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**The Impact of 'Good Faith' Obligations on
Collective Bargaining Practices and Outcomes
in Australia, Canada and the USA**

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The Impact of 'Good Faith' Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the USA

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Abstract

This paper examines the collective bargaining (CB) framework in Australia's *Fair Work Act 2009* (Cth), including the legislation's good faith bargaining (GFB) requirements, in comparison with the much longer-standing GFB laws of the USA and Canada. The paper considers the extent to which North American concepts such as 'hard bargaining', and limits on 'direct dealing' and communication with employees during bargaining, are influencing the interpretation and operation of Australia's GFB laws. Areas of parallel and divergence are identified. At a more 'macro' level, the paper assesses the early impact of the new Australian legislation on CB practices and outcomes – and in particular, its effect on employer resistance to CB. The paper finds that, after almost 12 months of operation, there are indications that the new Australian regulation is achieving the federal Government's policy objective of encouraging CB.

1 Introduction

Australian unions can't afford to be in the same position as UK unions and New Zealand unions have been, and that is to emerge from a period of Labor government with better industrial legislation but no increase in density and no increase in the spread of collective bargaining.

Jeff Lawrence
Australian Council of Trade Unions, Secretary¹

These laws give us the ability to be there. It's not just up to the employer any more, if the worker wants you the union to be there you can be part of the negotiations and the process

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¹ Quoted in 'Unfinished business on the agenda for ACTU Congress', *Workplace Express*, 26 May 2009.

The emphasis of [the Fair Work] system is very much on setting up mechanisms that make the parties agree whether they really want to or not

Frank Parry SC, Industrial Barrister³

This paper examines Australia's relatively new workplace relations legislation, the *Fair Work Act 2009* (Cth), in particular its collective bargaining (CB) framework and the good faith bargaining (GFB) requirements. These rules commenced operation on 1 July 2009, and there is already a significant volume of case law on the new provisions emanating from Australia's national industrial tribunal, Fair Work Australia (FWA).

The paper explores the parallels and divergences between Australia's new laws, and those of two other labour relations systems where GFB has been in operation for some time – the USA and Canada. It also begins to examine how the new CB provisions have been operating at a more 'macro' level, including their impact on employer approaches to CB. Have they, for example, reversed the past pattern of 'employer resistance' to CB? If so, what mechanisms under the new legislation have unions found to be most effective in achieving this objective? To what extent are employers entering into CB voluntarily? Overall, is the federal Government's policy goal of encouraging CB being realised? The paper forms part of a larger research project aimed at examining these issues.⁴

Before considering the CB provisions of the *Fair Work Act*, and how they have been operating in practice, the next section of the paper 'sets the scene' by providing a brief overview of Australia's labour law system and some recent developments.

2 Australian Labour Law in Context: From Conciliation and Arbitration, through 'Work Choices', to 'Fair Work'

The last five years have been a period of momentous change in Australian labour law. Traditionally, our regulation of labour relations took the form of compulsory conciliation and arbitration of industrial disputes by a powerful tribunal known, most recently, as the Australian Industrial Relations Commission (AIRC).⁵ The tribunal would settle disputes by making legally-

² Quoted in 'Unions open new bargaining front in the offshore resources sector', *Workplace Express*, 12 February 2010.

³ Quoted in 'Interventionist tribunal now central to bargaining: Parry SC', *Workplace Express*, 28 May 2010.

⁴ See: <http://www.buseco.monash.edu.au/blt/wclrg/collective-bargaining.html>

⁵ See Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

binding 'awards', setting minimum wages and other conditions of employment across industries.

Then, from the early 1990s, the focus of our system shifted away from award regulation towards 'enterprise-level bargaining'.⁶ Through this process, improvements in wages and other employment conditions were linked to business productivity and efficiency measures. The collective agreements made through enterprise bargaining were (like awards) regulated and enforceable under statute.

In 1996, the Howard Coalition (conservative) Government took office after 13 years of Labor rule. The Coalition swiftly implemented deregulatory labour law reforms,⁷ aimed mainly at speeding up the shift to enterprise bargaining and allowing (for the first time under federal law) the making of individual statutory agreements known as Australian Workplace Agreements (AWAs).

However, it was not until the Coalition gained control of the Australian Senate in the 2004 federal election that it was able to fully implement its agenda for labour market deregulation. This took the form of the 'Work Choices' legislation⁸ – widely regarded as the most far-reaching reforms of Australia's industrial relations system since 1904. The changes (which commenced operation on 27 March 2006) included allowing AWAs to totally override awards and collective agreements (so that, for example, award conditions such as overtime or penalty rates could be removed without compensation to employees); limiting the functions and powers of the AIRC; and placing significant constraints on trade union activity and industrial action. The policy rationale for these reforms was to remove the influence of 'external third parties' from workplace relations, enabling employers and employees to deal directly with each other for the benefit of the enterprise and (in turn) the national economy.⁹

Work Choices proved to be deeply unpopular in the Australian community, and this contributed to the defeat of the Howard Government in the November 2007 election.¹⁰ Since then, the Labor Government led by Prime Minister Kevin Rudd has implemented its 'Fair Work' reforms, which are intended to 'get the balance right' between fairness and flexibility in Australian workplaces.¹¹ This has meant that some of the harsher aspects of Work Choices have been done away with (eg AWAs, and the sweeping exclusions from unfair dismissal protection). At the same time, though,

⁶ See Richard Mitchell and Richard Naughton, 'Australian Compulsory Arbitration: Will it Survive into the Twenty-First Century?' (1993) 31 *Osgoode Hall Law Journal* 265; Ronald McCallum 'Enhancing Federal Enterprise Bargaining: The Industrial Relations Reform Act' (1993) 6 *Australian Journal of Labour Law* 63.

⁷ *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). See Richard Mitchell, 'Juridification and Labour Law: A Legal response to the Flexibility Debate in Australia' (1998) 14 *International Journal of Comparative Labour Law and Industrial Relations* 113.

⁸ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). See Anthony Forsyth, 'Decentralisation and 'Deregulation' of Labour Relations through 'Ultra-Regulation': Australia's 2005 Labour Law Reforms', in S Ouchi and T Araki (eds), *Decentralizing Industrial Relations: The Role of Labour Unions and Employee Representatives*, Kluwer Law International, Alphen an den Rijn, 2007, page 125.

⁹ See Commonwealth of Australia, *WorkChoices: A New Workplace Relations System*, 9 October 2005.

¹⁰ See eg Kathie Muir, *Worth Fighting For: Inside the Your Rights at Work Campaign*, UNSW Press, Sydney 2008.

¹¹ Australian Labor Party (ALP), *Forward with Fairness: Labor's Plan for fairer and more productive Australian workplaces*, April 2007; ALP, *Forward with Fairness: Policy Implementation Plan*, August 2007.

certain elements of Work Choices have been retained (eg limits on union 'rights of entry' and industrial action).¹² While the union movement may be unhappy about this, the *Fair Work Act* restores the primacy of CB in the workplace relations system – including enhanced rights for union involvement in bargaining and, of course, the GFB requirements.

In 2008, collective agreement coverage in Australia was still fairly high, with (federal and state) registered collective agreements covering 41.3% of the workforce.¹³ A further 17.4% of employees were covered by awards only¹⁴ (many of the employees on collective agreements would also have been covered by an underpinning award), putting the total coverage of collectively-determined employment conditions at just under 60%. AWAs were estimated to cover between 5 and 7% of workers at their peak,¹⁵ but covered just 2.2% in 2008¹⁶ when they began to be phased out of operation. Almost two-fifths (38.4%) of Australian employees were covered by unregistered individual employment agreements (or 'common law contracts') in 2008.¹⁷ Registered collective agreement coverage was much higher in the public sector (96%) than the private sector (25.6%).¹⁸ More recent data (based on an extensive survey of employee perceptions of the regulation of their employment conditions¹⁹) shows that 34% of employees report some form of individual bargaining with their employer; only 23% report that a union negotiates on their behalf; 9% indicate that collective bargaining without a union occurs; and 35% say that *no* bargaining takes place at all.²⁰

Union membership levels have been in decline in Australia, like most other industrialised countries, over the last 25 years.²¹ From a peak of 63% of the workforce in 1953, down to around 50% by the early 1980s, the level of union density continued to fall – to 18.9% in 2007. However, density stabilised at 18.9% in 2008 (the first time it had not fallen in 17 years).²² Then, in 2009, it actually rose to 19.7% - with union density in the public sector at 46.3%, although in the private sector it is just 13.8%.²³ It is probably too early to attribute this recent increase in density to the more supportive legislative

¹² See further Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, 2009, Chapters 1 and 11.

¹³ Brigid van Wanrooy, Sally Wright and John Buchanan, *Who Bargains?*, Report for the NSW Office of Industrial Relations, Workplace Research Centre, The University of Sydney, May 2009, page 37, referring to Australian Bureau of Statistics (ABS) data.

¹⁴ *Ibid.*

¹⁵ Department of Employment, Education and Workplace Relations, *Submission to the Senate Standing Committee on Education, Employment and Workplace Relations*, 29 February 2008, page 18.

¹⁶ ABS, *Employee Earnings and Hours, Australia*, Cat 6306.0, August 2008.

¹⁷ van Wanrooy et al (2009), page 37.

¹⁸ ABS, *Employee Earnings and Hours, Australia* (2008).

¹⁹ B van Wanrooy, S Oxenbridge, J Buchanan and M Jakubauskas, *Australia at Work: The Benchmark Report*, Workplace Research Centre, Sydney, 2007.

²⁰ van Wanrooy et al (2009), page 45; see further section 6 of the paper, below.

²¹ See eg Tom Bramble, *Trade Unionism in Australia: A History from Flood to Ebb Tide*, Cambridge University Press, Cambridge, 2008; David Peetz and Barbara Pocock, 'An Analysis of Workplace Representatives, Union Power and Democracy in Australia' (2009) 47:4 *British Journal of Industrial Relations* 623, noting at 627 that the rate of union membership decline in Australia has been 'much steeper' than in most other OECD countries.

²² ABS, *Employee Earnings, Benefits and Trade Union Membership*, Cat 6310.0, August 2008; see also 'Union membership grows 3% to 1.75 million, women almost as likely to be members', *Workplace Express*, 17 April 2009.

²³ ABS, *Employee Earnings, Benefits and Trade Union Membership*, Cat 6310.0, August 2009; see also 'Unions increase density for the first time in 20 years', *Workplace Express*, 12 May 2010.

environment for unions, given that relevant provisions of the *Fair Work Act* did not commence operation until 1 July 2009.

3 Overview of the *Fair Work Act* CB provisions

The key provisions relating to CB, which are found in Part 2-4 of the *Fair Work Act*, will now be explained.²⁴

The GFB obligations in section 228(1) require bargaining representatives²⁵ for enterprise agreements to:

- (a) attend and participate in meetings at reasonable times;
- (b) disclose relevant information (but not confidential or commercially sensitive information) in a timely manner;
- (c) respond to proposals made by other bargaining representatives in a timely manner;
- (d) give genuine consideration to the proposals made by other bargaining representatives, and give reasons for the responses made to those proposals;
- (e) refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognise and bargain with the other bargaining representatives.

