg: Kathryn J Ready, 'Is Pattern Bargaining Dead?' (1990) 43(2) *Industrial and Labour Relations Review* 272; Franz Traxler, Bernd Brandl and Vera Glassner, 'Pattern Bargaining: An Investigation into Its Agency, Context and Evidence' (2008) 46(1) *British Journal of Industrial Relations* 33.

specific measures or terms (including those around flexible work, additional leave, work-life balance measures, and so on), which might be described differently across different agreements. This study, then, is simply a preliminary attempt to map the field of equality bargaining in Australia. It offers an illustration of new methods and data sources that could be used to frame future, broader research projects. Equally, though, it offers a critical picture of current progress, and the current limits and potential of equality bargaining.

To enable this study, a search was conducted of the FWC document search[159] of EAs mentioning 'equality' on 3 June 2023. The FWC's record of current and past EAs represents a critical source of data to consider how, if at all, bargaining is being used to advance equality and address discrimination. This database and its research utility has been significantly strengthened following the FWC's digital library and document search project in 2022–23,[160] including to allow searching within the text of agreements via optical character recognition ('OCR'). The document search therefore represents a critical new source of data for facilitating academic research on bargaining.

The document search includes current, terminated and expired agreements, and includes some agreements from prior to the *FWA*. Of the 137,510 EAs recorded on the FWC website as at 3 June 2023, 'equality' was mentioned in 2,209 agreements (1.6% of all agreements). To expedite the collection of the agreement sample, I used the Python programming language to pull data relating to 'equality' agreements from the FWC website and insert it into a spreadsheet.[161] The FWC website includes key information for each relevant agreement, including the employer, the date, the industry or sector, and the nature of the agreement (single enterprise agreement, greenfields agreement, and so on). This information was added to the spreadsheet, along with the identified 'equality' terms. The data extraction revealed 45 duplicates in the FWC database; the duplicates were removed for analysis. Two pairs of agreements were listed with the same agreement number, but reflected different agreements; this appeared to be a numbering error, and each agreement was retained in the sample. With these refinements, the sample included 2,164 agreements referring to 'equality'.

Conducting a search of this nature — for 'equality' in an agreement — is more likely to identify broad equality or non-discrimination clauses, rather than cases where equality considerations have been mainstreamed into other areas (including,

159 'Document Search', *Fair Work Commission* (Web Page) <https://www.fwc.gov.au/document-search>.

160 Fair Work Commission, *Access to Justice: Annual Report 2022–23* (Report, 2023) 40 <https://www.fwc.gov.au/documents/reporting/fwc-annual-report-2022-23.pdf>; Fair Work Commission, *FWC Bulletin* (Bulletin Vol 20/22, 4 August 2022) 3 <https://www.fwc.gov.au/documents/assets/pdf/fwcb040822.pdf>.

161 The code is available from the author upon request.

for example, working time, flexibility, pay, promotion or restructuring).[162] Further, 'equality' is not the only term that might indicate reference to ideas of non-discrimination; other terms might include discrimination (73,039 agreements); equal opportunity (26,552 agreements); or equal employment opportunity (14,696 agreements). A narrow focus on 'equality' as a search term therefore limits the findings of this study. Equally, though, as the smallest group of agreements, a targeted study of agreements referencing 'equality' allows the methods of this study and analysis to be tested and refined on a smaller subset of agreements, before considering the broader pool of published EAs.

Within this sample of equality agreements, this study deployed qualitative and quantitative content analysis to analyse the equality terms appearing in EAs.[163] Content analysis focuses on themes in texts.[164] The equality terms in agreements were coded manually using themes derived from the literature and the documents themselves,[165] and analysed using qualitative and quantitative methods.[166] Drawing on the literature above, it was hypothesised that the term 'equality' might be used in six key ways in EAs, relating to:

1. The name of the entity itself;
2. Broad general equality statements, affirming the parties' commitment to equality and, in some cases, delegating more detailed provisions to policy;
3. Establishing an equality working group or consultative committee;
4. Requiring consultation or engagement in relation to equality issues;
5. Recognising specific barriers or limits to equality in the organisation or sector; or
6. Putting forward positive measures or strategies for advancing equality.

