

## EMBEDDING WORKPLACE COLLABORATION

### GOOD FAITH BARGAINING

BUSINESS COUNCIL OF AUSTRALIA



## ABOUT THIS PAPER

The Business Council of Australia (BCA) is an independent leadership group comprising the chief executive officers of 100 of Australia's largest and most economically significant companies. Through research, communication and advocacy, BCA members pursue economic, social and environmental policy outcomes for the benefit of all Australians.

This paper, the second in a series of BCA discussion papers on workplace collaboration, comprises a paper written by Professor Breen Creighton titled 'Good Faith Bargaining under the Fair Work Act – Striking a Balance', together with an executive summary by the BCA.

## CONSTRUCTIVE WORKPLACE RELATIONS ARE ESSENTIAL TO PRODUCTIVITY

## EXECUTIVE SUMMARY

### INTRODUCTION

Collective bargaining and good faith bargaining are inextricably connected. All developed countries have endorsed collective bargaining as the basis of regulating terms and conditions of employment, and many have also tried to ensure that such bargaining occurs in good faith. Voluntary, good faith bargaining has also been endorsed by the International Labour Organization (ILO) as the most appropriate means of regulating terms and conditions of employment.

Seeking to promote both fairness and productivity, the Fair Work Act 2009 attempts to radically reshape Australia's workplace relations system. It does this by establishing a legislated safety net consisting of ten National Employment Standards and a comprehensive network of modern awards, and the formal endorsement of collective bargaining as the basis for negotiation of terms and conditions of employment at the enterprise level. To try to make collective bargaining effective, the legislation requires that the parties negotiate in 'good faith'. How fairness is to be achieved in the new system is clear; what is less clear is how the productivity objective is to be achieved.

The implicit assumption in the Act, however, is that productivity is enhanced when workplace relations are harmonious and collaborative and that these are optimised when bargaining is collective, conducted in good faith and at the enterprise level.

In a series of discussion papers on embedding workplace collaboration, the Business Council of Australia considers how collaborative workplace relations might be further enhanced to ensure that the potential claimed for the new system is realised. Should that potential not be realised, Australia puts at risk the economic recovery and growth it needs.

In this second paper of the series, we focus on the good faith bargaining provisions in the Fair Work Act 2009. Even though it can be argued that these provisions represent significant legislative support for collaborative workplace relations, initially they may appear confronting and confusing, not least because of uncertainty and competing claims about how the provisions should be implemented.

The purpose of the incorporated paper is twofold. It has been developed both as a resource for BCA members as they develop strategies to comply with the new legislative regime, and as a contribution to the public debate on how the Fair Work legislation should be interpreted. It is necessarily technical in content, exploring the statutory requirements and considering how they might best be put into operation. Section 1 provides an introduction to the concept of good faith bargaining, its historical links to collective bargaining and its history within the International Labour Organization. Section 2 provides an outline of the history of good faith bargaining in Australia, both nationally and within state jurisdictions. Section 3 describes the objectives and good faith bargaining requirements of the Fair Work Act 2009. Section 4 then considers what is involved in putting these requirements into practice, including considering overseas experience. Section 5 offers some conclusions about the relevance of these experiences and what might be entailed in developing an Australian model of good faith bargaining.

Specifically, the paper warns against assuming that overseas experience can be imported into Australia without qualification, and argues for the development of a distinctly Australian approach, reflecting our national imperatives and history.

### **THE FAIR WORK ACT 2009 BUILDS ON PAST EXPERIENCE**

The Fair Work Act 2009 states that the objectives of the bargaining process are:

- 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; and
- to enable the Fair Work Authority (FWA) to facilitate bargaining and the making of enterprise agreements, including through:
  - (i) making bargaining orders; and
  - (ii) dealing with disputes where bargaining representatives request assistance; and
  - (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay.

### **Will the legislation actually engender the more collaborative and constructive behaviours sought?**

The Act also provides that good faith bargaining requires:

- attending and participating in meetings at reasonable times;
- disclosing relevant (but not commercially sensitive or confidential) information in a timely manner; responding to proposals in a timely manner;
- giving genuine consideration to proposals from bargaining representatives and giving reasons for the responses to those proposals;
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- recognising and bargaining with the other bargaining representatives.

The Act also indicates that these requirements do not require bargaining representatives to make concessions or that they reach agreement on the terms that are to be included in any agreement that emerges from the negotiations.

The Fair Work Act's good faith bargaining provisions are more sophisticated than previous legislative experiments in this area at the state and federal levels. It has sought to incorporate lessons both from international and previous Australian experience. For example, by backing the facilitative powers of the FWA with a hierarchy of orders and penalties, the Act seeks to overcome the lack of enforcement powers given to similar overseas bodies such as the United States National Labor Relations Board (NLRB), and to make bargaining processes more efficient and productive. By not adopting the New Zealand requirement to bargain to agreement conclusion, the Australian legislation maintains its commitment to not imposing arbitrated outcomes on, or requiring concessions by, negotiating parties where bargaining has been conducted in good faith.

Whether the system supports productivity improvement and jobs will be what determines the living standards of Australians

### **SOME REMAINING AREAS OF UNCERTAINTY: IS THE US MODEL THE ANSWER?**

However, notwithstanding the way in which the legislation has sought to address international and Australian experience, there remains uncertainty about how some provisions should be implemented. The issues causing the most angst are the nature of the information to be provided (and the effect of the qualifier that excludes commercially sensitive or confidential information), and what will be regarded as 'capricious and unfair behaviour'.

The Fair Work Authority is progressively being asked to clarify those provisions in the Act in which the meaning is ambiguous and/or there is little or no guidance offered in the Explanatory Memorandum. While accepting the mechanism for clarification, there are competing views about what should guide the decisions. Participants are looking to international experience and past Australian decisions for guidance.

The paper suggests that overseas law and practice, and ILO standards, offer only limited assistance. For many observers, the United States is the international benchmark in understanding what good faith bargaining means in practice, and it has certainly influenced developments in Canada and New Zealand. But while influential, the US approach has not been universally accepted nor legislated. The differences in philosophy and substance between countries imply the need for great care in drawing upon experience in one country in applying it to the legislation of another.

Certainly, the major contextual differences between the US and Australia would render automatic application of US law problematic. For example, where the Australian legislation contemplates competition in bargaining representation, the US system requires that before bargaining can begin, a union must win the exclusive right to represent employees in a given bargaining unit. Winning such a right imposes quite different obligations from those in Australia. Moreover, the process of winning this right is frequently preceded by bitter and prolonged processes, the legacy of which often contaminates the bargaining process itself.

Again, although both countries base their regulation on the philosophy that bargaining is a voluntary process, they differ radically in their treatment of situations where agreement cannot be reached, and in the nature and

extent of the powers given to their relevant facilitative bodies (NLRB and FWA).

While the drafters of the Fair Work Act have clearly drawn on international experience, they have left room for the emergence of a distinctly Australian model. This recognises that legislative provisions and associated cases have evolved within their distinctive national cultures and are driven by the imperatives of those countries and the eras in which those provisions were developed. It would be misguided for any one model to be seen as 'binding' on the Australian system, and unwise for those involved in trying to operationalise the Act – employers, unions, employees, legal advisers, tribunals, courts and regulators – to become distracted by inappropriate comparisons with overseas law and practice.

Moreover, while the US good faith bargaining model is held out as the international benchmark, many of its features are undesirable. Many observers, both inside and outside the United States, regard the good faith bargaining model in that country as seriously flawed. It is, for example, widely seen as excessively complex, highly litigious and overly proceduralist, with an insufficient focus on producing timely outcomes.

It is also important to appreciate that collective bargaining in the United States applies to only a small proportion of the workforce, especially in the private sector. The legislation's impact on productivity, therefore, is limited. The situation in Australia is different: levels of union membership are significantly higher than in the US, and the terms and conditions of employment of more than half the workforce are regulated by collective agreements or awards. The potential for impact on productivity therefore is much higher. Risking the introduction of a highly complex, proceduralist and litigious system of good faith bargaining would be both antithetical to the flexibility and timeliness Australia's productivity agenda demands, and at odds with the objective of collaborative workplace relations.

### **CAN LEGISLATION ESTABLISH COLLABORATIVE AND CONSTRUCTIVE WORKPLACE RELATIONS?**

Perhaps, however, the greatest uncertainty surrounding the new legislation flows from seeking to predict how the key participants in the system will behave. For example, there is uncertainty about how the FWA itself will interpret its role, how it will use its facilitative powers and how interventionist it will be. Will it rely heavily on past precedents to re-establish its role? Will the arbitration powers reserved for extreme circumstances be used more often or, perhaps as influential, will the potential threat of those powers, coupled with the uncertainty about the key provisions, engender more cautious and traditional behaviours on the part of employers? Will the legislation actually engender the more collaborative and constructive behaviours sought?

There are at least two elements to the current debate on workplace relations behaviours. The first relates to whether the re-establishment of collective bargaining and the accompanying rights given to bargaining representatives, and unions in particular, will lead to a resurgence of past adversarial behaviours. The second is whether legislation can, or even should, promote behavioural change.

Part of the current debate in Australia is whether the Fair Work Act can, or will, promote a more collaborative, and less adversarial, industrial relations system. Those who view industrial relations as necessarily adversarial are generally sceptical about whether it is possible, or even desirable, to prescribe behaviours between parties who have conflicting interests. Others believe there are overlapping interests and point to the many other contexts in which legal obligations to act in good faith are imposed on parties with competing interests. Still others point to the impact of regulation in other areas of behaviour modification to show that it is possible to effect changed attitudes by changing behaviours.

Whether the legislation, and in particular the good faith bargaining provisions, can help achieve a more constructive workplace relations culture will take several years to assess. If successful, Australia will stand out internationally. International experience suggests that good faith bargaining obligations have little impact on workplace cultures where relations have historically been adversarial. Those who point to the more collaborative workplace relations cultures in Scandinavia or some European countries as signs of success perhaps underestimate the effect of the relatively more collectivist and consensual cultures that underpin the workplace relations systems of those countries. Much depends on the longstanding workplace relations culture and history of each country.

Unless all parties to the process are committed to the goal of collaborative workplace relations, any change in behaviour is likely to occur only over the long term. Yet it is important to remember that regulations which have constrained industrial action on the part of both employers and employees have, along with other factors, already led to a significant decline in industrial disputation. In this case the chances for long-term behavioural and attitudinal change will require that the good faith bargaining

requirements not be treated as a legislative impost to be avoided or as something to be exploited for strategic gain in the context of an adversarial approach to workplace relations, but rather, as a facilitative tool.

More importantly, however, it is essential that parties to the implementation process remember that collaborative and constructive workplace relations are a means to an end. Whether the system supports productivity improvement and jobs will be what determines the living standards of Australians.

## **CONCLUSION**

This paper has been produced by the BCA as a constructive contribution to the successful implementation of the Fair Work Act 2009.

By surveying international and previous Australian experience with good faith bargaining, we conclude that Australia needs to develop a uniquely Australian model of good faith bargaining that meets our current needs and imperatives. Key among these is ensuring that it supports our objective for international competitiveness and enhanced productivity to ensure that Australia can maintain and enhance its standards of living.

The current legislation represents a relatively sophisticated attempt to learn from past international and domestic experiences with good faith bargaining and thus, provides legislative support for collaborative workplace relations. Yet whether the Australian legislation will be successful in changing behaviours and attitudes within workplaces and the workplace relations system more generally remains to be seen. International experience would suggest that we would be unique if we achieved this through legislation alone. In the end, the real test will be whether both objectives of the Act – fairness and productivity – are achieved.



# GOOD FAITH BARGAINING UNDER THE FAIR WORK ACT – STRIKING A BALANCE

DISCUSSION PAPER FOR THE  
BUSINESS COUNCIL OF AUSTRALIA

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Good Faith Bargaining. Collective bargaining in which the parties make serious and sincere attempts to arrive at a mutually agreeable settlement.<sup>1</sup>

## SECTION 1: AN INTRODUCTION TO GOOD FAITH BARGAINING

### 1.1 INTRODUCTION

For many observers, the good faith bargaining (GFB) requirements set out in Division 8 of Part 2-4 of the *Fair Work Act 2009* (FW Act) are amongst the most confronting and confusing aspects of the regulatory regime that is put in place by that Act. The purpose of this paper is to describe, analyse and demystify the legislative requirements, and the ways in which the FW Act seeks to promote and to ensure adherence to them. In doing so, it will suggest that the GFB requirements need not be an impediment to the development and maintenance of cooperative and productive workplace arrangements, and that on the contrary, they have the potential to be of real assistance in helping to develop such arrangements. However, for that potential to be realised, the GFB requirements do need to be treated with some care. In particular, it is most important that those involved in trying to operationalise them – employers, unions, employees, legal advisers, tribunals, courts and regulators – do not become distracted by inappropriate comparisons with overseas law and practice, and do not treat them as a legislative impost to be avoided if at all possible, or, worse, to be exploited for strategic gain in the context of an adversarial ‘game’.

Section 1 briefly explores the linkages between collective bargaining and GFB. It suggests that the two are inextricably connected, and that the collective bargaining process is much more likely to yield positive results for all concerned if the parties treat the notion of GFB as a facilitative tool rather than a weapon. Section 3 then looks at what GFB actually means as both a legal and a practical concept, with particular reference to the American experience. This leads on to a discussion in Section 4 of international labour standards relating to collective bargaining and GFB. It notes that whilst various standards adopted under the auspices of the International Labour Organization (ILO) emphasise the desirability of GFB, adherence with those standards does not require that GFB be mandated by law. It also suggests that the ILO jurisprudence offers little in the way of concrete guidance as to just what does, and does not, constitute GFB.

Section 2 looks at various attempts to enshrine the principle of GFB in Australian law. It starts with section 170QK of the *Industrial Relations Act 1988* (Cth) as amended by the *Industrial Relations Reform Act 1993* (Cth) (hereafter 'section 170QK'). It suggests that this was a limited measure from its inception, and was almost entirely marginalised by the narrow interpretation accorded to it by the Full Bench of the Australian Industrial Relations Commission (AIRC) in the *Asahi Case*.<sup>2</sup> It notes that section 170QK was repealed at the initiative of the Howard Government in 1996 and that it was not replaced until the enactment of Division 8 of the FW Act. However, Section 2 also shows that the concept of GFB did not entirely disappear from view in the period between 1996 and 2009. It then goes on to outline various largely unsuccessful attempts to give legislative effect to the GFB principle at the state level. This paves the way for a detailed description in Section 3 of the GFB requirements that are set out in Division 8 and the various techniques that have been adopted to encourage and (to a degree) impel adherence to them.

Section 4 then looks at what would be involved in giving effect to the requirements of Division 8 in practice. It starts with a discussion of the relevance of overseas law and practice in this context. It suggests that whilst such experience can be helpful on occasion, there are so many fundamental contextual differences between (say) the United States and Canada on the one hand and Australia on the other that it is necessary to exercise extreme caution in drawing upon experience in those countries in applying Division 8. Section 4 then proceeds to examine the practical implications of each of the GFB requirements set out in section 228(1) of the FW Act, and the qualifiers in section 228(2). In doing so, it draws upon the limited case law that has emerged in the months since Division 8 became operative on 1 July 2009.

The good faith bargaining provisions have the potential to make a positive contribution to the development of more cooperative industrial relations in Australia – but history does not provide great cause for optimism in this regard

Section 5 considers the GFB requirements in a broader perspective, and makes a preliminary attempt to assess their likely impact. It suggests that they do have the potential to make a positive contribution to the development of more cooperative industrial relations in Australia, with consequential benefits for all concerned. However, it also cautions that history does not provide great cause for optimism in this regard – not least because realisation of the potential of Division 8 requires levels of commitment (in terms of time, resources and conviction) on the part of employers, unions and government that, judging by past experience, are unlikely to be forthcoming. The fact remains, however, that Division 8 does constitute a generally sophisticated and balanced approach to the GFB issue that deserves to, and could, enjoy at least a modest level of success.

## 1.2. COLLECTIVE BARGAINING AND THE RATIONALE FOR GOOD FAITH BARGAINING

All developed countries have, with varying degrees of enthusiasm, endorsed the legitimacy of the regulation of terms and conditions of employment through collective bargaining. Many of them – including Canada, Japan, Luxembourg, New Zealand, South Africa, South Korea, Spain, the United States of America, and Australia – also require that those who engage in the bargaining process do so 'in good faith'.<sup>3</sup>

The Committee on Freedom of Association of the Governing Body of the ILO (CFA) has also endorsed the principle of GFB:

It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.<sup>4</sup>

Although there is widespread acceptance of the desirability of GFB, there is rather less agreement as to what the concept actually means, or as to whether it can and should be legally mandated. The principal

objections to mandating GFB are: first, that it is unrealistic to expect parties whose interests are fundamentally opposed to negotiate with each other in good faith; and second, that it is neither possible nor desirable legally to prescribe attitudes.

On an adversarial view of the industrial process, there is some substance to the first proposition. However, it must be recognised that there are many contexts in which the law requires parties whose interests may be opposed to act in good faith towards each other:

As a juridical concept, 'good faith' is frequently and flexibly used as a touchstone to define expected standards of behaviour. Company directors must act in good faith and in the best interests of their corporation; governmental decision-makers must exercise their administrative powers in good faith; mortgagees must exercise their power of sale in good faith; parties to commercial contracts are (arguably) required to perform their contractual obligations in good faith; parties to native title future act negotiations must negotiate in good faith.<sup>5</sup>

In addition, there is increasing, but not universal, acceptance in common law jurisdictions that there is an implied term in all contracts of employment to the effect that the parties will not behave in a manner that is inconsistent with a mutual duty of trust and confidence. This in turn is seen to be derived, at least in part, from 'a developing private law notion of a requirement of good faith in some forms of contract'.<sup>6</sup> There is a clear logic in saying that the duty of trust and confidence between employer and employee should also extend to negotiations between the employer and the employee's bargaining representative as to the terms and conditions under which the employee will work.

