Australian Institute of Employment Rights

The Debate:
Good Faith and the Employment Relationship

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Good faith

'Good faith' is a well-established concept in many legal systems throughout the western world. In the United States of America – paradigm of liberal democracies – the Uniform Commercial Code §1-304 states that every commercial contract includes 'an obligation of good faith in its performance and enforcement'. In Germany the doctrine of good faith in §242 of the Burgerliches Gesetzbuch has been described as a 'judicial oak that overshadows the contractual relationships of private parties'. Many more examples could be cited for acceptance of the principle that a legal system in a liberal democracy must assume that citizens are obliged to observe good faith in their business dealings with each other.

It is surprising that some Australian employment-law practitioners remain sceptical about good faith in employment relationships, and have difficulty articulating its meaning and implications in practice.

I suspect this scepticism stems from two sources. One is the inherently adversarial nature of past industrial law traditions in Australia. The other is a persistent misconception that good faith requires employers to waive their own rights and interests in all their dealings with staff.

Our adversarial system of justice has traditionally focused on contest, not cooperation. This culture, however, is changing. Criticism of the cost and delays of our court system has encouraged more conciliatory approaches to dispute resolution, by mediation and supervised negotiation.

In the past, the competitive, adversarial culture of our court rooms also carried over into industrial negotiations. The game of industrial bargaining has been perceived as a head-to-head contest between capital and labour. As Bob Hawke has written in the foreword to the Australian Charter of Employment Rights, the time for this 'senseless tug-of-war between capital and labour' is well past. In most contemporary liberal democracies, he continues, industrial-relations systems seek to improve productivity and raise living standards by promising 'fairness and balance in industrial bargaining' and 'employment relations founded on good faith, mutual respect and a sharing of gain'.

This is the basis of the Fair Work legislation's reintroduction of 'good faith bargaining requirements' (see the articles in this issue by Paul Lorraine on page 4, Aaron Rathmell on page 12 and Troy Sarina on page 14). Fair Work's good faith does not require parties to make concessions or reach agreement. A system based on good faith does not require surrender, just reasonable cooperation. As the perspectives on good faith in this magazine demonstrate, the time for scepticism is past. If Australian business and industry are to survive and thrive in difficult economic times, it is time to embrace good faith and a cooperative approach to industrial and employment relations.

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A new framework for **cooperation?**

Paul Lorraine examines the good faith bargaining provisions of the Fair Work Bill, and considers the opportunities this new framework provides for employers to benefit from adopting a more cooperative approach to workplace bargaining.

The Fair Work Bill 2008 creates a new framework for agreement-making that is very different from the existing system. The object is to provide a 'simple, flexible and fair' framework for collective bargaining at the enterprise level, and to improve productivity.

Good faith bargaining is central to the framework. The Bill introduces 'good faith bargaining requirements' and gives Fair Work Australia (FWA) the power to make orders to ensure compliance with those requirements. It creates a new obligation for employers to bargain with employees where there is majority support to negotiate a new agreement.

At its most basic level, requiring good faith imposes a procedural compliance threshold for anyone seeking to make an agreement. More realistically, employers who are not used to dealing with unions are afraid that the Bill increases union rights and power. Although the Bill is ostensibly agnostic about unions, it gives automatic rights of recognition to any union that has a member in the workplace.

At another level, good faith does have the potential to improve the quality of the negotiation process, which will be reflected in the outcomes. Because the requirements are mutual, this is as much an opportunity for employers as it is for employees or unions.

By understanding the good faith requirements and combining them with accepted principles of good management practice, employers can lead the bargaining agenda, hold unions accountable to the process and improve long-term relationships with employees.

IN SUMMARY

- An assessment of the agreement making and good faith bargaining requirements under the Fair Work Bill 2008.
- The powers granted to Fair Work Australia.
- The role good faith might play in the new system, and as a framework for cooperation.

Snapshot of agreement-making under the Bill

- One stream of agreement-making, the Enterprise Agreement (EA), between employer and employees
- Previous distinction between union and non-union agreements abolished
- Employees have the right to appoint anyone as their bargaining representative, and the employer must notify employees of that right
- However, a union is recognised as the bargaining representative of a union member, unless the member appoints someone else
- Unions are not parties to agreements. Instead, a union that was a bargaining representative can apply to FWA to be 'covered' by an EA.

