THE *FAIR WORK ACT 2009* (CTH): A NEW MODEL?

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I INTRODUCTION

The *Fair Work Act 2009* (Cth) (*'FWA'*), most of the provisions of which commence on 1 July 2009[1], needs to be understood in the wake of three waves of neo-liberal labour market reforms. The last fundamental change to the law of employment in Australia occurred of course on 27 March 2006 when amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) *('Work Choices')* to the *Workplace Relations Act 1996* (Cth) (*'WR Act'*) commenced. The changes made by *Work Choices* constituted some of the most significant changes to individual and collective employment relations law in Australia since the enactment over one hundred years ago of the *Conciliation and Arbitration Act 1904* (Cth). However, *Work Choices* constituted the third wave of labour market reforms in Australia aimed at reducing external inflexible forms of regulation and increasing greater flexibility in the labour market.[2]

The first wave was the legislation introduced by the Keating Labor government which increased the incidence of agreement making with much less reliance on arbitration and a centralised system but which retained an arbitration system primarily concerned with making

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1 National Employment Standards ('NES') and Modern Awards however will commence on 1 January 2010. See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (*'The First Transition Act'*).

2 H C Colvin, G Watson and N Ogilvie, *An Introduction To the Industrial Relations Reforms* (2006) 3.

awards as a safety net of minimum wages and conditions.[3] Included in the new bargaining regime established by the *Industrial Relations Reform Act 1993* (Cth) was provision for enterprise flexibility agreements whose significance lay in the fact that they might be negotiated directly between employers and employees at a workplace without union involvement. These agreements were intended to be the means by which enterprise bargaining would spread to non-unionised workplaces. The second wave was the legislation introduced by the Howard Liberal/National Party coalition government in 1996 which aimed to further facilitate agreement making including non-union agreements made directly by employers with employees.[4] This wave expanded the alternative forms of agreement making under federal legislation available to employers and employees by introducing a form of enterprise agreement made between the employer and individual employees: Australian Workplace Agreements ('AWAs'). Employers that now wished to could negotiate directly with each of their individual employees. The second wave also reduced the coverage afforded to employees by awards by limiting award making to a reduced set of subject matters or allowable award matters.

Further reform was introduced by *Work Choices* following the 2004 election. These reforms included:

- Further promoting the option of direct bargaining between employers and individual employees by providing that AWAs can 'trump' any other type of workplace agreement in the sense that *Work Choices* placed AWAs at the apex of a hierarchy of statutory instruments which placed collective workplace agreements next and awards at the bottom. An instrument higher in the hierarchy operated to the exclusion of those instruments below it.
- Further reducing the scope for award making under federal arbitration.
- Fundamentally changing the approval process for federal workplace agreements by removing the no disadvantage test, which related agreement outcomes for employees to existing outcomes for employees under awards.
- Removing the remedy of unfair dismissal from small

[3] *Industrial Relations Reform Act 1993* (Cth). See B Moore, 'The Industrial Relations Reform Act 1993: A New Era for Industrial Relations in Australia' (1994) 7(1) *Australian Journal of Labour Law* 69.

[4] *Workplace Relations and Other legislation Amendment Act 1996* (Cth).

businesses.

- Restricting further the scope for unions to take protected industrial action when negotiating collective workplace agreements.
- Removing significantly but not entirely the ability of unions and employees to circumvent the federal regime for workplace relations by choosing to access the often more favourable protections and remedies available under state industrial legislation.

Work Choices also had a significant impact on the institutional framework for industrial relations by:

- Expanding the existing federal system with the aim of creating one national system of workplace relations.
- Replacing the peculiar hybrid at federal level of compulsory arbitration co-existing with agreement making by effectively abolishing the award making power of the Australian Industrial Relations Commission ('AIRC') (except for award rationalisation and simplification)[5] and greatly restricting the AIRC's role generally in industrial dispute resolution.[6]
- Removing the AIRC's role in approving collective workplace agreements by replacing the approval process by a more simple lodgement process involving lodgement with the Employment Advocate and making all agreements subject to a new legislative safety net of minimum wages set by the Australian Fair Pay Commission and four employment conditions entitlements: levels of annual leave, personal leave, parental leave and maximum ordinary hours of work which together constitute the Australian Fair pay and Conditions Standard which prevails over a workplace agreement or a contract of employment.[7]

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5 *Workplace Relations Act 1996 (Cth)* ss 118-119D

6 For example, where the AIRC conducts an alternative dispute resolution process under either Division 3 or Division 4 of Part 13 of the *Workplace Relations Act 1996* (Cth) relating to a matter arising in the course of bargaining in relation to a proposed collective workplace agreement or pursuant to a power in a workplace agreement, it does not have the power to issue orders.

7 *Workplace Relations Act 1996* (Cth) Part 7, s 172(2).

II A NEW NATIONAL SYSTEM OF WORKPLACE RELATIONS?

