Submission to “Fair Work Act Review: Background Paper”

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The aim of this submission is to provide commentary with respect to Question 29 as detailed in attachment B of the document titled “Fair Work Act Review: Background Paper”, (http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Documents/FWAReview_Background_Paper.pdf), most particularly the first question “How have the good faith bargaining requirements affected enterprise agreement negotiations?”

Question 29

How have the good faith bargaining requirements affected enterprise agreement negotiations?

a. Are there ways in which the good faith bargaining requirements could be improved to better facilitate bargaining?

b. Are the powers possessed by Fair Work Australia (FWA) adequate to remedy breaches of the good faith bargaining requirements?

References

In developing this submission the authors have primarily drawn on the analyses provided in the following publications:

1 Donella Caspersz and Michael Gillan are academics at the Business School, University of Western Australia teaching and researching in the area of employment relations.


Background

In Australia, ‘good faith bargaining’ (GFB) has become a central component of a reformed enterprise bargaining system. Division 8 of Part 2-4 of the FW Act deals with enterprise agreement making and specifically the obligation on parties to bargain in ‘good faith’. Section 228 of the FW Act provides that bargaining representatives must meet a number of good faith bargaining obligations when negotiating an enterprise agreement, which mainly relate to the process of such negotiations.

GFB provisions were framed as a means of improving bargaining processes by providing specified standards and expectations as to bargaining behaviours and tactics, and limited means of redress in cases where parties had evidently engaged in bad faith practices.

In answering the question “How have the good faith bargaining requirements affected enterprise agreement negotiations?” we provide a discussion with reference to relevant cases considered by Fair Work Australia (FWA) in the following areas:

1. Bargaining orders

2. Procedural obligations for agreement approval

3. Treatment of the parties as per:


3.1 Managerial prerogative
3.2 Employees ability to take protected industrial action.

The submission concludes with some overarching commentary.

1. Bargaining orders (Section229-235)

Bargaining representatives can apply to Fair Work Australia in circumstances where the other negotiating party is not adhering to the Good Faith Bargaining obligations. Fair Work Australia also has broad discretionary powers in the types of orders it can make to require a party to rectify the breach of the Good Faith Bargaining provisions. In circumstances where a party fails to abide by a bargaining order issued by Fair Work Australia, an application can be then made by way of a serious breach declaration (Section 234-35), which provides the authority to Fair Work Australia to arbitrate the matter in dispute.

In a review of cases thus far, it appears that whilst ensuring parties adhere to the requirements as stipulated, FWA decisions have also accounted for the specific context of each case. In particular, where an employer has failed to recognize, communicate with or exchange important information with a legitimate employee representative or sought to subvert the bargaining process, FWA has intervened by means of bargaining orders. In doing so, many such decisions, have noted the ‘totality of conduct’ principle (Forsyth, 2010: 9), which expresses the need to interpret the GFB provisions with regard to the particular circumstances of each case and with reference to the context of the relevant industry and enterprise.

Several applications for bargaining orders have pertained to 1) the procedural context in which an employer has put a proposed collective agreement to an employee ballot and 2) the issue of employer-employee communication in the course of a bargaining process.

1.1 In CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 3510 a bargaining order was not granted even though the employer had sought to force a vote on its bargaining proposal and had directly communicated to employees by means of small group meetings and mail to employees’ homes, without the approval of the bargaining representatives. An FWA Full Bench found this not to be in breach of GFB obligations because there was a genuine impasse in bargaining and the conduct of the employer during the meetings was not aggressive or misleading.

1.2 In NSW Nurses, Association v Macquarie Hospital Services [2010] FWA 6372, Watson DP found that a precondition for the issue of a bargaining order is evidence that the bargaining representatives have corresponded in writing as to the nature of their concerns and alleged the particular breach of good faith bargaining to provide an opportunity for those matters to be addressed.

