



## **Fair Work Australia's Influence in the Enterprise Bargaining Process**

**Research Report – Fair Work Australia Research Partnership**

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## List of abbreviations

ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
AMIEU	Australasian Meat Industry Employees' Union
AMWU	Australian Manufacturing Workers' Union
ANF	Australian Nursing Federation
ANZSIC	Australian and New Zealand Standard Industry Classification
APESMA	Association of Professional Engineers, Scientists and Managers Australia
ASU	Australian Services Union
AWU	Australian Workers' Union
AWA	Australian Workplace Agreement
CFMEU	Construction, Forestry, Mining and Energy Union
DEEWR	Department of Education, Employment and Workplace Relations
FWA	Fair Work Australia
GFB	Good Faith Bargaining
HSUA	Health Services Union of Australia
LHMU	Liquor, Hospitality and Miscellaneous Workers' Union
MFB	Metropolitan Fire and Emergency Services Board
MSD	Majority Support Determination
MUA	Maritime Union of Australia
NUW	National Union of Workers
SDA	Shop, Distributive and Allied Employees' Association
TWU	Transport Workers' Union
WAD	Workplace Agreements Database

## EXECUTIVE SUMMARY

The *Fair Work Act 2009* (Cth) (FW Act) seeks to promote and enable collective bargaining in good faith at the enterprise level. A key means through which the legislation seeks to do this is by empowering Fair Work Australia (FWA) to oversee bargaining and to ‘facilitate good faith bargaining and the making of enterprise agreements.’<sup>1</sup> Part 2-4 of the FW Act provides a number of mechanisms through which FWA may provide assistance to negotiating parties (through their bargaining representatives), both to initiate and progress bargaining. These include majority support determinations;<sup>2</sup> scope orders;<sup>3</sup> and bargaining orders.<sup>4</sup> FWA is also empowered, in the case of deliberate and serious breaches of bargaining orders, to make a serious breach declaration,<sup>5</sup> which provides a basis for the tribunal to issue a bargaining-related workplace determination.<sup>6</sup> In addition, FWA may also deal with bargaining disputes when parties request the tribunal’s assistance, including (where all parties agree) through arbitration;<sup>7</sup> and may facilitate multi-employer bargaining for employees who are low-paid and have not historically had access to collective bargaining.<sup>8</sup>

This study examines the operation of these provisions in Part 2-4 of the FW Act during their first three years of operation: that is, from 1 July 2009 to 30 June 2012. The research was undertaken through a research partnership between FWA and the three chief investigators, and is intended to provide FWA with empirical data relevant to its reporting requirement under the FW Act: specifically, ‘to review the developments, in Australia, in making enterprise agreements.’<sup>9</sup> The primary aim of the research has been to assess how effective FWA has been in meeting its statutory obligations under Part 2-4 of the FW Act, to enable and facilitate good faith bargaining (GFB). This study has also sought to add to the small but growing body of empirical work seeking to map and evaluate how the new bargaining rules introduced under the FW Act are influencing bargaining practices.

### Background

This report begins by locating the bargaining rules in the FW Act – and the role given to the national industrial relations tribunal in supervising bargaining – in historical context (Chapters 1 and 2). While legislative support for enterprise agreement-making has existed since the earliest enterprise bargaining reforms were introduced at the federal level in Australia in the late 1980s, the decisive move towards formalised enterprise bargaining under federal law came through the *Industrial Relations Reform Act 1993* (Cth)(IR Reform Act). These amendments were intended to facilitate the extension of agreement-making, by providing for two types of collective agreements (certified agreements and enterprise flexibility agreements) and by

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<sup>1</sup> FW Act s.171(b).

<sup>2</sup> FW Act ss.236-237.

<sup>3</sup> FW Act ss.238-239.

<sup>4</sup> FW Act ss.229-231.

<sup>5</sup> FW Act ss. 234-235.

<sup>6</sup> FW Act Part 2-5, Division 4.

<sup>7</sup> FW Act s.240.

<sup>8</sup> FW Act Part 2-4, Division 9.

<sup>9</sup> FW Act, s.653(1)(a).



introducing, for the first time in federal law, principles of GFB. However these GFB provisions had only a very limited impact, due largely to the restrictive interpretation taken by the tribunal to its own powers under the provisions.

The *Workplace Relations Act 1996* (Cth)(WR Act), introduced by the Howard Coalition Government, consolidated the shift towards enterprise bargaining. However while continuing to provide for union and non-union collective agreements, this statute also introduced statutory individual employment agreements (Australian Workplace Agreements or AWAs), and significantly reduced the role and powers of the Australian Industrial Relations Commission (AIRC), including in supervising bargaining. It also removed any capacity of the Commission to make orders ensuring parties bargained in good faith, or to arbitrate during a bargaining period on any issue that was in dispute between parties. The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)(Work Choices) further prioritised AWAs over collective agreements, and further restricted the role and powers of the AIRC during bargaining.

A central policy objective underlying the FW Act bargaining reforms was to restore the primary of collective agreement making in the federal industrial relations system. The statutory commitment to good faith bargaining, the provision of mechanisms directed at attaining this objective, and the reinvigoration of the tribunal's role in supervising bargaining, all constitute significant departures from the bargaining framework found in the former WR Act. At the same time, however, the FW Act rules do not constitute a wholesale return to any of the bargaining regimes that existed prior to Work Choices. Rather, Part 2-4 of the FW Act introduces a number of mechanisms and concepts which constitute largely uncharted territory in Australian industrial relations. It is the operation of these mechanisms that are the major focus of this report.

## Methodology

This study was conducted over a 15-month period, from July 2011 to September 2012. It draws upon four principal sources of data:

1. the Workplace Agreements Database (WAD) maintained by the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR);
2. FWA's own case management data, which enabled an examination of the volume and nature of the tribunal's work under Part 2-4 of the FW Act during its first three years of operation;
3. relevant published decisions and orders made by FWA; and
4. qualitative evidence assembled from 50 semi-structured interviews conducted between February to July 2012 with parties involved in at least one FWA proceeding under Part 2-4 of the FW Act. This included 25 union representatives, 23 employer representatives and 2 employees who participated in bargaining as their own bargaining representative.

Compilation and analysis of these various forms of evidence has enabled us to maximise the amount of research data available, and to provide a detailed picture of the role and impact of the tribunal under Part 2-4 of the legislation. The methodological limitations of these data sources are outlined in Chapter 3.

## **An overview of agreement-making under the FW Act**

This report draws upon quantitative data on agreement-making collected and published by DEEWR, as one means of assessing the extent to which the bargaining provisions in Part 2-4 of the FW Act have been successful in achieving their policy objective of promoting collective bargaining. Analysis of this data suggests that a number of general trends in agreement-making that existed prior to the introduction of the FW Act have continued since its introduction. Most notably, the data showed the clear cyclical pattern in agreement-making as well as a general upward trend in both the number of agreements current in any quarter and the total number of employees covered by these agreements. Moreover, the average size of agreements does not appear to have altered significantly.