There is also a clear logic in the proposition that if parties become accustomed to acting in good faith towards each other, they may come to adopt a less adversarial approach to the bargaining process as a whole. They may, for example, become more receptive to the notion of 'interest-based' negotiations,<sup>7</sup> rather than the more adversarial approach that has traditionally characterised collective bargaining in countries like Australia and the United States. The distinction between adversarial and consensual bargaining was neatly captured by the distinguished American jurist, Clyde Summers when comparing the United States and Swedish approaches to collective bargaining:

In Sweden employers and unions have historically accepted each other as social partners and viewed collective bargaining as a collaborative process of developing mutually acceptable and socially responsible solutions.

In the United States unions and employers have historically viewed each other as antagonists, with employers denouncing unionisation and opposing collective bargaining. Negotiations when they occur are viewed as confrontations between hostile forces, prepared to do economic battle.<sup>8</sup>

The possibility of effecting a shift away from the adversarial approach that has traditionally characterised both the American and Australian systems towards a more consensual Swedish-type approach also goes some way to lessening the 'prescription of attitudes' objection to a mandated duty of GFB. It can readily be conceded that it is impossible by legislative diktat to tell people how to think, but (within reasonable bounds) it *is* possible to regulate their behaviour. That is what statutory GFB standards do when they mandate the processes to which the parties must adhere when engaging in collective bargaining. Ideally, this would in due course give rise to a genuine commitment to GFB, but at the very least it ought to ensure that bargaining participants no longer behave in a manner that betokens bad faith.<sup>9</sup> This is, of course, an important part of the rationale for the anti-discrimination legislation that has been adopted in all developed countries over the last thirty years.

### 1.3 WHAT IS GOOD FAITH BARGAINING?

Assuming acceptance of the premise that it is appropriate to mandate GFB in some form, it is, of course, important to provide clear guidance as to just what GFB entails. As McCarry has pertinently observed (1993: 37) 'a requirement to bargain in good faith is, without a great deal more, an invitation to legalism.' On the other hand, attempts to spell out GFB requirements in too much detail can also be a recipe for legalism. The history of section 8(d) of the *National Labor Relations Act 1935* (US) (NLRA) is a case in point.<sup>10</sup>

Section 8(a)(5) of the NLRA provides that it is an 'unfair labor practice' (ULP) for an employer 'to refuse to bargain collectively with the representatives of his employees', whilst section 8(d) states that:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

If parties become accustomed to acting in good faith towards each other, they may come to adopt a less adversarial approach to the bargaining process as a whole

This provision was inserted in the NLRA by the *Taft-Hartley Act 1947*, and was inspired by concerns that over-powerful unions were presenting employers (especially small to medium-sized businesses) with draft agreements on a 'take-it-or-leave-it' basis, without any preparedness to negotiate as to the content of the agreement. Over the years, it has indeed proved to be 'a recipe for legalism'. As such, it has generated a 'labyrinthine jurisprudence'<sup>11</sup> which is of such a character as to have rendered to the GFB requirement 'fairly meaningless'.<sup>12</sup> For example, both the National Labour Relations Board (NLRB) and the Supreme Court of the United States have expended much time and effort in dealing with issues such as:

... what is meant by good faith; what subjects are mandatory for bargaining, what are merely permissive and what are illegal; are unilateral changes during bargaining on mandatory subjects a refusal to bargain; what of a strike initiated without the required notice; can an employer by-pass the recognised representative of the workers and bargain direct with them; will 'surface bargaining' be enough and in any case how is it identified; must there be a willingness to compromise; if so, how is it to be reconciled with the statement in the Act that there is no obligation to compromise; may conditions be imposed on bargaining, and what of delaying tactics and so on.<sup>13</sup>

For all its limitations, section 8(d) of the NLRA and its associated jurisprudence has become the benchmark for legislated GFB requirements in many developed countries, including Canada,<sup>14</sup> New Zealand<sup>15</sup> and Australia.<sup>16</sup> In essence, the United States jurisprudence can be seen to require that the parties:

- have an open mind and a sincere desire to reach an agreement;
- evince a preparedness to 'engage sincerely in rational and informed discussion';<sup>17</sup>
- agree to meet at reasonable times and places;
- invest those involved in the bargaining process with sufficient authority to engage in meaningful negotiations;
- provide such information as is reasonably necessary to enable the other party to formulate their proposals and counter-proposals, and to respond to the positions put by the other party;

- be prepared to compromise, notwithstanding that there is no obligation to make concessions;
- recognise that the other party is entitled to reject any terms that they consider unreasonable;
- put reasoned proposals and counter-proposals;
- consider and respond to proposals and counter-proposals put by the other party;
- not engage in 'surface bargaining', whilst recognising that it is permissible to engage in 'hard bargaining' (including by taking industrial action) without breaching GFB requirements;
- not behave in a manner calculated to frustrate the bargaining process, for example by failing to attend meetings, putting fresh demands on the table at a late stage in negotiations, reneging on agreements already reached, dismissing or otherwise victimising those involved in the bargaining process;
- not seek to undermine the bargaining authority of the other party by seeking to negotiate directly with the persons whom that party represents whilst collective bargaining is ongoing;
- not unilaterally implement changes to terms and conditions of employment whilst negotiations are ongoing; and
- not refuse to conclude a written agreement ('contract' in US parlance) when negotiations are at an end, and agreement has been reached on all matters that were at issue.<sup>18</sup>

It is significant that all of the indicia of good faith derived from the United States jurisprudence are procedural in character. In other words, they have nothing to say about the outcome of the bargaining process. The substance of any agreement that may be reached is for the parties to determine, and there is no ULP if the parties, having negotiated in good faith, fail to reach agreement. Indeed, if the parties have bargained to an impasse the employer is free unilaterally to implement changes to terms and conditions of employment, so long as they are not less favourable than the last position put by the employer in the negotiations.<sup>19</sup>

This provides an interesting contrast with the position under section 33 of the New Zealand *Employment Relations Act 2000* which, following amendments in 2004, requires that the parties to a collective negotiation conclude an agreement unless there is a 'genuine reason, based on reasonable grounds' not to do so. Furthermore, the Employment Relations Authority (ERA) has the capacity both to facilitate agreement-making, including by making non-binding public recommendations, and, in the final analysis, to make binding determinations fixing the terms of an agreement. This last power amounts to the imposition of an arbitrated outcome, but can be exercised

only in the circumstances set out in section 50J(3) of the Act, namely where:

- (b) a breach of the duty of good faith in section 4 –
  - (i) has occurred in relation to the bargaining; and
  - (ii) was sufficiently serious and sustained as to significantly undermine the bargaining; and
- (c) all other reasonable alternatives for reaching agreement have been exhausted; and
- (d) fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.

#### 1.4 GOOD FAITH BARGAINING AND THE ILO

Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (No. 98) states that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

This obligation is binding upon Australia both by virtue of the fact that this country ratified Convention No. 98 in 1973, and the fact that the principles enshrined in Article 4 are taken to be part of the principles of freedom of association which all member-states of the ILO are obliged to respect by virtue of the fact of membership.<sup>20</sup>

Article 4 is the reference point for ILO jurisprudence on collective bargaining. It was, for example, the basis upon which the New Zealand *Employment Contracts Act 1991* and the provisions of the *Workplace Relations Act 1996* concerning Australian Workplace Agreements were found to be incompatible with ILO standards because they enabled individual agreements to displace collectively agreed outcomes.<sup>21</sup>

There are two features of Article 4 that are of particular relevance in the present context. First, it is clear that this Article is directed to the *voluntary* negotiation of terms and conditions of employment. It is, therefore, inconsistent with the requirements of Article 4 for parties to be required to engage in collective bargaining against their wishes. In general, it is also inconsistent with Article 4 for outcomes to be imposed upon parties who have been unable to reach agreement; and for the public authorities to interfere with the outcomes agreed by the parties. All three of these interventions are regarded as incompatible both with the voluntary character of bargaining and with the autonomy of the parties, which is also guaranteed by Article 4. That proposition is, however, subject to qualification in certain circumstances – for example, the supervisory bodies have recognised that it may be appropriate to impose an arbitrated outcome upon parties where they are

negotiating for their first agreement,<sup>22</sup> and that it may be permissible to interfere with bargaining outcomes at times of acute national crisis.

Secondly, it is important to appreciate that Article 4 is silent as to the question of whether the parties should bargain in good faith. As noted earlier, both the Committee on Freedom of Association and the Committee of Experts have emphasised the desirability of doing so. But they have not gone so far as to suggest that compliance with Convention No. 98 positively requires that national law and practice mandate GFB. This reflects the fact that the collective bargaining that is contemplated by Article 4 must be voluntary in character. That requires that the parties should be able to elect to adopt whatever bargaining positions and practices they chose (so long as they are not otherwise unlawful) – even if that means that they are bargaining in bad faith. However, a logical corollary of this is that the parties must have the capacity to take industrial action to try to force the other side to negotiate in good faith.

It might be argued that a failure on the part of a member-state to prohibit bad faith bargaining constitutes a failure to take appropriate measures to promote voluntary negotiation as required by Article 4, but this line of reasoning does not appear to have found favour with any of the supervisory bodies up to now.<sup>23</sup> Instead, they limit themselves to general statements of principles such as that quoted at 1.2 above, and that:

Both employers and trade unions should bargain in good faith and make every effort to come to an agreement, and satisfactory labour relations depend primarily on the attitudes of the parties towards each other and on their mutual confidence.

The principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means that any unjustified delay in the holding of negotiations should be avoided.

While the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith making every effort to reach agreement.

Agreements should be binding on the parties.

Collective bargaining implies both a give-and-take process and a reasonable certainty that negotiated agreements will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members...<sup>24</sup>

All other ILO standard-setting instruments concerning collective bargaining are equally silent on the GFB issue. Interestingly, the Conference Committee which had responsibility for the detailed examination of the Collective Bargaining Convention 1981 (No. 154) and its accompanying Recommendation (No. 163), recognised that ‘collective bargaining could only function effectively if it was conducted in good faith by both parties’ and ‘emphasised the fact that good faith could not be imposed by law, but could only be achieved as a result of the voluntary and persistent efforts of both parties’.<sup>25</sup> The fact that the Conference Committee proceeded on the basis of these assumptions may help explain the fact that the Convention not only does not mandate good faith bargaining, it does not even mention it.<sup>26</sup> Accompanying Recommendation No. 163 is also silent on the GFB issue, but does endorse a number of measures that can properly be seen to be supportive of GFB.<sup>27</sup> These include:

- the taking of measures to ensure that representative organisations of employers and workers are recognised for the purposes of collective bargaining (Para 3(a));
- that measures be taken to ensure that negotiators have access to appropriate training, and that the public authorities should assist in providing such training when requested to do so (Para 5(1), (2));
- that ‘parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations’ (Para 6);
- that ‘measures adapted to national conditions should be taken, if necessary, so that parties have access to the information required for meaningful negotiations’ (Para 7(1)); and
- that ‘measures adapted to national conditions should be taken, if necessary, so that the procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves ...’ (Para 8).

It is clear, therefore, that ILO standards do not mandate GFB, even though the supervisory bodies clearly consider that parties *ought* to negotiate in good faith, and have expressly endorsed a number of elements of GFB in the sense described in Section 3 of this paper. It follows that compliance with Australia’s international obligations does not require that GFB be mandated by law. However, it would also appear that it is not necessarily inconsistent with those obligations if GFB *is* mandated, so long as the relevant requirements are not of such a character as to deprive collective bargaining of its voluntary character. This means, for example, that bargaining outcomes can be imposed on parties who have failed to reach agreement despite bargaining in good faith only in exceptional circumstances – such as Canadian-style first contract arbitration. It is equally clear that the views of the supervisory bodies can properly be taken into account by Australian courts and tribunals in interpreting legislative provisions relating to GFB – bearing in mind that those pronouncements are couched in such general terms as to be of only very limited practical relevance.

## SECTION 2: GOOD FAITH BARGAINING IN AUSTRALIA

### 2.1 THE INDUSTRIAL RELATIONS REFORM ACT 1993

The Keating Government's *Industrial Relations Reform Act 1993* contained a number of provisions which have, as developed and refined over subsequent years, profoundly changed the shape of Australian industrial relations.<sup>28</sup> Of particular relevance for present purposes was the decisive shift away from regulation of terms and conditions of employment through centralised processes of conciliation and arbitration in favour of collective bargaining at the level of the enterprise. As part of this shift, the legislation for the first time at federal level recognised a limited capacity for employers and workers lawfully to take industrial action in the course of collective bargaining. It also included the first statutory recognition of GFB, in the form of what became section 170QK of the *Industrial Relations Act 1988*.

Section 170QK(2) enabled the newly-established Bargaining Division of the AIRC to make orders under its general powers in section 111(1)(t) of the 1988 Act for the purpose of:

- (a) ensuring that the parties negotiating an agreement under this Part [VIB] do so in good faith; or
- (b) promoting the efficient conduct of negotiations for such an agreement; or
- (c) otherwise facilitating the making of such an agreement.

The subsection went on to stipulate that for these purposes the Commission could 'order a party to take, or refrain from taking, specified action'.

Section 170QK(3), meanwhile, provided that:

In deciding what orders (if any) to make, the Commission:

- (a) must consider the conduct of each of the parties to the negotiations, in particular, whether the party concerned has:
  - (i) agreed to meet at reasonable times proposed by another party; or
  - (ii) attended meetings that the party had agreed to attend; or
  - (iii) complied with negotiating procedures agreed to by the parties; or
  - (iv) capriciously added or withdrawn items for negotiation; or
  - (v) disclosed relevant information as appropriate for the purposes of the negotiations; or

- (vi) refused or failed to negotiate with one or more of the parties; or
  - (vii) in or in connection with the negotiations, contravened section 170RB [which dealt with the representation of employees by trade union officials] by refusing or failing to negotiate with a person who is entitled under that section to represent an employee; and
- (b) may consider:
- (i) proposed conduct of any of the parties ... [including in relation to an industrial dispute]; and
  - (ii) any other relevant matter.

Section 170QK remained on the statute book for just three years, before being repealed as part of the changes effected by the Howard Government's *Workplace Relations and Other Legislation Amendment Act 1996* (WROLAA). In the few matters that came before the Commission concerning the GFB requirement, the tribunal adopted a generally cautious approach to the powers vested in it by section 170QK. For example, in the *ABC Case*<sup>29</sup> a Full Bench of the Commission determined that in the normal run of events it would make orders under this section only in relation to procedural matters – it would not, in other words, take account of the positions the parties adopted in relation to substantive issues in the course of the negotiations. This appears to take an unnecessarily restrictive view of the powers of the Commission in light of the fact that section 170QK(3)(b)(ii) expressly provided that the Commission could take account of 'any other matter' it considered appropriate in deciding whether to make orders, or in framing any orders it chose to make. As against that, the Commission in the *ABC Case* did take a fairly expansive view of its powers in determining that the taking of protected industrial action whilst negotiations were on foot did not constitute a failure to bargain in good faith.

The Industrial Relations Reform Act 1993 contained the first statutory recognition of good faith bargaining in Australian history

The Commission also adopted a restrictive view of its powers in the *Asahi Case* in 1995.<sup>30</sup> This was treated as a test case as to the powers of the Commission under section 170QK. It arose out of an attempt by the AFMEU to obtain an order requiring Asahi Diamond to negotiate with it. The Union had no members employed at Asahi, and despite repeated attempts to do so, had been unable to persuade any of the Company's employees to join. Its attempt to negotiate with Asahi was part of a pattern bargaining exercise involving some 3,000 employers throughout New South Wales. In December 1994, Hodder C granted an order which required that the Company 'negotiate in good faith with the AFMEU'.<sup>31</sup> This decision excited a great deal of public interest, and was viewed with considerable alarm by business groups, several of whom (including the BCA) made submissions to the Full Bench on appeal.<sup>32</sup>

The decision of Hodder C was reversed by a Full Bench of the Commission in March 1995. In doing so the Full Bench determined that the Commission lacked jurisdiction to order parties to negotiate in good faith, and that even if the Commission did have power to make such an order, Hodder C had improperly exercised his discretion in making the order that he did.

In reaching its conclusions, the Full Bench had this to say about the way in which it should approach its power to make orders under section 170QK:

... the Commission must balance, on the one hand, the intention underpinning the general [statutory] object that the parties should assume greater responsibility for handling their own industrial relations affairs, and, on the other hand, its own role under Part VIB of facilitating the making and encouraging the use of agreements. In our view a consequence of the need to balance these considerations is that the Commission should adopt a cautious approach in exercising its discretion to make orders pertaining to the bargaining process.<sup>33</sup>

As to its specific finding that the Commission lacked the power to order parties to negotiate, the Full Bench identified two reasons for arriving at the conclusion that it had:

[First] ... in our view, the industrial relations system provided by the Act is one which facilitates and encourages direct bargaining underpinned by an effective award safety net. It is not a system of compulsory negotiation.<sup>34</sup>

And

The second reason for our view that the Commission cannot order a person to negotiate flows from the meaning of the word 'negotiate'. An agreement is normally preceded by negotiation. Negotiation normally involves the making of concessions so as to achieve an agreement. The Commission has no power to order a negotiating party to make a concession.<sup>35</sup>

The Full Bench did, however, determine that it would have been open to the Commission to order the parties 'to meet or to confer', since such an order 'does not include the essential element implicit in an order to negotiate; namely that concessions be made'.

A number of commentators have pointed out that this line of reasoning proceeds from a misreading of the word 'negotiate':

... this appears to be a terribly odd linguistic distinction, and it gives an extremely limited reading of the sorts of orders able to be granted under section 170QK. It is of interest that most dictionary definitions of 'negotiate' contain no reference to the fact that it implies the making of concessions. Most definitions, interestingly enough, suggest that the word 'negotiate' means 'to confer ... (with another) for the purpose of arranging some matter by mutual agreement' [emphasis in original].<sup>36</sup>

It can readily be conceded that the orders made by Hodder C in *Asahi* involved an inappropriate use of the Commission's discretion, especially in light of the fact that the AFMEU had no members at the Company, and had not tried to commence negotiations with the Company beyond serving claims upon it. However, it would have been perfectly possible for the Full Bench to have arrived at that conclusion, and to have adopted a conservative approach to making orders in reliance upon section 170QK, without emasculating the capacity to make more 'aggressive' orders in appropriate circumstances. By adopting the approach that it did, the Full Bench rendered section 170QK largely ineffectual – as reflected in the fact that there appear to have been very few applications for orders in reliance upon that provision after March 1995.