The Good Faith Bargaining Requirements

The Bill specifies that bargaining representatives must:

- Attend and participate in meetings at reasonable times
- Disclose relevant information (other than confidential or commercially sensitive information) in a timely manner
- Respond to proposals made by other bargaining representatives in a timely manner;
- Give genuine consideration to the proposals of other bargaining representatives, and give reasons for the responses to those proposals
- Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining
- Recognise and bargain with the other bargaining representatives.

Bargaining representatives are specifically not required to make concessions or reach agreement.

Role of FWA

FWA has a general role in facilitating bargaining and has the power to make orders where participants are not bargaining in good faith.

Bargaining order
If the requirements are not being met, or the process has broken down because there are multiple bargaining representatives, a bargaining representative may apply for a bargaining order. The order must specify actions to be taken to meet the requirements. For example if the breakdown was due to having multiple bargaining representatives, the order may require them to meet and appoint one to represent them.

Failure to comply attracts a civil remedy. If the breach is 'serious and sustained', and significantly undermines the bargaining process, as a last resort, FWA may make a 'serious breach declaration'. This may lead to FWA making a 'bargaining related workplace determination', deciding terms that will apply to the workplace.

Majority support determination
If a majority of the employees want to bargain and the employer refuses, a bargaining representative may apply for a majority-support determination. In all cases, the group to be covered must be 'fairly chosen'.

To work out whether a majority of employees want to bargain, FWA may use 'any method FWA considers appropriate'. Conversely, if an employer wants to bargain and the employees refuse to consider proposals, the employer could seek a bargaining order.

Scope order
If bargaining stalls because the agreement will cover the wrong employees, a bargaining representative who has met the good faith requirements may apply for a scope order to specify who will be covered, and the group must be fairly chosen.

Disputes
Any bargaining representative may apply to FWA to deal with a dispute about the proposed agreement, regardless of whether the other bargaining representatives agree to the application. If all of the bargaining representatives agree, FWA may arbitrate.

> **"Acting in good faith basically means acting honestly and applying reasonable commercial standards for fair dealing, with an open mind and a willingness to reach agreement."**

What does 'good faith' mean, and how will the system work?

The government's policy is to encourage an open bargaining process, allowing employers and employees to meet, exchange relevant information, respect each other's right to be represented and consider and respond to each other's positions.

Good faith is not a new concept. It is well known in other jurisdictions and other fields of Australian law, such as commercial contracts, the Native Title Act 1993 (Cth) and company directors' obligations. Good faith requirements in the former Industrial Relations Act 1988 (Cth) were interpreted narrowly to mean only that the parties could be ordered to meet and confer.

However, good faith is an evolving concept and there is no working standard. Acting in good faith basically means acting honestly and applying reasonable commercial standards for fair dealing, with an open mind and a willingness to reach agreement. FWA will have the task of assessing the existence or absence of good faith case by case, based on the actual conduct and the legislative requirements.

Bargaining is largely a process of information exchange and concession making: 'give and take'. Information becomes a major source of leverage, which is why good faith requirements are mostly to do with information and communication, to keep the process moving. How much disclosure is enough is a point of contention, although good faith does not generally require full disclosure. How FWA structures and facilitates the process will greatly influence its success.

The ongoing debate

Is good faith simply a device to increase union involvement, and stop bargaining directly with employees? Or is it a legitimate framework for cooperation, imposed to keep bargaining going in a positive direction? Either way, self interest is protected because participants are free to withdraw at any time. If they fail to reach agreement, their options appear to be:

- Agreeing to walk away, and the existing arrangements continue in force
- Asking FWA to resolve a dispute or help them reach agreement
- Jointly asking FWA to determine particular matters
- Depending on the circumstances, taking protected action, or
- Arbitration if there is a serious and sustained breach of the good faith requirements, although this is reserved for exceptional circumstances, and FWA will not step in to resolve protracted disputes.

Ultimately, the shape of the new system will be determined by the manner in which FWA exercises its powers and develops its facilitative role.

Does good faith create a framework for cooperation?

Good faith is more than a mere procedural requirement, but does it promote cooperation? It is not to be mistaken for a 'soft option': self interest is preserved, no one is prevented from using 'hard bargaining' tactics and protected industrial action is available.

Employers who have a strong working relationship with their employees and who wish to bargain directly with them may do so. In reality, however, union members will probably choose to be represented by their union, which must now be recognised.

