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Bargaining Fair Work Style: Fault-lines in the Australian Model

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Abstract

The model of good faith bargaining introduced by the Fair Work Act 2009 (Cth) requires bargaining representatives to bargain in good faith with every other bargaining representative appointed by an employer or employee. This obligation is producing some interesting problems. The work once done by trade unions (in marshalling collective views of employees, funding the work of bargaining, and settling their own demarcation issues) appears to be falling into the lap of employers. This paper will examine some of the fault lines appearing in the system – possibly as a consequence of an ill-considered attempt to accommodate individualism in an essentially collective system. The paper is based on some empirical research, as well as an examination of Fair Work Australia decisions.

Good faith bargaining according to the Fair Work Act 2009 (Cth).

The introduction of an obligation to bargain in good faith in Australian labour law[1] has produced a great deal of professional commentary and scholarly analysis, seeking to clarify precisely what such an obligation means for employers and unions.[2] Much of that commentary compares the Australian obligation, enshrined now in the Fair Work Act 2009 (Cth) s 228, with good faith bargaining obligations in North American and New Zealand law. This paper focuses on a peculiarity of the Australian law, not found in the North American laws: the obligation to bargain in good faith with a number of bargaining representatives, and not only with a single employee association that has secured an entitlement (through some kind of trade union recognition process) to represent the entire workforce.

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[1] The term "labour law" has been adopted here, in preference to "industrial law", which is out of vogue in Australia since the inception of single business enterprise bargaining, and "workplace relations law", which connotes the particular anti-union agenda of the former Howard Coalition government.

[2] For a selection of publications see: Alex Bukaric and Andrew Dallas with Anthony Forsyth (ed) *Promoting Good Faith Bargaining under Australia's Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand* (CFMEU Mining and Energy, Sydney, 2010); Rae Cooper and Bradon Ellem "Fair Work and Re-regulation of Collective Bargaining" (2009) 22 AJLL 284; Rae Cooper and Bradon Ellem B "Getting to the Table: Fair work and Collective Bargaining" (paper presented at the Collective Bargaining Workshop, RMIT, 23-24 November 2010); Breen Creighton *Good Faith Bargaining under the Fair Work Act – Striking a Balance: Discussion Paper for the Business Council of Australia* (January 2010); Anthony Forsyth "'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work" in Anthony Forsyth and Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, Sydney, 2009) 120; Richard Naughton "The Obligation to Bargain in Good Faith: Inspired Innovation or Legislative Folly?", Working Paper No 6 (Centre for Employment and Labour Relations Law, University of Melbourne, 1995); Aaron Rathmell "Collective Bargaining after Work Choices: Will 'Good Faith' take us Forward with Fairness?' (2008) 21 AJLL 270; George Strauss "Should Australia Copy America Employee Relations Practices?" in Joellen Riley and Peter Sheldon *Remaking Australian Industrial Relations* (CCH, Sydney, 2008) 223.

It is argued here that this peculiarity of Australian law introduces an inconvenient level of complexity in the Australian system. This paper notes three inconvenient consequences of the obligation to bargain with multiple bargaining representatives:

1. The absence of a formal trade union recognition process, and the ability for everyone to appoint his or her own individual representative, means that the obligation to arrive at a consensus on the employees' side of the bargaining table now falls to the employer. Bargaining is multi-lateral, not bi-lateral; disputes between competing employee groups can hold up the process for settling agreements. The obligation (and opportunity) to find the appropriate consensus between competing employee demands appears to fall into the employer's hands.

2. Arguments have emerged over who is responsible for paying wages for the work of bargaining. Unions pay their own delegates to perform bargaining duties, but non-union bargaining representatives must fund themselves while in bargaining negotiations. Employers are not obliged to pay wages to employees during bargaining negotiations. Those who agree to pay wages are legitimately concerned that this may encourage more employees to self-represent.

3. Old demarcation disputes have reemerged. It appears that employees can exercise their right to appoint any bargaining representative, even when that representative is affiliated with a union that has no general entitlement to represent the industrial interests of the workforce at that particular site.