Nonetheless, our analysis revealed that the FW Act did have some significant impacts on the pattern of agreement-making. First, there is a marked spike in the number of agreements lodged in the June quarter of 2009; that is, immediately prior to the FW Act becoming operative – the largest number recorded in any quarter since 1992. Second, this spike was accounted for by a large increase in the number of non-union agreements, suggesting that many of these were likely to be associated with a desire to avoid the potential effects of the bargaining provisions contained in the FW Act. Third, whilst the growth in non-union agreement-making was evident – and can be attributed to legislative reforms that took place – prior to the FW Act, the new legislation has not been associated with a reversal of this trend. Finally, the FW Act was associated with a marked increase in the number of employees covered by collective agreements. When taken as a proportion of all employed persons, 21.3% of all employees were covered by a federally registered collective agreement by March 2012. This compares with 18.8% of all employed persons covered by federally registered collective agreements in the June quarter 2009. Interestingly, much of this growth in agreement coverage appears to have occurred in the private sector.

## **The role of FWA in resolving bargaining disputes**

Beyond these macro-level trends, the data collected by DEEWR through the WAD does not provide any insight into the role of FWA in facilitating bargaining or the extent and nature of its work under Part 2-4 of the FW Act. However we are able to assess this dimension of the tribunal's work through analysing FWA's own case management data. This data has been collected in relation to all applications made under Part 2-4 of the FW Act, from when the legislation commenced operation on 1 July 2009 until 30 June 2012.

Over the first three years of the FW Act's operation, 1785 applications were lodged seeking some form of intervention from FWA to assist in resolving disputes that arose at different stages of the bargaining process. A significant proportion of these applications – 293 or 16.4% of all applications made – were lodged in the first month after the FW Act came into operation. The overwhelming majority of these applications (94%) were made under s.240 (applications for assistance in resolving bargaining disputes). Just as the FW Act was associated with a one-off spike in agreement-making prior to its introduction, these data also suggest that a demand for such intervention had 'stockpiled' until the FW Act came into operation.

Following this initial spike, FWA has faced a relatively stable flow of applications under Part 2-4. Again, in most cases, these applications were seeking assistance to resolve bargaining disputes under s.240. A number of other, perhaps unsurprising, results emerged from FWA's case

management data. First, most of the applications under Part 2-4 were lodged by unions (74.3%). Most were also lodged in Victoria (48.6%), New South Wales (19.8%) and Queensland (14.3%). Applications most frequently came from the following industries: healthcare and social services (26.7%), manufacturing (22.9%), and transport, postal and warehousing (11.5%).

As our analysis of the operation of each of the relevant types of applications demonstrates, the provisions in Part 2-4 of the FW Act are capable of effectively addressing a range of types of conduct and circumstances in which bargaining disputes arise. Our research strongly suggests, however, that the provisions have proven incapable of addressing situations in which an employer simply does not wish to enter into an agreement on any terms. This is demonstrated by the fact that in a number of protracted bargaining disputes, a party has lodged applications under several of the available mechanisms under Part 2-4 (and indeed of other parts of the legislation as well) but, notwithstanding that some or all of these applications have been successful, 'bargaining' continues to be frustrated.

### Majority support determinations

Majority support determinations (MSDs) are a key feature of the bargaining framework established under the FW Act. An employee bargaining representative may apply to FWA for an MSD where an employer refuses to bargain and it can be demonstrated that a majority of the relevant employees wishes to bargain collectively. The MSD mechanism was introduced to remedy what was perceived to be a serious deficiency in the bargaining framework that existed under the WR Act: the ability of an employer to refuse to engage in collective bargaining, even where its workforce wished to do so, and the protracted disputes which often arose as a consequence.

Analysis of FWA data indicates that, over the first three years of the provisions operation, 274 applications for MSDs were lodged with FWA. The number of MSD applications has fallen steadily during the same period: from 111 in the first year to 96 in the second year, and down again to 67 in the third year. Based on the 274 MSD applications, FWA has made 78 determinations.

Analysis of FWA's published decisions considering the operation of the MSD provisions suggests that FWA has taken a relatively flexible and non-legalistic approach to the task of determining whether majority support for collective bargaining exists (a pre-condition for making an MSD under s.237 of the FW Act). Members of the tribunal have also shown initiative in ascertaining the views of employees where the evidence of majority support provided by the applicant is equivocal. FWA's refusal to mandate secret ballots as a matter of course appears to have been particularly important in ensuring the provisions have practical impact, and are not the subject of the type of protracted 'union-busting' tactics evident in North American labour law systems. The failure of many creative employer strategies seeking to contest applications for MSDs has further reduced the scope for protracted litigation around these provisions.

Our interview data supports the conclusion that the MSD provisions have been fairly effective in compelling employers to bargain where a majority of their workers wish to do so. Many of the interviewees – both employers and unions – expressed the view that the provisions and FWA's pragmatic approach to their interpretation and application have facilitated the commencement of bargaining in many cases. Our interviews revealed that the MSD provisions are also having an

important 'shadow effect'. This effect was observed by both employers and union representatives across a range of industries. It appears that many employers are now agreeing to bargain without a determination needing to be issued, or even without a bargaining representative having to formally lodge an MSD application.

## Scope orders

The scope order provisions of the FW Act provide a mechanism through which FWA may resolve disputes over the boundaries of the employee constituency for a proposed agreement. The provisions were introduced to provide an alternative to the taking of industrial action as the principal means of resolving disputes over the scope of an agreement. Between 1 July 2009 and 30 June 2012, there were 108 applications for scope orders, of which 19 were successful. The overwhelming majority of applications lodged under s.238 were lodged by unions seeking a scope order to assist in overcoming employer resistance to the union's preferred coverage of an agreement. As was the case with MSD applications, certain industries were overrepresented in the data on scope order applications, notably manufacturing, transport, postal and warehousing services, education and training, and public administration. Also like MSDs, the number of scope order applications lodged has decreased over the three-year period of this study. Of the 108 scope order applications lodged, almost half were lodged in the first year following the commencement of Part 2-4 of the FW Act.

Analysis of the relatively few FWA decisions on scope order applications suggests that tribunal members have shown a reluctance to interfere with the bargaining process on the issue of the appropriate scope of a proposed agreement. They have also approached the scope order provisions in a more technical manner than some of the other provisions relating to GFB, although it appears that this is largely because the provisions do not provide FWA with the degree of discretion it enjoys under other provisions of Part 2-4.

The relatively small number of scope order applications in the first three years suggests that, for the most part, the parties to enterprise bargaining negotiations determine the scope of their proposed agreement without use of the scope order provisions. Despite interviewing a number of parties who had been involved in scope order applications, our interview data has not provided much insight into how the scope order provisions are operating or viewed by the parties. This is largely because the parties interviewed seemed rather ambivalent about the provisions. Overall, while we are reluctant to conclude that scope issues have been insignificant in the context of bargaining under the FW Act, we are unable, based on the data before us, to assess the impact of the scope order provisions on the strategies and practices of unions and employers.

## Bargaining orders

The GFB provisions are widely regarded as among the most significant reforms introduced by the FW Act. Section 228(1) enumerates six GFB obligations that employer and employee bargaining representatives are required to meet. These obligations, enforceable through various orders/declarations that can be made by FWA and through court processes, were introduced by the government to facilitate agreement-making and prevent protracted bargaining disputes.

Over the first three years of operation of Part 2-4 of the Act, there were 324 applications for bargaining orders lodged under s.229, of which 23 (around 7%) have been successful. The

number of applications has remained fairly consistent over the three year period. Just over three quarters of bargaining order applications have been lodged by unions.