Recognition gives employees (and unions) a voice to suggest proposals and influence the outcomes of bargaining. On the other hand, recognition brings with it an obligation to comply with the good faith requirements, which enables the employer to hold the union accountable in the bargaining process.

The effectiveness of the process will depend on how management, employees and unions interact; and the new ground rules, based on good faith and supported by FWA as facilitator, appear to suggest that the participants will achieve more under the new system if they adopt an attitude of cooperation.

The strategic opportunity for employers

In preparation for bargaining under the new legislation, employers should consider adopting the following strategic approach:

- Review current workplace arrangements: map out what agreements are in place, who is covered and when agreements expire
- Provide clear leadership and direction, by demonstrating good faith
- Develop a proactive good faith bargaining strategy: scope out issues and create a bargaining agenda
- Be prepared to share appropriate information about business performance and any underlying problems, and consider the most effective means of communicating with employees and their representatives on these issues
- Plan to utilise FWA if necessary, to assist with: reaching agreement on a process, including timeframes and what information will be exchanged; coordinating the process; and holding representatives accountable if they display bad faith, and
- Prepare a legal strategy that is integral to the process and transparent, so that all participants understand the good faith requirements and the role of FWA in supporting the process.

As the current economic downturn deepens, the need to explore options for productivity improvement will become even more acute. That being the case, although the good faith provisions in the Bill only relate to collective bargaining, there are sound business reasons for embracing good faith as a guiding ideal for cooperation in all aspects of the employment relationship. ■

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Good Faith in Employment **Relationships**

Some recent court decisions have accepted that the duty of mutual trust and confidence owed by parties to employment contracts constitutes a duty of good faith and fair dealing. Joellen Riley considers the practical implications of the good faith obligation in employment contracts.

In a number of cases in recent years, courts in several Australian jurisdictions have accepted a duty long recognised in English employment law – the duty not to destroy mutual trust and confidence in the employment relationship. This duty, owed by both employees and employers, has sometimes been equated with the duty of good faith, known to some kinds of commercial contracts (notably contracts involving long-term relationships, like franchises and distributorships). For example, the NSW Court of Appeal in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* assumed that mutual trust and confidence and good faith obligations are synonymous.[1]

Although some lawyers continue to argue over the existence of this duty, it has received enough judicial acceptance now that it is time to do the more fruitful work of analysing what good faith means in the context of an employment relationship, and what implications it has for employers managing their businesses.

IN SUMMARY

- Good faith does not limit an employer's right to terminate an employment contract, provided the required period of notice is observed.
- Good faith can affect the interpretation of the employer's obligations in respect of notice.
- A breach of good faith does not necessarily result in additional damages awarded for distress or humiliation.

Good faith defined

One obstacle to acceptance of good faith is a fear that good faith obliges employers to act charitably. This is not so. The duty to perform an employment contract in good faith requires only that the parties cooperate so that each can enjoy the *agreed* benefits of the relationship.

In the commercial law context, determining the scope of the parties' agreement can be more straightforward than in employment, where relationships are often very fluid. Employers often reserve to themselves considerable discretions over important matters, such as the duties to be performed, and do not spell them out in a written document. This leaves room for good faith to assist in identifying the mutually agreed obligations of the parties. Good faith will assume that parties intend to behave honestly, and are committed to allowing the other party the benefits of the relationship while it survives. It will not, however, prevent either party from terminating the relationship, so long as they do so consistently with the terms of their agreement.

This is one of the frequent obstacles to acceptance of an obligation of good faith in employment: the fear that it locks employers in to keeping staff whose services they can no longer use.

Good faith and dismissal

It is clear from the case law that good faith does not require an employer to engage a worker perpetually. Under the common law, an employer is still entitled to terminate an employment

contract by giving the required period of notice, and does not need to give reasons. Those cases which have required employers to give reasons involved express contract clauses entitling the worker to reasons.[2] Sometimes, an obligation not to dismiss without conducting a proper inquiry will be incorporated into the employment contract from a policy document.[3] But without such a contractual term, employers do not have to give reasons for dismissal, so long as they give proper notice.

Good faith and interpreting agreements

Good faith can affect the interpretation of the employer's obligations in respect of notice. For example, in *Walker v Citigroup Global Markets Australia Pty Ltd*[4] the court was faced with some conflicting evidence. On the one hand there was correspondence that indicated Mr Walker would be employed for at least a year (because he was guaranteed a bonus for his first year in the job) and on the other hand, there were standard 'conditions of employment' attached to a final-offer letter saying he could be terminated with one month's notice.[5]

The court held that 'the purpose and object of the transaction, namely the recruiting of a high-level and high-profile employee then in other employment' made it a 'practical absurdity' that the parties would have agreed the employer could avoid any obligation to pay the guaranteed bonus by terminating on one month's notice.