Importantly, section 228(2) states that the GFB requirements do *not* require a bargaining representative to make concessions during bargaining for an agreement, or to reach agreement on the terms to be included.²⁶

The GFB obligations are given force by the ability of a bargaining representative to apply to FWA under section 229 for a 'bargaining order' in situations where another bargaining representative has not met any of the requirements of section 228(1). A breach of a bargaining order (if made by FWA under sections 230-231), or rather a series of serious and persistent breaches of bargaining orders, could lead to FWA making a 'serious breach declaration' under section 235. This, in turn, opens the way for FWA to make a 'bargaining related workplace determination' under sections 269-271. Put simply, repeated breach by a bargaining representative of their GFB duties under the *Fair Work Act* might be 'punished' by FWA arbitrating, ie imposing an agreement on the recalcitrant party (although the statutory tests for making serious breach declarations and bargaining related workplace

²⁴ See also Anthony Forsyth, "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work", in Forsyth and Stewart (2009), page 120; Rae Cooper and Bradon Ellem, 'Fair Work and the Re-regulation of Collective Bargaining' (2009) 22:3 *Australian Journal of Labour Law* 284. For background on the development of the new CB laws see Anthony Forsyth, 'Worker Representation in Australia: Moving Towards Overseas Models?' (2007) 33:1 *Australian Bulletin of Labour* 1.

²⁵ A union is the default bargaining representative of any of its members who will be covered by a proposed enterprise agreement, unless they appoint themselves or someone else to be their representative; an employer is a bargaining representative along with anyone they appoint (eg a lawyer or consultant): see section 176.

²⁶ See also *Fair Work Act*, s 255(1)(a).

determinations suggest that these mechanisms are to be utilised only as a last resort).²⁷ FWA can also assist parties to resolve bargaining disputes under section 240 by conciliating, or (only where all parties agree) by arbitrating.

The GFB obligations begin to apply when an employer initiates negotiations for an enterprise agreement, or (more likely) agrees to a union's request to begin bargaining; or when a 'majority support determination', or a 'scope order', or a 'low-paid authorisation' is made by FWA. Considering each of those concepts in turn:

- An employee bargaining representative can apply to FWA for a majority support determination, where a majority of employees to be covered by an agreement want to bargain, but their employer does not (sections 236-237). The majority support determination process is different to the US and Canadian models of union recognition elections for CB (see further section 5 of this paper).
- Scope orders are mechanisms that can be used to resolve disputes about what the employee constituency should be for testing the views of employees about, for example, whether a majority of employees want to bargain (and therefore whether FWA should make an MSD), or whether certain employees want to be covered by a particular agreement. The scope order provisions (sections 238-239) enable both employee and employer bargaining representatives to seek FWA involvement in determining the appropriate shape of employee bargaining units for these purposes (see also section 5 of this paper). Among the factors that FWA must consider in deciding whether to make a scope order is whether a proposed agreement will cover the appropriate group of employees, including whether this group has been 'fairly chosen', taking into account whether it is a geographically, operationally or organisationally distinct part of the workforce.
- Employee bargaining representatives seeking to obtain an enterprise agreement for low-paid employees²⁸ can seek a low-paid authorisation from FWA (under sections 242-243),²⁹ which then triggers a multi-employer GFB process overseen by FWA. This new mechanism includes powers for FWA to arbitrate an agreement (ie a 'low-paid workplace determination'), in certain limited circumstances including where there is no existing collective agreement in place and

²⁷ As at 10 June 2010, there have been no reports of serious breach declarations or bargaining related workplace determinations being applied for or made by FWA.

²⁸ For example, those employed in occupations like cleaning, security, child care, aged care and other community services, who have not traditionally had access to enterprise bargaining and are therefore 'stuck' on minimum award rates of pay.

²⁹ As at 10 June 2010, it appears that there has been only one application made for a low-paid authorisation: see 'Aged care workers first to use low-paid bargaining stream', *Workplace Express*, 10 May 2010; 'LHMU lodges landmark low-paid bargaining stream application', *Workforce*, Issue 17265, 14 May 2010 (including discussion of some of the legal issues that may arise in this case).

as a last resort because the parties are unable to reach agreement.³⁰ This is a form of the ‘first contract arbitration’ mechanism that operates in some Canadian jurisdictions.³¹

Employees and unions are permitted to take ‘protected’ industrial action in support of their claims in enterprise agreement negotiations, and employers may engage in retaliatory ‘lockouts’.³² However, numerous procedural and substantive requirements must be met before such industrial action may be taken – including that the party seeking to take it is and has been ‘genuinely trying to reach agreement’ with the other party.³³ This is a related, although legally separate, requirement to the GFB obligations. While FWA has indicated that the two concepts should not be conflated,³⁴ in practice, similar considerations arise when FWA is determining whether a negotiating party has been genuinely trying to reach agreement and whether a party is bargaining in good faith.³⁵

4 Australian, US and Canadian GFB Law: Identifying the Parallels – and Divergences

There has been considerable debate in Australia about whether overseas laws are relevant to the operation of the GFB provisions of the *Fair Work Act*. Some employer advocates have urged FWA not to take guidance from the US, Canadian, United Kingdom or New Zealand CB systems when interpreting the Australian legislation.³⁶ In contrast, the ACTU signalled that the prohibition in section 228(1)(e) of the *Fair Work Act* (relating to capricious or unfair conduct that undermines freedom of association or collective bargaining) could bring with it the international jurisprudence on ‘unfair labour

³⁰ For a detailed examination of the low-paid bargaining stream under the *Fair Work Act*, see Cooper and Ellem (2009), pages 299-304. See also section 6 of this paper, below.

³¹ See eg J Sexton, ‘First Contract Arbitration: A Canadian Invention’ (1991) 1 *Labor Arbitration Year Book* 231; Sebastian Spano, *Collective Bargaining under the Canada Labour Code – Remedies when Parties Fail to Resolve Labour Disputes*, Parliamentary Information and Research Service, Library of Parliament, Canada, 26 January 2009, p 4.

³² Under Part 3-3 of the *Fair Work Act*, see Shae McCrystal, ‘The Fair Work Act 2009 (Cth) and the Right to Strike’ (2009) 23:1 *Australian Journal of Labour Law* 3.

³³ For employees/unions, the genuinely trying to reach agreement requirement is one of the pre-conditions for obtaining a ‘protected action ballot order’ from FWA, which facilitates the holding of a secret ballot of employees to approve the proposed industrial action. Secret ballots authorising employee/union industrial action were introduced as a mandatory requirement under Work Choices, and have been retained by the Labor Government. See McCrystal (2009), pages 21-28.

³⁴ *Transport Workers Union of Australia v CRT Group Pty Ltd* [2009] FWA 425 (8/10/09, Hamberger SDP). The FWA and AIRC decisions referred to in this paper are available at: <http://www.fwa.gov.au/index.cfm?pagename=cdr>.

³⁵ See eg *NTEU v University of Queensland* [2009] FWA 90 (Richards SDP, 18/8/09); *AFMEPKIU and Australian Workers Union v Rocla Pty Ltd* [2009] FWA 508 (5/10/09); *Total Marine Services v Maritime Union of Australia* [2009] FWA 368 (Full Bench, 9/10/09).

³⁶ See Stephen Smith (Australian Industry Group), *Address to the Inaugural Sitting of Fair Work Australia*, Sydney, 1 July 2009; ‘Interventionist tribunal now central to bargaining: Parry SC’, *Workplace Express*, 28 May 2010. For more detailed consideration, including the contextual differences between Australia and the US that ‘would render automatic application of US law problematic’, see Business Council of Australia, *Embedding Workplace Collaboration: Good Faith Bargaining*, January 2010, page 3; Breen Creighton, *Good Faith Bargaining under the Fair Work Act – Striking a Balance*, Discussion Paper for the BCA, January 2010, pages 22-34.

practices'.³⁷ This section of the paper examines the key FWA decisions on the GFB obligations so far, to identify the extent to which parallels exist between its approach and that under North American law.

In relation to FWA's general approach to the GFB obligations, Thatcher C indicated in *Total Marine Services v Maritime Union of Australia* [2009] FWA 290 (16/9/09, para [40]) that: 'In applying the [GFB] provisions, I will adopt an 'even handed assessment of the industrial context, of demands, conduct, and character of the negotiators and negotiations, in which it becomes an issue' ...'.³⁸ He also made reference to an AIRC Full Bench decision in 2003, which had endorsed a similar approach to interpreting the requirement to genuinely try to reach agreement, and the relevance of 'the analogous concepts of [GFB] in United States industrial jurisprudence'.³⁹

The approach of examining the entire context of the negotiating process has been adopted in many of the FWA decisions on the GFB provisions so far – and this reflects the 'totality of conduct' assessment undertaken by labour relations boards in the US and Canada, when determining whether parties have engaged in good (or bad) faith behaviour.⁴⁰

Interestingly, a Full Bench of FWA in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510 (5/5/10)⁴¹ stated that:

Whether a party observes or fails to observe the [GFB] requirements set out in s.288(1) is to be determined in light of all of the relevant circumstances. While at one level this is stating the obvious, ... the question will rarely be decided by reference to one action or series of actions. *Equally it would be undesirable to read into the legislation concepts which do not already appear in it for the purpose of explaining its operation.* That approach is likely to lead to error in the construction and application of the provisions. (para [24]; emphasis added)

The italicised comment of the Full Bench could be read as an indication that concepts drawn from overseas GFB systems should *not* be viewed as assisting in interpreting relevant provisions of the *Fair Work Act*.

4.1 The Negotiation Process: section 228(1)(a), (c)-(d)

(i) Process Obligations

³⁷ 'Coverage fears 'gumming up' award modernisation process: Bowtell', *Workplace Express*, 17 November 2008; see also 'Good faith laws will end the Rio revolution', *Workplace Express*, 24 August 2009. On unfair labour practices, see eg K D Ewing, S Moore and S Wood, *Unfair Labour Practices: Trade Union Recognition and Employer Resistance*, Institute of Employment Rights, London, 2003; Alan Bogg, *The Democratic Aspects of Trade Union Recognition*, Hart Publishing, Oxford, 2009, Chapter 5.

³⁸ See also the comments of Hampton C in *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26/2/10), at para [44].

³⁹ *Re Media, Entertainment and Arts Alliance* (PR928033, 11/3/03); see also *National Union of Workers (NSW Branch) v ACCO Australia Pty Ltd* [2009] FWA 226 (Thatcher C, 8/9/09, para [11]).

