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Good Faith in Collective Bargaining Communications in Australia and New Zealand

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Abstract

Communications during collective bargaining are of central importance to the conduct of employment relations in Australia and New Zealand as they may substantially impact collective bargaining outcomes. Although communications during collective bargaining are required to be in good faith in both jurisdictions, the Courts have approached communication material that seeks to "negotiate" with or persuade employees of employer viewpoint quite differently. This paper discusses how the Australian courts have allowed greater latitude to employer and employee representatives to communicate their points of view during collective bargaining, and in turn led to results which may be seen as undermining the collective bargaining process.

Introduction

This paper compares the law covering communications during collective bargaining between employers, employees and bargaining representatives in Australia and New Zealand in the context of Good Faith Bargaining (GFB) requirements. Communication issues have assumed greater importance within the systems of enterprise based industrial relations in Australia and New Zealand over the last 20 years. They are integral to any consideration of collective bargaining parameters, and may substantially affect negotiation outcomes.[1]

Collective bargaining has only recently been concurrently covered by GFB provisions in both jurisdictions.[2] Although the current legislation in Australia and in New Zealand was enacted by Labour Governments, there are differences in the respective philosophies underpinning the two Acts. The Fair Work (FW) Act is based on individual rights and *enterprise* collective bargaining[3] and does not accord unions any particular status other than as professional bargaining agents like any others. Good faith is just one of many objects of the FW Act, and it contains simple GFB obligations. The New Zealand Employment Relations Act (ERA) 2000, however, promotes collective bargaining, accords unions exclusive status as bargaining representatives and gives good faith as well as GFB a central position in the objects of the legislative framework.[4]

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[1] Pam Nuttall "The Impact of Good Faith Principles on Communication Issues in Collective Bargaining" (2007) 32(1) NZJER 87 at 87.
[2] Aaron Rathmell "Collective Bargaining After WorkChoices: Will 'Good Faith' Take Us Forward With Fairness?" (2008) 21 AJLL 164 at 167.
[3] Fair Work Act 2009 s 3 (f), Rae Cooper and Bradon Ellem "Fair Work and the Re-regulation of Collective Bargaining" (2009) 22 AJLL 284 at 295.
[4] Gordon Anderson and Michael Quinlan "The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007" (2008) 95 Labour History 111 at 126, Mazengarb 's Employment Law, Online Edition, at 3-7.

These different philosophies are shown in the following research to have impacted on the different ways communications that seek to "negotiate" during "good faith" collective bargaining are perceived in each jurisdiction.

The New Zealand Position

The New Zealand government's recent reform of s 32 of the ERA[5] is the latest in a series of legislative and judicial attempts to deal with the lack of clarity and relative complexity in the law covering communications during collective bargaining. This reform confirms an employer may communicate with the employer's employees during collective bargaining, including about the employer's proposals for the collective agreement as long as the communication is consistent with the GFB requirements set out in ss 32(1)(d) and 4 of the ERA.

In order to understand the current New Zealand legal position, it is necessary to understand the legal position in respect of communications during collective bargaining under the Employment Contracts Act 1991 (ECA). Section 12(2) was the key section relating to communications in collective bargaining negotiations. This section, which is much less prescriptive than the current ERA, referred to "recognising the authority" of the representatives for negotiations, rather than any direct reference to communications.

Employment Contracts Act Cases

A discussion of the ECA position is facilitated by examining the following four cases, which interpreted ECA s 12(2).

In the first case, *Eketone v Alliance Textiles (NZ) Ltd*,[6] Cooke P expressed the law as it then stood to be: "[c]ertainly an employer is free not to negotiate with anyone: but if he wishes to negotiate I doubt whether he can bypass an authorised representative".

In the next case, *NZ Medical Laboratory Workers v Capital Coast Health*,[7] the employer was judged to have crossed the boundary between the provision of legitimate information and attempted direct negotiation by the Employment Court. The employer had held a meeting which involved a presentation by management to employees on matters pertaining to the proposed collective employment contract that the union was not invited to, and informed employees of proposals before they informed the union. A number of letters and an information pack with a copy of the contract and explanatory material were also sent to staff. The Employment Court held the employer had undermined the authority of the bargaining agent.

On appeal in *Capital Coast Health*, the Court upheld the finding that some of the communications amounted to direct negotiation. However, Hardie Boys J expressed the position that "[t]he provision of factual information does not impinge on that [negotiating] process. But anything that is intended or calculated to persuade or to threaten the consequences of not yielding does."[8] The employer's letter warning of the financial consequences of strike action had not amounted to negotiating or attempting to negotiate with staff.

