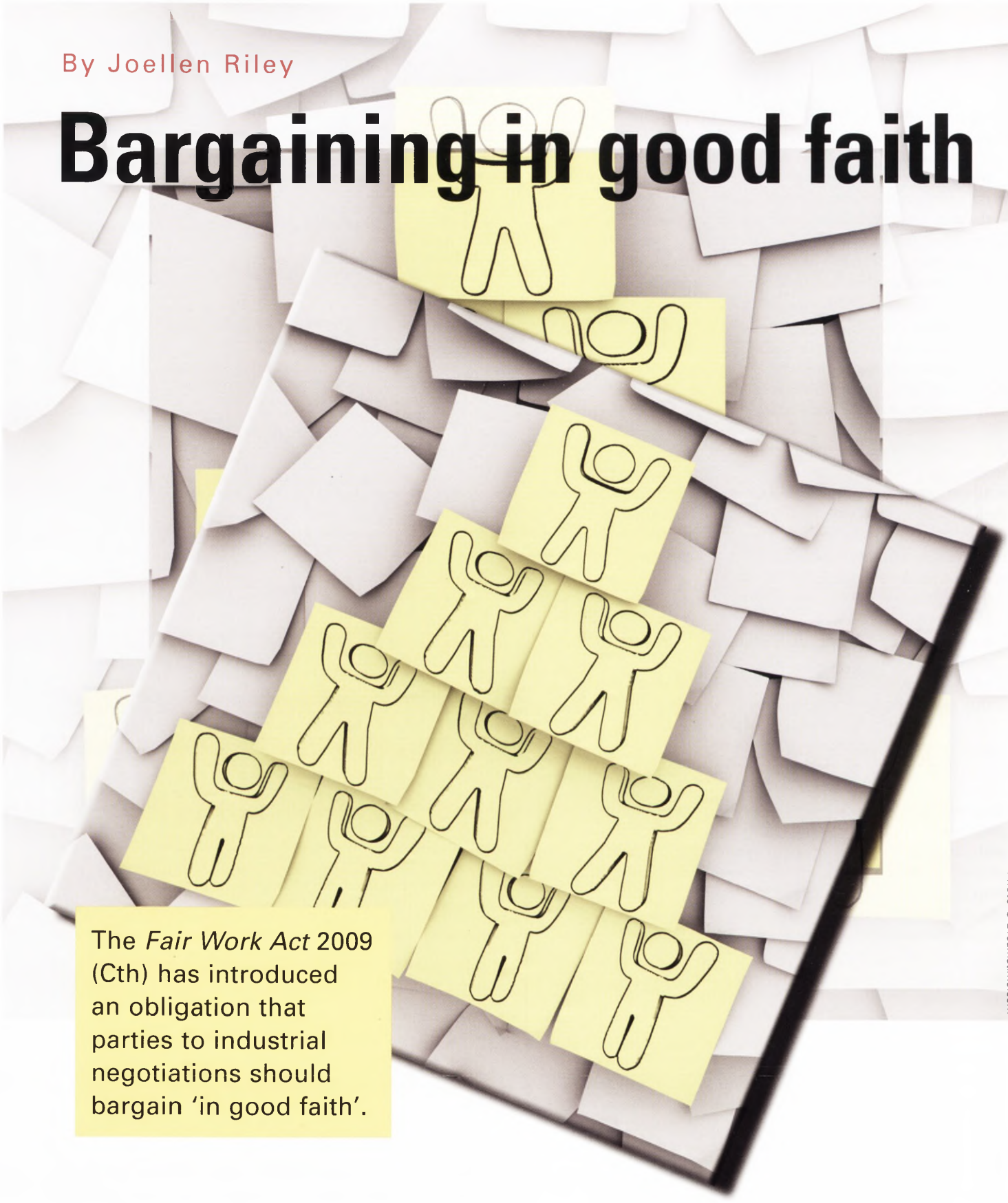
By Joellen Riley

# Bargaining in good faith



The *Fair Work Act* 2009 (Cth) has introduced an obligation that parties to industrial negotiations should bargain 'in good faith'.



Some have treated the new obligation with suspicion, as an opportunity for an interfering third party (Fair Work Australia) to meddle in collective bargaining outcomes. Could it be, however, that a mandatory good faith bargaining obligation will engender the kind of cultural change in workplace relations that governments of both colours have been urging in recent years? This article presents an optimistic view of the potential for the new bargaining rules to improve labour relations in Australia.