1.3 In AMIEU v T&R (Murray Bridge) Pty Limited [2010] FWA 1320, Fair Work Australia found that the requirement of Section 228 must be applied in the particular circumstance of each case. Whilst general principles may emerge from other decisions of Fair Work Australia, the pursuit of simple, flexible and fair collective bargaining requires that particular circumstances, dynamics and context of each application be weighed in applying the statutory requirements. Further, there is no general discretion for Fair Work Australia to merely prescribe an alternative, fairer bargaining process in the absence of a positive finding that the Good Faith Bargaining obligations have not been met.

1.4 In LHMU v Hall & Prior Aged Care Organisation [2010] FWA 1065, Fair Work Australia held that it is well established industrial principle that it is important to encourage communication between employers and employees both directly as well as through their representative organisations. Fair Work Australia found that communication between employers and employees on a wide range of matters was commonplace and it did not regard direct employer-employee meetings to breach the Good Faith Bargaining requirements. However, FWA went on to say that there may be, on occasions, content and conduct of meetings that would be a breach of Good Faith Bargaining requirements but that FWA would have to receive convincing evidence of such. See also QNU v Lourdes Home for the
1.5 In AMWU: APESMA v DTS Food Laboratories [2009] FWA 1854, Fair Work Australia concluded that whilst it is true that bargaining in good faith does not require an agreement to be reached or concessions to be made, sending an agreement out for vote prior to a failure of negotiations would not be dealing openly and honestly as it would go “behind the authorised bargainers in circumstances where no challenge is made to their bona fides”. Such conduct, Fair Work Australia held would be a “failure to bargain in good faith as there would be no genuine intention to find a basis for agreement”. See also Re: Alflington Aged Care [2009] FWA 301.

2. Procedural obligations for agreement approval

A review of relevant cases suggests that FWA has linked procedural obligations to agreement approval, and has strictly upheld these standards.

2.1 If a party is found to have not complied with the procedural requirements such as the 21 day period, notice requirements, or any other matter of procedure in relation to a single enterprise agreement, Fair Work Australia has taken a stance to reject the enterprise agreement in which case parties must recommence the entire bargaining process. See by way of example AsClear Pty Limited [2011] FWA 2188, in which there was no clear 21 day period in which the notice of representational rights was given and a vote was requested by the employer.

2.2 Further, in the decision of MCFT Pty Limited As Trustee for the Mildura Fruit Company Trust v/s Mildura Fruit Company (MFC) [2011] FWA 2024. Fair Work Australia found that there was no reasonable explanation of the terms of the proposed agreement given to the workforce. And, further, the process by which the employer called for a meeting of employees. Those 20 who attended were given a copy of the agreement. Others were invited to collect the agreement within a certain period of time. Those who received an agreement (either through the meeting or collection) were then sent a ballot paper to vote. This was a proportion of the workforce (26 out of 62) Fair Work Australia found that this was procedurally inadequate.

2.3 In Australian CharPty Limited [2011] FWA 1627, the employer posted to each employee a package including a copy of the proposed enterprise agreement document comparing existing workplace agreement to the proposed enterprise agreement, the relevant modern award, a covering letter relating to the proposed ballot, a ballot paper and a reply paid envelope. Fair Work Australia found that the employer had in fact commenced the voting process by sending to the employees a covering letter for the vote, the ballot paper and the return envelope for the ballot paper. There was not a clear 21 day period in which the notice of representational rights was issued and in which the vote was requested.

2.4 The Fair Work Act does provide for parties’ representatives to make undertakings in relation to a proposed enterprise agreement which may satisfy Fair Work Australia that the proposed enterprise agreement will comply with the Act and also including the better off overall test. In Rocklea (Vic) Pty Limited v/s Workforce Extensions Castlemaine [2010] FWA 6570, Fair Work Australia found that undertakings which lead to a substantial change in the terms in the agreement cannot be accepted. This clearly indicates that FWA will only exercise its discretion in relation to undertakings, so as not to totally distort the meaning of the enterprise agreement.