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[5] Employment Relations Amendment Act 2010, s 9.
[6] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 at 787.
[7] *NZ Medical Laboratory Workers v Capital Coast Health* [1994] 2 ERNZ 93.
[8] *Capital Coast Health Ltd v New Zealand Medical Laboratory Workers Union Inc* [1995] 2 ERNZ 305 at 320.

Between the Employment Court and Court of Appeal decisions in the *Capital Coast Health* case, *Ivamy & Ors v New Zealand Fire Service Commission* was decided.[9] The Fire Service Commission arranged for individual information packs containing contract proposals to be sent to fire fighters at a time when negotiations were under way. During negotiations, the employer had also been seeking to implement a restructure and there had been extensive meetings. The employer had agreed, as part of a settlement, not to negotiate directly with employees. In the Employment Court, Chief Judge Goddard stated that no further communication on the subject of negotiations should be addressed to the employees by the employer once negotiations were under way.[10] The employer argued that, pursuant to its right to freedom of expression under the Bill of Rights Act,[11] it should be allowed to communicate with employees in the manner it had.

Following that decision but before the Court of Appeal judgment in *Ivamy*, the decision in *Couling v Carter Holt Harvey* was delivered.[12] Judge Colgan considered that it was a matter of fact and degree as to whether communications about negotiations amounted to an attempt to negotiate. They would not necessarily undermine negotiations or representatives' authority to represent employees.

The Court of Appeal judgment in *Ivamy* then overturned the earlier Employment Court judgment and found the employer communications in that case did not undermine the authority of the bargaining agent.[13] Thomas J in his dissent commented that:[14]

> [the fundamental rights of employees to choose whether they bargain collectively]…and to choose their bargaining agent or representative … [will be taken away] …and the process of collective bargaining … [will be] undermined if the authority of the bargaining agent to represent the employees in negotiations for a collective employment contract is not recognised by the employer.

Thomas J listed two paragraphs of conduct that he did not think would be acceptable in recognising the authority of the bargaining agent but would now be considered legitimate in light of the majority decision.[15]

As explained in Butterworths Employment Law Guide, the decisions in *Ivamy* and *Capital Coast Health Ltd v NZ Medical Laboratory Workers Union* the Court of Appeal drew a line between impermissible "direct negotiation" with the employees represented, and on the other hand, permissible "direct communication" with those employees.[16] This difficult distinction effectively rendered section 12 inoperative in all but the most blatant bypassing cases.

The Current Position

The ERA provisions relating to communications during collective bargaining were designed to remedy the problems that had arisen under the ECA and clarify the type of communications which would cross

[9] *Ivamy & Ors v New Zealand Fire Service Commission* [1995] 1 ERNZ 724 (EC)
[10] At 766.
[11] New Zealand Bill of Rights Act 1990 s 14. *Ivamy* above n 9 at 751.
[12] *Couling v Carter Holt Harvey* [1995] 2 ERNZ 137.
[13] *New Zealand Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, [1996] 2 NZLR 587 (CA).
[14] At 116.
[15] At 124-125.
[16] Peter Agnew (ed) *Butterworths Employment Law Guide* (6 ed, LexisNexis, Wellington, 2002) at 232.

the line into unacceptable "negotiations" with employees. The ERA provisions were also designed to ensure the employer did not undermine the employee's agent during collective bargaining.

The current position was established in the leading case *Christchurch City Council v Southern Local Government Officers Union Inc.*[17] Pursuant to s 32(1)(d) of the ERA, an employer is prevented from communicating directly with employees after bargaining has been initiated:

(a) about their terms and conditions of employment, without the union's consent, if it amounts to *"negotiating"* during bargaining (emphasis added)
(b) in a manner that *undermines* or is *likely to undermine* the bargaining with the union or the union's authority in bargaining (emphasis added).

The *Christchurch City Council* case considered the extensive provisions in the ERA relating to good faith and communications during collective bargaining. In that case, the City Council's CEO communicated directly with council employees on matters related to bargaining during negotiations for a collective employment contract. The Employment Court found the council had breached s 32(1)(d) of the ERA, and had failed to comply with the duty of good faith with respect to three of the communications.

The Court of Appeal upheld the Employment Court's opinion that by sending out the communications in question the City Council failed to comply with its duty of good faith.[18] However, it stressed that it is only in the absence of provisions in the Bargaining Process Agreements setting out what communications are acceptable that the statutory default provision comes into play.[19] However, the Court of Appeal took a different approach to interpreting the statutory provisions to the Employment Court. Firstly, it applied the principle of statutory interpretation that specificity trumps general and concluded that s 4 must be read consistently with the more specific s 32. Section 4 continues to apply in a s 32 case to the extent it is not inconsistent with the specific provision of s 32.