Part of the legacy of *Work Choices* is its attempt to create a single national workplace relations system for Australia based on an expanded federal industrial relations system. *Work Choices* was the first attempt 'to simplify the complexity inherent in the existence of six workplace relations jurisdictions in Australia by creating a national workplace relations system based on the corporations power that would apply to a majority of Australia's employers and employees.'[8] The *Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005* explained the legislative strategy and the scope of the changes to be made by *Work Choices*:

> If legislated, the proposed reforms would expressly state an intention to 'cover the field' thereby ousting any conflicting state law. The states would be limited to regulating only those employers which do not come within the scope of the corporations power, the territories power, the power concerning commonwealth employees, or the Victorian referral of industrial relations powers.[9]

In *New South Wales v Commonwealth*[10] the High Court comprehensively rejected a general constitutional challenge to *Work Choices* holding that the federal parliament had the power to legislate as to the industrial rights and obligations of constitutional corporations and their employees. However it rapidly became apparent after *Work Choices* and State legislative initiatives directed at frustrating federal ambition including expanding the scope of public employment by the Crown in the right of State governments, and conferring new jurisdictions on State industrial tribunals pursuant to private arbitration based referral agreements between constitutional corporations and trade unions, that the corporations power cannot provide an adequate basis for a comprehensive national system of workplace relations.[11]

FWA and cognate legislation accepts this legacy and makes no attempt to reverse the expanded federal workplace relations system based on the corporations power that *Work Choices* created. Instead it builds on the legislative approach of *Work Choices* in this area by pursuing a

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8 Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) 7.

9 Ibid 9.

10 (2006) 229 CLR 1.

11 Neither by itself or in conjunction with the other constitutional heads of power relied upon by the Commonwealth. For a full discussion of the various legislative measures taken by State governments to frustrate federal ambition, see C Sappideen, P O'Grady and G Warburton, *Macken's Law of Employment*, (6th ed, 2009) ch 1.

policy of the federal government negotiating with State governments the terms of their co-operation 'to achieve national industrial relations laws for the private sector'[12] by 'either State governments referring powers for private sector industrial relations or other forms of cooperation and harmonisation'[13]. The fortunate coincidence for this policy of a federal Labor government negotiating with State Labour governments in all States except Western Australia has allowed the federal Labor government to achieve a significant measure of its aim in this area. In December 2009, the Commonwealth Parliament enacted the *Fair Work Amendment (State Referrals and Other Measures) Act 2009* which gives effect to earlier State referral legislation in all Australian States except Western Australia by which referral States referred their private sector industrial powers to the Commonwealth Parliament. In Western Australia the State Liberal government was reported as deciding not to make either a general referral of industrial powers or a text based referral of industrial powers but would consider opportunities for harmonisation with the federal system and has recently set up its own review of state workplace laws.[14]

III GOOD FAITH BARGAINING

The provision in *FWA* of a scheme for good faith bargaining was referred to in early 2009 as 'the novel aspect of the proposed changes as the current law makes no real provision for good faith bargaining'.[15] However, Senators Xenophon and Fielding were reported as being concerned that the good faith bargaining provisions 'were tantamount to compulsory arbitration'.[16] A peak employer chief executive was also reported as stating that the effect of the same provisions was that unions were being handed 'a key to the front gate, an automatic seat at the bargaining table and direct access to sensitive commercial records'.[17]

Perhaps the first thing to notice here is that good faith bargaining is a

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12 'Forward with Fairness', Australian Labor Party industrial relations policy, Federal Election 2007, 6 <http://www.workplace.gov.au>.

13 Ibid.

14 Thomson Reuters, *Workforce News Service,* Issue 1672 (27 March 2009) 2.

15 Marilyn Pittard, LexisNexis Butterworths, *Workplace Relations Australia Bulletin*, (at 8 February 2009) 5.

16 Phillip Coorey, 'Senate Set to Pass Work on Laws as Coalition Stews', *Sydney Morning Herald*, 10 March 2009, 6.

17 Thomson Reuters, *Workforce News Service,* Issue 1673 (27 March 2009) 3.

long established doctrine in both the United States and Canada[18] and is also not a novel development in Australian and New Zealand legislative history .It might even assist our understanding of the good faith bargaining scheme in *FWA* to examine some of the earlier legislative manifestations of a duty to bargain in good faith.

Currently good faith bargaining obligations are found in no fewer than five industrial jurisdictions in Australia and New Zealand: *Industrial Relations Act 1996* (NSW) s 134(4), *Fair Work Act 1994* (SA) s 76A, *Industrial Relations Act 1979* (WA) ss 42B-42D, the *Industrial Relations Act 1999* (Qld) s 146 and the *Employment Relations Act 2000* (NZ) *('ERA*(NZ)*')* ss 4 and 32. Of the Australian States, however, only Western Australia has an expansive statutory scheme for good faith bargaining for an enterprise agreement. That statutory scheme incorporates a power in a supervisory tribunal to declare on application from a negotiating party (that has discharged its good faith obligations), that bargaining has failed and there is no reasonable prospect of agreement being reached so that arbitration of the remaining terms of the agreement can take place.