Analysis of FWA decisions in relation to the GFB provisions suggests that the process obligations – that is, those obligations listed in s.228(1)(a)-(d) of the FW Act - appear to be operating largely as intended. In many instances, they help ensure an orderly bargaining process through the provision of clear rules for the conduct of negotiations. In addition, the obligations that impact more directly on bargaining tactics (s.228(1)(e)-(f)) have operated to prevent certain kinds of behaviour that undermines the bargaining process, particularly by employers, such as attempts to separate employees out from the collective group through direct offers or unilateral improvements to existing conditions.

A narrow interpretation of the obligations in s.228(1)(e)-(f) in some other cases, however, has allowed employers significant latitude in bargaining tactics: for example, to communicate directly with employees during negotiations. Such practices are arguably inconsistent with the statutory objective of facilitating and promoting collective bargaining. The statutory purpose would also appear to be undermined by FWA's approach to when an employer may submit a proposed agreement to a ballot of employees, as the tribunal's approach prioritises compliance with the *agreement-making* rules in Part 2-4 over those applicable to GFB and *collective bargaining*.

FWA's approach to surface bargaining also seems problematic, a product of the tension inherent in the s.228(1) obligations and the s.228(2) limitation upon those obligations. There would appear to be little value in an outcome whereby surface bargaining is found to have occurred and to be inconsistent with s.228(1), but FWA is unable to make orders giving effect to that interpretation because of the application of s.228(2).

Our interviews revealed very mixed views as to the scope and impact of the GFB provisions. There was some evidence of a 'shadow effect' of the GFB requirements, and evidence that the provisions were being used either directly or indirectly in bargaining without an application under s.229 having been lodged or, if lodged, not pursued. However, this effect did not seem to be nearly as pronounced as would appear to be the case with the MSD provisions of the FW Act. Union representatives expressed diverse views about the GFB obligations. Some were very positive and felt that the GFB requirements had had a strong moderating effect on behaviour and had facilitated bargaining. Others, however, felt that the GFB obligations – as drafted and applied by FWA – had only very limited potential to influence bargaining conduct. Overall, there appeared to be a sense that the GFB obligations civilise bargaining processes. But a number of interviewees emphasised the limitations inherent in the provisions: in particular, the capacity of the provisions to improve the bargaining *process* only, rather than substantive outcomes. While several employer parties interviewed expressed frustration over the lack of clarity with respect to the scope and meaning of some of the requirements in s.227, most appeared relatively sanguine about the GFB obligations. Some thought they had proved useful during bargaining and could be usefully employed strategically by employers, whilst others felt that they did not have any real bearing on agreement negotiations.

## FWA assistance with bargaining disputes

Under s.240(1) of the FW Act, a bargaining representative may apply to the tribunal for assistance in resolving a bargaining-related dispute. FWA may conciliate, mediate, make a recommendation, express an opinion or – providing both parties agree – arbitrate the dispute. This is the most widely used of all the avenues available under the FW Act directed at facilitating bargaining and agreement making, with FWA receiving significantly more applications under s.240 of the Act than it does under any other provision in Part 2-4.

In the first three years of the legislation's operation, the tribunal received 1075 applications under s.240. Two-thirds of these applications were lodged by union applicants. However over a quarter (28.5%) of s.240 applications were lodged by employers. Employers are significantly more likely to lodge applications under s.240 than under any other provision in Part 2-4 of the FW Act. A small number of industries account for almost 70% of all applications made under s.240: namely, healthcare and social assistance (401 applications), manufacturing (227 applications), and transport, postal and warehouse services (117 applications).

In contrast to the approach taken in this study towards other provisions, our analysis of the operation and impact of s.240 does not involve a comprehensive analysis of FWA decisions. This is partly because there are relatively few decisions made under s.240 publicly available, and because where decisions are made, they tend to be restricted to the facts of the case. Instead, the analysis draws on the qualitative interviews only.

While it is not possible to draw definitive conclusions based on the interviews conducted, a great deal of data was compiled from the interviews which provides insight into a number of features of s.240 applications, such as the types of parties using s.240 and their objectives in doing so. While s.240 is a provision that is used frequently, it tends to be used overwhelmingly by 'repeat players' and by experienced industrial relations practitioners. These users are often those with long-standing experience in union-management relations, and with a more pragmatic approach to collective bargaining. While not surprising, this suggests there is considerable scope for measures directed at promoting awareness of s.240 as an avenue of assistance to parties involved in enterprise bargaining. This would seem even more important, given the value of this avenue of assistance to progressing bargaining (according to those interviewed) and the fact that, if the FW Act is achieving its statutory objectives, there will presumably be more parties bargaining and so perhaps more parties in need of assistance to resolve bargaining-related disputes.

While interviewees identified a myriad of motivations for lodging s.240 applications, several common reasons emerged strongly. These included seeking assistance when bargaining has reached an impasse; diffusing hostilities and promoting more reasonable bargaining behaviour; as an 'exit strategy' and means of saving face where bargaining has become intractable; demonstrating to workers that all efforts are being made to progress bargaining; escalating a dispute to those with greater authority; and/or simply where one or more of the parties are frustrated by the lack of progress in bargaining but there does not appear to be any other option – either legally or strategically – to progress the negotiations. In all these circumstances, the involvement and assistance of an independent third party with expertise in industrial relations matters was considered to be of significant value.



Interestingly, the interviews also revealed an overwhelming preference for FWA conciliators who adopted a proactive approach to conciliation. In many cases, this type of approach was more informal and involved a conciliator engaging with the parties and issues in a dispute to a significant degree, and putting forward views and proposals directed at resolving the dispute. This type of assistance was widely regarded as the most effective approach to the resolution of disputes that arose during bargaining.

While s.240 was widely regarded positively, a number of limitations were commonly identified with the provision. These related to the way in which FWA sought to exercise its powers under s.240 and the statutory limitations on FWA's dispute resolution powers.

### Low paid bargaining provisions

The final set of statutory provisions examined in this report is the low-paid bargaining stream found in Part 2-4, Division 9 of the FW Act. These provisions have been widely identified as one of the most novel features of the bargaining framework. They are intended to assist low-paid employees who have not historically had the benefit of, or who face substantial difficulty undertaking, enterprise-level collective bargaining. Only three applications for a low-paid authorisation have been made under s.242 since the FW Act commenced operation. The first two applications (made by United Voice and the Australian Workers' Union of Queensland in relation to employers in the government-funded aged care sector), were lodged in May 2010 and dealt with jointly by FWA (*Aged Care Case*). These applications resulted in a low paid authorisation being made by FWA, which remains in force and has resulted in all parties involved seeking to conclude a multi-enterprise agreement with assistance from the tribunal. The third application, lodged by the Australian Nursing Federation in November 2011 in relation to nurses employed in private sector general practice clinics and medical centres, is currently before FWA.

Given the small number of applications that have been made under the low-paid bargaining provisions of the FW Act, it is perhaps too early to reach any conclusions as to their capacity to deliver on their objectives. Nonetheless, based on the *Aged Care Case* and our interview data, it is possible to draw several tentative observations on the operation of these provisions in their first three years of operation. First, there is some evidence to suggest that the provisions have resulted in more *enterprise-level* agreement making. It is impossible to say, however, whether this increase in the number of agreements made reflects increased *bargaining* in the aged care sector. It would also appear to be the case that the granting of the low-paid authorisation has resulted in multi-employer bargaining between unions, employers and employer representatives in the sector that would not otherwise have occurred. However, it is not yet possible to discern the practical impact of the low paid bargaining provisions on low paid employees.