A further category that emerged during coding involved references to legislation, particularly the *Gender Equality Act 2020* (Vic), but also the *Workplace Gender Equality Act 2012* (Cth). Reference to legislation was added as a seventh category in coding. Some agreements referenced equality in other ways, as in talking about equality of shift allocation among staff, or in including a Minister's cover letter (with a header referring to the portfolio of Minister for Equality). These were coded

162 On the differences between these clauses, see Briskin, 'Equity Bargaining/Bargaining Equity' (n 98) 32–43.

163 Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 941.

164 See Mark van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart, 2011) 1, 11–17.

165 Gery W Ryan and H Russell Bernard, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (Sage, 2nd ed, 2003) 259, 275–6.

166 Further details of these methods and results are on file with the author and available on request.

as 'n/a', as the reference to equality did not involve an equality 'term'. It was also hypothesised that some equality terms would be replicated across similar enterprises or within industries, reflecting the presence of similar union actors in bargaining, associated employers, or the emergence of model terms. This might be seen as a form of 'pattern bargaining' across enterprises (see Part IV(C)).

VI Findings

A *'Equality' Agreement Demographics*

In this study, equality agreements were more common in specific industries. Table 1 shows the industries (as coded by the FWC) with over 100 agreements containing equality terms in the sample. That said, nearly half of the 'equality' agreements in the sample were pre-*FWA* agreements (873 of 2,164 agreements); for these early agreements, the industry was often listed as 'other', indicating some data processing difficulties for early agreements. Where industry was recorded, equality agreements were common in building and construction, storage, manufacturing, local government, and education.

Table 1: Industries with over 100 equality term agreements, agreement sample

Industry	Number of agreements with equality term
Building metal and civil construction industries	126
Educational services	103
Local government administration	124
Manufacturing and associated industries	145
Other or miscellaneous	786
Storage services	157

Other industries are also notable in aggregate, such as road transport (39), vehicle (51), passenger vehicle transport (9), and rail (22) industries, where there were 121 equality term agreements in total. Other industries with high numbers of equality agreements included food beverages and tobacco manufacturing (48), health and welfare (54), and social community home care and disability services (22). Government and the public sector were also strongly represented; in addition to local government administration (124), equality terms were included in agreements for state government administration (32), Commonwealth employment (12), Northern Territory (12), Tasmania (16) and Australian Capital Territory (6). These sector-specific trends likely reflect the presence of specific unions in these industries; and high levels of unionisation generally in these sectors (see Table 2).

Table 2: Trade union membership (% of employees), by industry, Australia, 2016 and 2022[167]

Industry	Trade union membership (% employees)	
	2016	**2022**
Education and training	33.1	30.1
Public administration and safety	30.8	22.5
Electricity, gas, water and waste services	26.0	21.6
Health care and social assistance	23.5	20.2
Transport, postal and warehousing	23.5	19.8
Mining	16.5	10.2
Manufacturing	14.1	9.9
Construction	13.6	9.7
Arts and recreation services	9.2	9.5
Retail trade	11.9	8.1
Information Media and telecommunications	8.2	7.2
Financial and insurance services	11.0	6.0
Other services	6.1	3.7
Administrative and support services	5.7	3.4
Wholesale trade	5.7	2.4
Rental, hiring and real estate services	2.6	2.4
Professional, scientific and technical services	2.7	2.1
Accommodation and food services	2.3	1.6
Agriculture, forestry and fishing	3.7	1.3

In the sample, there was a general increase in 'equality' agreements since 2014 (see Table 3). There was a substantial increase (nearly 30%) from 2020 (88 agreements) to 2021 (114 agreements). This growth over time may reflect a growing awareness of equality among employers and unions, or a growing presence of equality bargaining. It may also reflect a linguistic shift from the terms 'discrimination' and 'equal opportunity' towards 'equality' in agreement terms. More likely, though, as discussed further below, the substantial increase from 2020 to 2021 reflects the legislative prompt of the *Gender Equality Act 2020* (Vic) for the public sector in the state of Victoria. In total, 78 agreements made reference to the 'Gender Equality Act'.[168]

167 Australian Bureau of Statistics (n 34).

168 This search specifically excluded references to the 'Workplace Gender Equality Act' to identify the Victorian statute specifically. The federal *Workplace Gender Equality Act 2012* (Cth) was referenced in 44 agreements.