2.5 In Class Electrical Services Pty Limited v CEPU [2009] FWA 1541, Fair Work Australia found that section 180(5) does not require an employer to explain differences between a proposed Agreement and any relevant existing Agreement. It does, however, require an explanation of ‘the terms’ and ‘effects of those terms’. In Fair Work Australia’s view, a proper explanation would necessarily involve a comparison with existing arrangements.
3. Treatment of the parties

3.1. Managerial Prerogative

Good faith bargaining, alongside other mechanisms in the FW Act, have created new obligations for otherwise reluctant employers to commence bargaining with employee representatives (see, for example, AMWU v Cochlear [2009] FWA 125) and have clearly had the effect of changing the industrial relations strategy of a series of large-scale enterprises formerly known for their avoidance of collective bargaining and union presence (Cooper and Ellem, 2009; Forsyth, 2010; Stewart, 2009). This has led to concern among employers and employers associations as to unreasonable constraints on managerial prerogative and even predictions of the end of the ‘direct engagement’ model of workplace relations (Workplace Express, 24 August 2009).

However, a ‘direct’ or largely individualised approach to employment relations may still characterize the strategy of an employer even after they have complied with any formal obligations to recognize duly appointed employee representatives and commence bargaining. Moreover, as our review of cases pertaining to bargaining orders has discussed, in many instances, FWA has supported the principle of ‘managerial prerogative’.

FWA support for managerial prerogative as an essential aspect of ‘productive’ workplace relations has been most evident in allowing direct communication by managers with their employees on any and all matters within the workplace – including matters relevant to bargaining positions and indeed even on the unfolding of the bargaining process itself (Forsyth, 2010: 14–18). For instance, in LHMU v Mingara Recreation Club Ltd, Vice-President Watson refused to grant a bargaining order against the employer even though the trade union representative had been excluded from a meeting convened by management to explain directly to employees their position prior to the commencement of bargaining, stating that:

In my view, an employer is free to meet with its employees to discuss employment issues including matters relevant to enterprise bargaining in the absence of bargaining representatives. Widespread communication is to be encouraged – not regulated, diminished or monopolised.

However, in our view such interpretations would appear to give little credence to inequalities of power inherent in the employment relationship, whereby ‘communication’ from one party may have greater weight and effect than that of another, most especially in the context of a bargaining process. Also see CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510

3.2. Employees: Protected Industrial Action

Decisions made by FWA have affirmed the legitimacy of protected industrial action.

3.2.1. In Community and Public Sector Union v Red Bee Media Australia Pty Ltd [2010] FWA 9253, the employer refused a union request for information relevant to bargaining on the basis of its understanding that union initiated industrial action signalled that bargaining had ended and that its GFB obligations no longer applied. Senior Deputy President Hamberger found otherwise, affirming that the “taking of protected action, as long as all the statutory requirements are met, is a legitimate bargaining tactic in the pursuit of an enterprise agreement” (Workplace Express 8 December 2010).

3.2.2 The legitimacy of protected industrial action as a bargaining tactic, indeed as an essential aspect of mobilising power and influence in support of a genuine bargaining position, was again evident in an appeal overturning a previous determination allowing for the suspension of protected industrial action by workers on the ‘Pluto’ gas project on the Burrup peninsula in Western Australia (Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd and Another [2010] FWAFB 6021). The original decision was made with reference to workers employed by a contractor on the project (Mammoet Australia Pty Ltd) and an application from companies
(Woodside Burrup Pty Ltd- the developer of the project- and Kentz E&C Pty Ltd- an electrical subcontractor) who successfully argued that they were “third parties” suffering “significant harm” from the protected industrial action, and that this required the suspension of the action as per section 426 of the FW Act 2009. A Full Bench overturned this suspension on the basis that the interpretation of what constituted “significant harm” was in error. The decision indicated that the power to suspend protected industrial action under s.426 should only be “used in exceptional circumstances” and that the harm caused to a third party would need to be “above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action”, notwithstanding the reported daily financial losses incurred by Woodside of $3.5 million.