⁴⁰ B Bemmels, E G Fisher and B Nyland, 'Canadian-American Jurisprudence on "Good Faith" Bargaining' (1986) 41 *Relations Industrielles* 596, at 598; Gina Fiorillo, *Good Faith Bargaining in Canadian Labour Law: An Overview of the Law*, Paper prepared for the New Zealand Council of Trade Unions, May 2000, pages 7, 12; Aaron Rathmell, 'Collective Bargaining after Forward with Fairness: Will 'Good Faith' Take Us Forward with Fairness?' (2008) 21 *Australian Journal of Labour Law* 164, at 173-175.

⁴¹ See further 4.3(i) and (ii) below.

The GFB requirements in section 228(1)(a), (c)-(d) – to meet with the other party, to give timely responses to proposals based on genuine consideration, and to provide reasons for those responses – are similar to the obligations applicable to the negotiation process under US and Canadian law.⁴² Based on these provisions of the *Fair Work Act*, there have been numerous cases so far in which FWA has made orders (or recommendations) setting a timetable for negotiations and the exchange of information, proposals and counter-offers.⁴³ In *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320, Hampton C found that an employer simply saying that a union's log of claims was 'unrealistic' was not giving 'genuine consideration' to the union's proposals within s 228(1)(c); the response was 'dismissive and very general' and did not 'actually assist the parties to advance their negotiations in any way'.⁴⁴

(ii) 'Hard Bargaining' and other Negotiating Tactics

In assessing parties' negotiating stances, FWA has adopted the position applicable under US and Canadian law that 'hard bargaining' is permissible.⁴⁵ In the US, this principle flows from the limitation imposed by section 8(d) of the *National Labor Relations Act 1935*, that parties are not required to make concessions or to reach agreement – a provision which is mirrored in section 228(2) of the *Fair Work Act*. There has been some speculation in Australia that despite this provision, parties may have to make concessions to prove that they are bargaining in good faith⁴⁶ (based on old US authority that an employer 'is obliged to make *some* reasonable effort in *some* direction to compose [its] differences with the union'⁴⁷).

In an *ex tempore* decision in *Australian Manufacturing Workers Union v Coates Hire Operations Pty Ltd* (FWA, 17/9/09), Harrison C found that an employer did not breach the GFB requirements where it insisted on a 'wages pause' (due to the global financial crisis) in the first phase of the proposed agreement. While the union was willing to negotiate on its claim for an 8% wage increase over 2 years, the parties had reached an impasse after 14 meetings: 'such are the dynamics of bargaining'.⁴⁸ In reaching this view, Harrison C reportedly made specific reference to the section 228(2) limitation

⁴² Bemmels et al (1986) at 597-598; Rathmell (2008) at 173-175.

⁴³ See eg *AFMEPKIU v Transfield Australia Pty Ltd* [2009] FWA 93 (Drake SDP, 14/8/09), discussed in 4.3(ii) below; *Australian Services Union v Queensland Tertiary Admissions Centre Ltd* [2009] FWA 53 (Richards SDP, 29/7/09); *NUW v Defries Industries Pty Ltd* (PR988441, 10/8/09); 'Company agrees to union-employee meetings, after union brings "capricious conduct" case', *Workplace Express*, 18 December 2009. See also *Fair Work Act*, section 231(1)(a); The Parliament of the Commonwealth of Australia, House of Representatives, *Explanatory Memorandum to the Fair Work Bill 2008* ('Explanatory Memorandum'), para [963].

⁴⁴ [2010] FWA 1320, at para [54]; see also paras [55], [59].

⁴⁵ Bemmels et al (1986) at 604; Fiorillo (2000), p 12; Rathmell (2008) at 174-175. However, in the US, parties must explain their positions – and they cannot adopt 'take it or leave it' stances (ie making a final offer at the commencement of bargaining, or refusing to accept or consider anything other than their own proposal): Bemmels et al (1986) at 604; Rathmell (2008) at 174-175.

⁴⁶ See 'Good faith laws will end the Rio revolution', *Workplace Express*, 24 August 2009.

⁴⁷ *NLRB v Reed & Prince Mfg Co.* (1953) 205 F2d 131, 32 LRMM 2225, quoted in Bemmels et al (1986) at 604.

⁴⁸ See 'FWA refuses bargaining order to halt employer's agreement ballot', *Workplace Express*, 23 September 2009.

that parties are not compelled to make concessions or agree on terms for inclusion in an agreement.⁴⁹

Smith C made the following observations in *AMWU and APESMA v DTS Food Laboratories* [2009] FWA 1854 (21/12/10):

... bargaining, particularly hard bargaining often has a quality which doesn't often lend itself to perhaps sterile notions of how many meetings, what meeting notes may say or how difficult the bargainers have been. They may be an aid but they can also be used to mask rather than inform what the true situation is. Needless to say, bargaining in good faith must not be contrived but must be genuine. (para [16])

So while hard bargaining has been endorsed by FWA, no observation has yet been made by the tribunal about the (il)legitimacy of certain other common negotiating tactics in North America – such as 'surface bargaining' (or merely 'going through the motions'),⁵⁰ 'receding horizon bargaining' (the late addition of new matters for negotiation) and 'reneging' (the withdrawal of already-agreed matters).⁵¹ However, in a recent decision, two unions were found to have engaged in capricious/unfair conduct in breach of section 228(1)(e) when they shifted position very late in agreement negotiations over the group(s) of employees that the agreement should cover.⁵²

4.2 Information Disclosure: section 228(1)(b)

The obligation to disclose information relevant to collective bargaining was widely expected to create significant problems for Australian employers – partly because the *Fair Work Act* does not define what kind of information must be provided (beyond stating that it must be 'relevant'), nor what is meant by 'confidential' or 'commercially sensitive' information that may be withheld.

Soon after the legislation took effect, there were reports of unions making claims for the provision of information going beyond that required by the legislation – and perhaps even beyond that required under US or Canadian law.⁵³ Generally, employers in both these jurisdictions must provide evidence of their financial position where they claim 'economic hardship' in response to a union's wage claims.⁵⁴ US and Canadian employers have also been required to disclose information about proposals for business restructuring

⁴⁹ Ibid. See also *NUW (NSW Branch) v ACCO Aust Pty Ltd* [2009] FWA 226 (Thatcher C, 7/9/09); *AFMEPKIU v HJ Heinz Co Aust Ltd (Echuca Site)* [2009] FWA 322 (Whelan C, 22/9/09), both confirming that that even if it is holding steadfastly to a position, a union will be considered to be 'genuinely trying to reach agreement'.

⁵⁰ See Bemmels et al (1986) at 604; Fiorillo (2000), page 12.

⁵¹ See Bemmels et al (1986) at 604-605; Fiorillo (2000), page 16.

⁵² *Capral Limited v AMWU, CEPU* [2010] FWA 3818 (Spencer C, 19/5/10); the unions were found to have suddenly reversed position, in a way that undermined GFB, by applying for a scope order one hour after the employer submitted the agreement to ballot.

⁵³ See 'CFMEU accused of overstepping the mark on good faith bargaining', *Workplace Express*, 29 July 2009; 'Unions get in early to set bargaining rules, test limits of information requests', *Workplace Express*, 13 August 2009.

⁵⁴ Bemmels et al (1986) at 602-603; Fiorillo (2000), pages 17-18, 20; Rathmell (2008) at 174; G Strauss, 'Suppose Australia Copied US Employee Relations Practices' (2008) 18:2 *Economic and Labour Relations Review* 123, at 129.

(eg outsourcing, sale of the business, closures) formulated during collective agreement negotiations.⁵⁵

To date, there have been very few FWA decisions examining the boundaries of 'relevant' or 'confidential/commercially sensitive' information, or other aspects of the section 228(1)(b) duty.⁵⁶ In *Re Alphington Aged Care and Mary Mackillop Aged Care* [2009] FWA 301 (17/9/09), Whelan C found that an employer breached section 228(1)(b) when it failed to disclose to the Australian Nursing Federation, a bargaining representative for some of the employees, that it would put the proposed agreement to a ballot of employees.⁵⁷ A failure to comply with the provision also informed Smith C's finding in *Finance Sector Union v Commonwealth Bank of Australia* [2010] FWA 2690 (9/4/10) that the employer had not bargained in good faith when it refused to put a pay offer to the union, but subsequently awarded unilateral wage increases to employees.⁵⁸

In an ex tempore decision in *AMIEU v SDA and Woolworths Ltd*,⁵⁹ Richards SDP refused the meatworkers' union's application that the employer and the rival shop assistants union be required to disclose their notes and all other documents relating to bargaining negotiations (eg draft agreements).⁶⁰ The AMIEU was seeking a scope order to address the employer and the SDA's attempts to reach a single national agreement excluding the AMIEU. FWA rejected the application on public policy grounds, apparently accepting Woolworths and the SDA's arguments that requiring the disclosure of such documents would destroy the concept of GFB under the *Fair Work Act*.

4.3 Capricious or Unfair Conduct and Recognising other Bargaining Representatives: section 228(1)(e)-(f)

As expected, there has been a considerable amount of activity focusing on the prohibition of capricious or unfair conduct that undermines freedom of association or collective bargaining (section 228(1)(e)), and the related requirement to deal with the other party's representative (section 228(1)(f)). While most of the decisions in this area have related to actions or tactics adopted by employers during bargaining, union activity has also been found to breach these provisions.⁶¹

(i) Submitting Agreements to Ballot

Several cases have considered whether an employer's submission of an agreement to a ballot of employees breaches these particular GFB

⁵⁵ Bemmels et al (1986) at 602-603; Fiorillo (2000), pages 18-21. See also 4.3(ii) below.

⁵⁶ Information disclosure issues have arisen in a number of 'genuinely trying to reach agreement' cases: see eg *Total Marine Services v MUA* [2009] FWA 290; *Total Marine Services v Maritime Union of Australia* [2009] FWA 368 (Full Bench, 9/10/09); *AMOU v Geraldton Port Authority* [2009] FWA 1722 (McCarthy DP, 14/12/09).

⁵⁷ See further 4.3(i) below.

⁵⁸ See further 4.3(ii) below.

⁵⁹ Reported in 'Releasing bargaining documents contrary to public interest: FWA', *Workplace Express*, 2 November 2009. See also *AMIEU v Woolworths Limited* [2009] FWA 849 (Richards SDP, 16/11/09), upheld on appeal in *AMIEU v Woolworths Limited* [2010] FWA 1625 (Full Bench, 3/3/10).

⁶⁰ It should be noted that this matter involved consideration of FWA's power to order the production of documents under section 590(2) of the *Fair Work Act*, rather than section 228(1)(b).

⁶¹ See eg *Capral Limited v AMWU, CEPU* [2010] FWA 3818, referred to in 4.1 above.

obligations. These decisions have brought to the fore competing interests that have to be balanced under the *Fair Work Act* – on the one hand, an employer’s ability to utilise the processes for making an enterprise agreement (including submitting the agreement to a vote of employees under section 181(1));⁶² and on the other, the rights of employees and unions to enter into GFB with employers for an agreement (and not having the GFB process circumvented by the ballot process).