Table 3: Number of agreements referencing 'equality', by year, agreement sample, 2014–23

Year	Number of agreements
2023 (part year)	50
2022	140
2021	114
2020	88
2019	92
2018	85
2017	53
2016	77
2015	78
2014	85

Agreements approved by the FWC during 2022 and 2023 (n = 190) were manually coded using qualitative and quantitative content analysis and the coding scheme above. In this subset of agreements, the most common form of 'equality' term was a broad equality statement, affirming the parties' commitment to equality (84 agreements), followed by references to legislation (68 agreements). A small group (12) of agreements established or referred matters to an equality working group or consultative committee; more agreements (38) required consultation or engagement around equality. Thirty-three agreements referred to specific equality issues or barriers affecting the particular organisation or sector; and only 10 put forward positive measures or strategies for advancing equality.

Using this detailed analysis of a subset of agreements, key terms were identified that were likely to be replicated across different equality terms in the sample. Searches were then conducted for these key terms across the whole sample to analyse the broader group of agreements and identify trends. Those whole sample findings are detailed in the sections that follow.

B *Broad Equality Clauses*

It was originally hypothesised that most references to 'equality' in enterprise agreements would be included in broad, general equality statements, affirming the parties' commitment to equality. As noted above, this was borne out in practice: general equality clauses were the most common term in the agreements approved in 2022 and 2023, being present in 44% of those agreements.

Across the whole sample, numerous agreements (100) referred to the objective of achieving 'high standards' of equality. Depending on the agreement, this objective

could include reference to occupational health and safety, equality of employment and/or exclusion of discrimination, harassment and/or vilification.

There was also a recurring general clause that referred to equal opportunities and preventing discrimination (117 agreements). This was frequently included in DHL agreements (102 agreements), but also appeared in other transport sector agreements (the Transport Workers' Union was referenced in 93 equality agreements across the whole sample). For example, the *DHL Supply Chain Workplace Logistics Services — VIC Enterprise Agreement 2021* says:[169]

> **13 Equal Employment Opportunity**
>
> The Company is an equal opportunity employer. All people have a right to fair and equal treatment in all aspects of their employment. It is unlawful to treat people differently or to harass them on the basis of, for example:
>
> (a) sex or gender
> (b) pregnancy or potential pregnancy
> (c) breast feeding
> (d) race, colour, descent, national or ethnic origin, immigration status
> (e) marital status, relationship status
> (f) family responsibilities, status as a parent or carer
> (g) homosexuality, sexual orientation, lawful sexual activity
> (h) transgender status, gender identity, gender history, transsexuality
> (i) religious belief, affiliation, or activity, ethno religious status
> (j) union membership, participation in union activities
> (k) political belief, affiliation or activity
> (l) disability, impairment (physical or mental)
> (m) age
>
> Equality of opportunity particularly applies to, for example:
>
> (a) recruitment and promotion
> (b) terms and conditions of employment
> (c) allocation of tasks
> (d) dismissal or redundancy
> (e) retirement
> (f) enterprise agreements
>
> Employees who feel that they have suffered discrimination or harassment on one of the above grounds should report the matter to their supervisor. The matter will be dealt with in accordance with the relevant Company procedures.

There were 101 agreements that replicated key parts of this clause.[170]

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169 *DHL Supply Chain Workplace Logistics Services — VIC Enterprise Agreement 2021* [2021] FWCA 7094, cl 13.

170 Specifically: '[the organisation] is an equal opportunity employer … Equality of opportunity particularly applies to, for example …'.

As noted in Part IV, these broad equality statements are not meaningless; general 'non-discrimination clauses' can enable those who experience discrimination to access a dispute resolution procedure, and therefore potentially represent an important addition to collective agreements.[171] That said, these broad clauses alone are not enough to meaningfully address inequality.[172]

C *Specific Barriers to Equality*

Going further, then, 62 agreements included a broadly similar term recognising the lack of gender diversity in construction. This term often read like:

> The Parties to this Agreement recognise that the current level of women's employment in the construction industry is not consistent with our commitment to equality of opportunity or the promotion of inclusive workplaces which are free from discrimination.[173]

This specific clause was replicated across 48 agreements; all of those 48 agreements were negotiated by the Construction, Forestry, Mining and Energy Union ('CFMEU'). Indeed, 241 of the equality agreements overall mentioned the CFMEU, demonstrating the strategic importance of specific unions (and their negotiators) in equality bargaining.