It appears that two conflicting agendas have created this complexity. On the one hand, the ALP (Australian Labor Party) Government has been committed to the reinstatement of collectivism in Australian labour law, after the ravages of the Work Choices laws which hastened union exclusion and individualisation of employment relations.[3] On the other hand, the Government has found it politically expedient to maintain the concept of freedom of association articulated in the Workplace Relations Act 1996 (Cth) as a right to belong *or not to belong* to a union.[4] The trade union movement was so effectively demonised during the Howard years that it is highly unlikely any ALP Government could ever sell the electorate legislation which gave unions a monopoly in the negotiation of enterprise bargains. The rhetoric adopted by the Australian Council of Trade Unions (ACTU) in its pre-2007 Election campaign supporting the abolition of the Work Choices laws, "Your Rights at Work",[5] has been very influential in shaping the Fair Work (FW) Act as legislation protecting individual worker's rights. That individualism extends to the right to participate directly in enterprise bargaining negotiations. Nevertheless, the growth of this kind of individualism probably has earlier roots.

The origins of non-union bargaining in Australian labour law

The absence in Australian law of a formal trade union recognition process to ensure that employees speak in a single voice in collective enterprise bargaining appears to have had its genesis in the Keating Government's Industrial Relations Reform Act 1993 (Cth). This enactment included provisions permitting employers to make

[3] Work Choices" is used throughout this paper as shorthand for the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) which commenced on 26 March 2006, and is widely reputed to have driven the demise of the Howard Coalition government: see Roy Morgan (2007) "IR Reforms Still Driving Labor Support: Liberal Voters Afraid of Union Dominance" <www.roymorgan.com/news/polls/2007/4179>.

[4] See former Workplace Relations Act 1996 (Cth) Part XA, enacted in the Workplace Relations and Other Legislation Amendment Act 1996 (Cth) with effect from 1 January 1997.

[5] To view a selection of advertisements, visit the YouTube website <www.youtube.com>.

collective enterprise agreements (called "enterprise flexibility agreements", or EFAs) directly with employees, without the involvement of a union.[6] A rationale for this novel invention was the desire to encourage enterprise bargaining as a means for trading productivity improvements for better wages and conditions (and for escaping the prevalence of "one size fits all" industrial awards), not only in unionised industries, but in new industry enterprises where unions had no effective presence.[7] The unions did not much like this innovation, nevertheless, the concept that the Australian enterprise bargaining system should permit non-unionised employees to participate independently of unions has remained.

The Howard Government's Workplace Relations Act 1996 (Cth) (both before and after the notorious Work Choices amendments) also maintained an avenue for direct bargaining between employers and employees, without the involvement of unions.[8] Of course, many of the agreements made without union involvement were made as a consequence of the acceptance of "take-it-or-leave-it" offers, and not as a consequence of any genuine negotiation process.[9] Notwithstanding, concerns about these non-union enterprise agreements, the idea that each employee, whether a member of a union or not, should be entitled to participate in enterprise bargaining, has persisted, even after the enactment by the ALP Government of the FW Act 2009 (Cth).

The system established by the Work Choices laws that all enterprise agreements are made between employers and employees directly, and that trade unions participate as "bargaining representatives", has been retained.[10] All employees have an entitlement to appoint a bargaining agent; union members will be taken to have appointed their union, unless they expressly make an alternative election.[11] Employers (who are, by definition, bargaining representatives themselves) are obliged to bargain in good faith with all bargaining representatives appointed by employees.[12] In most cases, the bargaining representatives are unions, nevertheless, there have been some instances where employees have appointed other bargaining representatives (or sought to represent themselves), and on these occasions, employers have sometimes faced difficulties in securing an enterprise bargain.