Moreover, the *Industrial Relations Reform Act 1993* (Cth) enacted under the Keating Labor government inserted section 170QK into the *Industrial Relations Act 1988* (Cth) which gave a power to the AIRC to make orders for the purpose of ensuring that the parties negotiating an agreement under that act do so in good faith.[19] A quick comparison of the latter provision with the corresponding provision in the *FWA*, s 229, reveals at first glance some significant apparent differences between the two sets of provisions. However when the main decisions of the AIRC on the scope of the earlier provision are taken into account the degree of difference is reduced.[20] Both sets of provisions effectively

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[18] Good faith bargaining in the United States was established by the *National Labour Relations Act 1935 ('Wagner Act'*). In 2007, the Supreme Court of Canada in *Health Services and Support Facilities Sub Sector Bargaining Association v British Columbia* [2007] SCC 27 held that the right to bargain collectively including a duty to bargain in good faith was protected under the Charter of Rights. One of the grounds for the decision was that collective bargaining and the duty to bargain in good faith had become generally recognised as a fundamental right in Canada prior to the enactment of the Charter in 1984.

[19] The *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) repealed this provision.

[20] *Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian broadcasting Commission* (1994) 36 AILR 372 *('ABC Case'*) and *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, metals and Engineering Union* (1995) 59 IR 385 ('*Asahi*') both held that good faith bargaining orders under s170QK were to facilitate an agreement and did not involve requiring

impose obligations mainly of a procedural kind and also prohibit certain kinds of bargaining tactics but are at pains to point out that good faith bargaining does not require a party to make concessions during negotiations. But unlike s170QK, the *FWA* has in adopting tests of 'genuine' and 'unfair' conduct gone further in formulating standards of bargaining conduct.

The provisions dealing with good faith in *FWA* are found in Part 2-4 of that Act. The key object of this Part is '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.'[21] Section 228(1) of *FWA* provides that a bargaining representative for a proposed enterprise agreement must meet the following good faith bargaining requirements:

(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 other 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.

Section 228 (2) then provides the important qualification that the above good faith bargaining requirements do not however 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.

It was never clear during the brief life of the s 170QK jurisdiction, from its commencement in 1993 to its repeal in 1996, if the facilitative rather

that concessions be made by a negotiating party.

21 *Fair Work Act 2009* (Cth) s 171(a).

than interventionist role that the AIRC adopted in relation to bargaining with good faith orders nevertheless co-existed with a power in the AIRC to arbitrate as a last resort where a party persisted in breaching good faith bargaining obligations. *Forward with Fairness*, the ALP's industrial relations policy at the last federal election, made it clear that the proposed good faith bargaining regime did not involve arbitration. Nevertheless, under Division 8 of Part 2-4 of the *FWA*, Fair Work Australia (FWAustralia) is given as a last resort in cases of serious and persistent breaches of good faith bargaining requirements a power to arbitrate the dispute between the negotiating parties.

Under Subdivision 8B of Part 2-4 of the *FWA* a bargaining representative for a proposed enterprise agreement may apply to FWAustralia for a bargaining order where one of the other bargaining representatives have not met the good faith bargaining requirements. Bargaining orders made under s 231 can, inter alia, specify the actions to be taken by the bargaining representative for the purpose of ensuring that they meet the good faith bargaining requirements. Where a bargaining representative has contravened such a bargaining order an application may be made to FWAustralia for a serious breach declaration. FWAustralia may make this declaration under s 235(2) only after being satisfied of the following:

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

The result of a serious breach declaration being made in relation to a proposed enterprise agreement is that a Full Bench may then arbitrate, ie, make a bargaining related workplace related determination in

relation to the agreement.[22] However, it is clearly apparent here from the nature and number of these pre-requisites that the power to arbitrate that is given to the Full Bench of FWAustralia is a very limited and circumscribed power. It should come as no surprise therefore that in the first six months of *FWA* there were only 38 applications for bargaining orders compared with over 1,000 applications for an agreement to be approved and no arbitrated workplace determination.[23] FWAustralia must make a bargaining related workplace determination as soon as possible after the post- declaration negotiating period ends.[24] The post declaration negotiating period (which ends 21 days after the serious breach declaration is made[25]) appears to be a final opportunity for the bargaining representatives to attempt to resolve their differences and avoid arbitration. It could hardly be said in the light of this extremely long and difficult path to arbitration that good faith bargaining is arbitration in disguise or even that it is easily available where there has been a breach by a bargaining representative of the good faith bargaining requirements.

