

## Beyond Good Faith Bargaining

With 1 July 2009 just around the corner, there is much lively chatter over the good faith bargaining bundle that is about to be delivered to the workplace doorstep. Risk analyses are the order of the day; instructions are going out on how to work up defensive postures; the jaded USA experience of unfair labour practices is being trawled for tactical tips and forbidding new check lists are being compiled with sombre gusto.

Lost in the wash, it seems, is the key objective set out in section 3 of the Fair Work Act: how best, in fact, “to provide a balanced framework for cooperative and productive relations that promotes national economic prosperity and social inclusion for all”.

Rather than frantically girding their loins with lawyers’ bling, it might just be helpful if the workplace parties had a long, hard think over the policy fundamentals and strategic direction of the new law and began to shape their engagement plans accordingly (with a little scepticism being held in reserve in case the latest reforms, too, fall from voter grace).

The Fair Work Act gives the institution of collective bargaining fresh legs, albeit in a rather curious and certainly internationally unique form (because now the process is triggered and owned by employees rather than trade unions). Local employers will not be able to adopt the expedients of their American counterparts in staving off the duty to bargain. In the USA, it is the trade union that enjoys the right to bargain, but only when it can muster majority workplace support as tested in a ballot. Unions’ efforts to land their rights regularly prompt bitterly contested election campaigns, with employers going all out to persuade their employees to vote “no”, more often than not with success. In Australia, employers can hardly respond to an employee initiative for bargaining with a campaign against *them*, as opposed to unions. Employee apathy heroically discounted, we should expect to see a marked increase in the incidence of bargaining across domestic workplaces. It is not surprising that national flagships such as Telstra and the Big Four banks have already begun to rejig their bargaining stances.

With an abiding business need to customise employment terms but the scope for individual contracting now much reduced, how should employers address the bargaining challenge?

Australians work with the typical Anglo-Saxon adversarial approach to bargaining. It is based on a conflict model and assumes low trust and restricted information flows. Employers have been intent on avoiding bargaining encounters or at least limiting their reach. Unions have been out to defend gains made and to add to them, but hardly to contribute to business success. IR negotiators have been tutored if not bred outright for supporting performances.

It will not be possible to achieve the objectives of the Act without a considered change to the underlying societal bargaining culture. There is a real danger that we are about to see old struggles being played out on the pristine terrain. As it happens, much of the tenor and machinery of the recharged law assumes that people left to their own devices will behave badly, and that therefore they need to be directed and obligated to behave otherwise. The first four good faith bargaining requirements – to attend meetings at reasonable times, to disclose relevant information, to give genuine consideration to the others’ proposals and to

respond to them in a timely way – are pretty modest. They represent no-brainers for those genuinely interested in getting on with bargaining, circumnavigable obstacles for sufficiently astute surface bargainers and rocks to founder on for the balance of dumb rogues.

The last two good faith requirements will prove to be a lot more searching. The obligation on (essentially) employers to recognise bargaining agents (including unions), that is, to treat them as legitimate stakeholders in the bargaining process, cuts against the orthodoxy of the last decade. It marks the legal restoration of the positive right of freedom of association and its corollaries, and the end of the “union as third party” vocabulary.

Coupled with an obligation not to do anything that might be subversive of either freedom of association or collective bargaining, it means, too, an end to direct dealings with employees wherever a designated bargaining representative is in play. Here, certainly, the comparative law lessons from not only the United States but also Canada, South Africa, Japan and other systems are unswerving.

But while the new suite of obligations should inject greater rationality into the scheme of things, truly productive bargaining is a still a mighty step change up from there. Although labour laws can facilitate this development – and the Fair Work Act’s contribution in this regard is perfectly underdone – they cannot prescribe it. Any decisive moves will have to be the product of parallel insights and commitments amongst the players. Employers will need to engage with bargaining representatives more comprehensively and intensively, following the logic of full recognition. Unions will need to embrace a finely balanced duet of “employee defender” and “business contributor” roles.

Examples of cooperative successes in adversarial systems are, not surprisingly, rather thin on the ground. But some powerful pointers are there. In their 2003 report *Simply the best: Workplaces in Australia* commissioned by the Business Council of Australia, the authors Hull and Reid concluded that quality relationships were the key:

“In all our excellent workplaces the atmosphere of mutual trust and respect was overwhelming. We became convinced that central to every excellent workplace is an understanding that to produce quality work in Australia, one must have quality working relationships.”

This general statement has been tracked through to the management-union dimension in Gittel’s 2003 book on the success story that is Southwest Airlines in the United States:

“Southwest’s most powerful organisational competency -- the ‘secret ingredient’ that makes it so distinctive -- is its ability to build and sustain high-performance relationships amongst managers, employees, unions, and suppliers. These relationships are characterised by shared goals, shared knowledge, and mutual respect.”

And, finally, reflections by eminent MIT researchers on what is widely regarded as the most sophisticated and enduring cooperative engagement in the United States have just seen the

light of day in the 2009 publication *Healing Together – the Labor-Management Partnership at Kaiser Permanente*:

“To the modern workforce and those designing modern organizations, [twentieth century] thinking may seem to belong in a museum. Workers today expect to have a voice at work and they expect management to listen to their ideas. Organizational design specialists emphasize the importance of building networks that draw on the knowledge of the full workforce and co-ordinate their efforts. Rather than dividing people into management and labor camps, contemporary models of work organization stress teamwork among people who bring different, specialized knowledge to bear on the tasks at hand. This is the potential creativity and shared commitment that labor-management partnerships ... seek to mobilize.”

Where to go from here? It follows that if trust, respect and engagement are the hallmarks of productive workplaces, then an adversarial model – even one shored up by good faith obligations – simply won't do.

On the social policy front, much will depend on what the office of the Fair Work Ombudsman makes of its statutory brief under section 682 “to promote harmonious, productive cooperative relations including by providing education, assistance and advice to employees, employers and organisations and producing best practice guides”. If its imagination extends no further than the four corners of the good faith bargaining requirements, no breakthroughs in bargaining culture – and therefore no cooperative workplaces – should be expected anytime soon. If on the other hand a well-conceived education program supported by a stretch-target best practice guide is generated, then the model workplace of the future might look quite different to what is on offer today.

In the meantime, nothing stops prescient employers from taking up the statutory invitation to forge their own innovative workplace compacts. Union reciprocity will be needed, and so too relationships that extend well beyond the confines of the current crop of good faith requirements and the churlish “matters pertaining” box. A tall order on the face of it but not if the parties are prepared to take steps one at a time. There are, after all, rewards in the wings.

Who will fare best? Those wedded to containing bargaining come what may or those capable of turning altered states into a source of competitive advantage? An interesting year lies ahead.

**Clive Thompson**  
**CoSolve**  
**[www.cosolve.com.au](http://www.cosolve.com.au)**  
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