In *Australian Services Union v Queensland Tertiary Admissions Centre Ltd* [2009] FWA 53, the union obtained the first bargaining order made by FWA, preventing the employer submitting an enterprise agreement for approval by employees in a ballot. Richards SDP found that QTAC had excluded the ASU from discussions about the proposed enterprise agreement, when the content of that agreement was not fixed or immutable, contravening section 228(1)(e). It also breached section 228(1)(f), by not recognising the ASU as a bargaining representative when it was apparent that the union had representative standing.

This decision was followed by several others in which different conclusions were reached about whether FWA can delay or prevent an employer from submitting an enterprise agreement to ballot⁶³ – or, put another way, whether doing so involves a breach of section 228(1)(e) or (f) on an employer’s part. Then, in *NUW v CHEP Australia Ltd* [2009] FWA 202 (11/9/09), Watson VP found that FWA does have the power to delay agreement ballots ‘for a short time’ (ie where a breach of the GFB obligations can be made out)⁶⁴ – as long as this ‘does not in substance deny employees the opportunity to vote for an agreement’ (para [43]).⁶⁵

A slightly different approach was adopted in *AMWU and APESMA v DTS Food Laboratories* [2009] FWA 1854 (21/12/10). Smith C accepted the employer’s argument that the negotiations, which had been going for a long period, had reached the point of ‘*impasse*’⁶⁶ – therefore, it would be reasonable for the employer to put the agreement to employees for

⁶² All enterprise agreements must be approved by a majority of the employees who are to be covered by the agreement and who vote on the agreement (ie a majority of those voting will be enough to approve an agreement): see section 182.

⁶³ FWA ordered employers to postpone agreement ballots in, for example, *NUW v Defries Industries Pty Ltd* (PR988441, 10/8/09, Order of Whelan C); *Construction, Forestry, Mining and Energy Union (Construction and General Division) v Australian Precast Solutions Pty Ltd and Abigroup Contractors Pty Ltd* [2009] FWA 68 (5/8/09, Interim Order of Watson SDP) – compare, however, *AMWU v Coates Hire Operations Pty Ltd* (see 4.1 above).

⁶⁴ This approach was followed in *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320; on this decision, see also 4.3(ii) below.

⁶⁵ However, Watson VP did not order the deferral of the ballot in this case, because various discretionary factors weighed against doing so – including the fact that the union became involved very late in the bargaining process, and that it did not take up the opportunity to participate in the negotiations. In his view, the union could not prevent employees voting on the agreement ‘in favour of an indefinite bargaining process between the company and itself’: [2009] FWA 202, at para [51].

⁶⁶ See also the decisions of Roberts C at first instance in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 942 (12/2/10), at para [54] (the appeal decision in this case is discussed below); and Cloghan C in *LHMU (WA Branch) v Hall and Prior Aged Care Organisation and Others* [2010] FWA 1065 (11/2/10), at paras [37]-[41] (see further 4.3(ii) below).

acceptance or rejection in a ballot.⁶⁷ However, in Smith C's view, sending an agreement out to vote prior to a failure of negotiations would not be dealing openly and honestly with the other party's bargaining representatives: 'It would be going behind the authorised bargainers in circumstances where no challenge is made to their bona fides [section 228(1)(f)]. Such conduct ... would be a failure to bargain in good faith ...' (para [14]). In determining when the point of impasse in negotiations is reached, Smith C stated as follows:

In American Federation of Television and Radio Artists v the National Labor Relations Board [395 F. 2nd 622 (D.C. Cir 1968)] the United States Court of Appeals District of Columbia Circuit did not disturb a finding of the [National Labor Relations Board] that there was *no realistic possibility that continuation of discussion at that time would have been fruitful* as being a proper factor to weigh in the balance when deciding if an impasse in negotiations had occurred. (para [15]; emphasis in original)

In my view the relevant question to be asked is has the stage been reached where further discussions would simply represent activity rather than any possible achievement? ... [para 16]⁶⁸

A definitive ruling on the issue of submitting agreements to ballot has now been provided by a Full Bench of FWA in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510, as follows:

Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the [GFB] requirements, it will not always be so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot. (para [30])

The Full Bench then explored what the test, or 'touchstone', might be for determining whether an agreement can be put to ballot – including whether an impasse or stalemate has been reached in the negotiations, whether the union and employees still need a reasonable opportunity to discuss the employer's latest proposal, or whether negotiations have reached a point where the employer is entitled to put an agreement to a vote 'to see if progress [can] be made' (para [30]). In the case before the Full Bench, the employer did not engage in capricious or unfair conduct by going to ballot, given the lengthy negotiations that had taken place including 50 meetings between the parties over 15 months.⁶⁹

(ii) 'Direct Dealing' and Communication with Employees

Considerable attention has been focused on the extent to which section 228(1)(e)-(f) of the *Fair Work Act* prevents employers from dealing directly

⁶⁷ Smith C ultimately found that the agreement in this case could not be put to a ballot, because the employer had unilaterally determined the coverage of the agreement (ie it had excluded certain supervisors that APESMA sought to cover in the agreement), and because those issues remained in dispute, DTS had undermined the *Fair Work Act* and CB.

⁶⁸ See further [2010] FWA 1854 at para [17] on the factors that may be considered when making this assessment, eg the length of the negotiations, whether concessions have been made or areas of agreement achieved, and the employer's adoption of a position that a 'final offer' has been made to the union(s) involved in bargaining.

⁶⁹ See further 4.3(ii) below on other aspects of the decision relating to the employer's conduct in the negotiations.

with employees who are represented by a bargaining representative. Some initial debate about this issue was triggered by Drake SDP's Recommendation in *AFMEPKIU v Transfield Australia Pty Ltd* [2009] FWA 93, which included the following provisions:

- that (during the program for negotiations recommended by Drake SDP) 'Transfield will not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages';
- that 'Transfield will deal with all officers and delegates of the bargaining agent representatives who are authorised by their organisations to conduct negotiations'.

To a certain extent, Drake SDP's recommendation reflects the position under US and Canadian law that an employer cannot engage in 'direct dealing' with employees where a union has been certified to represent them for CB – ie 'bypassing' the union amounts to a breach of the employer's GFB obligations.⁷⁰ Employers must not make unilateral changes to working conditions that are the subject of agreement negotiations, or make direct offers of increases in wages or other benefits to employees represented by a recognised union.⁷¹ However, the limits on direct dealing do not prohibit *all* forms of direct communication with employees – for example, employers can provide information about the progress of negotiations, or defend their bargaining position to employees, but not discredit the union or undermine its bargaining rights.⁷² Further, both US and Canadian law have recognised the rights of employers (based on the law of property and trespass) to restrict union access to employees at the workplace, and therefore the ability of unions to communicate with employees,⁷³ while employers are able to hold 'captive audience' meetings with the workforce.⁷⁴

The limits on direct communication with employees set out in Drake SDP's recommendation in *AFMEPKIU v Transfield Australia Pty Ltd* more closely replicate the position under New Zealand's GFB legislation.⁷⁵ This requires that all interactions, communications and correspondence in bargaining be conducted through the parties' chosen representatives.⁷⁶ A leading employer lawyer suggested that the approach taken by Drake SDP would become a

⁷⁰ Bemmels et al (1986) at 598; Fiorillo (2000), page 20.

⁷¹ Bemmels et al (1986) at 600.

⁷² Bemmels (1986) at 598; Fiorillo (2000), pages 20-21; see also Ellen Dannin, 'Good Faith Bargaining, Direct Dealing and Information Requests: The US Experience' (2001) 26:1 *New Zealand Journal of Industrial Relations* 45, at 54-55, noting that employers can also use certain employee participation mechanisms (eg brainstorming sessions, workplace committees) to discuss non-bargaining issues with their employees.

⁷³ See David Doorey, 'Union Access to Workers During Organizing Campaigns: A New Look through the Lens of *B.C. Health Services*' (2009-2010) 15:1 *Canadian Labour and Employment Law Journal* 1, at 4, 6-17.

⁷⁴ See eg David Doorey, 'The Medium and the 'Anti-Union' Message: 'Forced Listening' and Captive Audience Meetings in Canadian Labor Law' (2008) 29:2 *Comparative Labor Law and Policy Journal* 79; Paul Secunda, 'Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States' (2008) 29:2 *Comparative Labor Law and Policy Journal* 209.

⁷⁵ *Employment Relations Act 2000* (NZ).

⁷⁶ Dannin (2001) at 53; Rathmell (2008) at 186; see also Pam Nutall, 'The Impact of Good Faith Principles on Communication Issues in Collective Bargaining' (2007) 32:1 *New Zealand Journal of Industrial Relations* 87.

feature of GFB in Australia, and this would prevent employers from pursuing the 'direct engagement' industrial relations/HR model that became prevalent from the early 1990s.⁷⁷ However, the decisions since then have proven this observation to be only partially accurate. FWA has generally allowed employers significant latitude in their ability to communicate directly with employees during bargaining – although the tribunal has prevented 'direct dealing' in the form of unilateral pay increases.

(a) Employer (and Union) Communication with Employees during Bargaining

The decision of Whelan C in *AFMEPKIU v HJ Heinz Co Australia Ltd (Echuca Site)* [2009] FWA 322 (22/9/09) was the first to indicate that strict limits on direct dealing might not form part of Australia's GFB laws. Whelan C determined (at para [16]) that: 'Unlike the situation in the United States, where an employer cannot communicate about issues in dispute with its employees during a bargaining process, there is nothing to prevent either the union or the company from canvassing the views of employees on shift hours.'⁷⁸

In *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442 (1/12/09), the employer refused to allow a union bargaining representative to attend a management-staff meeting held to discuss award modernisation and enterprise bargaining. Watson VP found that: 'a preliminary meeting with staff in the absence of a bargaining representative is [not] inconsistent with the GFB requirements'. The holding of such a meeting did not equate to a refusal to meet with the LHMU,⁷⁹ nor had the union been denied any information or access to the employees (para [17]). Watson VP made the following further observations:

In my view, communicating with staff is good management practice. If such communications are not accompanied by a refusal to meet and communicate with a bargaining representative, then ... there is no breach of the [GFB] requirements ... (para [18])

The obligations under the *[Fair Work Act]* relate to genuine recognition and genuine bargaining activities with other bargaining representatives. They do not preclude concurrent communication and discussions with the employees who may be requested to approve the agreement. 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.

⁷⁷ See 'Good faith laws will end the Rio revolution', *Workplace Express*, 24 August 2009; and section 5 of this paper, below. See also the criticism of Drake SDP's directives in Michael Stutchbury, 'Back to bad old days', *The Australian*, 25 August 2009; and Alan Wood, 'Power put in unions' hands', *The Australian*, 10 September 2009.

⁷⁸ Therefore, in this case, Whelan C found that *the union's* distribution of a notice advising employees not to respond to the employer's proposal for 8-hour shifts – and accusing the employer of not acting in good faith – did not constitute a failure to genuinely try to reach agreement.