This conclusion is reinforced by the New Zealand experience relating to last resort arbitration under the bargaining in good faith regime in *ERA*(NZ).When first introduced in 2000 the *ERA*(NZ) provided that good faith bargaining did not require the making of concessions by a party during bargaining. However after amendments made in 2004 to section 33 of *ERA*(NZ) it now provides to the effect that parties are required to act in a way that will assist in concluding a collective agreement 'unless there is a genuine reason based on reasonable grounds not to'. The New Zealand Employment Relations Authority may arbitrate to determine the terms of a proposed agreement where there is a serious and sustained breach of the duty to bargain in good faith but to date no such determinations have been made.[26]

It is constructive when considering the bargaining in good faith provisions in *FWA* to compare them with the corresponding provisions in the *ERA*(NZ). Comparison with the central role given to the duty of good faith in the *ERA*(NZ) also puts the more modest position of good

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22 *Fair Work Act 2009* (Cth) s 269.

23 J Gillard, *Address to Julian Small Foundation*, Sydney, 12 November 2009.

24 *Fair Work Act 2009* (Cth) s 269 (1).

25 *Fair Work Act 2009* (Cth) s 269 (2).

26 *Employment Relations Act 2000* (NZ) s 50J. See Gordon Anderson, 'The Sky Didn't Fall in: An Emerging Consensus on the Shape of New Zealand Labour Law?' (Paper presented at the Australian Labour Law Association – Fourth Biennial Conference, Melbourne, 14-15 November 2008) 10.

faith bargaining for a collective agreement under the *Fair Work Act 2009* into perspective. Under the *ERA*(NZ) the objects section of the act makes it clear that the statutory obligation of good faith has a central role in the regulation of *all* aspects of the employment relationship and of the employment environment.[27] Thus good faith obligations are declared to be as central to an individual employment relationship as to collective employment relationships. Good faith in the *ERA*(NZ) does not merely operate, as in the *FWA*, to import a set of requirements for representatives engaged in collective bargaining. It is expressly provided that it is the duty of parties to an employment relationship 'to deal with each other in good faith' and that this duty is wider in scope than the implied common law duty of mutual trust and confidence and is not limited to bargaining for a collective agreement.[28] Pursuant to a 2004 amendment to *ERA*(NZ) this provision is amplified to include a requirement to the parties 'to be active and constructive in establishing and maintaining a productive employment relationship, in which the parties are, among other things, responsive and communicative'.[29] The matters to which the good faith obligation in *ERA*(NZ) applies are set out in subsection 4(4) thereof and include most matters that are likely to significantly affect employees either collectively or individually and includes 'consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about employee's collective employment interests, including the effect on employees changes to the employer's business'. There is also a mandatory consultation obligation on an employer when it 'is *proposing* to make a decision' that may have an adverse effect on the continuation of employment of any of its employees'.[30] The 2004 amendments to *ERA*(NZ) also made it clear that the obligation of good faith applied to bargaining for an individual employment agreement or for variation thereof and to any matter arising out of an individual employment agreement.[31] The basic good faith obligations that apply to collective bargaining are contained in Part 5 of *ERA*(NZ) and are supplemented by a Code of Good Faith issued by Minister. The Court may have regard to Code in determining if parties have acted in good faith. Clause 6 of the Code for example provides to the effect that where a party believes that there has been a breach of good faith in relation to collective bargaining the party shall

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27 *Employment Relations Act 2000* (NZ) s 3.

28 *Employment Relations Act 2000* (NZ) s 32(5), s4 (1A).

29 *Employment Relations Act 2000* (NZ) s 4(1A).

30 *Employment Relations Act 2000* (NZ) s 4(1A)(c).

31 *Employment Relations Act 2000* (NZ) s 4(4)(a).

indicate this at an early stage enable other party to remedy the situation or provide an explanation.

As Anderson notes a major objective of good faith obligation in *ERA*(NZ) was to promote collective bargaining which had dramatically declined during the era of the *Employment Contracts Act 1991* (NZ) which ended in 1999. However, since the *ERA*(NZ) commenced in 2000 collective bargaining density or the number of employees whose terms and conditions are determined by a collective agreement has continued to fall to the point where union density in the private sector in 2008 was only 10% and collective bargaining in New Zealand 'has increasingly become a public sector phenomenon'.[32] (A very similar pattern of relentless decline in trade union membership is also apparent in Australia where trade union density in the private sector was only 13.7% in 2007).[33] This pattern of decline in collective bargaining density however also serves to highlight the significance of the statutory obligation of good faith applying to individual employment agreements in New Zealand.

In Australia however under *FWA* there is no statutory good faith obligation on an employer either when negotiating terms of an individual employment agreement with an employee or generally in respect of its relationship with the individual employee. This is a conspicuous absence when some key features of enterprise agreements and modern awards under the *FWA* are considered. All enterprise agreements and modern awards made under *Fair Work Act 2009* must contain a flexibility term which enables 'an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee'.[34] In its decision of 20 June 2008, the Full Bench of the AIRC set out its model flexibility clause which enables an individual employer an employee to agree in writing to vary or displace the operation of certain elements in a modern award in relation to that employee. Under s 202 of *FWA* if an employer and an employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement this

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[32] Gordon Anderson, 'Transplanting and Growing Good Faith in New Zealand Labour Law' (2006) 19 *Australian Journal of Labour Law* 1-20 and above n 26. According to Anderson private sector collective bargaining density was only 9% in 2006 whereas the corresponding public sector figure was 61%. Note however that under *ERA*(NZ) only union members can be bound by a collective agreement in contract to enterprise collective agreements under *Fair Work Act 2009*.