This is evidence of the good faith obligation in operation. The court looked to the expectations of 'business people active in the financial world', and assumed that they were committed to the bargain they had concluded in their negotiations.

Similarly, in *McRae v Watson Wyatt Australia Pty Ltd*,[6] Raphael FM found that an employer owed an employee redundancy benefits calculated according to an informally agreed standard, notwithstanding that there were no redundancy provisions in her written employment contract.

While the courts in each of these cases did not expressly refer to any good faith obligation, the approach adopted in interpreting the respective agreements showed that parties will be assumed to

"This is one of the frequent obstacles to acceptance of an obligation of good faith in employment: the fear that it locks employers in to keeping staff whose services they can no longer use."

behave according to the reasonable expectations of prudent business people. Good faith does not oblige parties to volunteer new benefits. It requires only faithful observance of the spirit of the agreement, and disallows opportunistic manipulation of some technical flaw in its form. Good faith means 'not acting arbitrarily or capriciously; not acting with an intention to cause harm; and acting with due respect for the intent of the bargain as a matter of substance, not form'.[7]

Good faith and damages claims

Although the good faith obligation may require an employer to respect a reasonable notice period, breach of good faith will generally not sound in any additional damages award for distress or humiliation.

It is becoming increasingly common for an aggrieved employee to claim some kind of general damages based on mental suffering. English cases have been prepared to allow recovery of damages in contract in cases of medically treated mental illness, but only if the illness was caused during employment, and not as a consequence of early termination.[8] Australian cases tend to treat these kinds of claims as breaches of a duty to provide a safe workplace (which arises concurrently in tort and contract). It is still the case in Australia that claims for breach of an employment contract are confined by the general refusal to grant exemplary or punitive damages in breach of contract claims.

So what does good faith require of employers?

In many respects, the good faith obligation requires no more than decent, respectful behaviour at the workplace. A 'prudent, diligent and cautious' employer who paid heed to the lessons from recent case law would ensure that supervisors did not abuse their staff (as occurred in *Naidu*[9]). They would institute fair and reasonable performance review systems (as outlined in *McDonald*[10]); they would prudently investigate allegations of impropriety against employees before acting precipitately, and they would respectfully follow up repeated complaints from employees (*Nikolich, McDonald*[11]). They would certainly

not trump up malicious complaints against their staff (as in *Eastwood v Magnox*[12]). And so a great deal of personal grief, and an enormous amount of business time, finances and resources, would be saved.

"Good faith requires only faithful observance of the spirit of the agreement, and disallows opportunistic manipulation of some technical flaw in its form."

The future

Although the common law in Australia has begun to recognise a reciprocal good faith obligation in employment relationships, it is very poor at enforcing these standards. The fact that an employer's counsel can sometimes vigorously argue the absence of any such duty, even in the face of the most compelling evidence of appalling behaviour and serious harm, is testimony to common law's failure in this field.

Can anything be done about this? The AIER Charter of Employment Rights and accompanying accreditation project (see Lisa Heap's article on page 10) proposes a prophylactic approach. Prevention is profoundly better than a cure. The Accreditation project has been designed to assist employers and employees to commit to fair dealing at work and to foster relationships based on good faith and cooperation. In time, the success of this work should relieve the case load in this field – to the benefit of employers and employees alike. ■

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1. [2008] NSWCA 217 at [32] per Basten JA.
2. See *Murray Irrigation Ltd v Balsdon* [2006] NSWCA 253 at [25].
3. E.g. *Rispoli v Merke Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160.
4. [2006] FCAFC 101.
5. Ibid at [76].
6. [2008] FMCA 1568.
7. J W Carter, E Peden and G J Tolhurst *Contract Law in Australia*, 5th ed, (2007) Lexis Nexis Butterworths, Sydney at pp 26-27.
8. See *Gogay v Hertfordshire County Council* [2000] IRLR 703, and *Eastwood v Magnox Electrix plc* [2004] 3 WLR 322.
9. *Naidu v Group 4 Securitas Pty Ltd* [2006] NSWSC 144.
10. *McDonald v State of South Australia* [2008] SASC 134.
11. *Goldman Sachs J B Were Services Pty Ltd v Nikolich* [2007] FCAFC 120.
12. *Eastwood v Magnox Electrix plc* [2004] 3 WLR 322.