⁷⁹ See also *LHMU (WA Branch) v Hall and Prior Aged Care Organisation and Others* [2010] FWA 1065 (discussed further below), at para [28], but note in para [36] the statement that on some occasions the content and conduct of an employer's meetings with employees during bargaining *could* breach the GFB obligations.

Widespread communication is to be encouraged – not regulated, diminished or monopolised. (para [19])⁸⁰

This fairly liberal approach was taken further in *LHMU (WA Branch) v Hall and Prior Aged Care Organisation and Others* [2010] FWA 1065. Cloghan C found that an employer could use emotive language, or what has been described as ‘bargaining spin’,⁸¹ in its communications with employees during agreement negotiations. He was not prepared to intervene and find that the employer’s conduct was capricious or unfair, where both parties had engaged in the ‘rough and tumble’ of bargaining. This included the dissemination of ‘robust documentation’ by both parties, eg the LHMU had portrayed the employer as ‘the caricatured black suited, cigar smoking “fat capitalist” dragging a trolley load of money’; and the employer had described the union as “unfair”, “unreasonable” and “un-Australian” ... as well as portraying their role as wanting “to cause trouble” (para [15]). Cloghan C found that the employer and union had both simply put their ‘own (best) perspective on information circulated’; this was ‘a normal dimension to negotiations’ and not an illegitimate tactic (para [27]) (even though an employer representative had referred to the possible closure of the facilities and loss of jobs: see para [28]). Further, as ‘negotiations are not timid and genteel affairs’, the union could not complain about the employer’s tactics when it had not made the application for a bargaining order with ‘clean hands’ given its own actions and material (para [23]). That said, this ‘should not be seen as giving the “green light” to all and any actions of negotiators’ (para [24]).

The most authoritative statement by FWA on the legitimacy of employer communication with employees during bargaining is that of the Full Bench in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510. In this case, there had been lengthy negotiations which had stopped for a few months while the employer responded to the global financial crisis by restructuring and reducing the workforce by 35%. Some time after negotiations resumed, the employer changed the leader of its negotiating team (as a result of staff movements). The new lead negotiator adopted a different course which (in the union’s view) undid all the common ground reached in the prior negotiations. However, the CFMEU’s main complaint was that the employer held a series of briefings with employees on agreement proposals, and sent information packages to the employees’ homes outlining its position in the negotiations – but the union was not given advance notice of these actions, nor invited to the meetings. Ultimately, the employer sought to put the agreement to a ballot of employees against the wishes of the union.⁸² The union argued that the employer’s conduct breached section 228(1)(e), because direct meetings without the union present have ‘the natural effect of

⁸⁰ In a similar vein, see also the comments of Richards SDP in *Queensland Nurses’ Union of Employees v The Corporation of the Roman Catholic Diocese of Toowoomba T/A Lourdes Home for the Aged, Lourdes Home Hostel* [2009] FWA 1553 (7/12/09), at paras [54]-[59]; and Cloghan C in *LHMU (WA Branch) v Hall and Prior Aged Care Organisation and Others* [2010] FWA 1065, at paras [35]-[36].

⁸¹ ‘Bargaining spin a legitimate tactic: FWA’, *Workplace Express*, 15 February 2010.

⁸² See 4.3(i) above on that aspect of the Full Bench’s decision.

weakening or undermining [CB]’ – eg this ‘diminishes the authority of the employees’ bargaining representative’ (para [19]). But the Full Bench thought differently:

... There is no basis for a conclusion that one side or the other is at fault. ... [A]fter a very long period of negotiation the parties were simply unable to agree. In those circumstances ... it was not capricious or unfair conduct for Tahmoor to seek to explain its negotiating position to the employees directly. (para [28])

The Full Bench found that the employer was within its rights to encourage a different view among employees from that put forward by the employee bargaining representatives; the meetings with employees were not oppressive in any way,⁸³ and nor was the material provided misleading; and while the employee meetings were happening, the company continued to meet with the union, which also had adequate access to the employees in order to put its views (para [29]).

(b) Union Access to Employees: Paid Meetings

In an ex tempore decision in *LHMU v Fosters*,⁸⁴ Kaufman SDP rejected the union’s application for a bargaining order, finding that the company’s refusal to allow brewery employees to attend paid meetings to discuss wage negotiations and possible industrial action was not capricious or unfair conduct in breach of section 228(1)(e). In another matter, an employer agreed to a union demand for employees to attend paid meetings during bargaining, after the union applied for a bargaining order on the basis that denying it access to employees during working hours was capricious/unfair: *Weir Minerals Australia Ltd v AMWU*.⁸⁵ On this point, it should be noted that union officials have the right to enter employers’ premises to hold meetings with employees (during meal times and other breaks) for recruitment and organising purposes, under Part 3-4 of the *Fair Work Act*.⁸⁶

(c) What is an Appropriate Avenue for CB?

In *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320, Hampton C found that an employer could conduct agreement negotiations through a Joint Consultative Council established to consult with the broader workforce and obtain feedback on a proposed agreement. Such an approach was permissible, as long as the role of any union bargaining representatives was genuinely recognised (eg they had been invited to and had attended some of the JCC meetings) (see paras [46]-[52]). However, once the union made it clear that it was no longer willing to participate in the JCC process, the

⁸³ Compare, however, the Full Bench’s observations about the ‘aggressive tactics’ adopted by the management negotiators: see [2010] FWA 3510, at para [31].

⁸⁴ See ‘Mass meeting not a good faith requirement’, *Workplace Express*, 6 October 2009.

⁸⁵ This outcome was achieved through a recommendation made by Harrison C of FWA: see ‘Company agrees to union-employee meetings, after union brings “capricious conduct” case’, *Workplace Express*, 18 December 2009.

⁸⁶ Specifically, section 484; on the union right of entry provisions in Part 3-4 of the *Fair Work Act*, see Anthony Forsyth, Val Gostencnik, Jacqueline Parker and Rosemary Roche, *Navigating the Fair Work System* (Thomson Reuters, Sydney, 2010, forthcoming), Chapter 10. Compare the position in the US and Canada (see eg Doorey (2009-2010)), discussed briefly above.

employer should have met directly with the AMIEU as bargaining representative and responded to its claims (paras [54]-[59]).⁸⁷

(d) Unilateral Wage Increases

FWA (at least in one decision) has drawn a line around employers' direct dealings with employees, finding that the granting of wage increases to employees while refusing to negotiate with a union bargaining representative on pay breached section 228(1)(e).⁸⁸ In *Finance Sector Union v Commonwealth Bank of Australia* [2010] FWA 2690, the parties had been negotiating a new enterprise agreement for two years. The employer had said it would not make a pay offer because of uncertainty created by the global financial crisis, and it needed to see some movement (from the union) on non-pay matters in the negotiations. However, CBA then made two unilateral pay increases to its staff: 1.5% in July 2009, and 2% from January 2010 – but it did not consult or involve the union in these decisions. Smith C found that such unconditional awarding of pay increases was inconsistent with the bank's stated position in the negotiations – and putting a different position to employees through their bargaining representatives as opposed to the employees directly undermines CB (paras [66]-[67]):

Without travelling more broadly into the concept of unilaterally altering terms and conditions of employment during bargaining, it cannot be that an employer is negotiating in good faith if it is able to alter terms and conditions [of] employment of persons, on whose behalf bargaining is taking place, for reasons other than those advanced to the bargainers. (para [68])⁸⁹

In reaching this conclusion, Smith C dismissed the union's submission that he should have regard to US authority on the illegitimacy of implementing unilateral changes to employment conditions before impasse is reached in negotiations.⁹⁰ He found that there were 'factors which may bear upon the ... US jurisprudence in relation to [GFB], including the establishment of exclusive bargaining rights, which do not find legislative parallels in Australia.'⁹¹

Smith C rejected the union's application for an order that CBA put a pay offer 'on the table' within seven days.⁹² Instead, he made a bargaining order requiring the bank to advise employee bargaining representatives within 24 hours of any internal decisions to increase the wages of employees who were the subject of bargaining; and to allow those representatives at least 14 days to respond to any proposed increase, before it could become operative or employees could be informed about it.⁹³ In subsequent proceedings, CBA applied for a variation of the order to require the union to keep confidential

⁸⁷ See also 4.3(i) above.

⁸⁸ And section 228(1)(b), see 4.2 above.

⁸⁹ Note also Smith C's milder observations about CBA's conduct in subsequent (related) proceedings: *Finance Sector Union v Commonwealth Bank of Australia* [2010] FWA 4097 (1/6/10), at para [13].

⁹⁰ See the decisions of the NLRB referred to in [2010] FWA 2690, at para [53].

⁹¹ *Ibid.*, at para [58].

⁹² See [2010] FWA 2690, at paras [60]-[62], [70].

⁹³ See [2010] FWA 4097, at para [2].

any pay offer made by the bank during the negotiations. Smith C accepted that requiring the union to maintain confidentiality would assist 'fair and efficient bargaining', as this was consistent with the GFB obligations (applicable to the union) to consider and respond to the employer's proposals.⁹⁴ This outcome limits the ability of unions to communicate with their members during bargaining – in particular, to gauge employees' views on any offers that might be put by the employer.

(iii) Restructuring as 'Bad Faith'

It has already been noted that in the US and Canada, information about proposed business restructures may have to be disclosed by employers as part of their GFB obligations (see 4.2 above). Canadian case law goes further, ie an employer's failure to discuss with the union a decision to subcontract the work done by the employees in a bargaining unit – or a proposed plant closure – amounts to a failure to bargain in good faith⁹⁵ (therefore, implementation of such restructuring decisions during agreement negotiations, without informing or consulting the union, is bad faith). In the US, there has been mixed case law over a lengthy period on the question whether plant closures and other forms of restructuring are 'mandatory' subjects of bargaining, and therefore form part of an employer's GFB obligations.⁹⁶

The one Australian decision on this issue to date goes against the North American position. In *LHMU v Coca-Cola Amatil (Australia) Pty Ltd* [2009] FWA 153 (31/8/09), O'Callaghan SDP found that the employer's proposed restructuring of the 'syrup room' at its Adelaide manufacturing plant during agreement negotiations was not in breach of section 228(1)(e). The company proposed that employees in certain quality control positions could apply for new, salaried 'technical specialist' positions that would not be covered by the enterprise agreement under negotiation. Rejecting the union's application for a bargaining order, O'Callaghan SDP decided that the restructure could not be regarded as capricious, because the employer was acting to improve its competitive position in response to the recent loss of 20% of its overall manufacturing business; in the circumstances, the company's objectives were not 'fanciful, vindictive nor whimsical' (para [47]). Further, the restructure could not be considered unfair conduct (para [48]), because the company had committed to considering responses to its proposal; it was following the consultative process required by the applicable award; and the syrup room employees were not being excluded from negotiations for the new agreement (eg because they could elect not to take up one of the new roles, or they might be unsuccessful in doing so: para [40]). This decision suggests that where an employer can make out a 'business case' for reorganising its operations, it can implement a restructure while agreement

⁹⁴ Ibid, at paras [15]-[16].