[33] Email correspondence with Australian Bureau of Statistics, 15 April 2008.

[34] Industrial Registrar Williams, *Publication of Award Modernisation Request*, (2 April 2008).

has effect in relation to those parties as if the enterprise agreement were varied by the arrangement. There must be genuine agreement between the parties and the employee must be better off overall than the employee would have been if no individual flexibility arrangements were agreed to.[35] However, there is no independent body to supervise the making of such flexibility arrangements by the employer and the individual employee or to determine if the better off overall test has been satisfied.

Considerable uncertainty attaches to the issue of what standard is to be adopted when applying the good faith bargaining requirements for collective bargaining under the *FWA*. One threshold issue is whether an objective or subjective approach should be taken in determining if there has been a breach of good faith. However the New Zealand Court of Appeal in a series of decisions cautions against framing the construction issue in this way and regards it as 'unhelpful' for some compelling reasons.[36] In *Auckland City Council v Southern Local Government Officers Union Inc*[37] the Court of Appeal explained:

> [I]t does not follow that because good faith was related to the mutual obligations of trust, confidence and fair dealing, the Court should be taken to have mandated a wholly objective assessment by reference to effect. That would be to exclude consideration of honesty or lack of it which can be an important element in the concept of good faith. To suggest that conduct, undertaken honestly, that has an adverse effect for reasons completely unforeseen, is to be held to have been undertaken other than in good faith would be a significant departure from the natural meaning of those words. To judge conduct solely by reference to effect in this way would be to invoke hindsight and to disregard the influence of the circumstances in which conduct is undertaken. We think a broader and more balanced approach is called for.[38]

Also in *Carter Holt Harvey Ltd v National Distribution Union*[39] the New Zealand Court of Appeal stated that:

> Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct

35 *Fair Work Act 2009* (Cth) s 203(4).

36 Most of the decisions are referred to in *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] NZCA 1.

37 (2007) 2 NZLR 10.

38 Ibid [22].

39 (2002) ERNZ 239.

> is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.[40]

Another threshold issue regarding the construction of good faith bargaining requirements in the *FWA* is the relationship between these requirements and the taking of protected industrial action. It should not be presumed that when a bargaining representative is discharging its good faith bargaining requirements this necessarily precludes it from taking protected industrial action. One significant step taken by *FWA* towards an easing of a generally cumbersome and restrictive set of pre-conditions for protected industrial action inherited from *Work Choices* is the abolition of the requirement of initiating a bargaining period. Instead of this requirement the *FWA* provides that bargaining for an enterprise agreement begins when either:

- an employer agrees to bargain or the employer initiates bargaining for
- an enterprise agreement, or
- FWAustralia makes a majority support determination (MSD), 'using any method it considers appropriate'[41], to the effect that a majority of the employees who will be covered by the proposed enterprise agreement want to bargain collectively with the employer who will be covered by the agreement[42], or
- FWAustralia makes a scope order specifying in relation to a proposed single enterprise agreement the employers and employees who will be covered by the agreement[43], or
- FWAustralia makes a low paid authorisation in relation to a proposed agreement.[44]

With the exception of this change however the rules governing protected industrial action however under *FWA* remain basically unchanged from that which applied under *Work Choices*.[45] Protected

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40 Ibid [55].

41 *Fair Work Act 2009* (Cth) s 238 (1).

42 *Fair Work Act 2009* (Cth) s 237 (2).

43 *Fair Work Act 2009* (Cth) s 238.

44 *Fair Work Act 2009 (Cth*) s 173(2).

45 With the qualification that unlike *Work Choices* protected industrial action by employers under the *Fair Work Act 2009* (Cth) is limited to action taken in response to industrial action by employees, (s 411). See generally Shae McCrystal, 'A New Consensus: The Coalition, the ALP and the Regulation of Industrial Action' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The new workplace laws and the*

industrial action is only available to bargaining representatives who are pursuing a single enterprise agreement and not a multi-enterprise agreement and not engaging in pattern bargaining.[46] *FWA* also contains the precondition of a secret ballot introduced by the Howard government in 2005[47] including the requirement that each applicant for a ballot is genuinely trying to reach agreement.[48] It is a further requirement that remains from the Howard government era that in order for employee claim action or employer response action in relation to an enterprise agreement be capable of becoming protected industrial action the relevant bargaining representative must be genuinely trying to reach agreement.[49]