Bad Faith one day– **good faith the next?**

AIER Executive Director, Lisa Heap explores some of the limitations of the Fair Work Bill and outlines some proposed solutions.

The good faith bargaining requirements in the Fair Work Bill raise the question – how can you have a good faith bargaining relationship one day when you had a bad faith one the day before?

Already I have seen legal seminars aimed at 'risk managing' the new regime or minimising its impact on clients' activities. Surely this misses the point and will limit the benefits that both workers and employers can derive from more positive relationships.

AIER lobbied for the inclusion of good faith obligations throughout the Act prior to the release of the Exposure Draft. We were unsuccessful. We reiterated our views in our submission to the Senate Inquiry.

The Bill recognises the value of good faith relations but implements good faith requirements only in relation to collective bargaining, and only then in a way that responds to bad faith behaviour. Functionalist adherence to the minimum standard may be the result.

Promoting a climate of good behaviour

A good faith approach implies a commitment to honesty, fair dealing and cooperation in *all* aspects of the employment relationship – from bargaining, to performance and termination – not something that was promoted in the WorkChoices era. This requires parties to adopt a less adversarial approach, taking into account the interests of the other party in *all* of their dealings.

AIER recommends three initiatives to promote a climate of good faith:

- Layer good faith requirements throughout the Act to encourage necessary cultural change
- Adopt guiding principles that move the legislation beyond its current foundation in adversarial relationships
- Promote standards of behaviour that encourage an understanding of each party's interests.

To this end AIER has called on the government and all stakeholders to commit to working towards a new set of foundational principles over time. The AIER believes that the Bill should be based on a foundation of 'workplace citizenship' that – while recognising the inherent tensions and unequal balance in the employment relationship – would nevertheless encourage employers, employees and their representatives to interact positively as industrial citizens.

We are asking the government and stakeholders to look beyond the Fair Work Bill towards the next stages in changing workplace culture.

One strategy, adopted in the Charter of Employment Rights, has been to publish standards of behaviour that encourage a greater understanding of the employment relationship and the mutuality and reciprocity that is fundamental to its success. These standards offer maximum benefit when they are implemented. AIER recognises that parties will need assistance to do this.

The AIER proposes that the Government establish and promote institutions that foster cultural change in Australian workplaces and to rebuild an environment of trust and partnership in workplaces. There is also a need to provide education to the broader community about what constitutes fairness in the workplace.

In line with initiatives overseas, AIER argues that the Government should support independent centres that:

- promote good faith relations and industrial fairness
- shift the industrial relations climate to one of engagement around issues of mutual interest
- help to re-orient firms towards developments that improve quality innovation and responsiveness to emerging market opportunities, and
- provide a positive role for trade unions to play in the workplace.

The potential public benefits are substantial and include:

- reduced transaction costs in forming and maintaining workplace relationships
- reduced levels of industrial disruption and loss of productivity via hidden dissatisfaction and low morale
- a more adaptive production base
- accelerated pace of organisational and cultural change, and
- improved social cohesion resulting from greater satisfaction with work and improved productivity and economic sustainability.

Cultural change centres should be guided by the following objectives:

- improving the quality of Australians' working lives
- creating conditions for business success
- enhancing social cohesion via the promotion of respectful workplaces and workplace partnerships, and
- educating the Australian public about fair work practices.

This is not a role that Fair Work Australia can play alone. New collaborative institutions should be established.

British conciliation service Acas as role model

In the Explanatory Memorandum accompanying the Fair Work Bill the Government referred to the success of the British conciliation service Acas to justify the future success of FWA. The Memorandum notes, but glosses over, the fact that the functions of Acas and FWA are not the same. Acas is not a tribunal. It is an independent organisation governed by a committee of employer, union and independent representatives. Its stated objective is to 'improve organisations and working life through better employment relations.' It does this by volunteering services to parties in dispute, hence lowering the burden on Employment Tribunals (known as "intercepting claims"), and by adopting preventative methods such as an employment help line, training for small and large business on good practices, researching and promoting models of good practice.

Key to Acas's success is that it is independent and impartial and does not have enforcement powers.