## GOOD FAITH IN INDUSTRIAL BARGAINING

There are two firm views on whether it makes sense to require that parties to industrial negotiations bargain 'in good faith'. On the one hand, the United States' collective bargaining system regulated by the *National Labor Relations Act* 1935 (US) (the Wagner Act)[1] has long mandated good faith bargaining as a necessary complement to the trade union recognition rights in that legislation.[2] What is the use of granting a majority of employees a right to elect a union to bargain on their behalf, if the employer has no obligation at all to respond to their claims? And how safe is it to permit unions to take industrial action, protected from any legal sanction, if they are not first obliged to genuinely seek to reach agreement with employers? The view that an obligation to bargain in good faith was a necessary component of a system based on enterprise bargaining rather than compulsory arbitration was adopted by the Keating ALP government when it enacted the *Industrial Relations Reform Act* 1993 (Cth). Section 170QK in that legislation required parties to bargain in good faith when negotiating certified agreements.

The opposite view, espoused by the Howard Coalition government, when it enacted the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) (WROLA Act), is that a good faith obligation creates an unnecessary and unworkable fetter on the freedom of industrial parties to pursue their own interests. The WROLA Act repealed s170QK, although it did include some provisions requiring that parties 'genuinely try to reach agreement' before taking protected industrial action.[3] This approach was maintained after the extensive amendments to the *Workplace Relations Act* 1996 (Cth) (WR Act) made by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) (Work Choices).

Work Choices also found it necessary to spell out exactly what 'genuinely trying to reach an agreement' meant in the context of a prohibition on pattern bargaining. The definition in the WR Act s421 looked suspiciously like the old s170QK obligation to negotiate in good faith. It required that negotiating parties must agree 'to meet face-to-face at reasonable times',[4] to consider and respond to proposals within a reasonable time,[5] and not 'capriciously' add or withdraw items for bargaining.[6] (This definition applied only in the context of pattern bargaining.[7])

Now, the *Fair Work Act 2009* (Cth) has reintroduced a requirement that 'bargaining representatives'[8] must meet the good faith bargaining requirements listed in s228 when negotiating to reach an enterprise agreement. Bargaining representatives include all employers, unions representing their members, and any other bargaining agents appointed by employers or employees. The good faith bargaining requirements oblige them all to commit to the following, listed in s228(1):

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; and
f) recognising and bargaining with the other bargaining representatives for the agreement.

Importantly, however, bargaining representatives are *not* required to make concessions during bargaining, nor to reach agreement: s228(2). Although Fair Work Australia (FWA) has been given powers to make bargaining orders if parties have failed to meet the requirements in s228(1), those orders are all procedural in nature. They include orders that the parties should meet the good faith bargaining requirements (for example, by meeting together, or responding to proposals in a timely manner), and should reinstate any employee whose employment was terminated for tactical reasons during bargaining, but there is no power to make any orders that parties conclude an agreement. The power to impose an agreement by arbitration is limited to making 'workplace determinations' following termination of bargaining because industrial action by the parties has caused significant harm[9] or because parties have seriously breached bargaining >>

orders and cannot resolve a dispute themselves.[10] The Fair Work provisions permitting FWA to make workplace determinations are unlikely to prove any more intrusive on employers' prerogative to make their own enterprise agreements than those in the Work Choices legislation.[11]

## GOOD FAITH IN THEORY

If a good faith bargaining obligation cannot require parties to reach agreement, what purpose does it serve? Arguably, an obligation to negotiate in good faith is designed to engender a more co-operative approach to workplace bargaining, in the interests of increasing national productivity and avoiding the kinds of industrial battles that are destructive of economic prosperity. This would require a considerable cultural change in Australian industrial relations, away from the 'adversary paradigm'[12] towards a mutual gains model of bargaining.[13]

The 'adversary paradigm' was explained by Mason P in a case in which a worker argued that a workers' compensation insurer owed him a duty of good faith when dealing with his compensation claim. In *CGU Workers Compensation (NSW) Limited v Garcia*, the NSW Court of Appeal was asked to recognise a general tortious duty to act in good faith. The insurer in the case was alleged to have breached this supposed duty by withholding compensation payments from an injured worker for capricious reasons. In refusing to recognise the existence of a duty of the insurer to act in good faith, Mason P observed that the 'adversary paradigm' adopted by the legislative scheme, whereby parties were required to test claims in court, was not a conducive framework for the recognition of good faith obligations.[14] While the NSW Court of Appeal appears to have rejected the application of good faith in relation to the administration of workers' compensation claims, not all jurisdictions have been as categoric.[15]