Section 4(1A) imposes a general "good faith" obligation that parties to an employment relationship can only communicate matters of "fact and opinion that are reasonably held about an employers business or a union's affairs." Such communications also need to comply with another good faith obligation "to be active and constructive and responsive and communicative" in employment relationships. They must also not do anything to mislead or deceive each other, or that is likely to mislead or deceive each other, pursuant to section 4(1)(b). Subsection 4(6) makes it a breach of subsection (1) for an employer to advise or to do anything with the intention of inducing an employee –

(a) not to be involved in bargaining for a collective agreement; or
(b) not to be covered by a collective agreement.

These obligations apply at all times whether or not bargaining has been initiated. However, communications must also comply with s 32(1)(d) *after bargaining has been initiated.*[20] (emphasis added)

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[17] *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] 1 ERNZ 37 (CA).
[18] At [56].
[19] Gordon Anderson "Communications with employees during bargaining" [2007] ELB 37 at 39. Bargaining Process Agreements are important to assist the parties with an orderly bargaining process., as noted in *AUS v Vice Chancellor of the University of Auckland* [2005] 1 ERNZ 224 at [78].
[20] Jasmine Brown and Blair Scotland "Advising employers – Communication and passing on in collective bargaining" [2007] ELB 51 at 53.

Secondly, the Court of Appeal found the s 5 definition of "bargaining" covers all interactions between *parties* which relate to bargaining for a collective contract. However, the *parties* to the bargaining are the *employer* and *union*. The Court seems to have found only s 5(b)(i) applies to the employees represented in bargaining as it does not refer to "parties."

Section 5 defines bargaining in relation to bargaining for a collective agreement as follows:

(a) all the interactions between the parties to bargaining that relate to bargaining; and
(b) (i)includes negotiations that relate to the bargaining; and
(ii) communications or correspondence (between or on behalf of the parties before, during or after negotiations) that relate to the bargaining.

The Court of Appeal has indicated that an employer can potentially communicate with union member employees to clarify its position or to rectify incorrect and/or untruthful statements made by a union. However, such communication must comply with s 32(1)(d) and not undermine the union or the bargaining.[21]

In order to best understand s 32(1)(d) of the ERA, it is important to understand how the Employment Court's interpretation of s 32 differed from the way the Court of Appeal interpreted it. The Employment Court had interpreted s 32(1)(d)(ii) as meaning "on matters relating to the bargaining…the employer must not communicate or correspond with persons for whom a representative is acting."[22]

However, the Court of Appeal took the Employment Court to mean the above section meant all communications during bargaining were wrong. It is fair to say that s 32(1)(d) is confusing because not all communications on "matters related to the bargaining" are likely to cross the line into unacceptable "negotiations". Nutall makes the helpful point that at Select Committee stage and while the Employment Relations Bill was before Parliament, debate centred on whether all communications during bargaining should be prevented or only those that related to and undermined bargaining.[23] It seemed to be the intention of Parliament to only prevent communications that related to and undermined bargaining as opposed to statements of fact. Parliament simply does not seem to have expressed this clearly in the statute. The recent 2010 amendment is aimed at expressing this more clearly.

"Directly or Indirectly Bargaining" and Undermining Bargaining

There are several other terms in the ERA relating to Communications in bargaining that still require clarification by the Courts. Firstly, the exact meaning of "to directly or indirectly" bargain under s 32(1)(d)(ii) is still not completely clear. Some guidance can be taken from authorities under the ECA as the Court in *Christchurch City* accepted s 32(1)(d)(i) is based on the law as it stood under the ECA. However, in the *Christchurch City* case, the Employment Court also found that s 32(1)(d) does not codify the ECA 1991 position, rather it extends the obligations of each party. As extended, the definition of "undermine or likely to undermine" would encompass communications that:[24]

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[21]Brown and Scotland at 54.
[22]*Christchurch City Council v Southern Local Government Officers Union Inc* [2005] ERNZ 666, at [87] (EC).
[23] Pam Nuttall "Reviewing the communication cases: Christchurch City Council revisited" (2008) 33 (2) NZJER 45-55 at 49-52 and 54.
[24]Geoff Davenport "Communications with employees during bargaining – no blanket ban but still uncertainty [2007] ELB 40 at 44; *Christchurch City Council*, above n 22 at [116] and [117].