It is also difficult to draw any overall conclusions as to how the tribunal has approached its role under the relevant provisions. On the one hand, the reluctance of the tribunal to develop and apply a definition of 'low paid' can be understood as facilitating entry to the low paid bargaining stream. On the other hand, its reluctance to include within the only authorisation it has yet made employers already respondent to enterprise agreements may be seen as significantly narrowing entry to the stream. While FWA appears to have left the door somewhat open for unions in the aged care sector to make their case in detail that employers who were excluded

from the original authorisation on the basis that they were already respondent to an agreement, it is questionable how feasible it would be for the union (or any party to an application) to include analysis of every potentially relevant existing agreement.

Perhaps the only observation that can be made with some certainty in relation to the low-paid bargaining provisions of the FW Act is that they remain underutilised. There are a number of factors that may explain this phenomenon, including scepticism as to whether the provisions are capable of substantially improving working conditions of the types of workers which the provisions were intended to benefit; a preference among some unions to pursue alternative strategies (such as the equal remuneration provisions of the FW Act); and the time and resource-intensive nature of the application process.

## Further observations

Finally, based on our analysis of the operation of each of the relevant mechanisms to promote bargaining in Part 2-4 of the FW Act and the interview data more broadly, this report makes a number of general observations as to how the statutory provisions - and FWA through its interpretation and application of them - are influencing the extent and dynamics of bargaining.

First, the level of direct FWA involvement in collective bargaining through the mechanisms available under Part 2-4 is quite low compared with the overall number of agreements being negotiated and approved by the tribunal. However, this data understates the influence that FWA appears to be having on collective bargaining and agreement-making processes under the legislation. For example, there is evidence that the GFB provisions of the FW Act, as well as the supervisory role of FWA, have had a significant 'shadow effect' on the bargaining practices of both unions and employers. The evidence drawn from FWA's case management database showed that for all types of Part 2-4 applications, a significant proportion are lodged only and do not result in any hearing before a FWA member. Our interview data also indicate that the parties commonly use the threat of taking a matter in dispute to FWA – whether expressly or implicitly – as leverage in bargaining. Moreover, in many cases this action is enough to enable the applicant to achieve the desired outcomes or to generate momentum in the bargaining process. Consequently, there is ultimately no need either to make a formal application to FWA under Part 2-4, or to pursue an application once lodged. This 'shadow effect' would appear to be particularly pronounced in relation to the MSD provisions, but is also discernible in the case of the scope order and bargaining order provisions. This 'shadow effect' on the behaviour of negotiating parties would also appear to be consistent with the federal Government's intention that the FWA processes should operate in the background, with most enterprise agreement-making between Australian employers, employees and unions occurring without the direct involvement of the tribunal.

Second, while this study has found that FWA continues to exert a significant influence – both directly and indirectly – on the process of collective bargaining, it is important to emphasise that this conclusion relates largely to workplaces where a union is involved in the bargaining process. Unfortunately, none of the available data provide us with any direct comparison as to whether the potential role of FWA - or the provisions in the FW Act regulating bargaining - influence agreement-making where no union is involved. The limited evidence available suggests that agreement making in these non-unionised workplaces may be quantitatively and qualitatively different from bargaining in unionised sectors of the economy.



A further observation that can be drawn from the analysis in this report is that the provisions of FW Act, Part 2-4 appear to be having differing impacts for new and mature bargainers. For employers who are not accustomed to bargaining, it would appear to be the MSD provisions that are of most relevance. Their impact may be direct (for example, through an employer being subject to an MSD application), or indirect (for example, through the awareness that the mechanism is now available and that the employer is operating within a statutory environment that promotes bargaining and agreement making). The GFB requirements also appear to be providing some guidance to new bargainers as to what is expected of them during bargaining, and appropriate processes to be followed. In a number of cases it would appear that the GFB requirements are indeed leading to agreements being made. In general, however, these types of bargainers appear unlikely to be availing themselves of the tribunal's assistance under s.240 of the FW Act. This may be because they are not aware of the existence of the provision, or are not inclined to seek FWA assistance.

For mature bargainers – that is, employers who have had several generations of collective agreements in place – the provisions would appear to operate quite differently. The MSD provisions are, of course, of little relevance here as these parties have already been involved in previous rounds of bargaining. Whilst the GFB requirements apply to new and mature bargainers alike, they appear to be operating differently for these two groups. Mature bargainers indicated that generally they do not use the GFB provisions to influence their own behaviour or as any type of guide in bargaining – they generally already have well-established bargaining styles and patterns. Rather, mature bargainers appear (often) to use the GFB requirements in a more tactical manner so as to pursue specific bargaining agendas and objectives. These types of bargainers, however, are much more likely to avail themselves of FWA assistance through s.240. In doing so, mature bargainers are perhaps displaying the type of predisposition towards, or 'dependency' on, the use of an independent third party to assist in resolving bargaining disputes that has long been a feature of Australian industrial relations.

Overall, the analysis in our report suggests that the role played by FWA in bargaining under the provisions in Part 2-4 of the FW Act is overwhelmingly a facilitative rather than a determinative one. This is demonstrated by the high proportion of s.240 applications (many of which result in FWA conciliating or mediating in bargaining disputes); and the low proportion of other Part 2-4 matters that result in FWA issuing a decision or order. Further, our interview data confirm that members of FWA tend to initially deal with Part 2-4 matters by 'going into conference', rather than dealing immediately with the formal application before them; and that this conciliation is often successful in resolving the dispute.

A striking theme to emerge from a number of interviews conducted for this study concerns the role of FWA in facilitating communication and negotiation between the parties during the course of bargaining. While many interviewees recognized that there are clearly circumstances in which a matter requires a determination, or FWA utilising a specific remedy (e.g. an MSD), in many cases interviewees reported that the presence of an opportunity to access FWA and its personnel to assist in resolving a dispute was among the most important features of the system. This was particularly true of matters brought before FWA under s.240. In these instances, FWA was viewed as an important avenue through which parties to a bargaining dispute may meet and communicate, and in which FWA members might assist in the resolution of disputes. In many cases, the perceived effectiveness of this role appears to lie in its presence as an avenue for parties to meet in a neutral forum.

This finding is perhaps moderated by two further observations on the role of FWA in the bargaining process. First, a theme that emerges strongly from the interviews concerned the importance placed by parties on the conciliation skills held by FWA members. Second, a significant number of interviewees commented on the importance of the pace at which various applications were dealt with under Part 2-4. In a number of bargaining-related disputes, it was reported that the promptness with which the application was dealt with by FWA was one important factor in influencing whether or not the matter was successfully resolved.

A further way in which parties involved in bargaining have found FWA to play a useful role is by giving legitimacy to a compromise or outcome reached between the parties. For example, in some instances, unions and employers did not want to be seen by their constituents to have compromised on disputed issues in negotiations – but were more content to reach a settlement in circumstances where the tribunal was involved.

The interviews conducted for this research suggest that there is considerable scope for further activity around the provision of information and education to the parties about FWA's role. This related both to promoting public awareness of the various mechanisms available to the parties under Part 2-4 of the FW Act, as well as broader issues around accessing and utilizing the tribunal. Two groups of applicants appear to experience particular difficulty in accessing information about FWA and its processes. The first of these, as we have noted above, is 'new bargainers'; that is, organizations (or individuals) that are unfamiliar with the statutory framework for bargaining and the role of FWA. The second is non-union employee bargaining representatives. The concept and role of an employee bargaining representative is a novel feature of the FW Act. However, while bargaining representatives are given significant rights under Part 2-4 of the FW Act, there appears to be limited (if any) support or advice available to them about these rights. While it is not possible for us to draw any conclusions on the experiences of (non-union) employee bargaining representatives, in light of the fact that we interviewed only two such individuals, the experiences of these two individuals – despite working in very different industries and occupations – was remarkably similar. Each emphasised the lack of assistance available to them during the bargaining process. One consequence of the existing lack of support for non-union employee bargaining representatives would appear to be that some employers have taken the responsibility to provide information or training to such employees.