Our adversarial system of justice has traditionally focused on contest, not co-operation. Those who have been trained in courtroom practice perhaps understandably harbour a suspicion that 'good faith' means surrendering some power to the other side. An adversarial system is antagonistic to the notion that parties should be obliged to restrain pursuit of their own interests by considering the interests of the other. Hence, the Australian legal system has generally been reluctant to recognise and extend principles of good faith.

Nevertheless, this culture is gradually changing under the weight of criticism of the cost, delays and frequently perceived injustices of our court system. In recent years, governments have actively sponsored more conciliatory approaches to dispute resolution, by mediation and supervised negotiation.[16] Although Australia has enjoyed a long tradition of conciliation and arbitration in the industrial relations field, the competitive, adversarial culture of our court rooms has often carried over into industrial negotiations and dispute settlement in the past. Isaac and Macintyre have described Australia's labour history as 'rich in drama involving strikes, lockouts, imprisonment' and 'noisy protests in court rooms'.[17] This is a consequence of framing industrial bargaining as a contest between the inherently opposed interests of capital and labour. As former prime minister, the Hon R J Hawke, has written in the foreword to *The Australian Charter of Employment Rights*, this 'senseless tug-of-war between capital and labour' is unproductive in the twenty-first century. Now, most western democratic industrial relations systems focus on raising productivity and living standards by promising 'fairness and balance in industrial bargaining' and 'employment relations founded on good faith, mutual respect and a sharing of gain'.[18]

This co-operative approach is described in US labour negotiations literature as an 'integrative' rather than 'distributive' bargaining strategy.[19] Whereas 'distributive bargaining' describes the kind of adversarial contest in which parties seek to secure for themselves the largest possible slice of a fixed pie (to adopt the usual cliché), 'integrative bargaining' – or 'mutual gains bargaining' – focuses on more co-operative strategies designed to expand the pie, so there is more for all the parties to share. Where collective bargaining is 'integrative', it has the capacity to promote productivity gains. Productivity improvement has been a central concern of successive Australian governments since the early 1980s. It was at the heart of the Hawke government's accord with the trade union movement,[20] and it underpinned the introduction of enterprise bargaining in the *Industrial Relations Reform Act* 1993 (Cth).

### Good faith rejected ...

Although equally committed to productivity improvement, the Howard government consistently rejected the view that a good faith obligation was necessary or even useful to support the Australian system of 'workplace bargaining' introduced from the beginning of 1997. One reason for this is that the Howard legislation (from 1997, and not only after Work Choices) was not committed to collective bargaining. The WR Act allowed employers to choose to engage staff on individual Australian Workplace Agreements (AWAs), and to refuse to negotiate collectively with employees.[21] A good faith obligation would be an impediment to the employer's free choice in such a system, because it would oblige the employer to meet and talk to union representatives with a view to making a collective workplace agreement. Using individual AWAs to exclude unions was a well-known strategy adopted by some employers, even before Work Choices.[22]

### ... and reintroduced

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act* 2008 (Cth) prohibited the use of AWAs as an early measure implementing the ALP government's industrial relations policy, although employers already using AWAs were allowed to keep using Individual Transitional Employment Agreements (ITEAs) subject to a no-disadvantage test, up until the full implementation of the *Fair Work Act* on 1 January 2010. The good faith bargaining obligations in Fair Work commenced on 1 July 2009. This means that employers and unions are now obliged to comply with the s228 good faith requirements. This includes agreeing to meet and talk with any bargaining representative. So long as a union has a member in a workplace, the union will be entitled to represent that member in enterprise bargaining.

(Unions are the default bargaining representative for their members; however, union members can elect to represent themselves, or be represented by someone else.[23])

If parties fail to comply with the good faith requirements, FWA is empowered to play the role of referee, and to make bargaining orders to instruct parties in how they should behave. FWA cannot, however, determine the outcome of bargaining, unless all bargaining representatives have expressly agreed to confer a power of arbitration on FWA.[24] The obligation to bargain in good faith is clearly not a Trojan horse for the introduction of compulsory arbitration for enterprise agreement-making.