> [p]ut the Council's case for wishing to have a MUCA and was a communication that related to the bargaining before the negotiation (although the Court of Appeal confined the obligations to after bargaining has formally been initiated); or "presented only one side of the argument without reference to the union"

Conduct which is "likely to undermine bargaining" or "the authority of the other in bargaining" is also capable of covering a broad range of activities. "Likely" in this section was defined in *BONZ* as "more probable than not" and a "real risk."[25]

Davenport, in his article on the subject, lists reasons why communications by the Council in *Christchurch City* had potential to undermine bargaining as the timing, content, presenting a one-sided argument, whether the communication criticised the bargaining party, the consequence for the union's member (did it create confusion or ill feeling?) and the nature of the issues communicated on and whether they are "negotiating points." [26]

The following significant cases relating to communications during a bargaining period have considered the meaning of "undermine" in s 32(1)(d).*Association of University Staff Inc v The Vice-Chancellor of the University of Auckland*,[27] and *NDU v General Distributors*.[28] In the *AUS* case, the union wanted to negotiate a Multi-Employer Collective Agreement (MECA) with all New Zealand Universities, however, the Vice Chancellor of the University of Auckland wanted to negotiate its own separate Single Employer Collective Agreement (SECA) with the Union. The issue was whether the Vice Chancellor had breached his duty of good faith.

In that case, the Court accepted that **"undermine"** had a broad meaning:[29]

> Although the figurative dictionary definition of the word "undermine" includes underhanded, subtle or insidious means, we consider that s 32 (1) (d) (iii) is not so limited and must contemplate the action of undermining being carried out overtly as, for example, by a refusal to meet to bargain.

The Court found that as the Vice Chancellor had genuine reasons for taking the stance he did, that were clearly expressed to the union and acted on the legal advice it was given, it did not amount to a breach of good faith, even though its actions may have undermined bargaining.[30]

The Court expressed the view that:[31]

> While on their face these communications were arguably unexceptional, we conclude that the timing, their unilateral nature and their instantaneous and personal distribution by email may, in all the circumstances, have undermined bargaining. By announcing that it would never bargain with other employers, contrary to the way in which it did so in the previous

[25] *BONZ Group Pty Ltd v Cooke* [1994] 3 NZLR 216 at 229, Davenport, above n 24, at 44.
[26] Davenport above n 24 at 44.
[27] *AUS v Vice Chancellor of the University of Auckland*, above n 19, at [78].
[28] *National Distribution Union Inc v General Distributors Limited* [2007] 1 ERNZ 120.
[29] *AUS v Vice Chancellor of the University of Auckland*, above n 19 at [99].
[30] At [99].
[31] At [90].

bargaining round, could have the effect of undermining the form of bargaining balloted for by Auckland University staff who are members of AUS.

Other factors in the *AUS* and *NDU* cases which may be considered to determine whether they undermine bargaining or the union include: the effect on union membership and the tenor of the communications.[32] The *NDU case* highlighted that if the negotiating parties conclude a BPA specifying what the employer can communicate with union members directly, or stating what types of communications from either party are acceptable, then sending communications to the union for its comments before providing it to union members may provide some protection for employers against a breach of good faith claim.

Recent Cases Considering Good Faith in Collective Bargaining Communications

The following more recent cases have further clarified the meaning of GFB, and conduct which may undermine bargaining.

In *Service and Food Workers Union Inc v Sealord Group Ltd,*[33] the Employment Relations Authority held that the employer breached its GFB obligations when it held a meeting at which it addressed employees, including union members, and essentially ran the argument it used when negotiating with the union during collective bargaining. It also posted notices on its notice boards that were critical of the union's stance and which made negative statements about the union. The Authority held that the employer had bargained directly with union members, ignored the authority of the union representatives and conducted itself in a manner which had the potential to undermine bargaining.

In the case of *Mana Coach Services Ltd (MCSL) v NZ Tramways and Public Passenger Transport Union Inc,*[34] the Employment Court found that direct communication with the union's members was bad faith behaviour in breach of s 32(1)(d) of the Act. This evidenced a refusal to recognise the authority of the union's representatives, amounted to an attempt at indirect bargaining without its authority, and was conduct likely to undermine the bargaining or the authority of the union in relation to the bargaining. Individually, the letters that were sent to employees did not set out MCSL's expectation of the recipients but, read together, the implication was clear: members were to bring pressure on the union to accept options by the deadline if those options were not to be replaced by terms less attractive. MCSL's intention was to bypass the union and to present a new offer in bargaining. These communications were opportunistic and brazen.

In *Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd,*[35] the defendant was held not to have undermined bargaining when a management representative suggested to a member of the union's negotiating team that a potential impasse could be avoided either by dispensing with both lead negotiators (who had each demonstrated uncompromising attitudes) or otherwise progressing negotiations without them. The union had earlier, and successfully, argued for a change of the employer's previous lead negotiator and – in any event – the proposal to sideline the union's lead negotiator was part of a package that would also have sidelined the lead negotiator for the employer.

[32]At [99], *NDU Inc. v General Distributors Ltd* [2007] 1 ERNZ 120 at [161].
[33]*Service and Food Workers Union Inc v Sealord Group Ltd* (2002) 6 NZELC 96,828.
[34]*Mana Coach Services Ltd v NZ Tramways and Public Passenger Transport Union Inc* [2010] NZEmpC 110..
[35]*Eastern Bay Independent Industrial Workers Union Inc v ABB Ltd* [2008] ERNZ 537 (EC)..