Acas has produced a guide called *The Acas Model Workplace* based on its experience. It is not dissimilar to the Workplace Rights Standard developed by AIER.

The quality of Acas advisors is confirmed by the invitations it has received to assist former Eastern European countries, Brazil and Columbia to develop workplace mediation and conciliation services.

AIER believes the Government should fund and support a similar independent centre here.

Regardless of the limits of the legislation, parties can take their own steps towards cultural change. This is how organisations can have good faith relationships one day and the next.

AIER has developed the Australian Workplace Rights Standard to assist employers. This Standard, which will be the cornerstone of our forthcoming accreditation model, explores the elements of good faith relationships and provides guidance on how organisations and workers can approach the objectives of the Charter of Employment Rights. The Standard maps the types of behaviours, policies and protocols organisations should promote at the point of engagement, during the engagement and post termination to achieve good faith employment relationships. It will be launched in June 2009. ■

A longer discussion paper exploring many of these themes (by Joanna Mascarenhas, Paul Munro and Lisa Heap) is available on the AIER website, www.aierights.com.au

IN SUMMARY

- The AIER's recommendations for promoting a climate of good faith, and the public benefits that would flow from implementing them.
- The role of Fair Work Australia vs the role of the British conciliation service Acas.
- The AIER's Australian Workplace Rights Standard exists as a guide for organisations and workers to achieve cultural change and good faith relationships.

LISA HEAP is a lawyer specialising in workplace relations. She is executive director of the AIER.

Fair Work's good faith **bargaining requirements in perspective**

Aaron Rathmell considers the proposed Australian laws in comparison with the United States of America's experience.

The good faith bargaining requirements in the Fair Work Bill 2008 have a long pedigree.

When Australia made the shift away from awards to workplace bargaining in 1993, provisions were inserted into the *Industrial Relations Act 1988* to facilitate these unfamiliar enterprise agreements by empowering the Australian Industrial Relations Commission to make good faith orders. This proved to be a false start for good faith in the federal jurisdiction: first the powers were read-down by the Commission, and then they were repealed by the Coalition government in 1996.

Good faith bargaining requirements have deeper roots in other jurisdictions. They have long been central to workplace bargaining laws in the United States of America and Canada, and can currently be found in the workplace legislation of some Australian states. In New Zealand, good faith bargaining laws are approaching their 10th birthday, having been introduced in response to the political failure of individual contracts based employment regulation.

The Fair Work bill reintroduces these provisions (see the article by Paul Lorraine on page 4).

IN SUMMARY

- American good faith requirements and case law have become extremely complex; it is not clear that the good faith provisions in the Fair Work Bill will face the same fate.
- Many features of the Fair Work Bill provide indirect institutional support for fair bargaining practices.
- Benefits of increased regulation of bargaining procedures could include a reduction in costly negotiations, improved employee commitment to agreements and less recourse to industrial action.

Comparison with USA Good Faith

The classic American formulation of good faith – expressed in *NLRB v Montgomery Ward & Co* 133 F 2d 676 (9th Cir, 1943) – is that parties are required to approach negotiations with an 'open mind' and make a 'sincere effort' to reach agreement. This has been criticised as being too uncertain and subjective, and therefore impractical. Indeed, American case law has become highly complex, and remedies increasingly difficult to access, so that in the assessment of leading commentators American good faith requirements have become hollow.

It is not clear that the good faith provisions in the *Fair Work Bill* will face the same fate. For a start, the proposed cl 228 codifies the most conventional aspects of good faith jurisprudence, which are expressed with tolerable clarity and speak to procedural issues rather than 'a state of mind'. To the extent that the fifth requirement in the *Bill* – to 'refrain from capricious or unfair conduct' – admits uncertainty, it might be argued that it is desirable that FWA be allowed to exercise common sense discretion, given the indeterminacy of bargaining scenarios it may be confronted with and the potential for changes in community expectations of bargaining participants.

Arguably the difficulties with good faith bargaining in America are due to a highly adversarial bargaining culture and a lack of legislative and institutional support for fair bargaining generally, for instance, in relation to minimum wages and conditions, industrial action and the processes for investigating breaches of good faith.