D *Consulting Regarding Equality*

As noted above, a substantial number of agreements (78) included reference to the Victorian *Gender Equality Act 2020* (Vic), particularly its provisions relating to systemic gender equality issues.[174] These agreements were also far more likely than other agreements to include a requirement to consult or engage around matters of gender equality (50 agreements overall; 45 of those explicitly also mentioned the 'Gender Equality Act').[175] This was repeatedly expressed as, for example, '[t]he Employer will work collaboratively with Employees to identify, support and implement strategies designed to eradicate the gender pay gap, gender inequality and discrimination'.[176]

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171 Blackett and Sheppard (n 11) 439. See *FWA* (n 30) s 186(6).

172 Blackett and Sheppard (n 11) 440.

173 *Hindmarsh Construction Australia Pty Ltd and CFMEU ACT Enterprise Agreement 2022* [2023] FWCA 1464, cl 10.1.

174 *Gender Equality Act 2020* (Vic) ss 38(1), 39(1)(a).

175 Overall, 153 equality agreements referred to 'working collaboratively', but only 49 used this phrase in the context of equality or equity.

176 *Barwon Coast Committee of Management Enterprise Agreement 2022* [2022] FWC 1155, cl 10.1.1.

These clauses only referred to collaborating in relation to gender equality, reflecting the limited scope of the *Gender Equality Act 2020* (Vic).[177] However, the clauses typically went beyond the requirement to consult imposed by the Act, which is limited to consultation in the preparation of a gender equality action plan.[178] Often, the consultation clause was framed as involving collaboration with 'Employees and the Union'.[179] Thirty-one of the agreements that mentioned 'working collaboratively' around equality also mentioned the CPSU (Community and Public Sector Union). While clauses requiring parties to 'work collaboratively' to advance equality existed prior to the *Gender Equality Act 2020* (Vic), they became far more developed and widespread following the Act's implementation.

E *Consultative Committees*

Overall, 1103 agreements in the sample referred to a 'consultative committee', but only 136 referred to a consultative committee in the context of equality or equity or equal opportunities.[180] On closer review, however, many of these agreements referred to a consultative committee and equality in the table of contents, not within a substantive agreement term. In total, 86 agreements meaningfully referred to a consultative committee that addressed or considered equality issues.[181] Few agreements established a dedicated equality or equal opportunities committee;[182] more often, equality issues were referred or added to the agenda of an existing consultative committee. Further, while 91 agreements referred to a 'working group', only two referred to a working group in the context of equality or equity or equal opportunity. Of those two agreements, one also referred to the *Gender Equality Act 2020* (Vic). Thus, it is exceptional for agreements to refer equality matters to a consultative committee or working group.

F *Positive Measures*

Some agreements — exceptionally — included reference to positive action measures to redress inequality, particularly gender inequality. For example, the *Engage*

177 Noting, however, that the Victorian statute does make some provision for intersectionality. See: *Gender Equality Act 2020* (Vic) ss 4(c), 6(8), 9(2)(c), 11(2)(c), 11(3)(b); Commission for Gender Equality in the Public Sector, *Intersectionality at Work: Building a Baseline on Compounded Gender Inequality in the Victorian Public Sector* (2023) <https://content.vic.gov.au/sites/default/files/2023-10/Intersectionality-At-Work-Report-24-Oct.pdf>.

178 *Gender Equality Act 2020* (Vic) s 10(2)(b).

179 See, eg, *Melbourne Custody Centre Enterprise Agreement 2021* [2022] FWCA 1501, 38 cl 52.3.

180 This search picked up a reference to equality or equity or equal opportunity or EO within 100 characters of the term 'consultative committee' or 'workplace committee'.

181 Other results captured, for example, a table of contents, where equality clauses came before consultative committee clauses.

182 Though see *Maroondah City Council Enterprise Agreement No 11 2022* [2023] FWCA 258, cl 37.1.2.

Marine Pty Ltd Abbot Point Towage Services Union Collective Agreement 2021[183] cl 16.4.1 provides that

> when there are two candidates of equal skills and qualification, the gender diverse person or woman will be given preference over the cis-male until equality is reached in that classification. … These special measures are in accordance with s 7D of the *Sex Discrimination Act 1984* (Cth).

The *Loy Yang B Enterprise Agreement 2022*[184] cl 36 makes provision for creating an affirmative action policy, providing:

> The Company shall maintain an effective policy of affirmative action to ensure equal employment opportunity. Such policy shall be implemented through consultation between the Parties. The effect of the policy shall be to make inroads towards achieving gender equality targets as far as reasonably practicable.