Before leaving section 170QK, it is worth noting that in one of the other cases to which that provision gave rise, Hancock SDP provided a particularly helpful indication of what he thought GFB required:

Bargaining in good faith does not require a willingness to make concessions. It is consistent with adopting a hard line. Equally it does not imply moderation of demands. It does imply a preparedness to consider seriously offers and proposals made by the other side and to take account of arguments: but if, having done these things, a bargaining party is unmoved, it may still be bargaining in good faith. The inability of parties to reach an agreement is not evidence that either is acting in bad faith. The adoption of a hard line or the making of extravagant demands may evince an underlying intention of obstructing agreement. This tactic would constitute bad faith, but in few cases, if any, could its existence be inferred from the bargaining stance alone.<sup>37</sup>

As noted earlier, section 170QK was repealed as part of the Howard Government's first wave of industrial reforms in 1996, and from that point until the commencement of Part 2-4 of the *Fair Work Act 2009* (FW Act) on 1 July 2009, federal industrial legislation did not contain any express reference to GFB. However, that does not mean that the GFB issue had entirely disappeared from the radar:

- whilst in opposition, the ALP made a number of unsuccessful attempts to reintroduce a new version of section 170QK, either in the form of amendments to the 1996 Act, or through amendments to government legislative proposals;<sup>38</sup>
- in 2003 the Royal Commission into the Building and Construction Industry (Cole Commission) recommended the introduction of a statutory obligation to bargain in good faith in the building and construction industry.<sup>39</sup> This recommendation did not commend itself to the Howard Government;
- several members of the AIRC took the view that the collective bargaining provisions of the *Workplace Relations Act 1996* in both its pre- and post-Work Choices incarnations imposed an implied duty to bargain in good faith. This suggestion was decisively rejected by a Full Bench of the Commission in *Sensis Pty Ltd v Community and Public Sector Union*,<sup>40</sup> although a subsequent decision of the Full Court of the Federal Court<sup>41</sup> did recognise 'an essential element of GFB – a party's right to choose who it wants to be represented by, and to have that representative recognised by the other party'.<sup>42</sup>
- section 170PO(1)(a) of the *Industrial Relations Act 1988*, as amended by the 1993 Act, provided that the Commission could suspend or terminate a bargaining period (thereby depriving any industrial action pertaining to that bargaining period of its protected status) if a party that 'has organised or is organising, or has taken' industrial action was 'not genuinely trying to reach agreement with the other negotiating parties'. All subsequent versions of the legislation have contained provisions to similar effect.<sup>43</sup> Over the years, these provisions have given rise to a substantial body of decisions that 'taken together ... could be said to amount to a "code" of what constitutes fair (or unfair) bargaining practices under the ... [Work Choices] ... legislative framework' and 'which may also provide some guidance on the operation of the GFB obligations' now set out in the FW Act.<sup>44</sup>

## 2.2 GFB IN THE STATE SYSTEMS

### 2.2.1 New South Wales

The first statutory endorsement of GFB in any Australian jurisdiction was provided by section 352(1) of the *Industrial Relations Act 1991* (NSW), which stipulated that 'persons who engage in negotiations with respect to industrial matters are required to act in good faith'. According to Shaw (1996: 8), 'the section then requires the [State] commission to take into account the extent to which the requirement to act in good faith has been observed when the commission is exercising its functions', but subject to the qualification set out in section 352(3) to the effect that section 352 'is not intended to create an offence or to render any award, order or other decision void or voidable'. This meant that the GFB obligation was largely unenforceable in practice.

The GFB obligation was recast in 1996 so that the New South Wales Industrial Relations Commission was enabled to 'make recommendations or give directions to the parties to bargain in good faith', and to take account of whether the parties had negotiated in good faith in the course of dealing with industrial disputes.<sup>45</sup> This provision, like its 1991 predecessors, appears to have had only very limited practical impact.

### 2.2.2 Queensland

Section 146 of the *Industrial Relations Act 1999* (Qld) requires parties to enterprise bargaining to do so in good faith. This is said to include agreeing to meet at reasonable times, and disclosing information that is relevant to the negotiations. Like its counterpart in New South Wales, it appears to have had only a very limited practical impact, other than in the public sector.<sup>46</sup>

### 2.2.3 South Australia

Section 76A of the *Fair Work Act 1994* (SA) requires participants in the bargaining process to engage in 'best endeavours bargaining', which includes:

- (a) meeting at reasonable times and places to negotiate;
- (b) explaining their positions;
- (c) disclosing relevant and necessary information;
- (d) acting openly and honestly;
- (e) not 'capriciously' adding or excluding issues from the negotiations;
- (f) adhering to agreed procedures
- (g) adhering also to agreed outcomes and commitments; and
- (h) meeting their own timetables.

As with the New South Wales provision, section 76A appears to have generated little by way of case law, and to have had little practical impact.

#### 2.2.4 Western Australia

The most developed GFB provisions in the state systems are to be found in Division 2B of the *Industrial Relations Act 1979* (WA). These provisions were inserted in 2002 as part of a conscious attempt by the Gallop Government to shift the focus of the state system away from individual agreement-making in favour of collective bargaining. As such, they were strenuously opposed by business groups, one of which castigated the changes as constituting a return to a system of 'inflexible and unproductive workplace relations' 'dominated by adversarial relationships and with the involvement of third parties unconnected to the workplace'.<sup>47</sup>

The key elements of the regime established by Division 2B were summarised by Ford (2004: para 14) in the following terms:

Section 42B of the Act deals with the obligation of parties in collective bargaining. It provides, in part, that 'When bargaining for an industrial agreement, a negotiating party *shall* bargain in good faith'. Strictly speaking, therefore, the duty that is imposed by section 42B only arises once bargaining has commenced. It does not in terms oblige parties to engage in that process, rather it simply requires them when bargaining to do so in good faith. The approach taken by the section is to identify expressly a number of the more important elements of good faith and in effect mandate their observance. Should such bargaining between negotiating parties nevertheless stall and/or impasse ensue, the WAIRC, on application by a party who has bargained in good faith, may declare that bargaining between the parties has ended, but only if the tribunal reaches the conclusion that 'there is no reasonable prospect of the negotiating parties reaching agreement'. The Commission may then proceed, again on application, to make an enterprise order 'providing for any matter that might otherwise be provided for in an industrial agreement'. Once made that instrument continues to govern relations between the parties bound by it for up to two years or until replaced by a subsequent industrial agreement or award, or a new enterprise order.

This is clearly a potentially far-reaching power in that it does envisage the imposition of what is in effect an arbitrated outcome upon parties who have been unwilling or unable to negotiate to agreement. On the other hand, it is important to bear in mind that the legislation does not oblige the parties to negotiate in the first place, the GFB obligation arises only if and when negotiations have commenced. It is also important to note that there is no provision for the taking of protected industrial action under the 1979 Act, which means that bargaining parties do not have the capacity lawfully to respond to obdurate or unreasonable behaviour by the other party by recourse to industrial action. In a sense, therefore, the possibility of obtaining enterprise orders can be seen to be intended to serve as a substitute for the capacity lawfully to take industrial action.

In a submission to a 2004 review of the legislation the Chamber of Commerce and Industry of Western Australia asserted that:

The effect of these provisions has been to coerce employers into collective bargaining through the threat of arbitrated enterprise orders rather than promoting genuine bargaining based on good will. These provisions call into question the notion of genuine agreement making as being a process in which both parties voluntarily reach agreement on industrial matters.<sup>48</sup>

Whilst it is possible that the mere existence of Division 2B could have had the coercive effects suggested by the CCI, it is certainly the case that Division 2B has generated very little activity in the Western Australian Industrial Relations Commission.<sup>49</sup> It remains to be seen whether it will survive the review of the 1979 Act that has been initiated by the Barnett Government, and which is expected to report in the early part of 2010.

## SECTION 3: GOOD FAITH BARGAINING UNDER THE FAIR WORK ACT

### 3.1 OBJECTS

That GFB is central to the scheme of the FW Act is clear from section 3(f), which provides that one of the ways in which the legislation is to achieve its object of providing 'a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians' is by:

Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

The centrality of the concept to the scheme of the Act is further articulated in section 171, which sets out the objects of Part 2-4:

The objects of this Part are:

- (a) 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; and
- (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
  - (i) making bargaining orders; and
  - (ii) dealing with disputes where the bargaining representatives request assistance; and
  - (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay.

### 3.2 THE GOOD FAITH REQUIREMENTS

The concept of GFB is elaborated upon in section 228(1) of the FW Act:

The following are the *good faith bargaining requirements* that a bargaining representative for an enterprise agreement must meet:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by bargaining representatives for the agreement in a timely manner;
- (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

- (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (f) recognising and bargaining with the other bargaining representatives for the agreement.

These precepts are subject to the qualification set out in section 228(2):

The good faith bargaining requirements do not require:

- (a) a bargaining representative to make concessions during bargaining for the agreement; or
- (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

The section 228(1) requirements clearly cover much of the same ground as section 170QK, albeit with some significant changes of emphasis. As such, they are very much concerned with the bargaining process, and quite explicitly do not require the making of concessions or the conclusion of an agreement.<sup>50</sup>

Amongst the most significant of the shifts of emphasis between 1993 and 2009 is the requirement to refrain from 'capricious or unfair conduct that undermines freedom of association or collective bargaining'. This is clearly significantly broader than the reference to capricious addition or withdrawal of items for negotiation referred to in the former section 170QK(3)(a)(iv). Similarly, the requirement to respond to proposals made by other bargaining representatives, to give genuine consideration to the proposals of other representatives, and providing reasons for responses to proposals, seem to be rather more far reaching than the reference to refusal or failure to negotiate in section 170QK(3)(a)(vi).

On the other hand, the reference to disclosure of information in section 170QK(3)(a)(v) might be said to be wider than the requirement in section 228(1)(b) by reason of the fact that it is not qualified by any reference to 'confidential or commercially sensitive information' – although it seems reasonable to suppose that information would not have been regarded as 'relevant' or 'appropriate' for purposes of the 1993 provision if the AIRC considered that it was confidential or commercially sensitive. It should also be noted that there is nothing in section 228 that is as open-ended as the former section 170QK(3)(b)(ii), which, it will be recalled, gave the AIRC the capacity to have regard to 'any other relevant matter' in deciding what, if any, orders to make in reliance upon section 170QK.

Perhaps the most important difference between the approaches to GFB adopted by section 170QK and the FW Act derives from the fact that section 170QK enabled the Commission only to make orders requiring the parties 'to take, or refrain from taking, specified action' for the purpose of ensuring that the 'parties negotiating for an agreement ... do so in good faith', with the matters set

out in section 170QK(3) providing guidance as to what would constitute good faith in that context. Section 228(1) on the other hand, positively requires that a bargaining representative for an agreement meet the good faith bargaining requirements, and gives bargaining representatives who consider that other bargaining representatives are not meeting those requirements a number of options to try to remedy the situation.

It must be emphasised that the obligation to meet the GFB requirements arises only once bargaining has commenced, as was the case under the 1988 Act. The critical difference is that under the FW Act the requirement to bargain in good faith derives from the statute itself rather than an *ex post facto* decision of the tribunal, as was the case under section 170QK. Furthermore, as will appear presently, the fact that a bargaining representative can apply for a Majority Support Determination (MSD), and for any such determination to have the potential to trigger an application for a Bargaining Order (BO), means that under the FW Act bargaining representatives have the capacity to ensure that bargaining does in fact commence. They do not, however, have the capacity to ensure that it results in a concluded agreement.

### **3.3 FAILURE TO OBSERVE THE GOOD FAITH BARGAINING REQUIREMENTS**

Failure to observe the GFB requirements is not unlawful in itself. This means that such failure does not render the defaulting party liable to a monetary penalty, and could not form the basis for the issue of injunctions or the award of compensation. However, as will appear presently, failure to observe the requirements can provide the basis for the making of orders, breach of which could indeed lead to the imposition of penalties etc., and eventually to the imposition of an arbitrated outcome in the form of a bargaining related workplace determination (BRWD). First, however, it is necessary to say something about the facilitative role of FWA in the context of GFB.

#### **3.3.1 FWA and Facilitating GFB**

It is of the essence of voluntary collective bargaining that the parties should try to reach their own agreement in their own way – operating within the framework established by the relevant industrial legislation, and by the general law. This is true of all legal systems, although there are clearly significant differences as to the form and content of the legal framework from country to country. Inevitably, however, there will be circumstances where the parties are unwilling or unable to reach an agreed outcome, and it is here that the facilitative role of third parties may come into play.

In the United States this role is performed by the Federal Mediation and Conciliation Service (FMCS).<sup>51</sup> In Canada, it is performed by Provincial Labor Relations Boards, in New Zealand by the ERA, and in Australia by FWA.

## **Employers and unions need to learn how to make constructive use of the services of Fair Work Australia**

Section 240(1) of the FW Act provides that:

A bargaining representative for a proposed enterprise agreement may apply to FWA for FWA to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

Once a dispute has been referred to FWA in reliance upon this provision, FWA can then proceed to deal with the dispute ‘as it considers appropriate’, including by mediation or conciliation and/or ‘by making a recommendation or expressing an opinion’.<sup>52</sup> In doing so, FWA may exercise any of the powers vested in it by Subdivision B of Division 3 of Part 5-1 of the FW Act. This can include requiring persons to attend before FWA; inviting written or oral submissions; taking evidence under oath; requiring production of documents; conducting inquiries; commissioning research; conducting conferences; and holding (public or private) hearings.<sup>53</sup> There are, however, two things that FWA cannot do: first, it cannot exercise its section 240 powers of its own motion,<sup>54</sup> the dispute must be referred to it by a bargaining representative;<sup>55</sup> and second, it cannot arbitrate other than with the agreement of all parties.<sup>56</sup>

These provisions relate to bargaining disputes in general, not just to those relating to alleged failure to meet the GFB requirements. However, they clearly provide negotiating parties with a way to clarify just what it is necessary to do to meet GFB requirements, and also to help defuse disputes in relation to those requirements. This in turn means that FWA has the capacity significantly to shape the GFB requirements – especially through its recommendations and ‘expressions of opinion’. This provides both opportunities and challenges for all participants in the bargaining process. In particular, employers and unions need to learn how to make constructive use of the services of FWA in terms of the extent to which they refer disputes to it, the submissions they put, and their preparedness to respect the recommendations and expressions of opinion that emanate from it. FWA for its part needs to ensure that it exercises its powers in a pragmatic and non-legalistic manner that not only serves the interests of the parties, but that promotes the objectives of the legislation in general, and Part 2-4 in particular.

### 3.3.2 Majority Support Determinations

The FW Act does not, in express terms, require employers to engage in collective bargaining with their employees or their representatives. However, it does require an employer who agrees to, or initiates, bargaining for an enterprise agreement to take all reasonable steps to notify employees who will be covered by the proposed agreement of their right to be represented by a bargaining representative of their choice in the bargaining process.<sup>57</sup> The Act further provides that a trade union to which an employee belongs is the bargaining representative for that employee unless he or she has appointed another person or entity to be their bargaining representative, or has revoked the authority of the union in writing.<sup>58</sup>

The FW Act does not expressly provide for employee or union-initiated collective bargaining. However, it clearly contemplates that employees and/or unions as their bargaining representative may in fact make the first moves in the bargaining process. It also contemplates that in some circumstances employers may not be prepared to bargain with a union, or with anyone else.

Where this happens, section 236 of the FW Act enables the bargaining representative of an employee to apply to FWA for an MSD. Such determinations are to the effect that 'a majority of the employees who will be covered by the agreement want to bargain with the employer ... that will be covered by the agreement'. It is highly likely that applications would be made by trade unions, and according to section 237(1), FWA must make an MSD if it is satisfied of the matters set out in section 237(2):

- (a) a majority of the employees:
  - (i) who are employed by the employer or employers at a time determined by FWA; and
  - (ii) who will be covered by the agreement;

want to bargain; and

- (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and
- (c) that the group of employees who will be covered by the agreement was fairly chosen; and
- (d) it is reasonable in all the circumstances to make the determination.<sup>59</sup>

FWA can use any method it considers appropriate in working out whether a majority of employees want to bargain.<sup>60</sup> Once the MSD is made then the GFB requirements will be activated. As will appear presently, failure to meet the requirements can provide the basis for the making of a Bargaining Order (BO) under section 230 of the FW Act.

### 3.3.3 Scope Orders

As indicated, FWA may make MSDs in situations where there is doubt as to whether a majority of employees wish to bargain and to be represented by a particular bargaining representative. Section 238 deals with the situation where bargaining is on foot but there are concerns that it is not proceeding efficiently or fairly because 'the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover'. In such circumstances a disaffected bargaining representative may apply to FWA for the making of a Scope Order (SO). However, before making such an application, the bargaining representative must: have given written notice of their concerns to the other bargaining representatives; given them a reasonable time to respond to those concerns; and consider that the bargaining representatives 'have not responded appropriately'.<sup>61</sup>

According to section 238(4), FWA may make an SO if it is satisfied:

- (a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements;
- (b) that making the order will promote the fair and efficient conduct of bargaining; and
- (c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and
- (d) it is reasonable in all the circumstances to make the order.

As with MSDs, the fact that an SO is in operation can provide the trigger for the making of a BO under section 230.