⁹⁵ Bemmels et al (1986) at 603.

⁹⁶ See Robert A Gorman and Matthew W Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining*, Thomson West, St Paul MN, 2004, pages 682-696.

negotiations are occurring and not be in breach of the GFB obligations under the *Fair Work Act*.

5 The Impact of Australia's New Collective Bargaining Laws on Employer Resistance to CB: An Early Assessment

5.1 Objectives of Part 2-4 of the *Fair Work Act*

The Labor Government's stated objectives for Part 2-4 of the *Fair Work Act* include the following:

to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits ...⁹⁷

So, the Government aims to *encourage* CB – although it intends that this will occur, predominantly, on a *voluntary* basis,⁹⁸ with the statutory provisions there to facilitate bargaining 'in situations where an employer and their employees are unable to successfully bargain together'.⁹⁹

This section of the paper seeks to test the operation of Part 2-4 against the Government's objective of promoting CB, by exploring the effect of the new framework (so far) on employer resistance to CB. Only preliminary conclusions can be reached at this early stage, and these issues will be subjected to closer empirical analysis as this research project progresses (see further section 6 below).

The policy aim of encouraging CB is a major shift from the approach of the Coalition Government between 1996 and 2007. As well as prioritising individualised bargaining in various ways, the former Government's bargaining framework left employers free to ignore the preference of employees to engage in CB.¹⁰⁰ There was no positive obligation on employers to recognise a union that sought to negotiate a collective agreement – even if it had the support of a majority of employees – and no duty to bargain in good faith.¹⁰¹ As a result, there were many instances during the period of Coalition Government where employers strongly resisted

⁹⁷ *Fair Work Act*, section 171(a). On the Government's case in support of the *productivity* benefits of enterprise-based CB, see eg Explanatory Memorandum(2008), paras [r.194]-[r.204]; Department of Education, Employment and Workplace Relations, *Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Fair Work Bill 2008* ('DEEWR Submission'), 9 January 2009, paras [2.42]-[2.47].

⁹⁸ Explanatory Memorandum (2008), paras [r.114], [r.135], [r.163]-[r.165]; DEEWR Submission (2009), para [3.55].

⁹⁹ Explanatory Memorandum (2008), para [r.114]; DEEWR Submission (2009), paras [3.56], [3.61].

¹⁰⁰ See eg Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 *British Journal of Industrial Relations* 532.

¹⁰¹ The previous Labor Government's GFB provisions (introduced in 1993) were abolished by the Coalition Government in 1996: see Forsyth (2009), pages 121-122.

union efforts to engage in CB, usually in order to implement or maintain individualised employment relationships.¹⁰²

5.2 Achieving the Objective of Promoting CB: Majority Support Determinations

The main mechanism to achieve the Labor Government's objective of encouraging CB is found in the statutory provisions relating to majority support determinations (MSDs). Scope orders¹⁰³ may also assist unions in overcoming employer resistance to bargaining, for example, where there is a dispute about the appropriate coverage of an agreement.¹⁰⁴ On the other hand, the experience so far indicates that such disputes can also inhibit the commencement of CB negotiations under the *Fair Work Act*.¹⁰⁵ And, it must be remembered, employer as well as employee bargaining representatives can apply for scope orders.¹⁰⁶ There have been numerous FWA decisions to date relating to scope orders.¹⁰⁷ However, the focus for present purposes is only on MSDs.

As indicated in section 3 of the paper, under section 236 of the *Fair Work Act*, an employee bargaining representative can apply for an MSD where an employer does not accede to the wishes of a group of employees who want to engage in CB. If FWA makes an MSD under section 237, then the employer will become bound by the GFB obligations. The MSD itself 'is not an order, it is not an enforceable ruling and no penalty attaches to any contravention of the determination'; however, if an employer still refuses to bargain following the making of an MSD, then the employee bargaining representative(s) could apply to FWA for a bargaining order.¹⁰⁸

Unions have utilised the MSD process to a considerable extent already, and FWA has handed down decisions indicating that the following types of evidence will enable it to be satisfied that a majority of employees wish to collectively bargain:¹⁰⁹

¹⁰² See eg J Whittard, M Bray, R Larkin, J Lewer and E Groen, 'Collective Bargaining Rights under the *Workplace Relations Act*: The Boeing Dispute' (2007) 18:1 *Labour and Industry* 1; and the other examples discussed in Forsyth (2009), pages 122-123.

¹⁰³ See section 3 of this paper.

¹⁰⁴ See eg *APESMA v Australian Red Cross Blood Service* [2010] FWA 3911 (Richards SDP, 25/5/10).

¹⁰⁵ See eg *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 101 (O'Callaghan SDP, 19/8/09), upheld on appeal in *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWAFB 668 (Full Bench, 28/10/09); these decisions established that scope orders, rather than MSDs, are the appropriate statutory mechanism for resolving coverage disputes.

¹⁰⁶ See eg *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* [2010] FWAFB 3009 (Full Bench, 14/4/10), in which both the employer and the union had made competing scope order applications (the employer's application succeeding).

¹⁰⁷ In addition to the above decisions, see eg *Capral Limited v AMWU, CEPU* [2010] FWA 3818.

¹⁰⁸ *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 101, at para [17], referring also to the Explanatory Memorandum (2008), para [976].

¹⁰⁹ Under section 237(3) of the *Fair Work Act*, FWA can use any method it considers appropriate to work out whether a majority of employees want to bargain.

- a petition signed by the employees, where there is no basis for doubting that the signatures obtained are genuine, nor any other reason for discrediting the petition;¹¹⁰
- union membership records, eg a list of union members;¹¹¹
- employee signatures on union 'pledge cards', as evidence that a majority of employees want a particular union to represent them in CB;¹¹²
- union surveys of employee opinions on CB;¹¹³
- the outcome of a workplace ballot, which may be ordered by FWA in cases where a definitive view on whether majority employee support exists cannot be obtained through other methods.¹¹⁴

The flexibility given to FWA under the *Fair Work Act* to determine the question of majority support for CB, in these various ways, stands in contrast to the US and Canadian reliance on employee ballots as the primary vehicle for establishing union recognition and CB rights.¹¹⁵ The Australian legislation therefore limits the opportunities provided by the Canadian and (especially) US systems for 'union busting' and other forms of opposition to CB.¹¹⁶ The ability of bargaining representatives to enforce the GFB obligations under the *Fair Work Act*,¹¹⁷ and the remedies against various types of anti-union activity under the 'general protections' provisions,¹¹⁸ are also major

¹¹⁰ See eg *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 101; *AMWU v Kinkaid Pty Ltd T/A Cadillac Printing* [2009] FWA 1123 (O'Callaghan SDP, 16/11/09); *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377 (Whelan C, 1/12/09); *CFMEU v Xstrata Glendell Mining Pty Ltd* [2009] FWA 1682 (Roberts C, 22/12/09); *CFMEU v Mammoet P/L* [2009] FWA 1945 (McCarthy DP, 24/12/09); *AWU v Floccast Australia Pty Ltd* [2010] FWA 308 (Blair C, 21/1/10); *NUW v CMC Coil Steels P/L* [2010] FWA 410 (Kaufman SDP, 22/1/10); *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 2164 (McCarthy DP, 15/3/10); *CFMEU v Freo Group Limited* [2010] FWA 2592 (McCarthy DP, 30/3/10); *AMIEU v Hans Continental Smallgoods Pty Ltd* [2010] FWA 2673 (Spencer C, 6/4/10).

¹¹¹ See eg *AWU v Bluescope Steel Limited T/A Bluescope Lysaght* [2010] FWA 874 (Harrison C, 8/2/10), although in this case a petition accompanying the list provided the basis for FWA to make an MSD.

¹¹² See eg *LHMU v MSS Security Pty Ltd* [2010] FWA 314 (Cloghan C, 20/1/10); *AMACSU v Regent Taxis Ltd T/A Gold Coast Cabs* [2009] FWA1642 (Richards SDP, 10/12/09), although the unions were not able to establish majority employee support for CB in these two cases.

¹¹³ See eg *AMWU v Seawind Catamarans Pty Ltd* [2009] FWA 1510 (Harrison C, 4/12/09).

¹¹⁴ See eg *AFMEPKIU v Cochlear Ltd* [2009] FWA 67 (Harrison C, 4/8/09); *AFMEPKIU v Cochlear Ltd* [2009] FWA 125 (Harrison C, 20/8/09); *CFMEU v Sunbury Wall Frames & Trusses (Aust) Pty Ltd* [2010] FWA 3681 (Blair C, 10/5/10).

¹¹⁵ See eg Roy Adams, 'Why Statutory Union Recognition is Bad Labour Policy: The North American Experience' (1999) 30 *Industrial Relations Journal* 96; John-Paul Ferguson and Thomas A Kochan, *Sequential Failures in Workers' Right to Organize*, MIT Sloan School of Management, Institute for Work and Employment Research, March 2008. However, union 'card check' arrangements exist in 5 out of 11 Canadian provinces: see Sara Slinn and Richard Hurd, 'Excerpt: Key Aspects of Canadian Private Sector Collective Bargaining Legislation' (unpublished paper on file with the author). Card check also forms part of the proposed reforms in the *Employee Free Choice Act* currently before the US Congress: see eg John Logan (ed), *Academics on Employee Free Choice: Multidisciplinary Approaches to Labor Law Reform*, UC Berkeley Center for Labor Research and Education, May 2009.

¹¹⁶ See John Logan, 'The Union Avoidance Industry in the United States' (2006) 44 *British Journal of Industrial Relations* 651; John Logan, *U.S. Anti-Union Consultants: A Threat to the Rights of British Workers*, Trades Union Congress, London, 2008; Laura Dubinsky, *Resisting Union-Busting Techniques: Lessons from Quebec*, Institute of Employment Rights, London, 2000.

¹¹⁷ See sections 2 and 3 of this paper; and note, in contrast, Wilma B Liebman, 'Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board' (2007) 28 *Berkeley Journal of Labor and Employment Law* 569.

¹¹⁸ Part 3-1 of the *Fair Work Act*; this provides protection for employees, union activists and union officers against discrimination or victimisation for being involved in a wide range of activities, including union campaigns for CB,

differences from the North American systems that can assist Australian unions seeking to organise for CB.