The *Teachers Mutual Bank Limited Enterprise Agreement 2021* commits to undertaking a pay audit, acting on that audit and/or providing a gender pay gap analysis to the union (in that case, the Finance Sector Union ('FSU')).[185]

G *Other Matters*

Some agreements referencing the *Gender Equality Act 2020* (Vic) also included provision that the agreements should be read consistently with that Act. For example, the *Country Fire Authority Professional Technical and Administrative Agreement 2021*[186] cl 16.1 provides that: 'The provisions of this Agreement are to be interpreted consistently with the gender equality principles defined in section 6 of the *Gender Equality Act 2020* (Vic)'. In total, 45 agreements contained an interpretation provision of this nature; 43 of those agreements also mentioned the *Gender Equality Act 2020* (Vic) (though not necessarily in the context of this provision).[187]

Most equality clauses focused on the responsibilities of the employer or the parties mutually to advance equality. Some agreements, though, focused on the responsibilities of staff or teachers to advance equality. For example, in the *Seventh-Day Adventist Schools (North New South Wales) Ltd Teachers Enterprise Agreement 2022–2024*,[188] cl 10.2(v) provides: 'Teachers have a responsibility to recognise the right of equality

183 [2022] FWCA 841.

184 [2022] FWCA 3174.

185 *Teachers Mutual Bank Limited Enterprise Agreement 2021* [2022] FWCA 867, cl 57.

186 [2023] FWCA 124.

187 The two that did not mention the *Gender Equality Act 2020* (Vic) were the *Harness Racing Victoria Stewards Enterprise Agreement 2022–2023* [2022] FWCA 4054; and the *Melbourne Custody Centre Enterprise Agreement 2021* [2022] FWCA 1501. Both of these organisations are potentially captured by the *Gender Equality Act 2020* (Vic), even if they did not explicitly mention the Act in their agreement.

188 [2022] FWCA 674.

of opportunity of all according to their ability, without discrimination, within the context of the ethics, values and beliefs of the Seventh-day Adventist Church'.[189]

Some agreements specifically linked equality with secure work. For example, the *Carers Victoria Agreement 2021*[190] cl 19.5.2 provides that: 'The Employer will prioritise secure forms of employment over fixed term and casual employment, acknowledging the impact of insecure work on workers' health, work-life balance and gender equality within the workplace'. This clause was repeated across three equality agreements.

The agreement sample also featured some employers — or some divisions of employers — repeatedly. For example, 55 of the equality agreements related to O'Brien, the glass and vehicle repair company, covering different time periods and different divisions of the company.

VII Advancing Equality Bargaining

The results of this study are optimistic in parts: some agreements, and some unions, appear to be actively pursuing equality bargaining. The vast majority of EAs, however, omit any reference to equality. Further, equality terms are more likely to be broad equality statements or references to legislation than a substantive commitment to action. While this study's method and approach might not detect equality mainstreaming, or clauses using terms other than 'equality', it flags the need for further analysis and investigation, to better establish the prevalence of equality bargaining.

While treating these results with caution, and acknowledging the limits of this study, overall, it appears that equality bargaining likely remains 'underdeveloped' in Australia, as in the UK. While collective bargaining could be a critical means for advancing equality, the results of this study seem to indicate that equality bargaining has been de-prioritised in existing legal structures. Given the significant limits of individualised enforcement mechanisms for advancing equality, there is a need to reframe collective institutions and collective action, to better advance equality at work. This could be achieved through: better support and training for unions, to build capacity and re-prioritise equality; legislative prompts and external factors; or, perhaps, legislative mandates or requirements for equality bargaining.

A *Training and Support for Unions*

First, we need to build the capacity of unions, officers and delegates, to enable them to re-prioritise equality, and to engage with equality as a core aspect of the bargaining agenda. In his survey of union officers, for example, Heery found a strong

189 See also *Seventh-Day Adventist Schools (Greater Sydney) Ltd Teachers Enterprise Agreement 2023–2025* [2023] FWCA 294, cl 10.2(v).

190 [2022] FWCA 4252.

association between involvement in equal pay bargaining and receiving training on equal pay.[191] Heery also argues that union policy can influence and strengthen negotiators' commitment to equality bargaining.[192] Finally, there was a strong association between exposure to specialist equality officers and committees, and involvement in equality bargaining.[193] This implies, then, that unions can introduce supportive measures and structures, such as training, policies, committees and equality specialists, to strengthen equality bargaining.