### 3.3.4 Bargaining Orders

Section 229(1) of the FW Act enables a bargaining representative to apply to FWA for the making of a BO where the representative:

- (a) has concerns that:
  - (i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
  - (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
- (b) has given a written notice setting out those concerns to the relevant bargaining representatives; and
- (c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
- (d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Where an enterprise agreement already applies to employees to be covered by a proposed agreement, an application for a BO may be made not more than 90 days before the nominal expiry date of the existing agreement or, after an employer has requested employees to approve a proposed agreement but before the agreement is approved. Otherwise, an application may be made at any time.<sup>62</sup>

On application, FWA may make a BO where it is satisfied that one or other of the prerequisites set out in section 229(4)(a) is met; that the applicant has complied with the notification requirements in section 229(4)(b)-(d);<sup>63</sup> and that one or more of the circumstances set out in section 230(2) applies:

- (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
- (b) a majority support determination in relation to the agreement is in operation;
- (c) a scope order in relation to the agreement is in operation;
- (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.<sup>64</sup>

According to section 231(1) a BO must specify all or any of four things:

- (a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;
- (b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;
- (c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;
- (d) such matters, actions or requirements as FWA considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

An indication of the kinds of BOs that FWA can make is provided by section 231(2):

- (a) an order excluding a bargaining representative for the agreement from bargaining;
- (b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

- (c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);
- (d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

Interestingly, none of the BOs that had been made as at 1 November 2009 related to any of these issues. Instead, almost all of them consisted of orders preventing employers from pressing ahead with the approval of agreements where they had failed to notify and/or to hold discussions with a union that was a bargaining representative before proceeding with the proposed vote.<sup>65</sup>

Section 233 of the FW Act states that 'a person to whom a bargaining order applies must not contravene a term of the order'. This means that a party that is subject to a BO is liable to the imposition of penalties of up to \$6,600 in the case of an individual, and \$33,000 for incorporated entities, in respect of any such contravention.<sup>66</sup> It also means that the Federal Court or the Federal Magistrates Court can, amongst other things, grant injunctions (including on an interim basis), award compensation and order the reinstatement of employees.<sup>67</sup>

Contravention of a BO may also provide the basis for the making of a Serious Breach Declaration (SBD), and ultimately, a BRWD.

Fair Work Australia needs to ensure that it exercises its powers in a pragmatic and non-legalistic manner that not only serves the interests of the parties, but that promotes the objectives of the legislation in general

### 3.3.5 Serious Breach Determinations and Workplace Determinations

Section 234 of the FW Act provides that a bargaining representative may apply for an SBD under section 235, whilst section 235(2) states that FWA may make a determination where it is satisfied that:

- (a) one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement; and
- (b) the contravention or contraventions:
  - (i) are serious and sustained; and
  - (ii) have significantly undermined bargaining for the agreement; and
- (c) the other bargaining representatives for the agreement (the *designated bargaining representatives*) have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and
- (d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and
- (e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

In deciding whether the bargaining representatives have exhausted all other reasonable alternatives to reach agreement for purposes of section 235(2)(c), FWA may take account of any matter it considers relevant, including: whether it has provided assistance to the parties under section 240 of the FW Act, whether a bargaining representative has initiated court proceedings in respect of the breach; and any findings by a court in relation to any such application.<sup>68</sup>

On the day that an SBD is made, a 'post-declaration negotiating period' commences. During this period the parties are meant to try to 'settle all of the matters that were at issue during bargaining for the agreement'. The negotiating period lasts for 21 days, but can be extended for up to a further 21 days by FWA on application by all of the bargaining representatives for the agreement.<sup>69</sup>

If all outstanding matters have not been settled by the end of the post-declaration negotiating period, then FWA must make a BRWD 'as quickly as possible' after the end of the period. According to section 270(2) and (3) of the FW Act, a BRWD must include all of the terms agreed by the parties by the end of the post-declaration negotiating period, plus 'the terms that FWA considers deal with the matters that were still at issue at the end of the post-declaration negotiating period'. It must also include the 'core terms' set out in section 272, and the mandatory terms set out in section 273. The 'core terms' include:

a nominal expiry date, which must be not more than four years from the date the BRWD comes into operation; terms that would be regarded as being about 'permitted matters', and that would not be regarded as being an 'unlawful term', if the BRWD was an enterprise agreement; terms that would pass the 'better off overall' test if the BRWD were an enterprise agreement; and terms that would not result in refusal to approve an enterprise agreement because of inconsistency with the National Employment Standards. The mandatory terms are: a dispute-settling term; a flexibility term; and a consultation term. These matters aside, a BRWD must not contain any other term.<sup>70</sup>

At the end of the day, therefore, the FW Act does contemplate that what is in effect an arbitrated outcome can be imposed upon parties who fail to bargain in good faith. It must be emphasised, however, that there are many hurdles to be cleared before this could happen. It could, for instance, include the making of an MSD, an SO, a BO, and an SBD, plus court proceedings for contravention of a BO. Clearly, the legislation is premised on the assumption that the parties will have engaged in GFB long before FWA is put in a position where it is required to make a BRWD. It may also be the case that the parties will simply have abandoned the whole endeavour through exhaustion!

### 3.3.6 Refusal to Approve an Enterprise Agreement

Section 186 of the FW Act provides that FWA must approve any enterprise agreement that meets the requirements set out in that section, whilst section 187 sets out a number of 'additional requirements' that must be satisfied before FWA can approve an agreement under section 186. These additional requirements include that:

FWA must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.<sup>71</sup>

According to para 788 of the Explanatory Memorandum for the Fair Work Bill, this provision:

... is intended to deal with the situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all the employees and employers specified in a scope order issued by FWA in relation to that agreement. FWA may approve an enterprise agreement in that situation provided it is satisfied that the approval of the agreement would not be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives.

Viewed in these terms, section 187(2) can be seen to be intended to help preserve the integrity of SOs by ensuring that parties do not subvert the intent of the Order by concluding an agreement that does not cover all of the employees specified in the Order, or (presumably) that covers employees not contemplated by the original Order. It is important to appreciate, however, that the FW Act does not expressly state that agreements cannot be approved if they were negotiated in a manner that is inconsistent with GFB. This suggests that if none of the bargaining representatives for an agreement activates any of the mechanisms that are intended to ensure adherence to the GFB requirements, then FWA could not refuse to approve the agreement purely on the ground that the parties had not met the GFB requirements when negotiating for the agreement. On the other hand, decisions such as that of Whelan C in *Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) t/a Mary Mackillop Aged Care Centre*<sup>72</sup> do suggest that FWA can refuse to approve an agreement on this ground if the failure to adhere to the GFB requirements is a matter that is directly raised before it.

### 3.3.7 GFB and Protected Industrial Action

It will be recalled that the shift from centralised conciliation and arbitration to enterprise-level collective bargaining that was at the heart of the *Industrial Relations Reform Act 1993* was characterised by the introduction of a form of GFB requirement in the shape of section 170QK, and by the recognition, for the first time at federal level, of the capacity for employers and employees to take protected industrial action. The two concepts are clearly interconnected. Indeed the GFB requirement can be seen as a makeweight for the capacity to take industrial action in the sense that if parties are to have the capacity lawfully to use economic weapons in the course of bargaining, they must pay a price by being required to bargain in good faith.

It will also be recalled that in the *ABC Case*, the AIRC took the view that it was not necessarily inconsistent with GFB for one or both parties to take protected action whilst negotiations were still taking place. This was essentially consistent with United States jurisprudence in this area.<sup>73</sup> However, this did not mean that good faith bargaining was entirely irrelevant to the capacity to take protected industrial action. In particular, as noted earlier, section 170PO of the 1988 Act enabled the AIRC to suspend or terminate a bargaining period where it was satisfied that a negotiating party that was organising or taking industrial action 'is not genuinely trying to reach agreement with the other negotiating parties'. It was also noted that subsequent versions of the legislation contained provision to the same effect, and that after the introduction of

mandatory ballots by Work Choices, applicants had to satisfy the Commission that it had, and was, genuinely trying to reach agreement with the employer as a precondition of obtaining a ballot order.<sup>74</sup>

The genuinely trying to reach agreement concept is retained in the FW Act, both as a precondition for taking protected industrial action, and for obtaining a ballot order. The first of these requirements finds expression in section 413(3), which provides that one of the 'common requirements' for the taking of protected industrial action is that:

The following persons must be genuinely trying to reach an agreement:

- (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement – the bargaining representative;
- (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement – the bargaining representative of the employee.

There was no precise equivalent of this provision in any of the previous iterations of the statutory protections, but the logical consequence of section 413(3) appears to be that if a bargaining representative that is organising or engaging in industrial action is not, or has not been, genuinely trying to reach agreement then the action would not be protected even if all of the other prerequisites for taking such action had been satisfied.

The ballot requirement is found in section 443(1), which has the effect that a ballot order can be made only where the applicant has been, and is, 'genuinely trying to reach an agreement with the employer of the employees who are to be balloted'. In many respects this appears to fall within the generality of the section 413(3) requirement, but presumably has been included out of an abundance of caution.

The question then arises as to whether the 'genuinely trying to reach agreement' requirements amount to the same thing as a requirement that the applicant/party taking industrial action engage in GFB. As indicated, the two concepts are closely interrelated. This is borne out by Forsyth's suggestion that the case law the Commission developed in applying the forerunners of sections 413(3) and 443(1) could be described as a de facto 'code' of what constitutes fair (or unfair) bargaining practices.<sup>75</sup> However, it also seems clear that the two concepts cannot simply be treated as one and the same thing. For example in *Transport Workers' Union of Australia v GRT Group Pty Ltd*<sup>76</sup> the TWU had applied for a protected action ballot in circumstances where the negotiations had 'not been

handled as well as they might have been by the TWU' and where the conduct of one of its officials 'was unfortunate, and possibly even unprofessional'.<sup>77</sup> Hamberger SDP found that the Union's behaviour was not 'indicative of a lack of good faith', and continued:

While there is a relationship between 'genuinely trying to reach an agreement' and 'bargaining in good faith' it would be wrong simply to conflate the two terms. Even if I had found that the TWU was not bargaining in good faith ... that would not necessarily mean that the TWU was not genuinely trying to make an agreement ...

Hamberger SDP then went on to quote from para 1664 of the Explanatory Memorandum for the Fair Work Bill:

The question whether a person is genuinely trying to reach an agreement requires a subjective assessment of the actual intention of the person and the overall circumstances. It is not limited to an assessment of whether the person is complying with the good faith bargaining requirements.<sup>78</sup>

That said, there must in many instances be substantial overlap between the genuinely trying to reach an agreement and GFB requirements. Put simply, the fact that a party is bargaining in good faith must be compelling evidence that that party is trying to reach agreement, whilst the fact that a party is not bargaining in good faith strongly suggests that they are not genuinely trying to reach agreement. In the *TWU Case*, Hamberger SDP seemed to suggest otherwise. With respect, his reasoning is not entirely compelling.

It should also be noted that the FW Act does draw a direct link between meeting the GFB requirements and ongoing protected industrial action in the form of section 423(4). This provision lists a number of factors that are to be taken into account by FWA in deciding whether to suspend or terminate protected industrial action on the ground that it 'is causing, or is threatening to cause' 'significant economic harm' to an employer or employees who will be covered by the agreement. Among the listed factors are:<sup>79</sup>

(e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;

- (f) if FWA is considering terminating [as opposed to suspending] the protected industrial action:
- (i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
  - (ii) whether there is no reasonable prospect of agreement being reached.

This clearly bears out the suggestion that there is meant to be a trade-off between the capacity to take protected industrial action and meeting the GFB requirements. It takes a direct form in section 423(4)(e) and (f), and an indirect form in sections 413(3) and 443(1)(b). That said, it is important to appreciate that there is nothing in the FW Act to suggest an intention that the taking of protected industrial action should be regarded as inherently inconsistent with GFB.<sup>80</sup>

There is meant to be a trade-off between the capacity to take protected industrial action and meeting the good faith bargaining requirements

## SECTION 4: APPLYING THE GFB REQUIREMENTS IN PRACTICE

Against this background, it is now proposed to examine each of the requirements of section 228(1), and the qualifiers in section 228(2), in some detail. Regrettably, neither the *Forward with Fairness* policy document on the basis of which the ALP fought the 2007 election, nor the Explanatory Memorandum for the Fair Work Bill, offer any real guidance as to how the GFB requirements are intended to operate in practice.<sup>81</sup> Indeed, paragraph 951 of the Explanatory Memorandum contains the extraordinary statement that ‘the good faith requirements are generally self-explanatory’. If that is indeed the case, it is a pity that the framers of the legislation did not see fit to provide some examples of how these ‘self-explanatory’ provisions are meant to operate in practice. In the absence of such assistance, it is necessary to look elsewhere for guidance as to the meaning and effect of the GFB requirements. That itself is a not unproblematic process.

### 4.1 RELEVANCE OF OVERSEAS EXPERIENCE

It was suggested earlier that section 8(d) of the NLRA, and its associated jurisprudence, had served as the benchmark for legislated GFB requirements in Australia and in a number of other developed countries. This is clearly reflected in the GFB requirements set out in section 228 of the FW Act, and in the factors listed in the former section 170QK(3). This inevitably raises the question of whether the Australian provision can and should be applied by reference to the American jurisprudence. This is a particularly pertinent issue in light of the fact that that jurisprudence is widely regarded (within the United States and elsewhere) as ‘labyrinthine’, a ‘legal quagmire’ and so complex as to have rendered the GFB requirement ‘largely meaningless’.<sup>82</sup>

There is no doubt that the Australian provisions *could* be applied by reference to the United States jurisprudence, and indeed there are some areas where that jurisprudence could well provide useful insights into the ways in which the provisions of the FW Act ought to be applied. But it does not follow that Australian courts, tribunals and bargaining representatives should regard themselves as bound slavishly to follow the American lead in the application of section 228 and other relevant provisions in Part 2-4. Indeed, it would be most unwise for them to do so. As indicated, the American jurisprudence has become quite absurdly complex. It is hard to see that any attempt extensively to rely upon it in the Australian context could be in the best interests of anyone, apart perhaps from certain elements of the legal profession.

Not only would it be inappropriate to become excessively reliant upon the United States jurisprudence because of its complexity, it would also be inappropriate to rely upon it by reason of the fact that it operates in a very different regulatory and industrial context from that of Australia. The same is true of legislative provisions in other jurisdictions such as Canada and New Zealand. Again both the legislation, and its application, may provide helpful guidance as to the application of the Australian provisions. But it must always be borne firmly in mind that these provisions are the product of unique sets of national circumstances which mean that the legislation and its associated jurisprudence cannot be transplanted wholesale into the Australian context.

Among the more significant contextual differences are the following:

#### (i) *Linkage to Recognition*

In the United States, the duty to bargain collectively derives from the fact that a given union has successfully won an election to determine whether it should have the exclusive right to represent the employees in a particular bargaining unit.<sup>83</sup> It is only after a union has won such a ballot that the obligation to bargain arises, and whilst the union remains ‘certified’ it would be an unfair labor practice for the employer to bargain with anyone else (including its own employees). Often these elections involve a bitter and protracted process that leaves a legacy of bitterness between the parties which provides a further impediment to the development of the mutual trust and respect that are essential preconditions of meaningful good faith bargaining.

The situation in Australia is very different. The FW Act does not contemplate any direct link between trade union recognition and collective bargaining. It is true that a trade union that has a member in a particular workplace is the default bargaining representative for that member. But all employees, whether union members or not, have the right to appoint the bargaining representative of their choice,<sup>84</sup> and that choice can quite properly include the employee him or herself.<sup>85</sup> Furthermore, section 228(1)(f) makes clear that it is a GFB requirement that bargaining representatives (employers and others) must ‘recognise and bargain with’ the other bargaining representatives for a particular agreement, no matter how many of them there may be.<sup>86</sup>

It is also true that where an employer refuses to engage in collective bargaining, it is open to the bargaining representative for an employee who will be covered by a proposed agreement to apply for an MSD to try to establish that ‘a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement’. As in the United States, dealing with

such an application could be a protracted and bitter process, but it is unlikely that that would be the case in most instances in Australia. First, because the procedures set out in sections 236 and 237 are inherently simpler than those that operate in the United States, and provide much less scope for litigation. Secondly, even if FWA does not make an MSD the employer may well have to deal with the union in relation to other issues under the FW Act (such as dispute resolution under a Modern Award, or entry for permitted purposes under Part 3-4), whereas in the United States, if the union loses an election, the employer is not obliged to have any further dealings with it (unless or until the union again seeks certification). Thirdly, employees in Australia enjoy much higher levels of protection against anti-union victimisation than is the case in the United States, which would make it much harder for an Australian employer to wage a 'dirty war' against a union than would be the case in the United States. It is also important to bear in mind that even if FWA does make an MSD, it is still open to any employee who will be covered by the proposed agreement to appoint her or his own bargaining representative.

It follows from the foregoing that an Australian employer could well find itself in a position where it has to observe the GFB requirements in relation to a multiplicity of bargaining representatives, some of whom may have little or no access to research or other resources to help them in bargaining, and who may have little or no bargaining expertise. That employer's United States counterpart, meanwhile, would have to deal with just one employee representative in the form of a trade union which will very likely have access to relevant research facilities, and have considerable experience in bargaining.

The responsibilities of unions in bargaining situations are also very different between the two countries. An Australian union that is a bargaining representative for an agreement has no direct responsibility to anyone other than its members. It is true that a union cannot take adverse action against an employee, or exert influence upon an employer to take such action, on the ground that an employee has or has not exercised a 'workplace right' – for example, by appointing someone other than the union as their bargaining representative. But they are not in any way obliged to represent any other person in the course of negotiations. In the United States on the other hand, a 'certified' union is legally obliged 'fairly to represent' all workers in the bargaining unit, irrespective of whether they are union members.<sup>87</sup>

(ii) *Consequences of failure to meet GFB requirements*

The very different consequences that may flow from failure to adhere to the GFB requirements in Australia

The very different consequences that may flow from failure to adhere to the good faith bargaining requirements in Australia and the United States also impels caution in relying upon United States jurisprudence in an Australian context

and the United States also impels caution in relying upon United States jurisprudence in an Australian context (and vice versa). For example, after describing some of the tactics employed by American employers to avoid certification and/or GFB, Strauss (2005: 123) observed:

Many of these are technically illegal but the penalties for violating the law are almost laughably weak. If the employer loses after a long drawn out legal procedure it must post a notice saying that it will not violate the law again and if an employee is found to have been discharged because of legal union activity he or she must be reimbursed for back pay lost less any pay the employee earned elsewhere in the interim or could have earned if she/he looked harder. Many employers view these trivial penalties as just a cost of doing business.<sup>88</sup>

Remedies for breach of GFB obligations in the various Canadian jurisdictions are very similar to those in the United States, with the important qualification that in some Provinces the regulator has the capacity to impose an agreement where the parties are negotiating for the first time.<sup>89</sup> In contrast, the United States Supreme Court has determined that 'allowing the [NLR]board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the *NLRA* is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'.<sup>90</sup>

The situation in Australia is potentially very different from that in North America. Whilst failure to meet the GFB requirements is not unlawful in itself, it was noted earlier that such failure can provide the basis for the making of a BO. As also noted above, breach of a BO can lead to the imposition of quite substantial monetary penalties, the award of compensation, the issue of injunctions to remedy the breach, and the reinstatement of victimised employees. It can also provide the basis for the making of an SBD, which in turn can provide the basis for the imposition of what is in effect an arbitrated settlement on the parties.<sup>91</sup>

### (iii) *Bargaining Impasse*

In both Australia and the United States, it is clear that the parties do not have to make concessions in the course of negotiations, much less to reach agreement. In other words, the parties may bargain to impasse in all three countries. However, the consequences of reaching impasse are very different as between the two countries.