5.3 The Impact of MSDs: Employer Resistance Strategies, ‘Old’ and ‘New’

That said, the FWA decisions on applications for MSDs illustrate how employers in Australia continue to adopt certain approaches of resistance to CB. As indicated above, such strategies were given legitimacy by the Coalition Government’s legislative framework between 1996 and 2007. Cooper et al have demonstrated ‘the pivotal role of the Australian state in constituting anti-union employer strategies’ over much of that period.¹¹⁹ They also show how employer ‘de-collectivization’ stances became ‘increasingly aggressive’, and employers in many industries grew more ‘obstructive to union attempts to build membership and workplace organization’.¹²⁰ Cooper et al’s detailed qualitative data, including a survey of union officials in New South Wales in 2004-05, indicated that employers commonly adopted the following tactics in response to union organising campaigns:¹²¹

- management harassment or discipline of union activists;
- instructing managers to push an anti-union message;
- discouraging employees from joining the union;
- ‘one-to-one’ meetings between employees and management;
- managers holding compulsory meetings with workers about the union’s campaign (or ‘captive audience’ meetings).

Overall, 61.5% of the union officials surveyed ‘suggested that the employer in the work site/s they had targeted had acted in an “anti-union” fashion, with just under half of these suggesting the employer ran an “extremely” anti-union campaign’; 16.5% said the employer had been ‘supportive’ during the union campaign, and 20.6 % said the employer had been ‘neutral’.¹²² Despite this, more than 60% of respondents indicated that the union had met its aims in the campaign, while nearly 40% said it had failed.¹²³ This may be due to the fact that some employers allowed (for example) union access to employees for meetings, and time off for recruitment activities.¹²⁴

Some of the employer resistance tactics detected by Cooper et al were also identified in the discussion of the GFB case law in section 4 of this paper – which showed that tactics like direct communication with employees during

with remedies such as injunctions and civil penalties available from federal courts. See further Forsyth et al (2010), Chapter 9.

¹¹⁹ Rae Cooper, Bradon Ellem, Chris Briggs and Diane van den Broek, ‘Anti-unionism, Employer Strategy, and the Australian State, 1996-2005’ (2009) 34:3 *Labor Studies Journal* 339, at page 340; see also page 352, where the authors comment on the role also played by employment lawyers, employer organisations and consultants in ‘exert[ing] a critical influence on employer strategy’.

¹²⁰ *Ibid*, pages 351-352. See also the data presented in Peetz and Pocock (2009), pages 646-647.

¹²¹ *Ibid*, pages 353-354.

¹²² *Ibid*.

¹²³ *Ibid*, page 355.

¹²⁴ See further *ibid*, pages 354-355.

bargaining (eg meetings without the union present; the employer putting its best 'spin' on the negotiations) have been legitimised by FWA. The decisions on MSD applications reveal various *new* avenues that employers have pursued in order to oppose union efforts to compel them to bargain under the *Fair Work Act*, for example:

- questioning the composition of the proposed employee constituency for determining whether majority support exists for CB,¹²⁵ and withholding information on workforce numbers that would assist in resolving that issue;¹²⁶
- attacking the integrity of employee petitions submitted as evidence of majority support, for example by questioning whether employees of non-English speaking background understood what they were signing,¹²⁷ or whether employees had signed genuinely, free from coercion and on an informed basis;¹²⁸
- arguing that employee signatures on a petition indicating that they wanted the union to represent them in bargaining did not establish that they wanted to engage in CB for a new agreement;¹²⁹
- sending a memorandum to employees, following the union's application for an MSD, attaching *pro forma* letters of resignation from the union;¹³⁰
- the employer conducting its own survey of employee opinions, including statements that were irrelevant to the issue whether a majority of employees supported CB, eg: 'If this application is approved it will effectively mean that employee relations with Seawind Catamarans will become under the control of the AMWU, a result that would be irreversible in the future.';¹³¹
- arguing that the timing of the union's MSD application was difficult as the employer needed more time for management and employees to be educated about the implications of CB,¹³² or that employees' terms and conditions of employment under individual agreements were 'current and competitive';¹³³

¹²⁵ *AWU v Bluescope Steel Limited T/A Bluescope Lysaght* [2010] FWA 874.

¹²⁶ *LHMU v MSS Security Pty Ltd* [2010] FWA 314.

¹²⁷ *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377; *LHMU v MSS Security Pty Ltd* [2010] FWA 314; *AMIEU v Hans Continental Smallgoods Pty Ltd* [2010] FWA 2673.

¹²⁸ *AWU v Bluescope Steel Limited T/A Bluescope Lysaght* [2010] FWA 874.

¹²⁹ *CFMEU v Freo Group Limited* [2010] FWA 2592; McCarthy DP's rejection of this submission at first instance was confirmed in a decision of Watson VP (refusing a stay application in appeal proceedings brought by the employer): *Freo Group Limited T/A Freo Machinery v CFMEU* [2010] FWA 3489 (30/4/10), see para [11], '...it is necessarily implicit in an employee wanting a union to be his or her bargaining representative that the employee wants to bargain: it would be illogical for an employee to want a union to be his or her bargaining representative but not want to bargain'.

¹³⁰ *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377.

¹³¹ *AMWU v Seawind Catamarans Pty Ltd* [2009] FWA 1510, at para [3].

¹³² *AMWU v Seawind Catamarans Pty Ltd* [2009] FWA 1510.

¹³³ *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 2164.

- contending that as the employer was demobilising its operations at a particular project site, any proposed enterprise agreement would not cover the number of employees asserted by the union to form the constituency for testing majority support for CB (ie the shifting employee numbers made it impossible for FWA to make an MSD);¹³⁴
- maintaining that the union had not met the statutory requirement of demonstrating that the employer had refused to bargain¹³⁵ – in response to which FWA has made the obvious point that the employer could simply begin bargaining, rather than opposing the union’s application for an MSD!¹³⁶

However, the MSD mechanism has meant that these kinds of employer opposition tactics have been *unsuccessful*¹³⁷ – if the relevant union has been able to demonstrate majority support, then FWA has made an MSD and the employer has then been compelled to engage in CB.¹³⁸ FWA has also been critical of the tactics adopted by employers in some of the cases considered above.¹³⁹

Overall, then, MSDs have proven to be very effective in requiring reluctant employers to bargain. In addition to the cases just discussed, two other (high profile) examples should be noted:

Cochlear

Cochlear Limited is a cutting-edge, Sydney-based company that makes bionic ear implants. For two years, it had resisted the efforts of the AFMEPKIU (known as the Australian Manufacturing Workers Union) to represent its predominantly migrant, female production workforce in collective agreement negotiations. This had been a bitter dispute, which the Government made reference to as part of its justification for the new CB provisions in the *Fair Work Act* (in particular, the need to address the problem under the previous legislation that an employer could not be compelled to recognise a union for CB).¹⁴⁰ The AMWU obtained an MSD in August 2009, but only in the face of strong resistance by the employer. This involved attacking the credibility of a union survey of employees that formed the basis for its MSD application, alleging it was fraudulent because some surveys were completed by union activists rather than employees.¹⁴¹ Then, once FWA ordered a ballot of employees to determine whether there was

¹³⁴ *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 2164, in which FWA rejected this submission.

¹³⁵ *Fair Work Act*, section 237(2)(b). See *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 2164; *CFMEU v Freo Group Limited* [2010] FWA 2592.

¹³⁶ *CFMEU v Freo Group Limited* [2010] FWA 2592, at para [6].

¹³⁷ In one case, however, an employer’s questioning of a union-organised petition in support of CB led to an FWA-ordered ballot, in which majority support for CB was not established: *CFMEU v Sunbury Wall Frames & Trusses (Aust) Pty Ltd* [2010] FWA 3681. The employer also reportedly likened the union to a terrorist group, see ‘CFMEU ‘no different to al Qaeda’: Vic employer’, *Workforce*, Issue 17265, 14 May 2010.

¹³⁸ In addition to the cases discussed above, see ‘Workers win right to bargain at Target’, *Workforce*, Issue 17265, 14 May 2010; *ASU v Target Australia Pty Ltd* (FWA Order, PR996875, Kaufman SDP, 6/5/10).

¹³⁹ See eg *AMWU v Seawind Catamarans Pty Ltd* [2009] FWA 1510, at para [3]; *LHMU v MSS Security Pty Ltd* [2010] FWA 314 at paras [43], [65].

¹⁴⁰ Explanatory Memorandum (2008), pp xxxi, xxxiii-xxxiv.

¹⁴¹ See ‘FWA orders majority support ballot at Cochlear’, *Workplace Express*, 3 August 2009.

majority support for CB, the company's CEO wrote to staff urging a 'no' vote – and suggesting that union involvement in the business could create uncertainty and threaten job security.¹⁴² The union claimed that Cochlear management also held workplace meetings with groups of six employees at a time, and an offsite meeting at the University of NSW.¹⁴³ With an almost 60% vote in support of CB, FWA made the MSD.¹⁴⁴ After initial indications that the company might yet continue to resist the AMWU's representative role,¹⁴⁵ it seems the parties simply got on with negotiating an agreement (albeit the discussions have reportedly been vigorous¹⁴⁶).

IBM

This stands out as a striking example of the effectiveness of MSDs, given IBM's dogged opposition to CB not just in Australia, but globally.¹⁴⁷ The Australian Services Union had been attempting to obtain a collective agreement for workers in the 'flight deck' section of IBM's national operations centre in Sydney since at least 2008.¹⁴⁸ These employees maintain and operate mainframe computer systems for corporate clients and government departments.¹⁴⁹ IBM has engaged in a range of tactics to thwart the ASU's efforts to engage in CB, including lengthy legal challenges to the union's ability under its eligibility rule to cover the relevant employees.¹⁵⁰ However, FWA rejected these arguments in its reasons for decision¹⁵¹ on the granting of an MSD (having established that a majority of IBM's batch operators and systems operators in the national operations centre wanted to bargain);¹⁵² and in a subsequent decision on a stay application in appeal proceedings brought by IBM.¹⁵³ Boulton J, who issued the stay decision, is reported to have indicated that the company should commence bargaining with the ASU.¹⁵⁴ Ultimately, IBM did just that, informing employees that it would negotiate and agreeing to meet with the ASU.¹⁵⁵ The outcome of the MSD process in this case is apparently: '... the first time IBM workers have been

¹⁴² See Mark Skulley, 'Jobs could hinge on union vote', *The Australian Financial Review*, 19 August 2009, page 6; 'AMWU concerned at Cochlear letters urging "no" vote', *Workplace Express*, 19 August 2009. Cochlear's CEO was also quoted in the press as saying: 'I'm not anti-union ... I'm anti-dumb ideas.'; see Mark Skulley, 'Workplace risks magnified for Cochlear', *The Australian Financial Review*, 11 August 2009, pages 1, 10.

¹⁴³ Skulley (19 August 2009).

¹⁴⁴ *AFMEPKIU v Cochlear Ltd* [2009] FWA 125.

¹⁴⁵ See 'Cochlear workers back bargaining', *Workplace Express*, 20 August 2009; Ewin Hannan and Drew Warne-Smith, 'ACTU trumpets Cochlear victory', *The Australian*, 21 August 2009.

¹⁴⁶ See eg 'Cochlear says it won't be 'handcuffed' by union', *Workforce*, Issue 1705, 13 November 2009.

¹⁴⁷ See eg 'ASU makes bargaining breakthrough at IBM', *Workplace Express*, 30 April 2010.