In *Housing New Zealand Corporation v PSA*,[36] the Employment Relations Authority held that the evidence did not establish that the PSA attempted to undermine bargaining although it sent inaccurate and misleading communications to employees and breached terms of the Bargaining Process Agreement. It had not acted in good faith pursuant to s 4 of the ERA, however, the PSA was not penalised.

The Australian Position

In Australia, the Rudd Labor government implemented the Fair Work Act 2009 (FW Act) which was intended to "get the balance right" between fairness and flexibility in Australian workplaces.[37] The conservative Howard coalition government's previous WorkChoices legislation had expressly repealed the previous GFB provision. Work Choices had also closed off the ability of the courts or the Australian Industrial Relations Commission to imply good faith obligations into the bargaining regime.[38]

The industrial relations model under "WorkChoices" became known as "direct engagement" whereby employers were told to "bypass unions, bypass the Australian Industrial Relations Commission and deal directly with employees" in collective bargaining.[39] Employers had been left relatively free to create their own bargaining norms and, as there was no certification process to ensure agreements did not disadvantage employees, the quality, integrity and fairness of enterprise bargaining outcomes were threatened.[40]

The objects set out in s 3 of the FW Act, on the other hand, include achieving productivity and fairness through an emphasis on "enterprise level" collective bargaining. The FW Act reintroduced GFB requirements and enhanced rights for union involvement in collective bargaining.

The key GFB provisions in the FW Act in s 228(1) relate to bargaining representatives for enterprise agreements. The obligations are:

(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* (emphasis added)
(f) recognise and bargain with the other bargaining representatives.

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[36] *Housing New Zealand Corporation v PSA* ERA Wellington WA 174/10, 5311242, 29 October 2010.
[37] Andrew Stewart "A Question of Balance: Labor's New Vision for Workplace Regulation" (2009) 22 AJLL 3 at 7; Andrew Stewart and Anthony Forsyth "The Journey from Work Choices to Fair Work" in Andrew Stewart and Anthony Forsyth (eds) "*Fair Work"* (Federation Press, Annandale, 2009) at 7-8.
[38] Confirmed in *Association of Professional Engineers, Scientists and Managers, Australia v Telstra Corp Ltd* [2008] AIRC 734 at 11.
[39] Anthony Forsyth "Good Faith Bargaining: Australian, United States and Canadian Comparisons" (paper presented to Chairman's Lunch Seminar, US National Labor Relations Board, Washington DC, 4 November 2009) at 19, at n 50 per Stuart Wood as exemplified by Rio Tinto, Telstra and the Commonwealth Bank, "Good faith laws will end the Rio revolution" Workplace Express, 24 August 2009.
[40] Rathmell, above n 2, at 165.

It is noteworthy that s 228(1)(f) has some similarities with s 12(2) of the New Zealand ECA 1991. Cases decided pursuant to this section, and set out above, could be relevant in interpreting this section of the FW Act. Cases considering s 32(1)(d)(ii) of the ERA could also be relevant to s 228(1)(e) as both are concerned with conduct that undermines collective bargaining.

There was initial speculation about how the very general new GFB provisions in the FW Act would be interpreted. The Rudd government's "Forward with Fairness" platform, and central theme of fairness in the objects of the FW Act, signalled a clear change of direction in industrial relations. In practice, Fair Work Australia has stressed the need to approach the GFB requirements on a case by case basis.[41] The Commissioners have found breaches of the GFB provisions of the Act when:

(a) bargaining agents have been bypassed by employers at crucial stages of negotiations (such as close to the time of a vote on a circulated agreement): T & R (Murray Bridge) case;[42]
(b) agreements have not been properly explained to the employees or they have been misled: *Class Electrical v CEPU* and *United Group Rail* cases;[43]
(c) agreements have been put to a vote for employee approval without advising the bargaining agent without giving them a reasonable time to propose any amendments to the document, and without responding to the proposals they put through their bargaining representative concerning the content of such an agreement: *APEESMA v DTS*,[44] *Alphington Aged Care,*[45] *United Group Rail NUW v Defries* cases;[46]
(d) a different position has been put to employees through their bargaining representative, and the employer has sought to bargain with the representative and make an agreement with employees at the same time, such as in *Finance Sector Union*,[47]*Aegis Aged Care* cases;[48] and
(e) the voting process has been unfair: *United Group Rail* case

The practical outcomes of the current Australian law relating to communications in collective bargaining in Australia have many parallels with those that existed under New Zealand's ECA 1991, and Australia's IR Act from 1993 to 1996.[49]