Employer experiences

Assertions that the present bargaining framework manifests the inconvenient consequences described above became apparent in the course of some interviews conducted as part of a research project into Australian employers' experiences of good faith bargaining in the first round of bargains, struck after the commencement of the FW Act.[13] This project, conducted by the author with Dr Troy Sarina,[14] initially set out to investigate whether the new good faith bargaining obligation in s 228 of the FW Act was having any influence on the bargaining strategies of those employers, who had maintained a practice of bargaining collectively with unions

[6] See Amanda Coulthard "Non Union Bargaining: Enterprise flexibility Agreements" (1996) 38 JIR 339.
[7] See Second Reading Speech, House of Representatives, 28 October 1993, *Debates*, at 2781.
[8] See generally Anthony Forsyth and Carolyn Sutherland "Collective Labour Relations Under Siege: the Work Choices Legislation and Collective Bargaining" (2006) 19 AJLL 183.
[9] See generally Shelley Marshall and Richard Mitchell "Enterprise Bargaining, Managerial Prerogative and the Protection of Workers' Rights: An Argument on the Role of Law and Regulatory Strategy in Australia under the Workplace Relations Act 1996 (Cth)" (2006) 22 IJCCLIR 299.
[10] See Fair Work Act, s 174.
[11] See Fair Work Act, s 176.
[12] See Fair Work Act, s 176(1)(a).
[13] This project, "Legal Regulation and the Evolution of Organisational Practice: The Impact of Good Faith Bargaining Rules on Employment Relations Strategies" was funded by an Institute of Social Sciences Research Grant, University of Sydney
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throughout the Workplace Relations and Work Choices years. We wanted to see whether a statutory injunction to bargain "in good faith" would make any difference to the behaviour of experienced collective bargainers who already enjoyed established relationships with trade unions. We knew that good faith bargaining obligations, together with the abolition of the option of using Australian Workplace Agreements, had dragged certain big players (such as, Telstra, Cochlear and the Commonwealth Bank) back to the bargaining table with unions, but we were curious to see whether s 228 was doing any work in improving the quality of enterprise negotiations. We wished to test the assertions by the Minister of the day (Julia Gillard) that good faith bargaining would encourage "employees and employers to examine the way they work, discover new ways to improve productivity and efficiency, and share ideas that make workplace more harmonious and flexible."[15] We interviewed several industrial relations managers from three large enterprises, and also held a workshop attended by a number of advisors to many organisations, with a view to discovering the impact of the good faith bargaining obligation in practice.[16] In the course of this project, however, we discovered some unexpected matters which were distracting even experienced collective bargainers. One of them was the problem of dealing with multiple bargaining agents.

Multiple bargaining agents

As explained above, the FW Act entitles each employee to appoint a bargaining representative to negotiate on his or her behalf in collective bargaining negotiations with their employer. In theory, an employer may be obliged to recognise as many bargaining representatives as there are employees in an organisation. In practice, very few employees appoint their own independent bargaining representatives, however, if any employees have chosen to do so, an employer will be faced with the obligation to negotiate with a number of employee representatives, each representing a different cohort of the workforce. For some of the managers we interviewed, this created some apprehension that their former settled relationships with established and experienced union negotiators would be disturbed by the intervention of any number representatives of special interest groups, and possibly some eccentric "Aunt Sallys", interested only in coming along to bargaining meetings out of curiosity, or to enjoy the perks of attending bargaining sessions.

Managers were concerned about practical inconveniences and costs: what if dozens of employee representatives in a national enterprise all insisted on being flown (at the employer's expense) to a central meeting location, and accommodated over night? Would this add to the cost of bargaining, and perhaps encourage more employees to appoint themselves as bargaining agents, so that they too could join the party? The industrial relations managers said this problem had not yet emerged as a major inconvenience, however, some managers did report that they now had to deal with a second bargaining representative acting for a minority of the workforce with a different agenda from the union. At a workshop discussing these views, one industrial relations manager for a university said that she had, in fact, received notification from more than 50 non-union bargaining representatives when she first issued the required notices under Fair Work Act s 173. She opined that employers with highly professional workforces were more likely to face a need to deal with multiple bargaining representatives.