GOOD FAITH BARGAINING IN PERSPECTIVE

Again, the same is not true – in theory at least – of the *Fair Work Bill's* framework. The following features of the *Bill* in particular provide indirect institutional support for fair bargaining practices:

- The primacy of collective agreements, marking a significant break with WorkChoices' priority for Australian Workplace Agreements
- The new and relatively uncomplicated provisions relating to majority support determinations – Part 2-4, Division 8, Subdivision C
- The protection of workplace rights against adverse action – Part 3-1
- The National Employment Standards and Modern Awards, which set the base for bargaining – Parts 2-2 and 2-3
- The 'Better off over all test', which ensures workplace agreement negotiations do not become regressive – cl 193
- Special procedures for low-paid workers – Part 2-4, Division 9.

Another key support for the fair bargaining requirements in the *Bill* is the availability of a workplace determination. While in America an employer has prerogative to set the terms and conditions of agreements once negotiations reach an impasse, the prospect of workplace determinations under the *Bill*, however tightly constrained, provides an incentive to reach agreement quickly and informally, and discourages negative bargaining tactics. (The *Australian Charter of Employment Rights* emphasises the importance of a provision for last resort arbitration: see page 94.)

"Prospective parties to workplace agreements should begin looking to the potential opportunities offered by the new bargaining framework when the Bill comes into operation."

In this respect the Bill resembles the good faith framework under the Employment Relations Act 2000 in New Zealand, which, at its apex, now provides for the employment authority to fix the terms of an agreement where there have been 'sufficiently serious and sustained' breaches of good faith. This was likely the inspiration for the Fair Work Bill's formulation. To the author's knowledge, there have been no such arbitrations in New Zealand to date.

Conclusions and opportunities

The provisions of the Fair Work Bill are close to being settled following a lengthy consultation process, in the wake of a period of great regulatory upheaval. There is, of course, some uncertainty as to exactly how the provisions will operate in practice, and how FWA will exercise its discretions. Parts of the Bill that appear simplified on paper may wreak havoc with their vagueness in practice. Nonetheless, prospective parties to workplace agreements should begin looking to the potential opportunities offered by the new bargaining framework when the Bill comes into operation.

While employer groups may be critical of the Bill's increased regulation of bargaining procedures, that regulation offers some distinct benefits. First, negotiations that would otherwise become protracted and costly might, under the Bill, be reined in. Second, if procedural fairness in negotiations is improved, we might see improved employee commitment to agreements, rather than distrust and industrial unrest. This may in turn limit recourse to industrial action, both covert and overt.

Finally, the new emphasis on employee consultation and collective consensus building might lead parties to discover innovations in work practices, and incorporate them in their new enterprise agreements. In the present climate, this may be the fairest way to share the burden of economic crisis, and the most constructive way to look for new productivity gains. ■

Aaron Rathmell is a scholar in labour law at the University of Sydney. He published a study of the Australian good faith bargaining proposals in a historical and international perspective in the *Australian Journal of Labour Law*, Vol 21(2) in August 2008.

Does bargaining in good faith **make good sense?**

Good faith bargaining requirements make good business sense, writes management expert, Dr Troy Sarina.

The Fair Work Bill requires employers and bargaining representatives to bargain in good faith. If you have a sense of deja vu, you are right: we have seen these obligations before.[1] So why reintroduce them? Is this an ideological riposte to the Howard government's WorkChoices laws that supported managerial control at the expense of cooperative relations between workers and management?

The enormity of the global financial crisis requires politicians, employers, trade unions and workers to look beyond ideology. We now need a consensus among all stakeholders on how best to combat the looming general economic downturn and its impact on productivity and employment levels. We are at a fork in the road: we need a national employment relations system that is best equipped to prevent the Australian economy falling into recession. We could take the low road by focusing on minimising labour costs, but that tends to deliver workforces that are lower skilled and less committed to organisational goals. Or we could take the high road by constructing a system that builds cooperative and productive ways of doing work.[2]

The Fair Work approach to good faith bargaining is not so much about ideology as about promoting a pragmatic approach to ensuring work happens. In 2006 approximately 36 per cent (or 1,893,631) of the Australian workforce had its working conditions regulated by a collective agreement.[3] Long gone are the days when work arrangements and conditions were decided at an industry level. And that's a good thing. It allows organisations to develop their own unique responses to economic challenges.

A statutory good faith bargaining code is not about making the bargaining process more cumbersome or protecting unions. Rather, it is about ensuring both sides cooperate to devise better ways of working. Arguably, adopting good faith bargaining principles is good for business.