Early Cases Interpreting section 228 of the Fair Work Act

Very little foreign or pre-FW Act precedent has been cited in the decisions. A reason for this was given in the case of *Finance Sector Union.*[50] Commissioner Smith referred to decisions under the National Labour Relations Act in the United States of America in relation to bargaining in good faith. He decided not to deal with those cases for reasons including "there are a number of extra factors

[41]*The Australasian Meat Industry Employees Union v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26/2/2010) at [44]; *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510(5/5/2010) at [24].
[42]*The Australasian Meat Industry Employees Union v T & R (Murray Bridge) Pty Ltd*, above n 41.
[43]*Class Electrical v CEPU* [2009] FWA 1541 (9/12/2009); *United Group Rail Services Limited* [2009] FWA 452 (9/10/2009).
[44]*APESMA v DTS* [2010] FWA 429, (28/1/2010).
[45]*Alphington Aged Care* [2009] FWA 301 (17/9/09).
[46]*National Union of Workers v Defries* [2009] FWA 88 (18/8/2009).
[47]*Finance Sector Union* [2010] FWA 2690 (9/4/2010).
[48]*Aegis Aged Care Staff Pty Ltd* [2010] FWA 3715 (12/5/2010).
[49]Rathmell, above n 2. See the Explanatory Memorandum to the FW Act, cl 168 which refers to good faith in the Industrial Relations Reform Act 1993.
[50]*Finance Sector Union* [2010] FWA 2690 (9/4/2010)

which may bear upon the establishment of the US jurisprudence in relation to GFB, including the establishment of exclusive bargaining rights, which do not find legislative parallels in Australia".[51]

In an early case, the recommendation in *AFMEPKIU v Transfield Australia Pty Ltd* by Drake SDP was initially seen as signalling a step towards the more restrictive approach in New Zealand.[52] He recommended:[53]

> [t]hat [during the program for negotiations] 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;
>
> Transfield will deal with all officers and delegates of the bargaining agent representatives who are authorised by their organisations to conduct negotiations.

However since then, another line of authority has developed through the *Heinz,*[54]*Fosters,*[55]*Mingara,*[56] and *Tahmoor Coal* cases.[57] Fair Work Australia has stressed the Courts should be "slow to interfere in the legitimate tactics undertaken by the parties during the bargaining process."[58] In some of these cases, there is little doubt that the employers' communication tactics would breach the New Zealand ERA standards, and will be considered in greater detail in the following pages. Fair Work Australia has continually highlighted the well-established principle that "it is important to encourage communication between employees and employers both directly as well as through their representative organisations."[59]

Two early decisions provided guidance in interpreting the GFB provisions of the FW Act. In the first, *Total Marine Services Pty Ltd v Maritime Union of Australia*, Commissioner Cloghan established guidelines to assessing good faith conduct as follows:[60]

> …for Fair Work Australia to be satisfied that good faith bargaining has not been met, it is necessary to assess all the circumstances including the industrial context, character of negotiators and negotiations. He also observed that the question must be asked, whether any of the parties are not genuinely trying to reach agreement, secondly, when making an assessment of the negotiations, to be even handed, and thirdly, referring to the Explanatory Memorandum to the Fair Work Bill 2008, in relation to what was to become s 228 of the Act, which refers to assisting when bargaining representatives do not bargain voluntarily or co-operatively.

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[51] At [58].
[52] *AFMEPKIU v Transfield Australia Pty Ltd* [2009] FWA 93 (14/8/09) at 93; Forsyth above n 39,at 20.
[53] Forsyth above n 39 at 18.
[54] *AFMEPKIU v HJ Heinz Co Australia Ltf (Echuca Site)* [2009] FWA 322 (22/9/09).
[55] *LHMU v Fosters Australia Ltd* [2009] FWA 750 (28/10/2009).
[56] *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442 (1/12/2009).
[57] *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 (5/5/2010).
[58] *LHMU v Fosters Australia Ltd* at [20].
[59] *LHMU v Hall* [2010] FWA 1065 (11/2/2010).
[60] *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWA 290 (16/9/2009).

In the second, *LHMU v Fosters Australia Ltd*,[61] Kaufman SDP considered the meaning of "undermined freedom of association or collective bargaining" pursuant to s 228(1)(e) of the Act, and the meaning of "capricious". Capricious is defined as "guided by caprice; readily swayed by whim or fancy; inconstant," and "caprice" as "an unaccountable change of mind or conduct."

He quoted the Explanatory Memorandum to the FW Act:[62]

> The good faith bargaining requirements are generally self-explanatory. The last requirement, "refraining from capricious or unfair conduct …" is intended to cover a broad range of conduct. For example, conduct may be capricious or unfair conduct if an employer – does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees.