One question arising when more than one representative is appointed is whether an employer is obliged to meet with all bargaining representatives simultaneously, or whether the good faith obligation permits separate

[15] Julia Gillard, Minister for Employment and Workplace Relations "Introducing Australia's New Workplace Relations System" (National Press Club, Canberra, 17 September 2008).
[16] The project's findings on good faith are to be published separately.

negotiations with the different groups. Managers interviewed generally expressed a preference for holding meetings separately, generally because they felt that separate meetings allowed them greater control over negotiations. Several managers expressed a fear that bargaining representatives may bring adverse action claims if they were disgruntled by the employer's approach to dealing with different groups.

'Adverse action' complaints can be brought under the General Protections provisions in FW Act Part 3-1, where an employee can demonstrate that they have been treated in a less advantageous manner than others at the workplace, on account of their entitlement to exercise a workplace right (such as their freedom to join or not join a union, or their right not to suffer discriminatory treatment on the grounds of sex, disability, age, or some other protected characteristic). Adverse action claims can be brought by employees during the course of their employment, not only upon termination.[17]

The concern that special interest groups may delay settlement of an agreement, and may bring adverse action claims, was realised in *Qantas Airways Limited*.[18] This was an application for approval of an enterprise agreement voted up by Qantas flight attendant staff after successful negotiations involving the Australian Services Union (ASU) which supported the application for approval. Two employees, Ms. Waterhouse and Ms. Edwards, were bargaining representatives for a number of part-time employees in the Brisbane international terminal. They objected to some clauses in the agreement, for reasons including that those clauses gave preference in the allocation of overtime to full-time staff. Their objection to approval of the agreement was alleged indirect discrimination on the grounds of sex. This argument could not be sustained: Commissioner Raffaelli found that women made up the majority of the full-time workforce as well as the part-time workforce, so any advantage conferred upon full-time staff could not be construed as an act of discrimination against women. The part-timers objection was discounted and the agreement ultimately approved. Nevertheless, this skirmish demonstrates that the obligation to negotiate with minority groups can delay the approval of an agreement voted up by majority of employees.

Even in this case, where Qantas had met with the minority group's representatives and made some changes to the agreement to accommodate their concerns, the minority could still contest approval. In the days when agreements could be made directly with unions, the union bore the responsibility of accommodating disparate claims into a unified employee voice. It is not surprising that a system which burdens the employer with that responsibility should raise concerns for employers who have long been accustomed to dealing only with the union.

Employers are not permitted to take any steps themselves to require the various employee representatives to sort out their claims themselves before coming to the bargaining table. There is provision in the FW Act for Fair Work Australia (FWA) to make a bargaining order (under s 229) if it finds that the participation of too many bargaining representatives is interfering with efficient bargaining.[19] FWA can make an order under s 231 that "some or all" of the representatives meet and elect one of their number to represent them all in bargaining.[20]

Nevertheless, employers cannot pre-empt this kind of problem by requiring employees to elect representatives for the purpose of bargaining, as was demonstrated in *Capricornia Pty Ltd trading as Quality Hotel Batman's Hill on Collins*.[21] In that case, an employer with a non-union workforce wanted to strike an enterprise bargain under the FW Act with employees. Instead of doing what many employers appear to do, and simply put its own

[17] See for example *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* [2011] FMCA 58.
[18] *Qantas Airways Limited* [2011] FWA 3632.
[19] See Fair Work Act, s 230(3)(a)(ii).
[20] The provision does not appear to have been used to date.
[21] *Capricornia Pty Ltd trading as Quality Hotel Batman's Hill on Collins* [2011] FWA 727.

non-negotiable agreement to a vote of employees 21 days after announcing the intention to bargain, this employer genuinely attempted to encourage employees to bargain. The employer asked employees to form a bargaining team by electing a number of representatives from each of the classifications of occupation at the workplace. This approach – designed to establish a manageable team of elected representatives chosen by a vote of the majority – was held to contravene the FW Act, because it denied each individual employee the statutory entitlement to appoint his or her own personal bargaining representative. The employer's error in assuming that the responsibility for choosing a workable number of representatives should rest upon the collective of employees would be excusable if the employer was familiar with collective bargaining practices in European and North American jurisdictions. This peculiarity of Australian law actually discourages employers without a union presence from proactively encouraging the establishment of employee bargaining teams.