A comparative example of how unions might re-prioritise equality emerges from the UK. UK trade unions have appointed thousands of equality representatives to give advice and support on equality issues in the workplace.[194] The *TUC Equality Audit 2022*, which drew on surveys of 41 (out of 48) affiliated trade unions, found that 18 of 41 unions (44%) had at least one national officer with sole responsibility for equality or a single strand of equality (such as gender, disability, ethnicity, sexuality or age).[195] An additional 15 unions (37%) had officers at national level with equality as part of their explicit responsibility, if not their sole responsibility.[196]

Equality representatives are also present at branch level. These 'reps' are tasked with raising local awareness of equality issues, helping to ensure that equality is properly integrated as part of workplace consultation and bargaining, and supporting members who experience discrimination.[197] In the *TUC Equality Audit 2022*, 85% of members of respondent unions were in unions with a rule or practice on equality reps.[198] Some TUC affiliated trade unions also have formal or informal equality committees and networks.[199]

While equality representatives are present in many UK unions, they lack any statutory backing, and have no right to time off to facilitate their role.[200] This limited provision is likely to significantly constrain their ability to effect meaningful change on a day-to-day basis.[201] That said, equality representatives can still have a positive impact: in a 2009 survey of UK equality representatives (n = 209), over half (56%) of respondents reported having impacted positively on employer age practices,

191 Heery, 'Equality Bargaining' (n 137) 533.

192 Ibid 533–4.

193 Ibid 538.

194 Hepple (n 14) 60.

195 Trades Union Congress (n 134) 26.

196 Ibid.

197 Ibid 27.

198 Ibid.

199 Ibid 4, 28.

200 Nicolas Bacon and Kim Hoque, 'The Role and Impact of Trade Union Equality Representatives in Britain' (2012) 50(2) *British Journal of Industrial Relations* 239, 245.

201 Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2015) 242–3, 259.

though only 6% felt they had had 'a lot' of impact.[202] Similar results were reported for impact on employer gender practices (55% had some impact; 8% reported 'a lot' of impact).[203] A substantial group of respondents, though, felt they had no impact on employer equality practices, ranging from 54% (in relation to religion) to 37% of respondents (in relation to disability).[204] Overall, 25% of respondents reported having no impact on employer practices in relation to any protected characteristic.[205]

In that study, positive impact was more likely to be reported where respondents had contact with management at least once a month, where respondents attended equality committees or forums,[206] and in workplaces with negotiation over equality policies and practices (but not necessarily in workplaces with consultation).[207] However, less than half (46.9%) of equality representatives were located in workplaces with equality forums, and only 28.2% of equality representatives regularly attended a forum; 25.8% reported that negotiation over equality occurred in their workplace; and 37.3% had contact with management in their role at least once a month.[208] Overall, then, in the absence of a legal duty to consult in relation to equality, employer willingness and support is key to the success of equality representatives; despite this, only 29.7% of respondents agreed that managers valued their equality representative activities.[209]

In Australia, the Australian Council of Trade Unions has produced a *Women in Unions Report*. In 2011, the Report found that, like in the UK, women were underrepresented in union leadership positions compared to their overall union membership.[210] Around a third of unions in the Report had a standard bargaining clause that related to equal remuneration, sexual harassment or equal employment opportunity; where a standard clause was in place, though, it had been successfully adopted in 75% of negotiated agreements.[211] The Australian Council of Trade Unions has since committed to achieving gender parity in elected union positions,[212] building on

202 Bacon and Hoque (n 200) 248.

203 Ibid.

204 Ibid.

205 Ibid.

206 Ibid 248–53.

207 Ibid 253–4.

208 Ibid 261.

209 Ibid.

210 Australian Council of Trade Unions, *Women in Unions Report 2011* (Report, May 2012) 5 [1.2.3] <https://issuu.com/australiancounciloftradeunions/docs/women_in_australian_unions_2011>.

211 Ibid 6 [1.2.8].

212 Australian Council of Trade Unions, *Gender Equity and Unions* (ACTU Congress Resolution, 2021) <https://www.actu.org.au/wp-content/uploads/2023/07/gender-equity-and-unions-2021.pdf>. While the Australian Council of Trade Unions Congress has committed to conducting a Women in Unions survey every three years, the 2021 resolution still refers to the 2015 Report.

the *Women in Unions Report 2015* which found that women occupied only 40% of national union leadership positions, despite representing 49% of union members at the time.[213] Australian unions — and the Australian Council of Trade Unions — would benefit from considering and learning from the TUC's Equality Audits, to evaluate progress towards equality in Australian trade unions, and how it compares to overseas developments. This mutual learning is key to building capacity among trade unions to advance equality.