In the United States, once the parties have reached impasse, and the contract has expired, then, as noted earlier, the employer has a broad (but not unlimited) capacity unilaterally to alter terms and conditions of employment. Of course, the parties must have bargained in good faith before they reach impasse, and an employer cannot simply create an impasse by refusing to negotiate in any meaningful way:

If either party remains willing to move further toward an agreement, an impasse cannot exist: The parties' perception regarding the progress of the negotiations is of central importance to the Board's impasse inquiry.<sup>92</sup>

Naturally, there is an extensive jurisprudence on just what does and does not constitute impasse in the requisite sense. The fact remains, however, that once the parties have reached impasse, the employer then has access to an extremely potent weapon: the capacity, within limits, unilaterally to alter the terms and conditions of employment of its employees.

In Australia, on the other hand, an expired agreement continues to operate unless or until terminated or replaced. It is true that after the nominal expiry date of an agreement an employer, an employee or a trade union covered by the agreement may seek unilaterally to terminate it. But this can be done only by FWA, and only where it is satisfied that it would not be contrary to the public interest to terminate the agreement, taking account of all of the circumstances, including the views of the persons covered by the agreement and the circumstances of those persons 'including the likely effect that the termination will have on each of them'.<sup>93</sup>

It seems reasonable to assume that FWA would exercise great care in deciding to terminate an agreement in a situation where the parties to that agreement were deadlocked in negotiations for a new agreement. Furthermore, even if an agreement were terminated, the employees concerned would still be entitled to the benefit of the NES, of the other protections provided by the FW Act, and of any modern award that covered them but that had not applied to them whilst the agreement was in operation.<sup>94</sup> Not only that, if the impasse is the result of a breach of the GFB requirements, an outcome may be imposed upon them through one or other of the various forms of workplace determinations provided in Part 2-5 of the FW Act.

Self-evidently, this means that the Australian GFB requirements operate in a very different legislative and industrial environment from those in North America. In the United States and Canada the parties bargain in the knowledge that if and when they reach impasse, the employer will have the capacity unilaterally to alter terms and conditions of employment, and that at that stage there is little the union could do about it. In Australia the parties bargain knowing that if they reach impasse, the *status quo* will be maintained unless or until such time as the expired agreement is terminated; that even then the employees will be entitled to the benefit of the statutory safety net; and that in certain circumstances an outcome may be imposed upon them in the form of a workplace determination.

### (iv) *Industrial Tactics*

Levels of industrial disputation in the United States, as in all other developed countries, have declined very significantly over the last twenty years. But where industrial disputation does occur it can be robust in character, whilst remaining on the right side of the divide between good faith and bad faith bargaining. In particular: employers have access to both the pre-emptive and the retaliatory lockout,<sup>95</sup> and can engage in other forms of industrial action such as contracting out work to other providers;<sup>96</sup> they can, and do, treat industrial action by employees as bringing the work relationship to an end; and have the right to hire a replacement workforce whilst a dispute is on foot and to retain that workforce after the dispute has ended.<sup>97</sup> Employees also have the capacity to adopt robust industrial tactics in the course of industrial disputes, including taking action that is not permissible in terms of the NLRA.<sup>98</sup>

In Australia, in contrast, employers can lawfully lockout only in response to industrial action by employees and their representatives;<sup>99</sup> cannot lawfully terminate the employment of employees because they are taking, or have taken, protected industrial action; and may not be able to engage replacement labour doing so would constitute adverse action against an employee who was taking protected industrial action.<sup>100</sup> On the other hand, the capacity of Australian workers lawfully to take industrial action is much more circumscribed than in Canada and the United States – for example because of the formalities that must be observed before taking protected action, the restrictions on the tactics that can be used, and the broad range of circumstances in which protected action can be terminated or suspended. Furthermore, Australian workers cannot lawfully seek, receive or accept payment in respect of periods of industrial action, whereas these practices are permissible in the North American jurisdictions and may themselves be the subject of collective bargaining.

Care needs to be taken to pay proper heed to the very different regulatory, industrial and economic contexts in which the various good faith bargaining requirements operate

The considerations identified in this section serve clearly to show that the GFB requirements in North America operate in a very different legal and industrial environment from those under the FW Act. This again suggests that great care should be taken in seeking to rely upon North American jurisprudence in interpreting and applying Division 8 of Part 2-4. It is also important to appreciate that there are many other differences between both the legislation and legal and industrial practices in Australia and the North American jurisdictions which also point to the need for restraint in drawing parallels between the jurisdictions. That is not, of course, to suggest that Australian policy-makers, regulators, decision-makers and industrial practitioners should entirely ignore law and practice elsewhere in seeking to apply, and perhaps refine, the provisions set out in Division 8. But it is to say that care needs to be taken to pay proper heed to the very different regulatory, industrial and economic contexts in which the various GFB requirements operate.

Experience to date suggests that some members of FWA are prepared to draw upon North American jurisprudence in some contexts,<sup>101</sup> and not in others.<sup>102</sup> Forsyth (2009b: 28) summarises the situation thus:

The decisions to date indicate that some notice is being taken of the North American approach to GFB (e.g. the ‘totality of conduct’ approach to assessing parties’ negotiating tactics/positions; the permissibility of ‘hard bargaining’). However, in certain areas, FWA members have avoided adopting the US or Canadian position (e.g. the limits on direct communication with employees during bargaining; whether employer restructuring amounts to bad faith).

#### 4.2 ATTENDING AND PARTICIPATING IN MEETINGS AT REASONABLE TIMES

The requirement ‘to meet at reasonable times and confer in good faith’ is expressly spelled out in section 8(d) of the NLRA as a key element in GFB. This clearly forms the basis for section 228(1)(a), and is perhaps the least contentious of the GFB requirements in section 228(1).<sup>103</sup>

Manifestly, if a party is not prepared to attend and participate in meetings for purposes of negotiating an agreement, it is not engaging in GFB. In terms of the FW Act, such refusal would enable another bargaining

representative for the agreement to seek the assistance of FWA in reliance upon section 240 and/or seek a BO (and what follows from that in the event of non-compliance).

Agreeing to attend and participate, and then failing to do either or both of these things would also evidence a failure to meet the GFB requirements. Common sense would suggest that a failure to attend on one or two occasions would not necessarily constitute ‘failure’ in the relevant sense. The same would be true for last-minute cancellation of agreed meetings. However, persistent behaviour of this character clearly would constitute failure to engage in GFB at some point. Whether or when that point had been reached would be a question of fact and degree in any given case.

Assuming that the parties are prepared to engage in GFB, it would seem appropriate at an early stage in the process for the parties to agree a schedule of meetings for at least the first phase of the negotiations. Any such schedule could, of course, be adjusted in light of progress (or the lack thereof) over time. In some instances parties may find it helpful to conclude a more or less formal negotiating agreement to deal with issues such as meeting dates, disclosure of information, time off and training for bargaining representatives, and so on. Interestingly, section 32(1)(a)-(c) of the *Employment Relations Act 2000* (NZ) requires the parties to use their best endeavours to conclude a bargaining process agreement (BPA), but does not mandate the conclusion of such agreements as a precondition to substantive negotiations. Research recently undertaken by the New Zealand Department of Labour suggests that ‘most employers saw having a BPA as good practice’, although there were some situations where negotiating a BPA proved to be ‘time consuming and expensive’.<sup>104</sup> Whilst process agreements are not mandated by the FW Act, it seems reasonable to suppose that the preparedness to make, and adhere to, such agreements could, on occasion, impact upon a decision by FWA to make a BO, and upon the content of any order that it might make.<sup>105</sup>

#### 4.3 DISCLOSING RELEVANT INFORMATION

If the requirement to attend and participate in meetings is the least problematic of the section 228(1) requirements, the requirement to disclose ‘relevant information (other than confidential or commercially sensitive information) in a timely manner’ is likely to be one of the most problematic.

There is clearly much to be said for the view that effective participation in collective bargaining requires that the parties have access to relevant information to enable them to formulate their claims and to evaluate the responses of the other party: ‘recognition [for purposes of collective bargaining] does not deserve its name if one of the negotiating partners is kept in the dark about matters within the exclusive knowledge of the other which are relevant to an agreement’.<sup>106</sup>

#### 4.3.1 Overseas law and practice

The importance of access to information for purposes of collective bargaining is clearly reflected in Para 7 of the Collective Bargaining Recommendation 1981 (No. 163) which states:

- (1) Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.
- (2) For this purpose –
  - (a) public and private employers, should, at the request of workers' organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining ...

This is all very well as a statement of principle. However, it offers little by way of guidance as to what information should be disclosed in order to make negotiations 'meaningful'. Law and practice in other jurisdictions is scarcely more illuminating, and indeed that of the United States is positively unhelpful.

In *NLRB v Truitt Manufacturing Co*<sup>107</sup> the Supreme Court determined that if an employer wanted to argue that it could not afford to meet a union's pay demand, it had to disclose sufficient financial data to enable the union party to the negotiations to make an informed evaluation of that claim:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.<sup>108</sup>

This principle applied only to 'mandatory' bargaining topics such as claims for pay increases, hours of work, rosters, sick leave and annual leave,<sup>109</sup> and applies to both employers and unions.<sup>110</sup> Subsequent decisions have provided a measure of clarification as to:

What information is relevant and necessary for collective bargaining, the manner in which the data must be made available, the timeliness of making information available, legitimate employer defences for refusal to supply information, and the types of information that must be furnished. The latter may include financial data, wage and salary schedules, hours, insurance and pension

plan information (including the employer's cost and employee benefits thereunder), seniority lists, employees' biographical information, names and addresses of strikebreakers, and information on subcontracting (including actual copies of the contracts) among many others.[footnotes omitted]<sup>111</sup>

It is clear that employers do not have to provide information unless requested to do so by the union side. It is also important to appreciate that employers can fairly easily avoid the effects of all of this simply by attributing their refusal to meet union demands to something other than an inability to pay – such as an unwillingness to meet the claim because of the damage that doing so would inflict upon their competitive position.<sup>112</sup> Despite this, Bemmels et al., (1986:33) considered that '*Truitt* still stands for the important propositions that good faith bargaining requires truthful representations and that the union has the right to relevant information'. This remains the case in 2009, although it is far from clear just what that means in practice.

British law does not impose any duty of GFB. However, since the early 1970s there has been statutory recognition of at least one of the key elements of GFB, the duty to provide information for collective bargaining purposes. The current version of this provision is to be found in section 181 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA), which states that:

- (1) An employer who recognises an independent trade union shall, for the purposes of all stages of collective bargaining ... disclose to representatives of the union, on request, the information required by this section ...
- (2) The information to be disclosed is all information relating to the employer's undertaking which is in his possession, or that of an associated employer, and is information –
  - (a) without which the trade union representatives would be to a material extent impeded in carrying on collective bargaining with him, and
  - (b) which it would be in accordance with good industrial relations practice that he should disclose to them for the purposes of collective bargaining ...
- (5) Information which an employer is required by virtue of this section to disclose to trade union representatives shall, if they so request, be disclosed or confirmed in writing.

This duty of disclosure is subject to section 182(1) of the TULRCA, which states that an employer is not required to disclose information:

- (a) the disclosure of which would be against the interests of national security, or
- (b) which he could not disclose without contravening a prohibition imposed by or under an enactment, or

- (c) which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or
- (d) which relates specifically to an individual (unless that individual has consented to its being disclosed), or
- (e) the disclosure of which would cause substantial injury to his undertaking for reasons other than its effect on collective bargaining, or
- (f) obtained by him for the purpose of bringing, prosecuting or defending any legal proceedings.

Furthermore, according to section 182(2), in performing its duty of disclosure under section 181, an employer is not required:

- (a) to produce, or allow inspection of, any document (other than a document prepared for the purpose of conveying or confirming the information) or to make a copy of or extracts from any document, or
- (b) to compile or assemble any information where the compilation or assembly would involve an amount of work or expenditure out of reasonable proportion to the value of the information in the conduct of collective bargaining.

These statutory prescriptions are accompanied by an *ACAS Code of Practice on the Disclosure of Information to Trade Unions for Collective Bargaining Purposes*, which was issued in 1997. It gives the following non-exhaustive list of 'information relating to the undertaking which could be relevant in certain collective bargaining situations':

- (i) *Pay and benefits*: principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, sex, out-workers and home-workers, department or division, giving where appropriate distributions and make-up of pay showing any additions to base rate of salary; total pay bill; details of fringe benefits and non-wage labour costs.
- (ii) *Conditions of service*: policies on recruitment, redeployment, redundancy, training, equal opportunity, and promotion; health, welfare and safety matters.
- (iii) *Manpower*: numbers employed analysed according to grade, department, location, age and sex; labour turnover; absenteeism; overtime and short-time; manning standards; planned changes in work methods, materials, equipment or organisation; available manpower plans; investment plans.
- (iv) *Performance*: productivity and efficiency data; savings from increased productivity and output; return on capital invested; sales and state of order book.

- (v) *Financial*: cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.<sup>113</sup>

By force of section 183 of TULRCA, failure to disclose information in accordance with section 181 enables an aggrieved union to make a complaint to the Central Arbitration Committee (CAC) which, if it considers the complaint to be well-founded, can make a declaration requiring the employer to disclose specified information. Failure to implement such a declaration can provide the basis for a further complaint to the CAC, and if that is upheld, the Committee can make an award which has effect as a term of the contract of the employees affected by the breach. The enforcement provisions have been little relied upon in practice, and there is a widespread perception that the provisions (which are derived from measures that were first introduced in 1971) have only limited practical impact.<sup>114</sup>

It will be noted that section 182(c)-(e) of TULRCA have the effect that employers are not required to disclose information that could broadly be described as confidential or commercially sensitive in character. The NLRB and the courts in the United States have also been sensitive to the confidentiality issue in applying the *Truitt* principle. In particular, they have recognised that it is necessary to balance the union's need to have access to a particular piece of information against the legitimate interest of the employer and (on occasion) the employee in maintaining secrecy or confidentiality of information.<sup>115</sup> Yet again, this has been a fruitful source of litigation, but not of a great deal of enlightenment.

It will be recalled that ILO Recommendation No. 163 suggests that the appropriate approach to this issue is for the information to be communicated, but that its communication should be 'conditional upon a commitment that it would be regarded as confidential to the extent required'. This truly seems to offer the worst of all worlds. First, it does nothing to resolve the question of what is to be regarded as confidential. Second, it begs the question: if the information is truly confidential in character, what is the point in communicating it in the first place since it presumably cannot be used? And third, if the information is communicated, it must inevitably influence the attitudes and behaviour of the party to whom it is disclosed even if that party has undertaken to respect the confidentiality of the information. It may be said that the communication of information in confidence can still perform a useful function if it helps the negotiating parties to understand the position of the others – but that is of little assistance to (say) union representatives who cannot report back to their members on the factors that have caused them to adopt a particular bargaining position (especially where it involves making a significant concession).

In New Zealand, section 32(1)(e) of the *Employment Relations Act 2000* requires each party to collective bargaining to provide the other with 'information that is reasonably necessary to support or substantiate claims or responses to claims'. If an employer wishes to withhold information on confidentiality grounds, it must be referred to an independent third party to determine whether the employer's claim has been made out. Writing in 2006, Anderson observed that (2006: 13):

To date this obligation does not appear to have caused problems although this is likely to be due to non-utilisation of the provisions either because unions do not have the resources to take advantage of them or because they do not see them as relevant to bargaining demands.<sup>116</sup>

Despite the fact that it is largely unused, section 32(1)(e) does, in principle, seem to afford a more measured and practical way of addressing this issue than that suggested by ILO Recommendation No. 163.<sup>117</sup>

#### **4.3.2 Section 228(1)(b) of the FW Act**

The disclosure requirements set out in section 228(1)(b) of the FW Act are broadly consistent with these international standards and practices. They are also broadly consistent with section 170QK(3)(a)(v), but with the addition of the 'confidential or commercially sensitive information' qualifier.

Unfortunately, the fact that section 228(1)(b) is broadly consistent with international provision in this area does not in itself provide a great deal of guidance as to what information ought to be disclosed in any given situation. Nevertheless, Para 11 of the ACAS Code of Practice does seem to provide a useful starting point in determining what information an employer ought to disclose – bearing in mind that the disclosure requirement under the FW Act does not extend to 'confidential or commercially sensitive' information.<sup>118</sup>

An Australian employer could properly require a union or other bargaining representative to disclose information in its possession that is 'relevant' to the negotiations – but what does this include?