Who pays for bargaining work?

Managers interviewed also expressed concerns about how much paid time they needed to provide non-union bargaining representatives to engage in bargaining meetings. For a national employer who can expect to hold weekly meetings over the course of a few months to meet the good faith bargaining obligations in s 228, this could amount to a considerable amount of paid time. Unions, of course, pay their own dedicated staff, most of whom will *not* be direct employees of the employer in any event. But who pays the non-union bargaining representatives? The work is done for the employee or employees appointing the representative. What if the representative is the employee, or another member of the employer's staff, so that the bargaining work will take the employee away from normal duties? Is the employer obliged to release employees from normal duties to attend bargaining sessions?

The question of who must pay for the time that independent bargaining representatives spend around the bargaining table was resolved in *Bowers v Victoria Police*.[22] Sergeant Bowers wanted to attend the same negotiation meetings for an enterprise agreement with VicPol as the Police Federation of Australia (PFA). VicPol had agreed to organise his rosters to enable him to attend the meetings, but he argued that he should be entitled to attend during paid working hours. Commissioner Smith held that Sergeant Bowers was acting as his own bargaining representative, and on behalf of 132 other police prosecutors, and was not entitled to paid time off work to attend bargaining meetings. Although Commissioner Smith said that "many employers do provide paid time for employees to attend bargaining sessions,"[23] he held that VicPol's obligation to give genuine consideration to his proposals did not mean that it was obliged to pay his salary during meeting times.

The *Bowers* decision implies that the industrial relations managers' concerns about the costs of bargaining can easily be resolved: employees pay the costs for their own representation. This is entirely consistent with the spirit of Article 2 of the International Labour Organisation(ILO) Right to Organise and Collective Bargaining Convention C98, which insists that employers should fund or otherwise exert influence over worker organisations. Bargaining is indeed 'work', but it is not work that forms part of the employee's duties in service of the employer. Organised trade unions deal with the problem of how to pay for the work of bargaining by employing their own paid officials. Union members pay for bargaining services through their dues. The new breed of voluntary bargaining representatives need to establish their own arrangements for funding the work of bargaining. They cannot impose those additional costs upon the employer; and they ought not accept payment from the employer while performing any collective bargaining function, because this conflicts with the ILO

[22] *Bowers v Victoria Police* [2011] FWA 2862.
[23] Ibid at [30].

principle that workers ought not be under any suspicion of control or influence by the employer when engaged in collective bargaining.

Interestingly enough, no issue was raised in the *Bowers* case about the obligation of the 132 police prosecutors to contribute to a fund to pay for the work Sergeant Bowers was undertaking on their behalf. This exposes another peculiarity of the Fair Work system. It permits free-riding. Those who pay union dues support work that benefits many who do not contribute, but the FW Act (like the Workplace Relations Act before it) prohibits the compulsory levying of any kind of bargaining fee.[24] It should also be remembered that in the Australian system, once an enterprise bargain is struck for a particular occupational group, every employee performing that kind of work will be covered by the enterprise agreement, not only the union members of a union that bargained for the agreement.

Another potential source of grievance buried in the *Bowers* case, is the timing of bargaining meetings. The employer and the union are likely to want meetings to be in normal working hours, because industrial relations managers and union delegates like to get their work done in ordinary time. Self-appointed employee bargaining representatives, however, may want bargaining meetings to occur out of hours, if attendance will interfere with their paid work. Whose will prevails? How will the obligation to bargain in good faith, by meeting at reasonable times, sort out these kinds of disagreements?

Reemergence of demarcation disputes?