Finally, while this research has sought to provide a comprehensive analysis of FWA's role in supervising bargaining under Part 2-4 of the FW Act, it has revealed a number of areas in which further research would be useful. These include, for example, how FWA members themselves understand their role in assisting parties to resolve disputes under Part 2-4; more detailed analysis of the experience of different types of employers under the new provisions; and an examination of bargaining outcomes, which would add depth to the findings of this report regarding bargaining processes and the role of FWA under Part 2-4 of the FW Act.

# 1 INTRODUCTION

The *Fair Work Act 2009*(Cth) (FW Act) seeks to promote and enable collective bargaining in good faith at the enterprise level. A key means through which the legislation seeks to do this is by empowering Fair Work Australia (FWA) to oversee bargaining and to ‘facilitate good faith bargaining and the making of enterprise agreements.’<sup>10</sup> The statutory commitment to good faith bargaining (GFB), the provision of mechanisms directed at attaining this objective, and the reinvigoration of the tribunal’s role in supervising bargaining, all constitute significant departures from the bargaining framework found in the former *Workplace Relations Act 1996* (Cth) (WR Act).<sup>11</sup>

The bargaining provisions in the FW Act are based on the presumption that, in the majority of cases, parties will bargain and enter into collective agreements voluntarily and without the assistance of the tribunal.<sup>12</sup> The legislation recognises, however, that some parties may need assistance to resolve disputes that arise during the bargaining process. Part 2-4 of the FW Act provides a number of mechanisms through which FWA may provide assistance to negotiating parties (through their bargaining representatives), both to initiate and progress bargaining. These include provisions that enable FWA to:

- make a determination to the effect that a majority of employees to be covered by a proposed agreement wish to bargain collectively (a majority support determination),<sup>13</sup> one of the effects of which is to enliven the good faith bargaining obligations;
- make an order to resolve disputes between parties over the appropriate coverage of a proposed enterprise agreement (a scope order);<sup>14</sup> and
- make an order addressing bargaining behaviours or tactics which breach the good faith bargaining obligations set out in s.228 of the FW Act, or to remedy situations where bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives (a bargaining order).<sup>15</sup>

FWA is also empowered, in the case of deliberate and serious breaches of bargaining orders, to make a serious breach declaration,<sup>16</sup> which provides a basis for the tribunal to issue a bargaining-related workplace determination.<sup>17</sup> Under Part 2-4 of the FW Act, FWA may also:

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<sup>10</sup> FW Act s.171(b).

<sup>11</sup> See A Forsyth, “‘Exit Stage Left”, now “Centre Stage”: Collective Bargaining under Work Choices and Fair Work’, in A Forsyth and A Stewart (eds.) *Fair Work: The New Workplace Laws and the Work Choices Legacy*, The Federation Press, Sydney, 2009, 120.

<sup>12</sup> See House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, paras [971], [1088] and [1092]. See also Julia Gillard MP, *Fair Work Bill Second Reading Speech*, Hansard, House of Representatives, 25 September 2008, 11189, 11191.

<sup>13</sup> FW Act ss.236-237.

<sup>14</sup> FW Act ss.238-239.

<sup>15</sup> FW Act ss.229-231.

<sup>16</sup> FW Act ss. 234-235.

<sup>17</sup> FW Act Part 2-5, Division 4.

- deal with bargaining disputes when parties request the tribunal’s assistance, including (where all parties agree) through arbitration;<sup>18</sup> and
- facilitate multi-employer bargaining for employees who are low-paid and have not historically had access to collective bargaining (once FWA has made a low-paid authorisation).<sup>19</sup>

This research project examines the operation of the above provisions in Part 2-4 of the FW Act during their first three years of operation: that is, from 1 July 2009 to 30 June 2012. It explores how – through its supervisory role – FWA has influenced bargaining and the extent to which it has assisted parties to resolve bargaining-related disputes. We also examine the views of parties who have been involved in matters under Part 2-4 as to the effectiveness of FWA involvement in negotiations, and the extent to which the tribunal has influenced how parties manage collective bargaining and industrial relations at the workplace level.

The primary aim of this research is to assess how effective FWA has been in meeting its statutory obligations under the FW Act to enable and facilitate bargaining. In doing so, it is intended that the research will provide FWA with empirical data relevant to its reporting requirement in s.653(1)(a) of the FW Act, ‘*to review the developments, in Australia, in making enterprise agreements.*’ It is also hoped that the research findings will:

- enable FWA to ascertain the effectiveness of its interventions in collective bargaining under Part 2-4 and, in turn, its success in assisting with the achievement of the objects of the legislation to promote productivity and fairness in agreement making;
- assist FWA in developing its approach to fulfilling its statutory obligations under Part 2-4 in future cases; and
- explore the efficacy of the mechanisms at FWA’s disposal to assist parties to bargain and reach agreements.

More broadly, this research – by providing a comprehensive account of the operation of the collective bargaining provisions in their first three years of operation – is intended to contribute to understanding of how the provisions are influencing bargaining practices (both directly through legal cases and indirectly through parties bargaining ‘in the shadow of the law’).<sup>20</sup> Finally, we hope this research will contribute to efforts to link the Australian experience of bargaining with international debates about the design and implementation of effective statutory collective bargaining systems, and the failure of legislation in several industrialised countries to stimulate collective bargaining on a widespread basis.<sup>21</sup>

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<sup>18</sup> FW Act s.240.

<sup>19</sup> FW Act Part 2-4, Division 9.

<sup>20</sup> The ‘shadow’ effect of collective bargaining legislation is considered, in the United Kingdom context, in G Gall, ‘The First Ten Years of the Third Statutory Union Recognition Procedure in Britain’ (2010) 39 *Industrial Law Journal* 444.

<sup>21</sup> See, e.g., R Dukes, ‘The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?’ (2008) 37 *Industrial Law Journal* 236; B Sachs, ‘Enabling Employee Choice: A Structural Approach to the Rules of Union Organising’ (2010) 123 *Harvard Law Review* 565; B Creighton and A Forsyth, ‘Rediscovering

This report focuses on FWA and how it has discharged its functions under Part 2-4 of the FW Act, because the work of the tribunal is critical to understanding how the new bargaining rules are operating in practice. Prior to the passing of the FW Act and during the first months of its operation, many commentators and stakeholders emphasised the central role to be played by the tribunal in applying and interpreting the new good faith bargaining rules,<sup>22</sup> and more broadly ‘in improving and maintaining the integrity of the bargaining system.’<sup>23</sup> The importance of the tribunal stems in part from the considerable discretion that is given to FWA under Part 2-4 of the FW Act, which takes a number of forms. First, several of FWA’s powers under Part 2-4 are discretionary in nature:<sup>24</sup> FWA ‘may’ make a bargaining order, for example, where the relevant statutory requirements are fulfilled and it is ‘reasonable’ to do so.<sup>25</sup> Secondly, the tribunal is given considerable discretion in determining how certain mechanisms under Part 2-4 are to operate: for example, in considering an application for a majority support determination, the tribunal may determine the means of ascertaining ‘majority support’ and the time at which this support is to be determined.<sup>26</sup> Finally, the meaning of key terms in the provisions has been left open by the legislature, to be interpreted by FWA, such as the meaning of ‘low-paid’ employees for the purposes of making an authorisation in the low paid bargaining stream.<sup>27</sup> The focus on FWA’s role in the bargaining framework under the FW Act also stems from the historical recognition that the federal industrial tribunal in Australia has proven to be a very resilient and adaptable institution. Despite having altered forms, functions and processes over time, FWA and its predecessors have long played and continue to play a very influential role in the national industrial relations system.<sup>28</sup>