B *Legislative Prompts and External Factors*

Second, equality bargaining can be encouraged or stimulated by external factors, including public policy, law, and policy networks.[214] Indeed, public policy is a key external factor that can prompt equality bargaining.[215] As Heery argues, 'innovation within unions often emerges from prior innovation in the policies of the state',[216] partly due to declining union density and fragmented bargaining at the workplace level: 'In this context of declining bargaining power, unions have become more dependent on opportunities afforded by changes in employment law and wider public policy to open up collective bargaining on new issues.'[217]

However, this also reflects the dynamic interplay between legislative standards and collective bargaining; as Blackett and Sheppard posit: 'Providing basic labour standards and equality rights in law buttresses the bargaining power of workers; in other words, if the law already recognizes equality principles in the workplace, then negotiations can focus on how to achieve equality at work.'[218]

This interplay is reflected, for example, in the clear stimulus provided by the *Gender Equality Act 2020* (Vic) in encouraging and extending equality bargaining in public entities (see Part VI). Where legislation is in place, collective bargaining can translate legal rights 'into real rights and substantive outcomes in the workplace'.[219] Thus, bargaining can play a critical role in implementing and embedding legal rights at the local level.[220] This reflects Dickens's argument that '[i]n providing for minimum standards, legislation provides not only a safety-net but also a resource or lever to be used in bargaining'.[221]

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213 'ACTU Congress: Women in Unions — Room for Improvement', *Australian Manufacturing Workers' Union* (Web Page) <https://www.amwu.org.au/actu_congress_women_in_unions_room_for_improvement>.

214 Heery, 'Equality Bargaining' (n 137) 536.

215 Ibid 538.

216 Ibid 539.

217 Ibid 540.

218 Blackett and Sheppard (n 11) 451.

219 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 197.

220 Ibid.

221 Ibid.

As Heery notes, unions can also drive and influence public policy;[222] what Professor KD Ewing describes as the governmental and public administration functions of trade unions.[223] This was also the case with the *Gender Equality Act 2020* (Vic), which was supported and driven by the union movement, among others.[224] As Sue Williamson and Professor Marian Baird argue, '[c]ollective bargaining is at the heart of union activity, but associated campaigning and lobbying activities for gender equality shows that the impacts of equality bargaining extend beyond collective bargaining itself'.[225]

Unions can also influence the work of governments and public policy through bargaining. Collectively bargained solutions can come to set the standard for broader labour law reforms: 'Just as labour law can act as a lever for unions to negotiate gender equality items, collective bargaining can also set the benchmark for other forms of regulation and foster wider regulatory activity.'[226]

Again, this reflects the dynamic interplay between law, regulation and bargaining. This was the case, for example, in relation to paid leave for domestic family violence in Australia, which was later embedded in statutory workplace entitlements.[227] In that case, too, the union's advocacy was spurred by advocates, including the Australian Domestic & Family Violence Clearinghouse, which helped develop a model clause.[228] This illustrates the potential importance of advocates and equality experts assisting unions to advance equality bargaining. Collating model equality clauses (as, for example, in this article), or developing a database of equality bargaining in Australia, might also help to spur and extend equality bargaining.[229]

C *Legislative Mandates*

Third, there is an open question as to whether legislation should mandate consultation around equality, or equality bargaining specifically. I have previously argued, for example, that there should be a legal duty on employers to consult and engage on equality issues.[230] This has been embedded, to some extent, in the *Gender Equality*

222 Heery, 'Equality Bargaining' (n 137) 539.

223 KD Ewing, 'The Function of Trade Unions' (2005) 34(1) *Industrial Law Journal* 1, 4–5.

224 Lauren Ryan et al, *Laying the Foundation for Gender Equality in the Public Sector in Victoria: Final Project Report* (Report, University of Melbourne, February 2022) 9 <https://doi.org/10.26188/19254539>.

225 Williamson and Baird (n 97) 164.

226 Ibid.

227 Baird, McFerran and Wright (n 141) 198.

228 Ibid.

229 See, eg, Susan Milner, Hélène Demilly and Sophie Pochic, 'Bargained Equality: The Strengths and Weaknesses of Workplace Gender Equality Agreements and Plans in France' (2019) 57(2) *British Journal of Industrial Relations* 275, 297 .