Some of the industrial relations managers interviewed also expressed concerns that the system requiring recognition of many bargaining agents has the potential to generate the kinds of problems that were once settled by the conciliation or arbitration of demarcation disputes. This fear is well illustrated by the FWA decision in *Tracey v Technip Oceania Pty Ltd*,[25] which involved agreement-making with waterside workers. This is an industry with a rich and colourful history of union rivalry.

When Technip advised employees of their right to appoint a bargaining representative for the purpose of negotiating a proposed agreement, it was dismayed to find that a number of them purported to appoint a certain Mr. William Tracey. Technip challenged the appointment because Mr. Tracey was Assistant Branch Secretary of the Maritime Union of Australia (MUA), well known to be a militant union. As a consequence of the settlement of a demarcation dispute many years earlier, Technip's staff were all entitled to be members of the Australian Maritime Officers Union (AMOU), but not the MUA. Understandably, Technip wished to bargain only with the AMOU and did not want the MUA influencing negotiations (or getting into stoushes with the AMOU during the course of bargaining). Technip sought to rely on the FW Act s 176(3) which provides that "an employee organisation cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement". Nevertheless, Commissioner Cloghan found that as the employees had appointed Mr Tracey himself, and not the MUA, Technip should be ordered to recognise him as a bargaining agent. The MUA could not act as their representative, but the MUA's representative could, so long as he acted in his personal capacity.

[24] See Fair Work Act, s 353.
[25] *Tracey v Technip Oceania Pty Ltd* [2011] FWA 3509; [2011] FWAFB 6551.

Technip appealed to a full bench of FWA. On appeal, the principal finding that Mr. Tracey had been validly appointed as a bargaining agent for the employees was not disturbed.[26] Nevertheless, the bargaining order was overturned by a majority of the full bench (but with a strong dissent by Drake SDP) on the basis that Mr. Tracey had applied for the order not in his personal capacity, but in his position as an official of the MUA. His correspondence was 'bristling' with indications that he was acting as an MUA official.[27] He used the MUA logo and his MUA contact details in his sign-off. Had he been more cautious and used personal stationery for his correspondence, it is arguable that Mr. Tracey would have succeeded in the matter.

It is not surprising that employers who have dealt in the past with difficult demarcation disputes should be apprehensive that some of those problems may be re-enlivened by rules which permit any person – even a union organiser for a rival union – to act as a bargaining representative at a workplace. It seems rather naïve to suggest that a union delegate can genuinely act in a personal capacity for persons who are not entitled (as a consequence of a demarcation arrangement) to official representation. On the other hand, it is difficult to see what other decision Commissioner Cloghan could have made given the privilege the FW Act confers on the individual's right to choose his or her own bargaining representative.

Conclusions?

The FW Act is relatively young. It is due for revision in 2012, as a consequence of promises made in the Explanatory Memorandum to the original Fair Work Bill 2008. My intuition, however, is that these matters are unlikely to be addressed in any review of the Act. The inconveniences caused by this peculiar system are an inevitable consequence of the now entrenched individualism in Australia's approach to labour relations. Perhaps this is understandable, given the poor reach of union influence in many sectors of the Australian economy.[28] If you are a part-time worker in the private sector, chances of being a union member are now as low as 14 percent. While it is understandable the system should accommodate an insistence upon the Workplace Relations-style of freedom *not* to associate, it is clear that if too many non-union employees decided to pursue their rights of individual representation too vigorously, the system could become quite unmanageable. Presently, the general apathy of most of the non-unionised workforce is the only thing that permits collective enterprise bargaining to proceed efficiently. If too many more employees were to follow the path of the part-time flight attendants, the police prosecutors and waterside workers in the cases above, the hairline faults noted above may ultimately fracture the Fair Work bargaining system.

[26] *Tracey v Technip Oceania Pty Ltd* [2011] FWAFB 6551 at [24].
[27] Ibid at [26].
[28] From August 2009 to August 2010, overall union density rates in Australia declined from 20% to 18%. See Australian Bureau of Statistics "6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2010" (2010) <www.abs.gov.au>.