IN SUMMARY

- The Fair Work approach to good faith bargaining is about promoting a pragmatic approach to ensuring work happens.
- Textbook management theory promotes negotiation practices similar to those proposed by the Fair Work Bill.
- A statutory model of good faith bargaining converts best practice bargaining principles into a statutory code of rights and obligations intended to assist the negotiation process.

Collective bargaining, agreement making and management theory

There is an ever-expanding body of management literature that promotes negotiation practices similar to those proposed by the Fair Work Bill. A Behaviour Theory of Labor Negotiations, written over 40 years ago, explains how successful agreement-making was the result of trade unions and management adhering to a negotiating framework predicated on fair and productive bargaining.[4]

The authors recognised that the process of collective bargaining was not easy and often involved a component of tough bargaining over how to allocate a finite pool of resources between workers and other stakeholders. This pioneering text has inspired others to develop labour negotiation theories that promote effective bargaining while minimising conflict.[5] A number of best-practice negotiation principles emerge from a review of this literature. These include:

- Encouraging parties to adopt an integrative or win-win approach to agreement making
- Ensuring constituencies can elect their own bargaining representatives who are recognised by the employer
- Allowing bargaining groups access to resources and communication mechanisms to ensure the dissemination of information between negotiators and their constituency
- Obliging parties to share information and give genuine consideration to proposals, and
- Establishing mechanisms that encourage commitment to agreed outcomes.[6]

This kind of integrative bargaining is not just management speak. It involves both sides genuinely committing to reframing the process of negotiation to identify common interests, problems and solutions. Engaging in this dialogue can help to expand the resources or economic pie available while also reshaping each party's perceptions of and attitudes to the other.

The other key elements of this model, such as recognising nominated bargaining representatives and establishing formal communication mechanisms, are the means to ensure commitment to integrative bargaining. The similarity between these principles and the Fair Work good faith bargaining code are clear. Parties are encouraged to engage with each other. Collective bargaining is more likely to succeed if it is framed as a process of interest accommodation and bipartite discussions about the regulation of work.[7]

Converting best practice bargaining principles

So the resurrection of a statutory model of good faith bargaining is unlikely to intend that trade unions will secure a superior position in collective bargaining. Instead it converts best-practice bargaining principles into a statutory code of rights and obligations that *both* management and workers can call on to keep the negotiation process on track. The Bill does not require parties to make concessions or reach an agreement. Its intention is to establish a process of bargaining that allows both parties to navigate the often rocky road to arriving at an acceptable outcome while keeping any power imbalance in check.

> **"A statutory good faith bargaining code is about ensuring both sides work together to devise better ways of working. Arguably, adopting good faith bargaining principles is good for business."**

In other jurisdictions such as Canada the incorporation of a good faith bargaining code into workplace laws is virtually uncontested. Both sides of politics recognise that good faith bargaining makes good industrial sense.[8]

So what will be the likely impact of good faith bargaining on businesses in Australia? Will the new code guarantee sustained growth and productivity across industries? Unlikely. Will it eliminate all industrial conflict? Never. It will, however, encourage parties to work towards reaching an agreement.

Good faith bargaining will not predicate outcomes but encourage parties to genuinely engage with each other through dialogue and relationship building. ■

1. E.g., *Industrial Relations Reform Act* 1993 (Cth) s 170QK.
2. See T Kochan "Taking the High Road" (2006) 47 (4) *MIT Sloan Management Review* pp. 16-19.
3. See "Agreement making in Australia under the Workplace Relations Act: 2004-2006" (2007) *Department of Employment and Workplace Relations* at xi.
4. R.E. Walton and R.B. McKersie *A Behavioural Theory of Labor Negotiations* (1965) ILR Press, New York.
5. See R Paquet, I Gaetan and J Bergeron "Does Interest-Based Bargaining (IBB) Really Make a Difference in Collective Bargaining Outcomes?" (2000) 16 (3) *Negotiation Journal* at 281; J Cutcher-Gershenfeld "How Process Matters: A Five-Phase Model for Examining Interest-Based Bargaining" (2003) in T Kochan and Lipsky D (eds.) *Negotiations and Change: From the Workplace to Society*, ILR Press, Cornell University Press, London
6. Ibid
7. J Bellace "The Role of the Law in Supporting Cooperative Employee representation systems (1994) 15 *Comparative Labour Law Journal* 441
8. See G Davenport "Approach to Good Faith Negotiations in Canada: What could be the lessons for us?" (2003) 28(2) *New Zealand Journal of Industrial Relations* 150

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