3.2.3 Protected industrial action in the overall bargaining regime was further clarified in a subsequent FWA decision finding that protected industrial action could take place in circumstances where the employer refused to bargain and where a majority support determination, scope, or bargaining order had not been applied for or provided to the relevant trade union [Transport Workers’ Union of Australia v J.J. Richards & Sons Pty Ltd [2010] FWA 8766]. This determination allowed for the possibility, in certain circumstances, for protected industrial action to occur before bargaining commenced, thereby circumventing the need for FWA determinations on GFB or a MSD before arriving at a protected action ballot. A Full Bench [J.J. Richards & Sons v Transport Workers’ Union of Australia [2010] FWAFB 9963] supported this position although the union application for a protected action ballot was dismissed on a technicality (Workplace Express 13 January 2011).

Upon referral from a Full Bench, Commissioner Harrison subsequently [Transport Workers’ Union of Australia v J.J. Richards & Sons [2011] FWA 973] allowed a new protected action ballot to occur, noting that the explanatory memorandum to the FW Act envisages “streamlined and simplified” processes for taking protected action, arguing that this decision was in accordance with this intention (Workplace Express 17 February 2011). This decision may now allow two tracks for a union to follow in dealing with an employer that refuses to bargain: an application for a protected action ballot (after satisfying FWA that have sought to “genuinely trying to reach an agreement”) or the pursuit of a MSD and GFB orders to compel the other party to commence negotiations.

**Comments**

With respect to Q29, it would appear that the provision has contributed to establishing a general climate of expectation that the parties to agreement making conduct themselves in an efficacious manner. That this is the strength of the provision was the conclusion reached in a review of the provision within the West Australian system where GFB has been in existence since 2002 (see Gillan et al, 2011).

As the case law indicates, the provision along with related provisions, has provided FWA with an instrument that does promote agreement making, without necessarily any specific pattern emerging that indicates a special weight of any voice in the process of decision making. One the one hand, FWA decisions have, in general, enforced and regulated the procedural obligations of the parties to a bargaining process and have supported the right of a party to engage in legitimate protected industrial action. On the other hand, and as noted in our discussion above, other decisions have supported managerial prerogative and direct employer-employee communication.

With respect to Q29 (a), we would suggest that a major consideration here is that of whether a code of conduct would strengthen the provision. In reviewing the cases as per above, it is clear that the practical application and implications of the provision is still emerging. There are others better versed than ourselves who can comment as to whether a Code will assist to clarify this scenario.

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2 Our study of the GFB provisions in Western Australia found that they were not utilised to a great extent and that there was significant continuity in bargaining tactics and behaviours, and indeed even the relative bargaining power of the parties, before and after their introduction. However, they did contribute to a general shift away from a regulatory environment which fostered a culture of avoidance of trade unions and collective bargaining in Western Australia. Additionally, GFB may have created a wider awareness of the need to better manage a bargaining process.

3 In Western Australia, the WAIRC (Western Australian Industrial Relations Commission) did not develop a detailed ‘code’ of GFB to assist parties through a bargaining process, although this was originally called for by the Labour Relations Reform Act 2002. The failure to develop a code was
With respect to Q29 (b) we again return to our observation in view of our analysis of GFB in Western Australia: the introduction of the provision has not had a transformative effect on industrial relations or collective bargaining but has provided a mechanism for dealing with clear breaches of procedural obligations or the avoidance of entering into negotiations with a legitimate bargaining representative, and, finally, may have contributed to a greater general awareness of the need for carefully managed processes and ‘good faith’ bargaining behaviours. Whether that climate exists at only a surface rather than at a deeper level is an open question.

References


Workplace Express, 24 August 2009 ‘Good faith laws will end the Rio revolution’. Workplace Express, 8 December 2010 ‘Industrial action doesn't end good faith bargaining: FWA’.

Workplace Express, 13 January 2011, Unions can pursue industrial action before bargaining starts: Bench majority.

Workplace Express, 17 February 2011 TWU wins new strike ballot order after company refuses to bargain’.

thought to be because the WAIRC had not become “significantly involved” in every day and well-established bargaining processes, hence, the making of a detailed code of practice was of low priority (Gillan et al 2011).