Forsyth raises the issue of whether the concept of genuinely trying to reach agreement is intended to have the same meaning as the obligation to bargain in good faith so that the protected industrial action cannot be engaged in until after a party has met its bargaining in good faith obligations.[50] He argues that there is at the least 'scope for confusion' given the provisions in the *FWA* about the extent to which parties may have to fulfil their good faith obligations before they undertake industrial action.[51] It is submitted that the starting point here is that these provisions by expressly providing that bargaining representatives are not required by their good faith obligations to make concessions or reach agreement allows hard bargaining. McCrystal points out in this connection that a trade union can be genuinely trying to reach agreement but on terms which are presently unacceptable to the employer and that this situation will not deprive the union of any genuineness.[52] Determining when a refusal to compromise constitutes a lack of genuineness may sometimes be a difficult task but it should be undertaken by considering the conduct of the party as a whole and differentiating between different bargaining starting points. Thus in *Community and Public Sector Union v Australian Broadcasting Corp*[53] a Full Bench of the AIRC held that taking protected industrial action was

Work Choices legacy (2009) 141-163.

46 *Fair Work Act 2009* (Cth) ss 413, 422.

47 See Graeme Orr and Suppiah Murugesan, 'Mandatory Secret Ballots before Employee Industrial Action' (2007) 20(3) *Australian Journal of Labour Law* 1-18.

48 *Fair Work Act 2009* (Cth) s 443(1)(b).

49 *Fair Work Act 2009* (Cth) s 413.

50 Anthony Forsyth, 'Exit Stage Left, now Centre Stage: Collective Bargaining under Work Choices and Fair Work' in Forsyth and Stewart, above n 45, 138.

51 Ibid.

52 McCrystal, above n 45, 150.

53 (1995) 36 AILR 419.

not necessarily inconsistent with a duty to bargain in good faith and stated that:

> Negotiations in good faith would generally involve negotiations with an open mind and a genuine desire to reach agreement as opposed to simply adopting a rigid predetermined position and not demonstrating a preparedness to shift.[54]

At the same time as the Ontario Labour Relations Board has held 'the duty to bargain in good faith is not designed to redress an imbalance of bargaining power between the parties'.[55] Similarly, the National Labor Relations Board in the United States has held that 'delay and its cause and effect, a lack of cooperation between the parties or of preparation, and the reasonableness and unreasonableness of demands are among the factors considered when determining if the party intended to negotiate in good faith.'[56] Thus the requirement in effect in s 228(1)(d) of the *FWA* that the bargaining representatives engage in a process of rational discussions during negotiations for an enterprise agreement should not obscure the fact that such bargaining also involves the exercise of bargaining muscles including the ability to make persuasive threats of industrial action and even carry out industrial action in certain circumstances. There is no contradiction here if one accepts as Cox argues that

> collective bargaining is not a purely intellectual activity and that conduct or the threat of conduct away from the bargaining table is a normal and legitimate component of negotiations.[57]

In a recent decision of FWAustralia SDP Richards recognised that while 'precipitous recourse to industrial action may well be demonstrative of an unwillingness to genuinely try to bargain, or let alone to bargain in good faith'[58] much depended on the facts and circumstances of each case and in many cases bargaining in good faith would operate in co-existence with the taking of protected industrial

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54 Ibid 421.

55 *Ontario Nurses Association v Board of Health of Haliburton* (1977) OLRB Rep 65, 67.

56 *NLRB v W R Hall Distributor*, 341 F 2d 359 (10th Cir, 1965).

57 P Cox, 'The Duty to Bargain in Good Faith' (1958) 71 *Harvard Law Review* 1401, 1408. The qualification here of course is that under ss 423 and 424 of the *Fair Work Act 2009,* as under *Work Choices,* there is a power in the tribunal to suspend or terminate protected industrial action where it is causing significant economic harm to the employer or where the action is threatening to endanger the life, personal safety or health or the welfare of the population or part of it or threatening to cause significant economic damage to the Australian economy or an important part of it.

58 *National Tertiary Education Industry Union v University of Queensland* [2009] FWA 90, 4.

action. Thus, in the circumstances of that case, where bargaining had been extended over a lengthy period of time and the employer was found to have its own reasons for seeking to delay the progress of bargaining, it was found that in the context of the union making an application for a secret ballot under s 437 of *FWA* that the application should not be denied on the basis that the union was not genuinely trying to reach agreement .In another recent decision of FWAustralia it has been held that it is not necessary that bargaining representatives bargain to an impasse or standstill or reach a specific stage in their negotiations before making a protected ballot application.[59]

IV NATIONAL EMPLOYMENT STANDARDS AND MODERN AWARDS

As Murray and Owens[60] recognise, it was in the area of minimum standards that *Work Choices* had arguably its most radical effect by adopting in federal legislation (instead of in accordance with long tradition in awards) a set of minimum standards known as the Australian Fair Pay and Conditions Standard ('AFPCS').[61] These legislative standards were at such an austere level in some key areas that as Murray and Owens put it 'they represented the driving force behind the deregulatory impact of *Work Choices*'.[62]

AFPCS comprises minimum employee entitlements in five key areas: wages (minimum rates of pay and casual loadings), maximum ordinary hours of work (38 per week plus reasonable additional hours), annual leave, personal leave (consisting of paid personal leave/carer's leave, unpaid carer's leave and unpaid compassionate leave) and parental leave. Many traditional award determined entitlements such as overtime, penalty rates and redundancy payments were missing from these five standards. The overall impact of AFPCS needs to be understood however in the broader context of *Work Choices*. At the same time as it established the AFPCS *Work Choices* removed minimum wage determination including the determination of classification structures and casual loadings from the AIRC and gave it to a new statutory tribunal, the Australian Fair Pay Commission (AFPC). *Work Choices* also provided that once a federal statutory

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59 *AFMEPKIU v HJ Heinz Company Australia Ltd* [2009] FWA 322, [20] (Whelan C).