Before proceeding further, it is important to emphasise the scope of this study. This report focuses on the operation of the rules relating to the bargaining framework set out in Divisions 8 and 9 of Part 2-4 of the FW Act. It does not examine in any detail other provisions of the legislation that are relevant to agreement-making and operate alongside Part 2-4, Divisions 8

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Collective Bargaining’, in B Creighton and A Forsyth (eds.), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012, 1 at 9-18.

<sup>22</sup> See, e.g., R Cooper and B Ellem, ‘Fair Work and the Re-regulation of Collective Bargaining’ (2009) 22 *Australian Journal of Labour Law* 284.

<sup>23</sup> J Buchanan, ‘Labour Market Efficiency and Fairness: Agreements and the Independent Resolution of Difference’ in J Riley and P Sheldon (eds.) *Remaking Australian Industrial Relations*, CCH, Sydney, 2008, 175 at 183.

<sup>24</sup> See further R Naughton, ‘The Role of Fair Work Australia in Facilitating Collective Bargaining’ in Breen Creighton and Anthony Forsyth (eds.), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012, 68.

<sup>25</sup> FW Act ss.230 and 238(4).

<sup>26</sup> FW Act s.237(2)(a), (3).

<sup>27</sup> FW Act ss.242-243. Indeed, the central role of the federal tribunal in developing a good faith bargaining system in Australia was recognized long before the FW Act was drafted. In advocating for a good faith bargaining system in 2006, the Australian Council of Trade Unions (ACTU) observed as follows: ‘We recognise that the model we have developed relies to a large extent upon the expertise and independence of the [Australian Industrial Relations] Commission in determining whether, and in what manner, to make good faith orders.’ ACTU, *A Fair Go at Work: A New Model of Collective Bargaining for Australian Workers*, September 2006, 109.

<sup>28</sup> See, e.g., A Stewart, ‘The AIRC’s Evolving Role in Policing Bargaining’ (2004) 17 *Australian Journal of Labour Law* 245; H Forbes-Mewett, G Griffin and D McKenzie, ‘The Australian Industrial Relations Commission: Adapting or Dying?’ (2003) 11(2) *International Journal of Employment Studies* 1; M D Kirby, ‘Industrial Relations Law – Call Off the Funeral’ (2001) 6 *Deakin Law Review* 256. See also various comments made by the peak employer and union bodies at the Inaugural Sitting of FWA, Melbourne, 1 July 2009, reported in ‘First day on the job for Fair Work Australia’, *Workplace Express*, 1 July 2009.

and 9. These include, for example, those divisions of Part 2-4 that deal with the approval, variation or termination of enterprise agreements;<sup>29</sup> and Part 3-3 of the FW Act dealing with the taking of protected industrial action in support of claims made in enterprise bargaining. In addition, this study does not examine the operation of rules governing the content of enterprise agreements; nor does it in any way seek to measure the quality or effects of agreements.

It is also important to note that, while the predominant means of accessing FWA to assist during the bargaining process is through Part 2-4 of the FW Act, there are other ‘entry points’ that can be and are strategically used by parties to trigger tribunal assistance in resolving disputes that arise during bargaining. These include, for example, applications to suspend or terminate protected industrial action under Division 6 of Part 3-3 of the FW Act (in some instances, with a view to having FWA arbitrate an outcome through the making of an industrial action related workplace determination under Part 2-5, Division 3). These mechanisms, and the extent to which they are used by parties, are beyond the scope of this study.

Finally, this report does not collate or analyse the views of key representative groups as to the desirability of the current bargaining rules or the need for further reform. These views were canvassed extensively during the drafting of the Fair Work Bill 2008 and its passage through Parliament,<sup>30</sup> and have been the subject of recent analysis through the Fair Work Act Review process.<sup>31</sup>

## 1.1 Structure of the report

Chapter 2 of the report provides background to this study. It begins by providing a brief overview of legislative developments in Australia’s federal industrial relations system since enterprise bargaining was first introduced in the early 1990s, focusing in particular on the extent to which the various statutory regimes have sought to regulate collective bargaining, as well as the role and powers given to the federal industrial tribunal in overseeing the bargaining process. It also briefly outlines the mechanisms through which FWA may become involved in the bargaining process under Part 2-4 of the FW Act. Chapter 2 also identifies existing studies and literature that have sought to assess the operation and impact of the new bargaining framework.

In Chapter 3 of the report, we outline the data sources and methodologies used for the research, and identify its limitations. In Chapter 4, we provide an overview of agreement making under the FW Act, drawing on quantitative data collected by the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR).

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<sup>29</sup> FW Act, Part 2-4, Divisions 4 through to 7. Divisions 1 (objects), 2 (making of enterprise agreements) and 3 (representation in bargaining) of Part 2-4 are considered at various points during this report, as they are integral to the operation of Divisions 8 and 9; so too are FWA’s powers to make low-paid and bargaining related workplace determinations under Part 2-5, Divisions 2 and 4 respectively.

<sup>30</sup> See e.g. Parliament of Australia, The Senate, Standing Committee on Education, Employment and Workplace Relations, *Fair Work Bill 2008*, Final Report, February 2009.

<sup>31</sup> In the first half of 2012, an independent panel conducted a post-implementation review of the FW Act, including measurement of its impact and effects in the first two years of operation of all provisions of the legislation (1 January 2010-31 December 2011). The review panel’s report was released by the federal Government on 2 August 2012; see J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012.

Chapter 5 focuses on FWA's role in resolving bargaining disputes under Part 2-4 of the FW Act. It presents a detailed analysis of applications made to the tribunal under the relevant provisions during the first three years of the legislation's operation, including the number of applications made; the nature of the applicants; trends and patterns in applications over time; and the outcomes of these applications.

Chapter 6 of the report focuses on the majority support determination mechanism. Drawing upon a detailed analysis of all relevant FWA decisions as well as interview data, we seek to assess the nature and impact of the operation of majority support determinations. In Chapters 7 and 8, we undertake the same type of analysis in relation to scope orders and the good faith bargaining requirements/bargaining orders respectively.

In Chapter 9, we present our findings with respect to the operation of s.240 of the FW Act, drawing principally on analysis of the interview data, while Chapter 10 examines the operation of the low-paid bargaining provisions.

In Chapter 11 of the report, we identify and discuss a number of distinctive themes that have emerged from the study. We also outline our conclusions as to the operation of the current bargaining rules and the roles played by FWA under Part 2-4 of the FW Act. Finally, we identify a number of areas for further research.