It does, however, reintroduce a much more active role for a supervisory body to govern play in the game of industrial bargaining. One of the objects of *Fair Work Act* Part 2-4 is 'to enable FWA to facilitate good faith bargaining and the making of enterprise agreements',[25] and it is empowered to do that by making bargaining orders, and dealing with disputes when requested to do so. FWA will be able to make orders that parties meet at reasonable times, respond to proposals, and refrain from capricious and unfair conduct.[26]

## GOOD FAITH IN PRACTICE

Will these new obligations have an impact on Australian industrial relations practice? Already we have seen an announcement that Telstra Corporation has signed an agreement of 'Principles', committing the company to engaging in good faith bargaining with relevant unions.[27] The agreement has been signed by delegates of the ACTU, the Communications Electrical and Plumbing Union (CEPU) and the Community and Public Sector Union (CSPU), which have also committed to complying with the spirit of the new laws. Given that Telstra was one of the employers that enthusiastically embraced the use of AWAs under the former legislation, this agreement is at least symbolic of a commitment to the new principles espoused by the Fair Work system.

It is to be hoped that the scepticism of the Howard era has been put aside, and employers and employee representatives will now be prepared to adopt the practices encouraged by the current government's Forward with Fairness policies.[28] Employers should be reassured that the good faith bargaining requirements do not usurp their prerogative ultimately to decide what kind of industrial agreements they can afford to make with their workers. The new law does not mandate reasonable compromise, but it may encourage it. By structuring industrial negotiations as an exercise in co-operation, the new system may lead employers and employees to discover mutual interests and facilitate new solutions. In difficult economic times, this is surely a worthwhile endeavour. ■

**Notes:** **1** For a digest of the good faith provisions in the *Wagner Act*, see A Rathmell, 'Collective Bargaining after Work Choices: Will "Good Faith" Take Us Forward with Fairness?' (2008) 21 *Australian Journal of Labour Law* 164 at 177-81. **2** See *Wagner Act*, ss8(a)(5), 8(d) and 9(a), discussed in Rathmell, above at 171. **3** See former *Workplace Relations Act* 1996 (Cth) s170MP. **4** *Ibid* at s421(4)(d). **5** *Ibid* at s421(4)(e). **6** *Ibid* at s421(4)(f). **7** *Ibid* at s421(6). **8** 'Bargaining representative' is defined in *Fair Work Act*, s176. **9** See *Fair Work Act* ss266-8 and 423-4. **10** *Ibid* at ss269-71. **11** See *WR Act* s504. **12** *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193 at [87]. **13** Mutual gains bargaining is described in R E Walton and R B McKersie, *A Behavioral Theory of Labor Negotiations*, (1965) ILR Press, NY at 5. I am indebted to Dr Troy Sarina, and his PhD dissertation entitled *Bargaining at its Best? An Examination of the Australian Legislative Framework that Regulates Non-Unionised Collective Bargaining*, September 2007, Faculty of Law, University of Sydney (Copy available in the Fisher Research Library), for introducing me to this literature. **14** *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193 at [87]. **15** See, for example, *Ilieska-Dieva v SGIO Insurance Ltd* [2000] WASCA 161. **16** See, for example, the National Alternative Dispute Resolution Advisory Council (NADRAC), which was established in 1995 with a mission to promote Alternative Dispute Resolution. See NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, November 2006. **17** J Isaac and S Macintyre, *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration*, 2004, Cambridge University Press, Melbourne, at p1. **18** At pxii. **19** See Walton and McKersie, above, note 13. **20** See ALP and ACTU, *Statement of Accord by the Australian Labor Party and the Australian Council of Trade Unions Regarding Economic Policy*, Canberra, 1983. **21** See *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2000) 106 FCR 482. **22** See, for example, *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2001) 106 FCR 482. **23** *Fair Work Act* s174(3). **24** *Ibid* at s240(4). **25** *Ibid* at s171(b). **26** See Fair Work Bill cl 231(2)(d). **27** See http://www.cepuconnects.org/files/File/Telstra_Principles_Doc_090625.pdf visited 3 July 2009. **28** See K Rudd and J Gillard *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, 2007, ALP, Canberra.

**Joellen Riley** *is Professor of Labour Law, Sydney Law School, University of Sydney.* **PHONE** *(02) 9351 0476*
**EMAIL** *joellen.riley@usyd.edu.au*