60 Jill Murray and Rosemary Owens, 'The Safety Net: Labour Standards in the New Era' in Forsyth and Stewart above n 45, 40.

61 See *Workplace Relations Act 1996* (Cth), Part 7.

62 Jill Murray and Rosemary Owens, above n 60, 41.

workplace agreement commenced operation the effect was to oust or exclude the application of any awards to the employees covered by that workplace agreement[63]but not to exclude the AFPC minima.[64] *Work Choices* also abolished the no disadvantage test under which no workplace agreement could be approved if it provided in effect that there was a less favourable net outcome for employees under the proposed workplace agreement than under a relevant award. Late in the term of the Howard government however amending legislation was passed which in effect re-introduced a modified version of the no disadvantage test.[65]

The most conspicuous feature that emerges on a comparison of *Work Choices* and the *FWA* in this area is that the latter act has retained the essential *Work Choices* model of a set of legislative minimum standards. Moreover there is a significant degree of similarity between the content of the respective core legislative standards on annual leave, personal/carer's leave and parental leave. Although Labor's National Employment Standards ('NES') contain five more standards than the AFPCS all of the five minima in the latter with the exception of wages are also found in the NES. The critical difference between the AFPCS and the NES however is that the latter must be understood in the context of modern awards under *FWA*. It should also be noted that minimum wage rates under the latter act will be determined by a Minimum Wage Panel of FWAustralia. Although modern awards cannot generally exclude the NES they may contain terms ancillary to or incidental to the NES and in the case of redundancy may replace the redundancy standard in the NES by a more favourable industry specific redundancy scheme for employees.[66]

Modern awards do not however revive pre-*Work Choices* modes of arbitration. Pre-*Work Choices* most federal awards operated on the basis of respondency. That is they applied only to those employers named in the award as a respondent or person bound by the award. These awards generally set minimum standards and also allowed employers to provide additional 'over award' payments or conditions more favourable to employees. Some awards were made by arbitration by an industrial tribunal and others were made by consent of the parties and then approved by an industrial tribunal. Unions often pursued general improvements in working conditions through award variations in one

63 *Workplace Relations Act 1996 (Cth*) ss 349, 354, 399.

64 *Workplace Relations Act 1996 (Cth*) s172 (2).

65 See the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth).

66 *Fair Work Act 2009* (Cth) ss 55, 141.

sector where they had stronger bargaining power which was then adopted as a 'flow on' to other awards. Also major test cases were regularly mounted before industrial tribunals which were asked to adopt a model clause which set new general standards to be ultimately inserted in all awards. For example in 1984 the *Termination, Change and Redundancy Case*[67] established new general standards in federal awards in relation to termination of employment and redundancy. *Work Choices* severely restricted the arbitration powers of the AIRC to make or vary awards by for example reducing the subject matter of awards from 20 to 15 matters.

Modern award making (unlike traditional arbitration pre-*Work Choices*) is a top down process driven originally by the AIRC pursuant to an 'award modernisation request' from the Minister under s 576 (4) of the *Workplace Relations Act 1996(Cth).*[68] Under the *FWA* a Full Bench of FWAustralia is given the task of carrying out the process and it may inform itself in any way it thinks appropriate.[69] However, Minister Gillard varied her original *Reques*t made on 28 March 2008 on 7 occasions up to the end of December 2009 to incorporate new directions or instructions as to specific aspects of modern award making. For example, the variation of 28 May 2009 deals specifically with the restaurant and catering industry and instructs the AIRC that it should create a modern award covering that industry separate from the Hospitality Industry Award 2010 which modern award the AIRC was at the time in the process of determining under the Ministers original *Request.* The terms of the variation reflected the Minister's response to reports of employer opposition in the restaurant industry to the proposed penalty rate regime in the Hospitality Industry Award 2010.It directed the AIRC to 'establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times'.[70] Thus the award modernisation process is not a traditional adversarial process where evidence gathering depends on the parties. The outcome of this process is common rule awards which bind employees and employers on the basis of the industry or occupation in which they are located.[71] Modern

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67 (1984) 8 IR 34.

68 The Ministers request was made on 28 March 2008. See Industrial Registrar Williams, *Publication of Award Modernisation Request* (2 April 2008).

69 *Fair Work Act 2009* (Cth) s 590.

70 [2009] AIRCFB 555 [2].