## 2 BACKGROUND

This chapter of the report provides some background to the research undertaken for this project. It begins by placing the *Fair Work Act 2009* (Cth) (FW Act) – and more specifically, the bargaining rules and the role of Fair Work Australia (FWA) in supervising bargaining – in historical context. It then turns to consider the policy intent of Part 2-4 of the FW Act, and presents an overview of the provisions that form the focus of this study. Finally, the chapter discusses the small but growing body of literature that has sought to evaluate the operation of the FW Act bargaining framework.

### 2.1 The FW Act bargaining reforms in historical perspective

The nature and significance of the bargaining provisions contained in the FW Act can only be understood in the context of preceding legislative regimes. The following section presents a brief overview of legislative developments in Australia's federal workplace relations system since enterprise bargaining was first introduced. It focuses on the extent to which the various statutory regimes have sought to regulate collective bargaining, as well as the role and powers given to the federal industrial tribunal in overseeing the bargaining process.<sup>32</sup>

#### 2.1.1 Enterprise bargaining under the Industrial Relations Act 1998 and the 1993 reform legislation

The shift in Australia away from compulsory conciliation and arbitration as the principal means of regulating wages and conditions of employment, towards enterprise-level bargaining, commenced under the Hawke and Keating Labor Governments in the late 1980s and early 1990s.<sup>33</sup> Initially, this was sought to be achieved through provisions of the *Industrial Relations Act 1988* (Cth) (IR Act), which enabled the making of enterprise-level agreements and their certification by the tribunal.<sup>34</sup> These provisions were amended in 1992,<sup>35</sup> in an attempt to provide a stronger statutory basis for enterprise bargaining after the federal tribunal had

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<sup>32</sup> For a detailed account of the development of agreement making in the federal system, see A Forsyth, 'Chapter 12: Enterprise Agreements' in B Creighton and A Stewart, *Labour Law*, 5<sup>th</sup> edition, The Federation Press, Sydney, 2010, 292; P Gahan and A Pekarek, 'Collective Bargaining and Agreement-Making in Australia: Evolution of the Legislative Framework and Agreement-Making in Practice', in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>33</sup> See R McCallum, 'Enhancing Federal Enterprise Bargaining: The Industrial Relations Reform Act' (1993) 6 *Australian Journal of Labour Law* 63; R Mitchell and R Naughton, 'Australian Compulsory Arbitration: Will it Survive into the Twenty-First Century?' (1993) 31 *Osgoode Hall Law Journal* 265.

<sup>34</sup> IR Act, ss.115-117; see M Pittard and R Naughton, *Australian Labour Law: Text, Cases and Commentary*, LexisNexis Butterworths, Sydney, 5<sup>th</sup> edition, 2010, 789-790. From its inception to the present, enterprise bargaining under federal law has provided for the making of agreements relating to a single business/enterprise, or part thereof. Over time, provision was also made for the making of multi-enterprise agreements; and greenfields agreements (for a genuine new business, project or undertaking).

<sup>35</sup> These amendments inserted Division 3A in Part VI of the IR Act; see W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, Law Book Company, Sydney, 2<sup>nd</sup> edition, 1993, 866-873.



reluctantly endorsed the shift to enterprise-level negotiations underpinned by award minimum standards.<sup>36</sup>

The decisive move to formalised enterprise bargaining under federal law came through further amendments to the IR Act made by the *Industrial Relations Reform Act 1993* (Cth) (IR Reform Act).<sup>37</sup> The IR Reform Act established two types of collective agreement: certified agreements (to be made between an employer and a union), and enterprise flexibility agreements (EFAs) (to be made between an employer and its employees, i.e. non-union agreements),<sup>38</sup> both of which required the approval of the Australian Industrial Relations Commission (AIRC).<sup>39</sup>

The IR Reform Act also introduced principles of good faith bargaining (GFB) into federal industrial legislation for the first time.<sup>40</sup> A newly-created Bargaining Division of the AIRC<sup>41</sup> was empowered to make orders for the purpose of ensuring that parties negotiating certified agreements and EFAs did so in good faith; promoting the efficient conduct of negotiations; or otherwise facilitating agreement making.<sup>42</sup> The legislation enumerated different types of conduct of bargaining parties that the tribunal was required to consider in determining whether, and in what form, to make bargaining orders. These considerations included, for example, whether the party concerned had agreed to meet at reasonable times proposed by the other party; disclosed relevant information; or capriciously added or withdrawn items for negotiation.<sup>43</sup>

These GFB provisions had only a very limited impact, an effect largely attributed to the restrictive interpretation the tribunal took of its own powers under the provisions.<sup>44</sup> Creighton

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<sup>36</sup> *National Wage Case October 1991 Decision* (1991) 39 IR 127; see also *National Wage Case April 1991 Decision* (1991) 36 IR 127. For an overview of these developments, see P Gahan and A Pekarek, 'Collective Bargaining and Agreement-Making in Australia: Evolution of the Legislative Framework and Agreement-Making in Practice', in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>37</sup> Section 3 of the amended IR Act identified as a principal object of the legislation 'encouraging and facilitating the making of agreements, between the parties involved in industrial relations, to determine matters pertaining to the relationship between employers and employees, particularly at the workplace or enterprise level.' See further R Naughton, 'The New Bargaining Regime under the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 147.

<sup>38</sup> Division 2 and Division 3 respectively of Part VIB of the IR Act. The introduction of non-union agreements was a controversial measure, and presaged further moves away from the collectivist focus of the federal system under the Howard Government's 1996 reforms (see below). See further K Nomchong and J Nolan, 'Enterprise Flexibility Agreements and Threats to Unions under the New Federal Act', in P Ronfeldt and R McCallum (eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, 1995, 154.

<sup>39</sup> An important part of this approval process was the requirement that any proposed agreement not result in any reduction of employee entitlements under an applicable award or other law (the 'no disadvantage' test).

<sup>40</sup> As Cooper and Ellem emphasise, GFB principles 'were arguably unnecessary in a system based on compulsory conciliation and arbitration and, more particularly, de facto recognition of unions as the exclusive agents in bargaining and of workplace regulation more broadly': R Cooper and B Ellem, 'Fair Work and the Re-regulation of Collective Bargaining' (2009) 22 *Australian Journal of Labour Law* 284, 289.

<sup>41</sup> See The Hon J T Ludeke QC, 'The Structural Features of the New System' (1994) 7 *Australian Journal of Labour Law* 132.

<sup>42</sup> IR Act (as amended), s.170QK(2).

<sup>43</sup> IR Act (as amended), s.170QK(3).

<sup>44</sup> See e.g. R Naughton, 'Bargaining in Good Faith' in P Ronfeldt and R McCallum (eds) *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press, Sydney, 1995; Aaron Rathmell, 'Collective

and Nuttall explain that: ‘In the small number of matters that came before it concerning the GFB requirement, the AIRC adopted a generally cautious approach to the powers vested in it: indeed it seemed to experience some difficulty in coming to grips with the policy underpinnings of the new provisions.’<sup>45</sup> Two decisions in particular rendered the GFB obligations largely ineffectual. First, in *Public Sector, Professional, Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission*,<sup>46</sup> the AIRC found that it could only make orders of a procedural nature, not orders going to the substance of the negotiations. Shortly afterwards, in *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union*,<sup>47</sup> the tribunal concluded that it did not have the power to require a party to commence bargaining or to enter into an agreement.