The UK legislation deals only with disclosure of information by employers. The same is true for ILO Recommendation No. 163. However, like section 32(1)(e) of the New Zealand Act, the Australian requirement clearly applies to all bargaining representatives for an agreement. This means that an Australian employer could properly require a union or other bargaining representative to disclose information in its possession that is 'relevant' to the negotiations. What does this include? It seems reasonable to suppose that a request for information about a union's predetermined final bargaining position (if it has one), or industrial tactics, could be refused on grounds of 'confidentiality'.<sup>119</sup> But what of a request for information about that union's costing of its demands, or any research it may have commissioned or accessed about practice in other companies (or overseas) in relation to an issue such as flexible working arrangements or manning levels? The mere fact of having to respond to such requests could be a significant drain on union resources, and could be a source of potential embarrassment if the union had to admit that it had not done any costings or obtained any relevant information to support its claims. By the same token, vexatious use of requests for information by either employer or union bargaining representatives may be counter-productive for all concerned – for example by causing negotiations to become more protracted and/or heated than would otherwise have been the case.<sup>120</sup>

In its own terms, the 'confidential or commercially sensitive' qualifier is a potential source of difficulty and uncertainty. For example, it seems inherently unlikely that information can be regarded as 'confidential' just because a bargaining representative chooses to attach that label to it. But what of information that is communicated to a bargaining representative 'in confidence', even though the bargaining representative does not regard it as such? What of information relating to individuals that they, and perhaps the employer, would prefer not to disclose – for example because it provides details of 'over-award' payment to that individual? Likewise, is information to be regarded as 'commercially sensitive' simply because the employer would prefer that it was not accessible to its competitors, or does it have to be 'sensitive' in the sense that its disclosure would be positively harmful to the employer?

Self-evidently, there needs to be some person or body that is in a position to make a determination as to whether information can properly be regarded as 'confidential' or 'commercially sensitive'. The New Zealand provision for reference to an independent third party has its attractions, but it is interesting that it has been so little used in practice. The FW Act does not contain express provision of this kind, but it clearly is an issue in relation to which the parties could seek the assistance of FWA under section 240, and in the final analysis could be resolved in the context of an

application for a BO. An alternative, and more proactive, approach would be for negotiating parties to include protocols about requests for, and disclosure of, information in a BPA.<sup>121</sup> Government could also play a constructive role by issuing a Code of Practice such as the one produced by ACAS in the United Kingdom, or perhaps some form of guidelines. It is, of course, important not to fall into the trap of being overly prescriptive in an area such as this, but it is too important an issue simply to introduce a rather vague legislative prescription and then leave the parties entirely to their own devices.<sup>122</sup>

It is clearly appropriate that any information that is to be provided for the purposes of collective bargaining should be provided in a timely manner. This is necessary both to enable the party that has requested the information to make use of it in the course of the negotiations, and to ensure that delay in providing information does not itself delay the bargaining process. Sensibly, the FW Act does not lay down any hard and fast rules as to the time within which requested information should be provided. It is, however, the kind of issue that could properly be dealt with in a BPA, or by ad hoc agreement. In the absence of such agreement, any actual or perceived delay in providing information could be addressed through referral to FWA under section 240, and ultimately, the making of a BO.

#### **4.4 RESPONDING TO AND CONSIDERING PROPOSALS**

The requirements set out in section 228(1)(c) and (d) are clearly closely interrelated, and indeed in some ways it is surprising that they are accorded separate paragraphs. Taken together, they require each bargaining party give 'genuine consideration' to proposals made by the other bargaining representatives, and respond to those proposals with reasons, in a timely manner.

On a commonsense view, such behaviour would appear to be of the essence of GFB. Interestingly, however, there was no specific reference to giving consideration to, or responding to, proposals put by the other party in the factors listed in section 170QK(3) – although the AIRC could clearly have taken account of such conduct in deciding whether to make orders for 'promoting the efficient conduct of the negotiations' or 'otherwise facilitating' the making of an agreement in reliance upon section 170QK(2).

The wording of section 228(1)(c) seems to imply that a bargaining representative must respond in some way to any proposal put by another representative – even if it is only to reject it. Not only that, section 228(1)(d) has the effect that the response must include reasons. There is no requirement that such reasons be in writing. Prudence would suggest that they normally should be committed to writing in order to make it easier to establish that the requirement has been met in any subsequent proceedings before FWA, or a court. As against that, bargaining

representatives may sometimes judge that it would be preferable to provide only an oral response, to minimise the risk of subsequently finding themselves 'hoist with their own petard'. Other than in very exceptional circumstances, prudence, not to mention adherence to the principles of GFB, would suggest that the written response option is to be preferred.

Neither the FW Act itself nor the Explanatory Memorandum for the Fair Work Bill provides any guidance as to what would constitute 'genuine consideration' in this context. But at the very least it would seem to require that a bargaining representative give serious consideration to what acceptance of a particular proposal would entail, both in its own terms and in the context of the negotiations as a whole. In many instances, the act of preparing a written response would itself entail giving 'genuine consideration' in the sense that doing so would require the bargaining party to turn its mind to whether the proposal can be agreed to, modified, or rejected outright.

What 'genuine consideration' does not require is the making of concessions. That much is, ostensibly at least, clear from section 228(2)(a). This provision, and the cognate section 228(2)(b) will be considered at greater length in due course.

It will be recalled that according to section 231(1)(a) of the FW Act, a BO can specify 'the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements'. An order that requires a bargaining representative to 'give genuine consideration' to proposals put by other bargaining representatives, and to respond to such proposals with reasons, would be an order to negotiate in all but name. It is also important to bear in mind that the Federal Magistrates Court of the Federal Court can grant injunctions for the purpose of enforcing any such order, and award compensation in respect of its breach. This constitutes a clear repudiation of the position adopted by the Full Bench of the AIRC in *Asahi*. It is, however, important to bear in mind that a bargaining representative still cannot be ordered to make concessions, or to reach agreement.

#### **4.5 REFRAINING FROM CAPRICIOUS OR UNFAIR CONDUCT**

##### **4.5.1 The Context**

Section 170QK of the 1988 Act did not make any express reference to capricious or unfair conduct, beyond requiring the AIRC to consider whether a party had 'capriciously added or withdrawn items for negotiation'. The NLRA is also silent on the question of capricious or unfair conduct, although many of the ULPs that are created by that measure would clearly encompass 'capricious or unfair conduct that undermines freedom of association or collective bargaining' in terms of the FW Act.

The juxtaposition of ‘freedom of association’ and ‘collective bargaining’ is interesting in this context. In terms of ILO standards, the right to engage in voluntary, autonomous collective bargaining is part of freedom of association. The fact that section 228(1)(e) uses both expressions suggests an intention to capture something more than undermining collective bargaining as protected by ILO standards. But it is hard to see what. Capricious or unfair conduct that undermines freedom of association by discouraging trade union membership or activity, or victimising those who take protected industrial action, would already be unlawful by force of one or more of Parts 3-1, 3-2 or 6-4 of the FW Act.<sup>123</sup> And, of course, section 228(1) does not make anything unlawful in any event. It may be, therefore, that the inclusion of reference to ‘freedom of association’ in section 228(1)(e) can be best explained as an attack of to legislative ‘exuberance’ – recognising that it was included in the *Forward with Fairness* policy document.

Section 228(1)(e) is the only one of the requirements that merits detailed treatment in the Explanatory Memorandum for the Fair Work Bill. Para 951 states that this provision ‘is intended to cover a broad range of conduct’, and goes on to list four examples of what would constitute capricious or unfair conduct by an employer:

- failing to recognise a bargaining representative;
- not permitting an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees;
- dismissing or engaging in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining; or
- preventing an employee from appointing his or her own representative.

The first of these examples essentially replicates section 228(1)(f), whilst the third and fourth would, like undermining freedom of association, be unlawful under one or more of Parts 3-1, 3-2 or 6-4 of the FW Act. This suggests that the intent of section 228(1)(e) is to extend and consolidate those protections by providing that not only is such conduct unlawful in its own terms, it also constitutes a failure to meet the GFB requirements.

There is, of course, a range of other behaviours that might be said to ‘undermine freedom of association or collective bargaining’. Several of these have already given rise to litigation before FWA. For present purposes, it is proposed to examine just three of the multitude of issues that can arise in this context: restructures during negotiations, direct dealing, and taking industrial action during bargaining.

The issue of operational restructures during negotiations is likely to prove to be a source of difficulty in the Australian context

#### 4.5.2 Restructuring During Negotiations

In *Liquor, Hospitality and Miscellaneous Union v Coca-Cola Amatil (Australia) Pty Ltd*<sup>124</sup> the Company had initiated a restructure of the ‘Syrup Room’ at a plant in South Australia whilst negotiations for a new enterprise agreement were ongoing. The Union sought a BO on the ground that this constituted unfair or capricious conduct within the meaning of section 228(1)(e). O’Callaghan SDP rejected the Union’s application on the technical ground that it had not given the employer reasonable time to respond to its concerns as required by section 229(4)(c). However, his Honour went on to indicate that he would not have been prepared to grant the Union’s application even if it had not failed on technical grounds:

On the information before me I am unable to agree [with the Union’s position]. The Syrup Room restructuring cannot be regarded as capricious. Coca-Cola have provided evidence that the proposal is based on its concerns about the recent loss of 20% of its overall manufacturing business and its desire to improve its competitive position, both externally and within the overall corporate group. In this respect, Coca-Cola have detailed its objectives which can be regarded as neither fanciful, vindictive nor whimsical. I cannot consider the Coca-Cola restructuring proposal to represent unfair conduct. Coca-Cola has committed to considering responses to this proposal. It has committed to completing a consultative process before implementing the change proposal. It has committed to not excluding the current Syrup Room employees from the negotiation process directed at a new Collective Agreement.<sup>125</sup>

This is, of course, just one isolated decision. It seems to suggest that if the employer is able to present a credible commercial or operational reason for the restructure then it can be implemented whilst negotiations remain on foot without running foul of the GFB requirements. It must be recognised, however, that this has been a potent source of difficulty in the North American context, and it seems inevitable that it will need to be revisited in the Australian context.<sup>126</sup>

### 4.5.3 Direct Dealing

In both Canada and the United States, it is a ULP for an employer to seek to circumvent a union – for example by negotiating directly with employees whilst negotiations remain on foot. This is a reflection of the fact that in both countries ‘a certificate requires the employer to recognise the union as the *exclusive bargaining agent* for all members of the appropriate bargaining unit’.<sup>127</sup> It would be inconsistent with this notion of exclusivity if the employer were able to negotiate directly with members of the bargaining unit. It might also compromise the standing of the union in the eyes of the employees in the bargaining unit by showing them that the employer can provide benefits that the union cannot obtain through collective bargaining – a factor which could be expected to be particularly potent where negotiations have dragged on for a long time with little sign of progress.

The duty not to undermine bargaining also finds expression in section 32(1)(d) of the *Employment Relations Act 2000* (NZ) which stipulates that for purposes of collective bargaining the union and the employer:

- (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
- (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
- (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining ...

In *Christchurch City Council v Southern Local Government Officers Union Inc*,<sup>128</sup> the Employment Court interpreted this provision as meaning that whilst bargaining was ongoing, ‘neither party may, without agreement otherwise, correspond or communicate about the bargaining with persons for whom an authorised representative is acting’.<sup>129</sup> According to Nuttall (2009: 14–15), this decision ‘provoked a storm of furious employer protest’ and induced a ‘state of irrational panic’ on the part of sections of the business community.

This aspect of the decision was reversed on appeal, with the Court of Appeal taking the view that section 32(1)(d) did not prevent communication that was not bargaining, even though it related to bargaining. However, the Court of Appeal also determined that such communication must not ‘undermine’ the bargaining.<sup>130</sup>

The New Zealand Department of Labour recently reported (2009: 41) that ‘the most frequently cited breach of good faith related to employers communicating with employees during bargaining’, but also noted that few cases were actually brought before the Employment Court. Apparently this was due to ‘pressure from union members to settle

agreements as quickly as possible, a lack of clarity around what constituted a breach, and [erroneous] perceptions that there were no real penalties for breaches’. As to employer perceptions of the restrictions on communications with employees during bargaining, the Department’s research suggested (2009: 33) that:

A range of employers ... had no issues with a restricted ability to communicate with employees at this time. These employers included those with a heavily unionised workforce and those with a small proportion of unionised employees. However, there were also employers who had strong views about being able to communicate with employees. This was because they wanted to correct any misrepresentation of their (the employer’s) views, because their employees asked them to communicate with them, and because non-unionised employees may miss out on information.

Traditionally, Australian law has not sought to restrict the capacity of employers to communicate with their employees during collective bargaining, or at any other time. In the past, it would, for example, have been quite permissible for an employer to offer ‘above award’ conditions to employees whilst negotiations for a collective agreement were taking place, or whilst the employer was refusing to engage in collective bargaining. Furthermore, under Work Choices, an employer was at liberty to try to persuade employees to enter into individual Australian Workplace Agreements (AWAs) at any time, including during negotiations for a collective agreement which would have the effect of displacing any collective agreement that might subsequently be concluded.<sup>131</sup>

It is not entirely clear just how much this has changed under the FW Act. There is certainly no longer any capacity for employers to enter into individual agreements that have the effect of displacing otherwise applicable collective instruments. It would also be inconsistent with the GFB requirements for an employer to refuse to negotiate with the bargaining representatives of its workforce, and FWA has been given the capacity to make a range of orders that are intended to ensure that parties meet the GFB requirements. It is also the case that employees who are subject to ‘adverse treatment’ on account of their exercising a ‘workplace right’ (which includes ‘making varying or terminating an enterprise agreement’ and ‘appointing, or terminating the appointment of, a bargaining representative’) may be able to obtain relief under Part 3-1 of the FW Act. It remains to be seen, however, whether it would still be open to an employer directly to approach its employees with a view to persuading them to elect to have their terms and conditions of employment regulated by ‘common law contracts’ rather than an enterprise agreement, or to persuade them to approve an enterprise agreement that had not been agreed with all or any of the bargaining representatives.<sup>132</sup>

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Transfield (Australia) Pty Ltd* Drake SDP issued a series of Recommendations relating to the conduct of negotiations between the parties. Among them was the following:

During this process [of meetings between company and union representatives] 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.<sup>133</sup>

This recommendation is clearly influenced by American jurisprudence in this area. However, it does seem to go rather further than the NLRA in that it refers to *all* communication with employees whereas in the United States it is permissible for employers to communicate with their employees about the progress of negotiations, etc., – what they must not do is try to negotiate with those employees whilst the negotiations are ongoing. The recommendation in *Transfield* also seems to run counter to the kind of freedom of communication during negotiations to which Australian employers (and unions) are accustomed. As such, it provides an interesting contrast to the comments of Whelan C in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HJ Heinz Company Australia Ltd (Echuca Site)* to the effect 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 ...[the issue in dispute]... Ultimately the parties will either reach agreement on the issue or the employees will indicate their position in a vote.<sup>134</sup>

Inevitably, there will be further court and tribunal decisions in relation to these issues in the not-too-distant future. It is to be hoped that the courts and tribunals concerned will not become trapped in ‘the legalistic quagmire’ that characterises the United States system.<sup>135</sup> Helpful as decisions in other jurisdictions may be, it is important to bear in mind that each case will turn on its own particular facts. What may be regarded as inconsistent with the GFB requirements in one set of circumstances may not be so regarded in another. This is borne out by a comparison of the *Transfield* and *HJ Heinz* decisions noted above. The situation-specific character of such decisions is particularly important in the context of FWA decisions on bargaining orders etc in light of the fact that that tribunal is not bound by the rules of precedent in the same way as a court of law.<sup>136</sup>

Helpful as decisions in other jurisdictions may be, it is important to bear in mind that each case will turn on its own particular facts. What may be regarded as inconsistent with the GFB requirements in one set of circumstances may not be so regarded in another.

#### 4.5.4 Taking Industrial Action During Bargaining

It will be recalled that in the *ABC Case*, the AIRC was prepared to accept that it was not inconsistent with the notion of GFB for a union party to negotiations to take protected industrial action whilst negotiations remained on foot. This was consistent with United States jurisprudence – and suggests that taking protected action in support of an agreement would not of itself be regarded as constituting capricious or unfair conduct that undermines freedom of association or collective bargaining. However, it is possible to envisage circumstances where taking protected action could be regarded as undermining freedom of association or collective bargaining – for example, where the parties had reached agreement on all, or almost all, outstanding issues and a union decided to take protected action ‘as a friendly reminder’.

If it is not inconsistent with the GFB requirements for parties to take protected industrial action during bargaining, it follows that it would not be inconsistent with those requirements to seek a ballot order to take protected industrial action. It will be recalled that a condition of the making of such an order is that the bargaining representative seeking the ballot order must be ‘genuinely trying to reach an agreement’, and it was suggested that in practical terms this requirement must amount to very much the same thing as the GFB requirement. That being the case, it seems safe to assume that, in the normal run, the mere fact of seeking a ballot order would not be regarded as tending to undermine freedom of association or collective bargaining, or any of the other GFB requirements.

What, then, of unprotected industrial action? There have not yet been any decided cases in Australia on this point. It is interesting to note that in *NLRB v Insurance Agents’ International Union* the United States Supreme Court took the view that the right to exert economic pressure in the context of collective bargaining extended to industrial action that was not authorised under the NLRA.<sup>137</sup> It remains to be seen whether FWA would be prepared to adopt a similar position under the FW Act. Intuitively,

it seems unlikely. The 2009 Act goes to considerable lengths to ensure that the capacity to take protected action is exercised in a responsible and democratic manner, and provides significant penalties for taking unprotected action. It surely would not be consistent with those measures to permit a bargaining representative to take unlawful industrial action and still claim to be adhering to the GFB requirements.

#### 4.6 RECOGNISING AND BARGAINING WITH OTHER BARGAINING REPRESENTATIVES

As noted earlier, the Explanatory Memorandum for the Fair Work Bill expressly identified failure to recognise a bargaining representative as an example of conduct that tended to undermine freedom of association and collective bargaining. This suggests that, to the extent that it requires recognition of bargaining representatives, section 228(1)(f) adds nothing of substance to section 228(1)(e). The same appears to be true of its application to 'bargaining' in the sense that it is hard to see that it requires anything not already dealt with in the first four paragraphs of section 228(1).

This suggests that section 228(1)(f) was included out of an abundance of caution, and that it does not add anything of substance to the rest of subsection (1). This assessment is borne out by the fact that paragraph (f) was not included in the *Forward with Fairness* document, whereas the other five paragraphs were listed in almost precisely the same form as they appear in the FW Act.