In a number of cases where employer communication tactics have been held not to breach the FW Act, the Fair Work Australia Commissioners have commented that the evidence has not supported the finding of a breach. In future, a more thorough approach to the presentation of evidence setting out details of alleged communication breaches would likely result in a stricter approach by Fair Work Australia to preventing conduct which undermines collective bargaining and good faith requirements.

Cases Illustrating the Differences in the Australian Approach to Communications

As the GFB requirements apply to employee bargaining representatives as well as employers, there have been a number of cases where employers have claimed unions breached GFB requirements during negotiations. In the *Total Marine Services* case, Fair Work Australia declined to find a breach of GFB provisions by the unions involved, instead viewing the union's behaviour as "legitimate negotiating tactics." The Commissioner found during negotiations the union wanted to keep some options open and the employer wanted to consider the claim as a whole. In the *Heinz* case, the union was found to be entitled to distribute a notice advising employees not to respond to the employer's proposal for eight hour shifts and accusing the employer of not acting in good faith. In *Minda*,[63] Fair Work Australia found it was acceptable for the union to communicate directly "once off" with the company's board. In *Capral*, the union was entitled to distribute flyers to employees relating to the proposed enterprise agreement and terms and conditions of employment.

In some situations where Fair Work Australia has allowed a robust approach to negotiations, aggressive tactics have often been the norm for both employers and employees. Fair Work Australia has allowed communications with employees which would be seen as "negotiating and bargaining" in breach of the New Zealand ERA. Significantly, in the *Queensland Nurses Union* case,[64] the Commissioner found "an employer may directly communicate *and/or bargain* with its employees throughout the bargaining process".

The recent Full Bench Appeal decision *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* illustrates the different approach Fair Work Australia has taken to communication issues

[61] *LHMU v Fosters Australia Ltd*, above n 55.
[62] Fair Work Act 2009, *Explanatory Memorandum* at [951], LHMU v Fosters Australia Ltd at [13].
[63] *LHMU v Minda Incorporated* [2010] FWA 3461 (30/4/2010).
[64] *Queensland Nurses Union v The Corporation of the Roman Catholic Diocese of Toowoomba t/a Lourdes Home for the Aged, Lourdes Home Hostel* [2009] FWA 1553 (7/12/2009).

in comparison with the New Zealand position.[65] The CFMEU sought an order restraining the employer from putting the employer's proposed agreement to an employee ballot and relied only on the alleged breach by Tahmoor of the requirement in s 228(1)(e) to "refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining".[66]

The Commissioner at first instance had followed *Mingara* in holding that communicating with staff was good management practice.[67] So long as the employer did not refuse to meet and communicate with a bargaining representative, then in the Commissioner's view there was no breach of the GFB requirements of the Act. The CFMEU argued the material presented by Tahmoor management at meetings and in packages sent out to employees was tantamount to arguing in support of the position it was taking in collective bargaining. It also argued that there was a "level of intimidation" in that the possibility of a lock out of employees and selective re-engagement had been raised. Tahmoor also terminated bargaining meetings in January 2010 in order to put its proposed agreement to employees in a ballot. Small group meetings had been held without union officers being invited to attend and the meetings were held compulsorily during work time. At these meetings, the company adopted a "hard sell" position relating to its views in the employment negotiations. The meetings lasted for approximately four to five hours each.

The Commissioner, at first instance, had accepted that the employer bargaining representative adopted a very aggressive approach in the employee meetings and that he "probably crossed the line of what is reasonable in such circumstances", but he commented that aggressive tactics appeared to be the norm in the coal industry.

On appeal, the Commissioners found that although the company's action in communicating directly with employees might be inconvenient and offensive to the CFMEU, it was not improper. The Commissioners accepted that it appeared that the company made it less than convenient for CFMEU Lodge Officers to attend the small group meetings, and that Tahmoor may have been trying to influence employee views. However, the Full Bench found that the general practice adopted by Tahmoor in communicating directly with employees did not constitute an undermining of the CFMEU's role as bargaining representatives. The company's wish was to put its view to employees in an unencumbered manner as possible. The absence of a bargaining representative at a meeting held between the company and its staff was not considered inconsistent with the GFB requirements.

The Full Bench held on appeal that the Commissioner was entitled to conclude that after a very long period of negotiation the parties were simply unable to agree. In those circumstances, the conclusion was open that it was "not capricious or unfair conduct for Tahmoor to seek to explain its negotiating position to the employees directly."

A second case provides another good illustration of the differences in the Australian approach to communications during GFB. In *LHMU v Hall,*[68] LHMU applied for bargaining orders. Commissioner Cloghan declined to issue the orders as he was not satisfied on the basis of the evidence the employer had breached the GFB requirements. This case also highlights the need for applicants to ensure they obtain convincing evidence.