71 *Fair Work Act 2009* (Cth) s 143.

wards are to be updated only every 4 years by FWAustralia however it will also have a discretion to exercise its powers in relation to modern awards outside the four year review period but only where this is necessary to achieve the aims of the modern award system.[72] Although an employer, employee or organisation may make an application to vary, omit or include terms in a modern award[73] this opportunity must, it is submitted, also be understood in the limiting context of the aims of the modern award system to set minimum conditions for employees in particular industries or occupations. In her *Request* Minister Gillard made it clear that part of the modern award process is to reduce the number of awards and to simplify their content starting from first principles and to reach different results in different industries.[74] Modern awards may also include only terms relating to 10 subject matters: minimum wages and skill based classifications and career structures and incentive based payments, type of employment, arrangements for when work is performed, overtime rates, penalty rates, annualised wage arrangements, allowances, leave, superannuation and procedures for consultation, representation and dispute settlement.

Cooney et al stress the need for responsive standard setting in employment in which the subjects of regulation are engaged and able to respond to local conditions and changing circumstances.[75] To meet their benchmark employment standards 'need to be created through dynamic participative processes that both engage actors at the local level and provide for continuous evaluation'.[76] Public regulation of employment is required because private modes of regulation are unable to generate decent work.[77] This is a useful perspective from which we can evaluate standard setting under the *FWA* and *Work Choices*. The latter failed to create decent work through responsive regulation and instead adopted' command and control methods' via elaboration of key legislative standards according to Cooney et al.[78] The legislative standards of *Work Choices* offered no opportunity other

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72 *Fair Work Act 2009* (Cth) s 157.

73 *Fair Work Act 2009* (Cth) s 158.

74 Industrial Registrar Williams, *Publication of Award Modernisation Request* (2 April 2008).

75 Sean Cooney, John Howe and Jill Murray, 'Time and Money Under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation' (2006) *29 University of New South Wales Law Journal* 215.

76 Ibid 241.

77 Ibid.

78 Ibid.

than the cumbersome mechanism of legislative amendment to develop new standards. Without advocating a return to pre-*Work Choices* modes of standard setting, the authors support what they cryptically describe as a model that 'would draw on, rather than marginalise the successful elements' of the award based system that both engaged actors at the local level and provided for continuous evaluation.[79]

How does the *FWA* score on the scale of responsive regulation? Not very well it is submitted since its approach is a hybrid of inherently unresponsive legislative standards and a modern award based system far removed from the award based system discussed by Cooney et al in which regulation provided real opportunities for the actors the subject of regulation to be engaged at the local level and for continuous evaluation. Instead modern award making under the *FWA* is a process that is driven from the top down with no real continuous engagement between the tribunal and the subjects of the standards or any continuous evaluation of the standards themselves

V CONCLUSION

While *FWA* does not really revive pre-*Work Choices* modes of regulation it has not sought fresh inspiration in any basic reformulation of the modes of regulation or in fundamental overarching concepts. Instead a Labor federal government that was out of power since 1996 appears to have been content to move not too far away from *Work Choices* in some major areas and even to retain some of the *Work Choices* model in some key areas such as the regulation of industrial action and the statutory safety net. The analysis earlier in this article of good faith bargaining provisions in *FWA* highlights the very narrow set of circumstances that must exist before a Full Bench of FWAustralia may arbitrate the terms of a proposed enterprise agreement. By any reasonable standard this power to arbitrate that is given to FWAustralia in the context of a persistent and serious breach of the good faith bargaining requirements is a very limited and circumscribed power. Why the Rudd Labor government, which campaigned on a policy of re-introducing fairness into employment relations, chose to adopt inherently unresponsive legislative standards as a key part of its industrial safety net remains inexplicable. Although it removed the hierarchy of statutory instruments under *Work Choices* that encouraged individual arrangements over collective agreements and supports collective bargaining moving to centre stage in

[79] Ibid 215.

employment regulation it has not come to terms with or adequately addressed the relentless decline in trade union membership in Australia in recent decades that has now reached the point where only 13.7 % of private sector employees were union members in 2007.[80] The corresponding figure in the public sector was 41.1%.[81] These figures threaten to undermine the legislative strategy of placing collective bargaining at the centre of employment regulation. It appears illusory given the New Zealand experience to expect the good faith bargaining requirements in *FWA* to reverse this continuing decline. Most of all *FWA* suffers as a legislative strategy for a reforming Labor government by comparison with the *Employment Relations Act 2000* (NZ) which has proved to be an enduring reformulation[82] by a Labor government of the basic framework for regulating employment relations. *ERA*(NZ) does this by articulating a comprehensive code of good faith which has a central role in *all* aspects of the employment relationship and of the employment environment. It thus places statutory good faith at the core not only of collective but also of individual employment relations.

[80] See above n 34.

[81] Ibid.

[82] See Anderson, above n 26. The *ERA*(NZ) has been substantially retained by the National Party Government that assumed office in November 2008.