#### 4.7 THE NO CONCESSIONS QUALIFIER

In *NLRB v Montgomery Ward & Co*<sup>138</sup> the Ninth Circuit of the United States Court of Appeals determined that the duty to bargain in good faith entails an 'obligation ... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement ...' This in turn requires that the employer have 'an open mind and a sincere desire to reach an agreement' and that 'a sincere effort must be made to reach a common ground'.<sup>139</sup> It might be assumed that a preparedness to make concessions would be an obvious way to manifest the relevant 'intention', 'sincere desire' and 'sincere effort' for these purposes. However, to rely upon that assumption would be to ignore the effect of section 8(d) of the NLRA. It will be recalled that this provision contains an express stipulation to the effect that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession'.<sup>140</sup>

This qualifier has been a source of great conceptual and practical difficulty in the United States context. In some respects, it can be seen as a contradiction in terms:

The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground,

but it need make no concessions and may reject any terms it deems unacceptable. One can argue that the formulation is too self-contradictory to survive.<sup>141</sup>

But, survive it has. Cox (1958: 1416) suggested that this is because in applying the relevant statutory provisions, the NLRB must be conscious of two 'conflicting desiderata': '(1) legal pressure upon labor and management to enter into joint agreements determining terms of employment, and (2) complete freedom from government pressure as to what the terms will be'.

In other words, the NLRA enshrines a public policy that parties should negotiate for, and agree, terms and conditions of employment through a robust process of collective bargaining. But it also reflects a public policy that dictates that the parties must be free to make, or not make, an agreement on their own terms without interference from the state or its agencies.

This reasoning may be more or less persuasive in the abstract, but it has led to some curious outcomes in practice – particularly in situations where the NLRB and the courts have had to try to distinguish between 'hard' bargaining, which is permissible, and 'surface' bargaining, which is not:

In some cases in which a party has been found guilty of failure to bargain in good faith, the NLRB and the courts have cited the party's rigidity in adhering to a bargaining position. Some court and NLRB decisions suggest that a party must be prepared to make at least some concessions if that party is to be found to be bargaining in good faith. Other decisions emphasise that willingness to make concessions is not required for good faith bargaining. And there has been much debate concerning whether a 'take-it-or-leave-it' bargaining position is a lawful bargaining strategy or a failure to bargain in good faith. [Citations omitted]<sup>142</sup>

Section 170QK did not contain a 'no concessions' qualifier, although this was probably of little practical significance in light of the decision of the Full Bench of the AIRC in the *Asahi* Case that section 170QK did not enable it to order the parties to negotiate: if the parties could not be compelled to negotiate, manifestly they could not be compelled to make concessions. The rather more robust approach to GFB that is enshrined in section 228 of the FW Act appears to have persuaded the government that the issue ought to be revisited, as reflected in the qualifier now set out in section 228(2)(a).

There must be a very real danger that FWA and the Australian courts will find themselves confronted with similar dilemmas to the NLRB and the United States courts as they seek to apply this provision. Indeed, in some respects the dilemmas may be even more acute in the Australian context because of the requirement in section 228(1)(e) that the parties refrain from 'capricious or unfair

conduct that undermines freedom of association or collective bargaining', a requirement that has no precise equivalent in United States law. There must inevitably be situations where adopting a 'hard' bargaining position which entails a refusal to make any (further) concessions could be said to constitute 'capricious or unfair' conduct – although there would equally clearly be many situations where it such an assertion could not be sustained. This suggests that a great deal will depend upon FWA and the courts adopting a pragmatic approach to reconciling the requirements of sections 228(1)(e) and 228(2)(a).<sup>143</sup>

#### 4.8 THE NO REQUIREMENT TO AGREE QUALIFIER

Just as section 228(2)(a) stipulates that the GFB requirements do not require a bargaining representative to make concessions during bargaining, section 228(2)(b) provides that they also do not extend to a requirement 'to reach agreement on the terms that are to be included in an agreement'. The two qualifiers are clearly closely related, as is also clear from the way in which the two concepts are linked in the qualifier in section 8(d) of the NLRA.

Despite this, the United States and Australian provisions do raise some rather different policy considerations – especially in relation to whether there should be some mechanism whereby an outcome can be imposed upon parties who are unwilling or unable to adhere to the GFB requirements. As noted earlier, there is no such mechanism under the NLRA, and indeed when the parties have reached impasse under the regime established under that measure, the employer enjoys a broad capacity unilaterally to set terms and conditions of employment. The same is true in Canada, apart from those Provinces that provide for the imposition of an arbitrated outcome in the case of first contract negotiations.

The same is not necessarily true elsewhere, however. As indicated, the current New Zealand legislation: (i) requires the parties to conclude an agreement unless 'there is a genuine reason, based on reasonable grounds not to'; (ii) provides for 'facilitation' and the making of non-enforceable recommendations by the ERA; and (iii) permits the making of determinations by the Authority that 'fix' the terms and conditions of the employees concerned. Again, under Division 2B of the *Industrial Relations Act 1979* (WA) the State Commission, if satisfied that 'there is no reasonable prospect of the negotiating parties reaching agreement', can make an 'enterprise order' 'providing for any matter that might otherwise be provided for in an industrial agreement'.<sup>144</sup>

Both the New Zealand and Western Australian provisions have been very little relied upon in practice, but they do evidence a perception that in certain circumstances the failure to bargain in good faith should lead to the imposition of a non-agreed outcome. McCarry (1993: 37) would take this rather further:

American experience should sound a clear warning against relying on an obligation to bargain in good faith as the mainstay of a legal framework for bargaining (or any other) regimes. Even the most cursory inspection of the American materials demonstrates that it [is] certain to generate an unending stream of litigation. There may be a number of alternatives. One which has some initial attraction is to try and improve the American model by prescribing in detail the 'objective' ingredients of good faith bargaining obligations ... Proliferation of more detailed standards or rules is no doubt possible, but it is likely to shift the frontiers of litigation rather than eliminate them.

Another more promising answer is by all means include in the norms a requirement to bargain in good faith and by all means set out what that involves, but realise that it is not enough. Where the bargaining does not produce an outcome, whether because of the absence of good faith or otherwise, provide the parties with a final solution, which, I suggest, should be a compulsorily arbitrated decision.

The FW Act certainly does not go that far. It is true that it does set out the 'objective' ingredients of good faith obligations in the form of section 228(1). But not only does it expressly stipulate that the parties are not obliged to reach agreement on the terms that are to be included in an agreement, it also provides that arbitrated outcomes can be imposed only with the agreement of all parties to the negotiations. However, the FW Act does, by an indirect route, go part of the way towards McCarry's favoured approach. This is by means of the BO/SBD/BRWD procedure that was described earlier. There are so many hurdles to be cleared before an arbitrated outcome can be imposed that this is likely to occur only in most extreme circumstances. Nevertheless, it is the case that, in the final analysis, breach of the GFB requirements can result in a form of agreement being imposed on the parties, notwithstanding the terms of section 228(2)(b).<sup>145</sup>

## SECTION 5: THE GFB REQUIREMENTS IN PERSPECTIVE

It appears from the foregoing that legislated GFB requirements have not been conspicuously successful in any of the jurisdictions in which they have been introduced, if 'success' is measured by the establishment and maintenance of a culture 'in which the parties [routinely] make serious and sincere attempts to arrive at a mutually agreeable settlement'. The United States provisions were born out of, and form part of, an exceedingly adversarial culture, and a perception that overbearing trade unions needed to be brought to heel by being required to bargain in good faith. Not only have they failed to effect a cultural change in favour of good faith dealings, they have generated a 'legal quagmire' which has enriched lawyers and helped (with other factors) to emasculate the supposedly over-powerful union movement and to make collective bargaining of any kind very much the exception rather than the rule in the private sector. Much the same is true for Canada, although the trade union movement does appear to be in rather better shape than in the United States, and the reach of collective bargaining to be rather wider.

Attempts to promote GFB in New Zealand have fared little better. The *Employment Relations Act 2000* was intended to replace what the newly-elected Labour Government saw as the neo-liberal extremism of the *Employment Contracts Act 1991* with a system that was more focused upon collective bargaining and encouraging trade unionism. An important element of the new regime was the duty to act in good faith, not just in collective bargaining, but in the employment relationship as a whole.<sup>146</sup> Measured against these objectives, the 2000 Act has enjoyed only limited success. In part this may be attributed to lack of appreciation of the objects of the legislation on the part of the judiciary (especially in the Court of Appeal) – a state of affairs which far-reaching amendments in 2004 appear to have done little to correct.<sup>147</sup> More likely, it can be attributed to the debilitated state of the trade union movement after almost a decade of contractualism under the 1991 Act. The end-result is that in 2009 around 17% of the New Zealand workforce are union members, but only 15% have their terms and conditions of employment regulated through collective bargaining.<sup>148</sup> Not only that, the various mechanisms that are intended to support GFB – such as rights of access to information, protection against 'undermining', facilitation by the ERA, and 'fixing' of terms and conditions – appear to be almost entirely unused in practice.

Australian attempts to provide legislative support for GFB have been equally unavailing. Section 170QK was a limited measure by any standard, and was rendered virtually inoperative by the extremely restrictive interpretation accorded to it in the *Asahi Case*. State provision – including the ostensibly far-reaching Division 2B of the Western Australian Act – appears to have had very little practical impact. Certainly, they have generated very little case law in either the industrial tribunals or the courts. To some extent, this may reflect the 'capture' of all incorporated employers by the federal system since the adoption of Work Choices. But even before the 2005 changes, the state provisions were largely dead-letters in practice.

Does this mean that Division 8 of Part 2-4 of the FW Act is destined for the same irrelevance as its state and trans-Tasman counterparts? Alternatively, are Australian employers, unions and employees doomed to flounder in the same legal quagmire as their North American contemporaries? It is impossible entirely to discount either possibility. But nor is either outcome inevitable.

Whilst not without its flaws and areas of uncertainty, the legislative framework put in place by Division 8 is quite sophisticated in many respects. The requirements set out in section 228(1) are the kinds of things that parties who are trying to negotiate in good faith could reasonably be expected to do. The facilitative role of FWA, plus the interlocking system of orders provided by Division 8, afford a finely balanced combination of encouragement and compulsion. It would require particularly obdurate and/or stupid behaviours for employers or unions to find themselves subject to a BRWD, but in the final analysis that is what can happen. As such, it is a possibility that ought to give all parties pause for thought if they decide to adopt an obstructive approach to collective bargaining in general, and the GFB in particular.

Inevitably, the practical impact of Division 8 will largely depend upon the attitudes and behaviours of the parties. If employers and unions see the GFB requirements as a possible basis for adopting a more nuanced and less confrontational approach to workplace relations, then those requirements could indeed have a transformative effect. If, on the other hand, parties see them as another 'stick' with which to beat the other side, then the GFB requirements will not only fail to have a transformative effect, but may hasten the descent into the quagmire of legalism.

It is hard to be optimistic in face of the lack of impact of previous antipodean experiments in this area, and of the legalistic irrelevance that characterises the North American systems. The fact is that making constructive use of provisions of this character is hard. It requires the

allocation of time and resources, and it requires a real effort of will to move away from traditional adversarial practices and attitudes in order to embrace new concepts and approaches. Some (regrettably few) businesses may have the requisite time, resources and open-mindedness. Few unions are likely to have the time or the resources, even if they do have the requisite mind-set. Nevertheless, it is not entirely unrealistic to think that there may be some situations where employers and unions can make constructive use of these provisions to develop new ways of doing business with each other.

For there to be any realistic prospect of positive outcomes in this area, it is essential that FWA makes a more sustained attempt to embrace the objectives of Part 2-4 in general, and of Division 8 in particular, than was evident in the response of its predecessor in the form of section 170QK. In particular it needs to use its discretionary powers to encourage bargaining representatives to try to resolve their differences by direct negotiation rather than by applications for formal orders and judicial intervention. At the same time, it also needs to show that it is prepared to make formal orders where it is necessary and appropriate to do so, and that it is not prepared to be complicit in attempts by bargaining representatives to manipulate the system for their own ends – for example by trying to create circumstances where FWA will feel impelled to make a BRWD.

In exercising its powers under Division 8, FWA must also be mindful of the importance of developing a coherent, balanced jurisprudence that gives effect to the objects of the legislation and at the same time recognises the legitimate rights and interests of all participants in the process. As noted earlier, it is most important that it exercise extreme caution in drawing upon overseas jurisprudence in interpreting and applying Division 8. Of course, such jurisprudence may be of qualified assistance in some instances, but it is most important to take full account of the different contexts within which the overseas legislation operates, and to avoid the unnecessary importation of artificial distinctions and the endorsement of practices that are conducive of further litigation rather than the promotion of GFB.

Government also has an important role to play in operationalising the GFB requirements. First, it needs to ensure that all departments and agencies respect the GFB requirements whilst negotiating agreements to apply

to their staff. Second, it needs to provide advice and encouragement to those who are endeavouring to come to grips with the GFB requirements. This could include the provision of guidance materials, funding or otherwise facilitating training for bargaining representatives, and providing access to appropriate advisory services.<sup>149</sup> Third, it needs to recognise the need for more formal guidance – perhaps in the form of a Code of Practice – as to what the GFB Requirements actually entail.<sup>150</sup> Self-serving platitudes to the effect that ‘the good faith bargaining requirements are generally self-explanatory’ are simply not good enough.

In short, the GFB requirements set out in Division 8 have the potential to make a significant contribution to the development of more sophisticated, less confrontational approaches to collective bargaining in Australia. They are structured in such a way as to provide real incentives for both employers and employees and their representatives to take the GFB requirements seriously, and to use them in a creative and constructive manner. They require significant input from FWA and from government. They are not a panacea for the ills that beset either business or organised labour. History suggests that they will have little practical impact. But despite the conventional wisdom, history doesn’t have to repeat itself.

History suggests that the good faith bargaining provisions will have little practical impact. But despite the conventional wisdom, history doesn’t have to repeat itself.

## NOTES

- 1 Marsh & Evans 1973: 130.
- 2 *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385.
- 3 See Naughton 1995a: 3.
- 4 ILO 2006: para 935. See also ILO 2006: paras 934–43. For the (essentially similar) views of the Committee of Experts on the Application of Conventions and Recommendations, see ILO 1994: paras 243, 246–47, 257–59.
- 5 Rathmell 2008: 169. Note, however, that in *Walford v Miles* [1992] 2 AC 128, at 138 the House of Lords took the view that an obligation to negotiate in good faith in commercial dealings is 'inherently repugnant to the adversarial position of the parties' when they are involved in negotiations in circumstances where each of them is free to pursue their own interests – cited in Anderson 2006: 5.
- 6 Anderson 2006: 23, paraphrasing Brodie 1998: 98.
- 7 Gillan & Caspersz 2005: 222.
- 8 Summers 1984: 221–22, quoted in Naughton 1995a: 9.
- 9 See further Wilson 2004: 17.
- 10 The NLRA is often referred to as the 'Wagner Act', after the senator who piloted it through Congress. Similarly the 1947 amending legislation, which inserted section 8(d), is commonly referred to as the 'Taft–Hartley Act' after the Senators who promoted its passage.
- 11 Shaw 1996: 8.
- 12 Strauss 2005: 6.
- 13 McCarty 1993: 37.
- 14 See Carter 1983; Bemmels et al., 1986 and Fiorillo 2000.
- 15 See *Employment Relations Act 2000*, section 32(1). See also Rathmell 2008: 184–89; Anderson 2006.
- 16 See Section 5.
- 17 Ford 2004: para 43.
- 18 For a similar list from an Australian perspective see Bromberg & Irving 2007: 95–6.
- 19 There is, not surprisingly, an extensive jurisprudence as to what constitutes an impasse. Furthermore, even where there is an impasse, the parties may be obliged to resume negotiations 'if changed circumstances or new proposals indicate agreement may be possible'. See Goldman & Corrada 2008: 326–27.
- 20 For an overview of ILO standard-setting and supervisory procedures, see Creighton & Stewart 2005: paras [3.06]–[3.22].
- 21 See, for example, ILO 2007: 43–48.
- 22 A number of the Canadian provinces make provision to this effect – see Sexton 1991.
- 23 For a brief description of ILO supervisory procedures, see Creighton & Stewart 2005: paras [3.16]–[3.19].
- 24 ILO 2006: paras 936, 937, 938, 939 and 941 respectively.
- 25 ILO 1981: 22/11.
- 26 Convention No. 154 has not been ratified by Australia, and indeed as of 1 November 2009 had attracted only 40 ratifications in total (out of a possible 183).
- 27 ILO Recommendations are not open for ratification, and are not capable of giving rise to obligations in international law. They do, however, provide guidance as to good practice, and may be used in interpreting and giving effect to Conventions.
- 28 Amongst the other major innovations contained in the 1993 Act were the introduction of statutory protection against unfair and unlawful termination of employment, and legislated minimum standards in relation to issues such as notice of termination of employment, parental leave, and equal pay for work of equal value.
- 29 *Public Sector, Professional, Scientific, Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1994) 36 ALJR 372 (31 August 1994, Print L4605). For comment see Naughton 1995a: 3–4, 1995b; Rathmell 2008: 178–9.
- 30 *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385. For comment see Naughton 1995a: 5–6, 1995; Rathmell 2008: 179–80; Floyd 2009: 256–7.
- 31 Print L7818 and L7819, 19 December 1994; Print L8135, 23 December 1994.
- 32 The joint submissions of ACCI and BCA are summarised at (1995) 59 IR 385, 399–401. Essentially they consisted in the assertion that the Commission did not have the power to order the parties to negotiate, but that if it did, that power should not be exercised where the union had no members at the employer's workplace and where negotiations had not commenced.
- 33 (1995) 59 IR 385, 420.
- 34 (1995) 59 IR 385, 421.
- 35 (1995) 59 IR 385, 422.
- 36 Naughton 1995a: 6. See also Floyd 2009: 257.
- 37 *Re The Australian Rail, Tram and Bus Industry Union* Print L5622, 30 September 1994. Quoted in Ford 2004: para 73.
- 38 See the account of these endeavours provided by Rathmell 2008: 182.
- 39 Cole 2003: paras [242] and [245], cited in Rathmell 2008: 182.
- 40 (2003) 128 IR 92.
- 41 *Sensis Pty Ltd v Australian Industrial Relations Commission* (2005) 146 IR 120.
- 42 Forsyth 2009a: 124.
- 43 For example, the post-Work Choices version of the *Workplace Relations Act 1996* provided for suspension or termination of bargaining periods where parties did not genuinely try to reach agreement before organising or taking industrial action (section 430(3)); required employers genuinely try to reach agreement before taking industrial action (section 444); and made genuinely trying to reach agreement a condition of the making of a ballot order (section 461(1)). See further the discussion of the equivalent provisions of the FW Act in Section 3.3.7.
- 44 Forsyth 2009a: 125.
- 45 *Industrial Relations Act 1996* (NSW), section 134.
- 46 In 2003 the State government and relevant public sector unions agreed to a Queensland Public sector Protocol which sought to operationalise GFB in the State public sector.
- 47 Gillan & Caspersz 2005: 225.
- 48 Quoted in Gillan & Caspersz 2005: 225.
- 49 Speaking at a conference in Sydney in June 2008, the Acting Executive Director, Labour Relations, of the Western Australian Department of Consumer and Employment Protection indicated that up to that time there had been 'about 50' applications for enterprise orders under the 1979 Act, but that only nine orders had actually been made – *Workplace Express*, 17 June 2008. See also the review of cases in Gillan & Caspersz 2005: 226–7.
- 50 See further Sections 4.6 and 4.7.
- 51 For further discussion of the role of the FMCS, see Forsyth 2009c.
- 52 FW Act, section 595(2).
- 53 FW Act, section 590(2). See also sections 591–594.
- 54 Cf section 42E of the *Industrial Relations Act 1979* (WA), which entitles the State Commission to 'exercise its powers as if it were endeavouring to resolve an industrial matter' in order 'to assist parties to bargain for an industrial agreement'. This could include intervention on the Commission's own initiative. See Ford 2004: para 48.
- 55 Section 240(2) has the effect that where the proposed agreement is a single-enterprise agreement (which would be the norm), or a low-paid authorisation is in operation, an application to FWA may be made by any bargaining representative for the agreement. In all other cases (e.g. in relation to a greenfields or multi-enterprise agreement) applications can be made only where all parties agree.
- 56 FW Act, sections 240(4) and 595(3).
- 57 FW Act, section 173.
- 58 FW Act, sections 176–178A. It is quite permissible for an employee to revoke a union's authority without nominating a replacement representative if the employee so chooses.
- 59 In *Liquor, Hospitality and Miscellaneous Union v Coca-Cola Amatil (Australia) Pty Ltd* [2009] FWA 101 FWA refused to make an MSD on the ground that negotiations had in fact commenced, which meant that the requirements of section 237(2)(b) were not satisfied.
- 60 For example, in *AMWU v Cochlear Limited* [2009] FWA 67, FWA decided to ascertain the views of the Company's workforce by means of a ballot conducted by the Australian Electoral Commission. In due course a majority of the employees polled indicated that they wished to bargain for an enterprise agreement with their employer, and FWA duly made an MSD on 20 August 2009 – [2009] FWA 125.
- 61 Section 238(3). In *Liquor, Hospitality and Miscellaneous Union v Coca-Cola Amatil (Australia) Pty Ltd* [2009] FWA 320 FWA refused to make an SO because the applicant union had not met any of these requirements.
- 62 FW Act, section 229(3).
- 63 FW Act, section 230(3)(b). Section 229(5) enables FWA to consider an application under section 229 even though the section 229(4)(b) and (c) requirements have not been met if it is 'satisfied that it is appropriate in all the circumstances to do so'.