230 Blackham, *Reforming Age Discrimination Law* (n 2) 329.

Act 2020 (Vic), which requires that defined entities '[i]n preparing a Gender Equality Action Plan … consult with … employees, employee representatives and any other relevant person'.[231] Sue Williamson and Linda Colley go further, and suggest mandating equality bargaining in the public sector, as is the case in France.[232] The authors do not explore how this might occur in the Australian context.[233]

Mandating equality bargaining specifically is likely to be difficult to implement in Australia: the role of the social partners in France is quite different to that in Australia, and the French system imposes complex duties on employers, backed by financial penalties for non-compliance.[234] Even then, Susan Milner, Hélène Demilly and Sophie Pochic's evaluation of 186 French equality agreements and plans flags that, even where equality bargaining occurs to be 'formally compliant', this might result in 'weak agreements which provide little in the way of concrete actions or additional protections beyond legal minima' but simply enable 'box-ticking'.[235] There is a need, then, to focus on how unions are resourced and up-skilled to build capacity to ensure meaningful bargaining. Overall, imposing a positive duty on employers to engage and consult on equality issues, if not to undertake equality bargaining specifically, is likely to encourage and facilitate equality bargaining going forward. It is a critical step forward for equality law, which should be advocated for by unions and equality advocates.

VIII Conclusion

This article has articulated a clear case for advancing equality bargaining in Australia, and empirically mapped existing progress towards equality bargaining in EAs. Given equality bargaining appears underdeveloped, this article offers concrete suggestions for strengthening equality bargaining in Australia. Unions have a clear self-interest in advancing equality bargaining. Advancing equality via bargaining could prove to be a key recruitment tool for engaging non-traditional union members;[236] these non-traditional members are critical to the future of the union movement.[237] As the demographics of union membership change, it is critical to the union movement's legitimacy as a representative institution that it engages more

231 *Gender Equality Act 2020* (Vic) s 10(2)(b).

232 Sue Williamson and Linda Colley, 'Regulating for Gender Equality in the Australian Public Service: Extending Dickens' Tripod of Regulation' (2023) 65(3) *Journal of Industrial Relations* 274, 287.

233 Ibid.

234 Milner, Demilly and Pochic (n 229).

235 Ibid 277, 296.

236 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 198. In Australia, see similarly Barbara Pocock, 'Introduction' in Barbara Pocock (ed), *Strife: Sex and Politics in Labour Unions* (Allen & Unwin, 1997) 1, 2.

237 Dickens, 'Collective Bargaining and the Promotion of Gender Equality at Work' (n 103) 198.

deeply with the equality agenda.[238] Further, as Blackett and Sheppard argue, for collective bargaining to be 'effective', it must include those who have traditionally experienced exclusion and inequality.[239] Briskin cautions, though, that a focus on representational democracy — that is, the demographics of bargaining teams — is a 'limited proxy' for achieving voice or advancing equality, though it can have some benefits in strengthening voice and union democracy.[240] As well, then, she argues for representational justice, which focuses less on individuals (and 'individual equality champions')[241] and more on creating structural and constitutional linkages between equality structures within unions — like constituency committees — and bargaining.[242] Thus, not only do unions need to adopt and embed equality structures, but these structures need to be embedded and linked with bargaining.[243]

There is much to be done, but advancing equality through bargaining is as critical for the union movement as it is for individual workers. This article, then, frames the task facing Australian unions: to use collective mechanisms to prioritise and advance equality; to strengthen institutional arrangements for advancing equality in unions themselves; and to collect data and analyse progress towards equality in unions and bargaining. By mapping existing progress towards equality bargaining, this article offers important models and templates of what can and should be achieved through bargaining.

Finally, this article also puts forward a call for law reform, to ensure employers have a duty to engage and consult on equality issues. As governments and statutory agencies become increasingly attuned to the limits of the individual enforcement of equality law,[244] strengthening collective mechanisms represents a critical priority for enhancing regulation and enforcement of equality law.

238 Ibid.

239 Blackett and Sheppard (n 11) 427–8.

240 Linda Briskin, 'Strategies to Support Equality Bargaining inside Unions: Representational Democracy and Representational Justice' (2014) 56(2) *Journal of Industrial Relations* 208, 216.

241 Ibid 217.

242 Ibid 217–21.

243 Ibid 223.

244 See: Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>; Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Report, 2021).