¹⁴⁸ 'ASU seeking first union deal at IBM', *Workplace Express*, 12 August 2008.

¹⁴⁹ *Ibid*; 'Unions NSW seeks to represent IBM workers', *Workplace Express*, 8 February 2010.

¹⁵⁰ This issues arise for consideration in the MSD process because only a bargaining representative of employees can apply for an MSD, and section 176(3) of the *Fair Work Act* provides that a union cannot be a bargaining representative unless it is entitled (under the union's rules) to represent the industrial interests of the relevant employees in relation to work that will be performed under the proposed enterprise agreement.

¹⁵¹ *AMACSU-NSW and ACT (Services) Branch v IBM Australia Limited* [2010] FWA 3340 (Drake SDP, 7/5/10).

¹⁵² *AMACSU-NSW and ACT (Services) Branch v IBM Australia Limited* (FWA Order, PR996498, Drake SDP, 23/4/10). See also 'IBM to appeal majority support ruling', *Workplace Express*, 6 May 2010; 'IBM fights majority support decision', *Workforce*, Issue 17255, 7 May 2010.

¹⁵³ 'No freeze for IBM majority support order', *Workplace Express*, 10 May 2010; 'FWA rejects IBM call to delay union talks', *Workforce*, Issue 17265, 14 May 2010.

¹⁵⁴ 'No freeze for IBM majority support order', *Workplace Express*, 10 May 2010.

¹⁵⁵ 'ASU welcomes "world first" bargaining win at IBM', *Workplace Express*, 12 May 2010.

granted union representation [and CB] rights anywhere in the world.’¹⁵⁶ The ASU has since obtained approval from FWA to hold a protected action ballot, the first step towards employees taking lawful industrial action in support of their bargaining claims.¹⁵⁷

5.4 ‘We Surrender!’: Employers Agreeing to CB

While many employers have been compelled to engage in CB against their will through the mechanisms available under Part 2-4 of the *Fair Work Act*, others appear to have ‘seen the writing on the wall’ and voluntarily reversed their long-standing opposition to CB – either just before, or since, the new legislation took effect on 1 July 2009. Some of these are major employers that were at the forefront of resistance to union-based CB during the years of the Coalition Government, including the following:¹⁵⁸

- *Telstra*, Australia’s largest telecommunications company, which in May 2009 ended its year-long refusal to negotiate a new collective agreement with the ACTU and relevant unions.¹⁵⁹ This had been preceded by concerted efforts by Telstra over the previous decade to individualize its former public sector workforce.¹⁶⁰ The parties entered into a set of ‘Principles Relating to a Productive Working Relationship’, to guide their CB negotiations.¹⁶¹ However, even within this more constructive approach by Telstra, elements of resistance can still be seen – for example, the telco bypassed the CEPU by putting a wages offer directly to the workforce in September last year,¹⁶² then threatened large-scale redundancies in April 2010.¹⁶³
- *Optus*, a newer entrant in the telecommunications industry which (since 1994) had pioneered a ‘direct relationship’, HRM-based employee relations strategy.¹⁶⁴ In September 2009, Optus employees approved a new collective agreement with the support and involvement of the CEPU, ‘a reversal from past years when the union was excluded from bargaining’.¹⁶⁵
- *Rio Tinto*, the mining company that became a model for de-unionisation in both Australia and New Zealand.¹⁶⁶ Following the

¹⁵⁶ ‘ASU wins representation rights for IBM workers in historic first’, *Workforce Daily*, Issue 17244, 29 April 2010.

¹⁵⁷ ‘IBM workers win protected action ballot’, *Workplace Express*, 9 June 2010.

¹⁵⁸ See also ‘Unions open new bargaining front in the offshore resources sector’, *Workplace Express*, 12 February 2010.

¹⁵⁹ See Mark Skulley, ‘Telstra deals unions back in game’, *The Australian Financial Review*, 26 May 2009, pages 1, 10-11; ‘CEPU calls off Telstra campaign’, *Workplace Express*, 12 June 2009.

¹⁶⁰ See Cooper et al (2009), pages 347-348.

¹⁶¹ See ‘Trouble brewing at Australia Post but all smiles at Telstra’, *Workplace Express*, 2 July 2009.

¹⁶² ‘Telstra makes 9% pay offer; “Inadequate”, says union’, *Workplace Express*, 17 September 2009; ‘Telstra makes EBA offer while CEPU in negotiations’, *Workforce*, Issue 1697, 18 September 2009.

¹⁶³ ‘Telstra jobs axe inflames EA negotiations’, *Workforce*, Issue 17245, 30 April 2010; see also ‘7,000 Telstra workers on strike today, with more to come’, *Workforce*, Issue 1708, 4 December 2009; ‘No movement in Telstra talks’, *Workforce*, Issue 17235, 22 April 2010.

¹⁶⁴ See Cooper et al (2009), pages 355-358.

¹⁶⁵ ‘Optus employees back CPI pay deal’, *Workplace Express*, 30 September 2009; see also ‘Union back in the game at Optus’, *Workplace Express*, 23 July 2009.

¹⁶⁶ See Bruce Hearn Mackinnon, ‘CRA/RIO Tinto in the 1990s: A Decade of Deunionisation’ (2009) 97 *Labour History*, 76; Cooper et al (2009), pages 348-351.

CFMEU's application in late 2009 for an MSD to force the company into negotiations for an agreement covering its train drivers in the Pilbara region of Western Australia,¹⁶⁷ Rio Tinto agreed to bargain one month later.¹⁶⁸ While the negotiations are continuing,¹⁶⁹ the company has indicated that this shift in its position does not reflect a broader change to its direct engagement approach.¹⁷⁰

- ANZ, Westpac and Commonwealth Bank (three of Australia's 'big four' banks) 'ended their long freeze on collective bargaining' in early 2009¹⁷¹ – and while an agreement has been reached at Westpac,¹⁷² as indicated in 4.3(ii) above CBA (like Telstra) continues to adopt some strategies that are more consistent with an oppositional rather than constructive approach to CB.

6 Conclusion

In late 2009, the Minister for Workplace Relations claimed that:¹⁷³

The experience of the first few months of our reforms confirms [that the CB] provisions are working as intended.

Fair Work Australia has made orders in a number of cases to ensure [GFB] requirements are being met. And this is a good thing.

...

... [W]hile the [GFB] cases have attracted attention, they are just a small part of the bigger bargaining picture.

There have been just 38 applications for bargaining orders, compared with over 1,000 applications for an agreement to be approved.

This shows that in the overwhelming majority of cases, agreements are negotiated from start to finish between employees, employers and their representatives without any recourse to Fair Work Australia.

The Government's claims about the successes of the new legislation will be monitored and tested as this research project progresses – along with ongoing assessment of whether Part 2-4 is meeting the Government's stated

¹⁶⁷ 'CFMEU launches Rio Tinto majority support bid', *Workplace Express*, 15 December 2009.

¹⁶⁸ 'CFMEU secures bargaining foothold at Rio Tinto', *Workplace Express*, 14 January 2010.

¹⁶⁹ See eg 'Rio Tinto and CFMEU lock horns over performance pay', *Workplace Express*, 8 April 2010.

¹⁷⁰ 'CFMEU secures bargaining foothold at Rio Tinto', *Workplace Express*, 14 January 2010. See also, however, 'Olive branch in new Pilbara battleground', *Workforce*, Issue 1709, 11 December 2009.

¹⁷¹ 'Big banks return to the bargaining table', *Workplace Express*, 1 April 2009; see also 'ANZ commits to collective bargaining', *Workplace Express*, 15 June 2009.

¹⁷² 'FSU and Westpac agree on EA', *Workforce*, Issue 17295, 4 June 2010.

¹⁷³ The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, *The Julian Small Foundation 2009 Address*, Sydney, 12 November 2009.

objective of promoting CB. For now, this paper has made a number of preliminary findings, ie:

- some aspects of the North American approach to GFB have been emulated in the Australian GFB case law (eg the ‘totality of conduct’ approach; ‘hard bargaining’; the definition of ‘impasse’) – but on the whole, FWA members have eschewed consideration of North American jurisprudence as a guide to interpretation of the GFB obligations in the *Fair Work Act*;
- bargaining orders have been useful mechanisms to address certain employer resistance strategies (eg bypassing union representatives; submitting agreements to ballot prematurely; direct dealing in the form of unilateral pay increases) – however, other employer tactics (eg direct communication with employees; restructuring during CB) have been permitted by FWA;
- the examples of Cochlear and IBM, in particular, show that MSDs are proving to be a highly effective mechanism to overcome strident employer resistance to CB – and although certain new strategies of obstruction have been adopted by some employers, these have proven to be unsuccessful where a majority of employees can demonstrate to FWA that they want to engage in CB;
- there is anecdotal evidence of employers voluntarily embracing CB, in the face of the mechanisms now available under the *Fair Work Act* to compel them to recognise unions and collectively bargain;
- overall, there are positive early signs that Part 2-4 is achieving the Government’s objective of encouraging CB.

However, this last finding will need to be subjected to closer analysis over time, to determine whether CB coverage increases as a result of the new regulation. On that question, van Wanrooy et al’s recent survey data suggested that the mechanisms to promote CB in the *Fair Work Act* would need to overcome the problem that CB in Australia is restricted mainly to large, unionised workplaces in the public sector and some pockets of the private sector.¹⁷⁴ They predicted that, for the many workers who are excluded from CB (including the low-paid, young employees, and women): ‘outcomes ... under the *Fair Work Act* will rely heavily on the degree of success and coverage of the low-paid bargaining stream.’¹⁷⁵ It is therefore surprising that so little use has been made of the low-paid bargaining provisions of Part 2-4 to date.

Another area for further research will be to compare the effectiveness of Australia’s statutory framework for CB with that of Canada, the US, and other industrialised countries like the UK and NZ. CB coverage and union density

¹⁷⁴ van Wanrooy et al (2009), pages 45-49.

¹⁷⁵ Ibid, page 49.

in all of these countries have declined over the last 25-30 years,¹⁷⁶ despite legislation supporting union recognition and CB being in place – for the last decade or so in NZ and the UK, and over a much longer period in North America.¹⁷⁷ What is different about the *Fair Work Act* that might mean Australia does not follow this trend? The avoidance of an exclusively ballot-based process for establishing CB rights is already proving to be one important point of difference. This, and other factors, may contribute (over time) to more effective statutory support for CB in Australia than in comparable overseas jurisdictions.

¹⁷⁶ See eg the data summarised in Forsyth (2007), pages 11-16.

¹⁷⁷ See eg Adams (1999); Ferguson and Kochan (2008); Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper #235, 20 May 2009; Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37:3 *Industrial Law Journal* 236; Gordon Anderson, 'The Sky Didn't Fall In': An Emerging Consensus on the Shape of New Zealand Labour Law' (2010) 23:2 *Australian Journal of Labour Law* 94.