- 64 Low-paid authorisations are dealt with in Division 9 of Part 2-4 of the FW Act. Detailed consideration of the operation and effect is beyond the scope of this paper.
- 65 See, for example, *Australian Municipal, Administrative, Clerical and Services Union v Queensland Tertiary Admissions Centre Ltd* [2009] FWA 53; *National Union of Workers v Defries Industries Pty Ltd* 10 August 2009, PR988441. In *Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) t/a Mary Mackillop Aged Care Centre* [2009] FWA 301 Whelan C refused to approve two agreements on the ground that they had been approved by employees without the union bargaining representatives having been advised that they were proceeding to a vote. A number of employer groups, most notably the AiG, have strongly argued that FWA does not have the capacity to stop employers putting agreements to the vote because to do so is inconsistent with the prohibition in section 255(1)(c) on the making of an order 'that requires or has the effect of requiring' 'an employee to approve, or not approve a proposed enterprise agreement'. In August 2009 AiG was given leave to intervene in *CFMEU v Australian Precast Solutions Pty Ltd and Abigroup Contractors Pty Ltd*, a case where this point was very much at issue. However, the matter was settled before the case could be argued. Meanwhile, in *NUW v CHEP Australia Limited* [2009] FWA 202 Watson VP ruled that FWA could make orders to delay the conduct of a vote without running foul of section 255 'provided it be only or a short time and does not in substance deny employees the right to vote for an agreement'.
- 66 Proceedings for the imposition of a penalty may be initiated by a bargaining representative, an employee who will be covered by the proposed agreement, or an inspector – FW Act section 539(2)(Item 6).
- 67 FW Act, section 545.
- 68 FW Act, section 235(3).
- 69 FW Act, section 269.
- 70 FW Act, section 271.
- 71 FW Act, section 187(2).
- 72 [2009] FWA 301.
- 73 See, for example, *NLRB v Insurance Agents' International Union* (1960) 361 US 477. See further Section 4.5.3.
- 74 *Workplace Relations Act 1996*, section 461 (a) and (b).
- 75 See Forsyth 2009: 124, quoted at the text accompanying note 44, above.
- 76 [2009] FWA 425.
- 77 [2009] FWA 424, para 25.
- 78 [2009] FWA 424, para 26.
- 79 FW Act, section 423(2) and (3).
- 80 For discussion of the relationship between GFB and unprotected industrial action, see Section 4.5.4.
- 81 The *Forward with Fairness* policy document listed (at 15) five GFB requirements which coincide with those set out in section 228(1)(a) to (e). The requirement to 'recognise and bargain with the other bargaining representatives for the agreement' (section 228(1)(f)) was added after the government was elected to office.
- 82 See respectively Shaw 1996: 8; Naughton 1995a: 9; Strauss 2005: 6.
- 83 This process is described as 'certification'.
- 84 As noted earlier, section 176(1)(b) would also enable a union member to revoke the status of the union as their bargaining representative without appointing another bargaining representative.
- 85 The employer is automatically treated as a bargaining representative, but under section 176(1)(d) may also appoint another person to be their bargaining representative.
- 86 It will be recalled, however, that one of the bases upon which a bargaining representative may seek a BO is that they have concerns that 'the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representative for the agreement' (section 229(4)(a)(ii)).
- 87 This requirement originated in the decisions of the Supreme Court in *Steele v Louisville & Nashville Railroad* (1944) 323 US 192 and *The Wallace Corporation v NLRB* (1944) 323 US 248. It has subsequently become an enormously complex and contentious issue, and has generated a very extensive and distinctly unifying, jurisprudence.
- 88 Employers who are found to have bargained in bad faith may also be required to compensate a union for negotiating expenses – such a lost wages for members of a negotiating committee, or extra organising expenses incurred because of the employer's recalcitrance. See further Bemmels et al., 1986: 609. reimburse
- 89 See further Bemmels et al., 1986: 608–10. This is rather similar to the low-paid workplace determinations that can be made by FWA under Division 2 of Part 2-5 of the FW Act.
- 90 *HK Porter Co v NLRB* (1970) 397 US 99, quoted in Bemmels et al., 1986:608. See also Rathmell 2008: 175.
- 91 The enforcement provisions in the amended *Employment Relations Act 2000* (NZ) are broadly similar to those under the FW Act, but with the significant qualification that section 33 of the New Zealand Act includes a stipulation to the effect that GFB 'requires a union and an employer ... to conclude a collective agreement unless there is a genuine reason based on reasonable grounds not to'. See further Anderson 2006: 10, 15–18; Rathmell 2008: 187–9.
- 92 *Teamsters Local Union No 639 v NLRB* (1991) 136 LRRM 2329, 2332.
- 93 FW Act, sections 225–226.
- 94 FW Act, section 57.
- 95 See especially *American Shipbuilding Company v NLRB* (1965) 380 US 300.
- 96 Note, however, that the employer may have to disclose information to the union about any decision to contract out work whilst negotiations are ongoing, and may be required to bargain about the decision and its implications for its existing employees.
- 97 *NLRB v McKay Radio & Telegraph Company* (1938) 304 US 333. Perhaps the best-known example of the dismissal and replacement of a workforce occurred in 1981, when President Reagan authorised the dismissal and replacement of some 10,000 air traffic controllers.
- 98 See, for example, *NLRB v Insurance Agents' International Union* (1960) 361 US 477. See also commentary by Dau-Schmidt 2005: 26–38.
- 99 FW Act, section 411.
- 100 FW Act, sections 340(1), 341(1)(1)(b) and (2)(c)-(d), 346(b) and 347(b).
- 101 For example in *National Union of Workers – New South Wales Branch v ACCO Australia Pty Ltd* [2009] FWA 226 Thatcher, C. (at para 11) endorsed AIRC authority which relied upon the North American approach to hard bargaining.
- 102 See, for example, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HJ Heinz Company Australia Ltd (Echuca Site)* [2009] FWA 322, where Whelan, C. (at para16) declined to read the American jurisprudence about employer communication with employees during bargaining into her consideration of the FW Act.
- 103 This requirement was also reflected in the former section 170QK(3)(i)–(iii).
- 104 Department of Labour 2009: 31–32. For the priority accorded to such agreements by the Employment Court, see *Association of University Staff Inc v Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224.
- 105 Note that section 170QK(3)(iii) directed the Commission to consider whether a party had 'complied with negotiating procedures agreed to by the parties' in deciding 'what orders (if any) to make' in relation to GFB.
- 106 Davies & Freedland 1983:110, quoted in Deakin & Morris 2005: 850–1.
- 107 (1956) 351 US 149. For a particularly interesting analysis of the legal and factual background to this case, see Dau-Schmidt 2005: 6–18. For a highly critical view of the decision and its implications, see Cox 1958: 1430–42.
- 108 (1956) 351 US 149, 152–3, quoted in Rathmell 2008: 174.
- 109 Mandatory topics are to be distinguished from non-mandatory or 'permissive' topics, and from illegal topics. Employers who engage in bargaining are obliged to negotiate in relation to mandatory topics, may bargain about permissive topics (which can broadly be equated to the Australian concepts of managerial prerogative or (more recently) non-pertaining matters). It is forbidden to negotiate about illegal topics, such as a demand that an employer engage only union members (which broadly equate to the Australian concept of objectionable terms). This distinction is derived from the decision of the Supreme Court in *NLRB v Wooster Division of Borg-Warner Corporation* (1958) 356 US 342. Predictably, it has generated a vast, and highly confusing, jurisprudence as to which constitute mandatory, non-mandatory and illegal terms, and as to what information must be disclosed in what circumstances.
- 110 *Detroit Newspaper Printing (Oakland Press Co) v NLRB* (1977) 233 NLRB 994. Employers not infrequently use their right to require disclosure of information by the union side as a bargaining tactic – hoping either to dissuade the union from claiming further information for fear of retaliation, or to distract the union from the bargaining process by having to devote time and resources to acquiring and providing information.
- 111 Bemmels et al., 1986: 602. The authors also note that Canadian jurisprudence was to essentially the same effect (1986: 602–3).
- 112 *NLRB v Neilsen Lithography Co Ltd* (1991) 305 NLRB 90, cited by Naughton 1995a:8.
- 113 ACAS 1997: para 11.

- 114 See further Deakin & Morris 2005: 850–54, and the sources cited therein. Under the Information and Consultation of Employees Regulation 2004 employers and unions in the United Kingdom can negotiate collective agreements relating to consultation and information-sharing in general, but including for purposes of collective bargaining. The regulations became fully operative only in April 2008, and it is too early to make an informed assessment of their impact – see further Deakin & Morris 2005: 897–909.
- 115 See, for example, *Detroit Edison Co v NLRB* (1979) 440 US 320.
- 116 See also Department of Labour 2009: 35.
- 117 In the Australian context, it would, of course, be open to the parties to seek the assistance of FWA in relation to any dispute about disclosure of information in reliance upon section 240 of the FW Act.
- 118 The duty to disclose under TULRCA is subject to a similar qualification by force of section 182(1)(c) and (e).
- 119 In *Australasian Meat Industry Employees Union v Woolworths Limited*, 1 November 2009, B2009/10670, Richards SDP rejected an attempt by the Union (using FWA's powers to require production of documents under section 590(2)) to obtain access to notes of negotiations kept by the Company's chief negotiator. In doing so he observed that ordering such disclosure 'would be the most effective way of destroying good faith bargaining'.
- 120 In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Rocla Pty Limited t/a Rocla Pipeline Products* [2009] FWA 508 Richards SDP determined that the GFB requirements do not require that a union must disclose the entirety of its agreement agenda and desired content (paras 14–22). On the other hand, in *Total Marine Services Pty Ltd v Maritime Union of Australia* [2009] FWAFB 368 a Full Bench of FWA determined that the MUA had not established that it was genuinely trying to reach agreement because the negotiations had not reached a sufficiently advanced stage to be able to say that it was genuinely trying to reach agreement. The Full Bench emphasised (para 32) that there are no hard and fast rules on the matter, but that 'at the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side'. Interestingly, the Full Bench made no reference to the section 228 requirements, whereas Richards SDP in *Rocla* (which was also a secret ballot application) drew a direct connection between the GFB requirements and the genuinely trying to reach agreement requirement.
- 121 In the period immediately after Part 2-4 of the FW Act became operative the ACTU promoted the use by its affiliates of letters to employers which purported to provide the basis for an 'agreed' negotiating procedure. These letters took a fairly 'optimistic' view of what had to be disclosed under section 228(1)(b), and contained provision to the effect that 'The employer will disclose all relevant information to the Union in a timely manner. If the Parties agree that certain information should be kept confidential, then they will not disclose that information to any third party without permission.' Some versions of the letter also contained a commitment to sign a 'legal undertaking' in relation to non-disclosure.
- 122 The Department of Employment Education and Workplace Relations has funded the publication by various industry groups of fact sheets, dealing *inter alia* with 'Agreement Making'. These publications are worthy enough in themselves, but do not provide sufficient depth to be really useful in practice.
- 123 Dealing respectively with 'general protections', unfair dismissal and unlawful termination.
- 124 [2009] FWA 153.
- 125 [2009] FWA 153, paras 47–48.
- 126 See, for example, Bemmels et al., 1986: 602–3; Fiorillo 2000: 18–21
- 127 Bemmels et al., 1986: 598. See also Forsyth 2009a: 136.
- 128 [2005] 1 ERNZ 666.
- 129 [2005] 1 ERNZ 666, 686.
- 130 [2007] 1 ERNZ 37. See further Nuttall 2008.
- 131 Note the unsuccessful attempt to challenge this on freedom of association grounds in *AWU v BHP Iron Ore Pty Ltd* (2001) 106 FCR 482.
- 132 The decision in *Re Alphington Aged Care, Sisters of St Joseph Health Care Services (Vic) t/a Mary Mackillop Aged Care* [2009] 301 suggests that this would not be regarded as consistent with the GFB requirements.
- 133 [2009] FWA 93, para 7. With respect, this is to overstate the effect of the American legislation. However, Whelan C's characterisation of the effect of section 228(1)(b) is quite consistent with Australian practice in this area.
- 134 [2009] FWA 322, para 16.
- 135 Naughton 1995a: 9.
- 136 FWA is, of course, bound to follow court decisions on matters of law, but it is not bound to follow other tribunal decisions in relation to matters of discretion and the application of its discretion in particular circumstances.
- 137 (1960) 361 US 477. See also Dau-Schmidt 2005: 18–38.
- 138 (1943) 133 F2d 676.
- 139 (1943) 133 F2d 676, 686 as extracted in Cox 1958: 1414.
- 140 It is interesting to note that section 8(d) was inserted in the NLRA four years after the decision in *Montgomery Ward*, but there does not appear to be any suggestion in the jurisprudence that this has any direct bearing upon either the authority of the 1943 Case or the interpretation of section 8(d).
- 141 Cox 1958: 1416.
- 142 Goldman & Corrada 2008: 329–30.
- 143 On the limited evidence available so far, FWA seems quite comfortable with the notion that the parties can engage in 'hard' bargaining – see, for example, *National Union of Workers – New South Wales Branch v ACCO Australia Pty Ltd* [2009] FWA 226; *AMWU v Coates Hire Operations Pty Ltd*, B2009/10656, 22 September 2009, as noted *Workplace Express* 23 September 2009.
- 144 See Ford 2004: para 14.
- 145 It will be recalled that a BRWD must include *all* of the terms agreed by the parties, plus a determination by FWA on all matters in relation to which the parties had not agreed, but nothing else – in other words, a BRWD is not a settlement 'at large'.
- 146 See Anderson 2006: 1–3, 21–6.
- 147 See Anderson 2006: 3–7; Nuttall 2007, 2009.
- 148 Department of Labour 2009: chs 2 and 3. The comparable figures for Australia are 18.9% union membership, with 38.1% covered by collective agreements, and 19% by awards – Forsyth 2009b: 3-4, citing ABS 2008.
- 149 See also the proposals discussed in Forsyth 2009c.
- 150 For example, sections 35–37 of the *Employment Relations Act 2000* (NZ) enable the Minister to issue a code of good faith practice. This code is not binding in law, but the ERA or a court 'may' take it into account in deciding whether the parties have acted in good faith' – Anderson 2006: 11. Section 42C of the *Industrial Relations Act 1979* (WA) enables the West Australian Industrial Relations Commission to publish a 'code of good faith to provide guidance about the application of the duty to bargain in good faith'. However, no such code appears to have been produced. Finally, as noted earlier, in 1983 the Queensland Government and public sector unions adopted a Protocol for Good Faith Bargaining in the Public Sector, which contains some of the things that could usefully be included in a more general Code of Practice. It also a good indication of the kinds of provisions that could appropriately be included in a PBA.

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