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[65] *Construction, Forestry, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510(5/5/2010).
[66] At [7].
[67] *LHMU v Mingara Recreation Club Ltd*, above n 56.
[68] *LHMU v Hall*, above n 59.

Amongst the negotiations, there was "robust" documentation by both parties describing each other's position. This included the LHMU portraying the employer as "frightening" employees, describing negotiators as "monkeys" (in words and in caricature); misleading or inaccurate information (according to the employer) and the caricatured black suited, cigar smoking "fat capitalist" dragging a trolley load of money. For the employer, "robust" was the use of words like "unfair" "unreasonable" and "un-Australian" to describe the LHMU as well as portraying their role as wanting "to cause trouble" and providing misleading or inaccurate information (according to the LHMU). The union highlighted the employer's taking and putting the employer's own (best) perspective on information circulated. A difficulty that the union faced was that it did not come to the hearing with "clean hands."[69]

The Commissioner found that it was not unusual for the employer to meet with its employees (without bargaining representatives or their delegates present) and to put forward the best perspective of the employer was common. He found that, with the absence of maybe an employer representative's comments in relation to the closing down of facilities and the possible loss of jobs, these meetings were conducted in an environment where employees were free to have their say and did so. However, he did say he was sure that, on some occasions, the content and conduct of such meetings would breach GFB requirements, but he had not seen or heard evidence on this occasion to determine that it falls into this category."

Contrast with New Zealand case law

In contrast, the leading New Zealand case of *Christchurch City Council*[70] held that comparable direct employee communication tactics to those used in *Tahmoor* and *Hall* of holding meetings where the employer adopted a hard sell approach to their position in employment negotiations would be a breach of good faith in New Zealand. Similarly, in a case decided under the ECA in New Zealand, the employer in *New Zealand Fire Service v Ivamy* sent out information packs to staff.[71] Under current New Zealand law, communications of this nature would be in breach of GFB obligations, as illustrated by the recent New Zealand case of *Mana Coach Services*[72]. In this case, it was held the communications material sent to employees' homes was intended to persuade them of the employer's point of view and not allowed under the ERA. Unfortunately, insufficient evidence was presented in Tahmoor of the nature and content of information that was sent to employees. If the material was simply factual, it would not have breached the New Zealand GFB requirements. The New Zealand *Sealord* case also found that the employer had undermined the employees' bargaining representative by (inter alia) holding meetings at which they directly communicated their negotiating position to staff, in a similar manner to *Tahmoor* and *Hall*.[73]

In the *Tahmoor Coal* case, the employer conducted compulsory meetings with staff that lasted four to five hours and adopted a hard sell approach. Although aggressive tactics were the norm in the coal industry, this should not have allowed the employer to breach its GFB obligations and communicate in a way that undermined the employee bargaining representative's authority.

Hall provides another example of where the New Zealand Courts would find a breach of GFB provisions as the aggressive tactics, meetings and misleading information on behalf of the employer and even the union could be seen as undermining bargaining (if sufficient evidence was presented).

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[69] At [23].
[70] *Christchurch City Councilv Southern Local Government Officers Union Inc*, above n 17.
[71] *New Zealand Fire Service Commission v Ivamy,* above n 13.
[72] *Mana Coach Services Limited v NZ Tramways and Public Passenger Transport Union Inc,* above n 34.
[73] *Service and Food Workers Union Inc v Sealord Group Ltd,* above n 33.

Conclusion

Although the Australian Parliament has legislated for good faith bargaining in the FW Act, it is not being applied to employee communications as strictly as the equivalent GFB provisions in New Zealand. A much stricter approach is taken in New Zealand to conduct that undermines bargaining, as evidenced by the leading case of *Christchurch City Council v Southern Local Government Officers Union Inc*.[74]

Fair Work Australia has interpreted the GFB requirements on a case by case basis, emphasising an even handed approach and the importance of encouraging communication between employees and employers both directly as well as through their representative organisations. The level of fairness and good faith in collective bargaining has increased from the "direct engagement" level under Australian Work Choices to the extent that employee bargaining representatives are now being recognised, and cannot be bypassed at crucial stages of negotiations. In addition, employees must not be misled, agreements must be properly explained and agreements cannot be put to vote for employee approval without advising the bargaining agent. However, persuasion, direct influencing of and bargaining with employees, intimidation, aggressive tactics and other conduct that would be seen as undermining bargaining in North America and New Zealand has been allowed in some cases. In the result, the actions of employers in cases like *Hall* and *Tahmoor Coal* may seriously undermine the process of collective bargaining.

[74] *Christchurch City Council v Southern Local Government Officers Union Inc*, above n 17.