Accompanying the introduction of GFB under the IR Reform Act was the ability of parties engaged in collective agreement negotiations to take protected (i.e. lawful) industrial action in support of their bargaining claims.<sup>48</sup> Although modified by subsequent rounds of legislative reform, the right of employees/unions to take protected action (e.g. strikes, work bans, ‘work to rule’ and ‘go slows’) – and of employers to ‘lock out’ employees – has remained a feature of the federal workplace relations system.<sup>49</sup>

### 2.1.2 The bargaining framework under the Workplace Relations Act 1996

The *Workplace Relations Act 1996* (Cth) (WR Act), enacted by the Howard Coalition Government, consolidated the shift towards enterprise bargaining by continuing to provide for union and non-union collective agreements.<sup>50</sup> However, the legislation challenged the primacy of *collective* bargaining by introducing statutory *individual* employment agreements for the first time (in the form of Australian Workplace Agreements, or AWAs).<sup>51</sup> The WR Act also facilitated non-union agreement making, through removal of the requirement that employers seeking to use this type of agreement notify a relevant union of its intention to do so.<sup>52</sup>

The WR Act sought to assign the ‘primary responsibility’ for the determination of workplace issues to the parties themselves.<sup>53</sup> The roles and powers of the AIRC, including during the bargaining process, were significantly reduced.<sup>54</sup> The statute removed the Commission’s powers

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Bargaining after WorkChoices: Will “Good Faith” take us Forward with Fairness? 21 *Australian Journal of Labour Law* 164, 177-79; B Creighton and P Nuttall, ‘Good Faith Bargaining Down Under’ (2012) 33 *Comparative Labor Law and Policy Journal* 257, 266-267.

<sup>45</sup> Creighton and Nuttall, *Ibid* 266.

<sup>46</sup> (1994) 3 AILR 372.

<sup>47</sup> (1995) 59 IR 385.

<sup>48</sup> See G McCarry, ‘Sanctions and Industrial Action: the Impact of the Industrial Relations Reform Act’ (1994) 7 *Australian Journal of Labour Law* 198.

<sup>49</sup> See further S McCrystal, *The Right to Strike in Australia*, The Federation Press, Sydney, 2010. As indicated in Chapter 1, this aspect of the FW Act bargaining system is not examined in detail in this report.

<sup>50</sup> WR Act, s.170LJ and s.170LK respectively. See further M Pittard, ‘Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements’ (1997) 10 *Australian Journal of Labour Law* 62.

<sup>51</sup> See R McCallum, ‘Australian Workplace Agreements – An Analysis’ (1997) 10 *Australian Journal of Labour Law* 50.

<sup>52</sup> See further C Briggs and R Cooper, ‘Between Individualism and Collectivism? Why Employers Choose Non-union Collective Agreements’ (2006) 17(2) *Labour and Industry* 1.

<sup>53</sup> WR Act s.3(d) and (h).

<sup>54</sup> In fact, a new statutory body – the Office of the Employment Advocate – was created to approve and promote the use of AWAs.

to make orders ensuring that parties bargained in good faith, introduced only three years earlier, leaving parties with little recourse against 'bad faith' tactics in agreement negotiations.<sup>55</sup> While the WR Act continued to provide for the tribunal to conciliate disputes that arose during bargaining on the application of one party,<sup>56</sup> it could not arbitrate during a bargaining period in relation to any matter 'at issue between the negotiating parties'.<sup>57</sup>

Despite the significant narrowing of the scope for parties to bring disputes to the AIRC under the WR Act, analyses of the tribunal's powers and practices undertaken during this time suggest that it continued to play a significant, albeit diminished, role in resolving disputes. Forbes-Mewett et al, for example, concluded from their study of the usage, processes and attitudes of users of the AIRC undertaken in 2002 that the tribunal continued to play a significant role in dispute resolution (including disputes over agreement negotiations) and to be viewed as an important source of assistance by the parties, especially through conciliation of disputes.<sup>58</sup> Similarly, Stewart concluded from his survey of the tribunal's role and functions in supervising bargaining under the WR Act that: '*the AIRC is very much still in business. It continues to play an important role in brokering settlements to workplace disputes, even when its powers of intervention are limited.*'<sup>59</sup> Both these studies attribute the resilience of the AIRC under the WR Act largely to its capacity to adapt to its new functions and role, and also to the continuing expectations of participants in the federal system that the tribunal play a role in assisting them to resolve bargaining-related disputes.

### 2.1.3 Bargaining under the Work Choices reforms

The *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices) made major changes to the WR Act rules governing bargaining and the role of the AIRC in supervising agreement-making processes. While continuing to provide for union and non-union collective agreements, Work Choices further prioritised AWAs over collective agreements.<sup>60</sup> In addition to making the process for entering into AWAs simpler, the new legislation expanded the ability of employers to make greenfields agreements (including the option of determining such

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<sup>55</sup> See, e.g., *Morris McMahon & Co Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU)* [2003] NSWSC 452; J Whittard et al., 'Collective Bargaining Rights under the Workplace Relations Act: the Boeing Dispute' (2007) 18(1) *Labour and Industry* 1. For a discussion of the various ways in which parties used other legal strategies to counter bad faith during bargaining in the absence of any statutory requirement to bargain in good faith, see Margaret Lee, 'Crafting Remedies for Bad Faith Bargaining, Coercion and Duress: "Relative Ethical Flexibility" in the Twenty-First Century' (2005) 18 *Australian Journal of Labour Law* 1.

<sup>56</sup> WR Act, s.170NA. The procedural powers available to the AIRC in conciliating a dispute were specified in s.111. For a detailed discussion of these provisions and their operation in practice, see A Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 246.

<sup>57</sup> WR Act, s.170N. It should also be noted that the AIRC's general arbitration powers were limited by the WR Act to twenty 'allowable award matters', and by making arbitration a measure of 'last resort': see M Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62.

<sup>58</sup> H Forbes-Mewett, G Griffin and D McKenzie, 'The Australian Industrial Relations Commission: Adapting or Dying?' (2003) 11 *International Journal of Employment Studies*, 1, 19.

<sup>59</sup> A Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 245, 274.

<sup>60</sup> See A Forsyth and C Sutherland, 'Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; J Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210.

agreements unilaterally, rather than through negotiation with employees or their union).<sup>61</sup> Perhaps of greatest significance, though, was the removal under Work Choices of the no disadvantage test in respect of all forms of agreement that were available under the legislation.<sup>62</sup>

Work Choices also placed significant restrictions on the role and powers of the AIRC during bargaining.<sup>63</sup> The AIRC could only conciliate a dispute that arose during bargaining where both parties agreed that it should do so.<sup>64</sup> In such cases, the tribunal could hold conferences between the parties and make recommendations. It could not, however, compel a person to do anything (e.g. require a party to attend tribunal proceedings relating to the dispute). Further, the AIRC could not arbitrate a bargaining-related dispute even where both parties wanted it to.<sup>65</sup> Nor could the tribunal compel an employer to recognise a union or engage in collective bargaining.<sup>66</sup>

#### 2.1.4 Good faith bargaining in state industrial relations systems

While it is beyond the scope of this report to examine the bargaining frameworks in the Australian state industrial relations systems in any depth, it is important to note that GFB provisions have operated in a number of state jurisdictions. New South Wales, Queensland, South Australia and Western Australia have all, at various times, had some form of GFB obligations in their industrial relations legislation.<sup>67</sup> However, none of these good faith bargaining regimes appear to have had far-reaching or transformative effects, or even to have been used extensively.<sup>68</sup> Their limited effect is attributable, in part, to the increased coverage of the federal industrial relations system which commenced under Work Choices and has continued under the FW Act.<sup>69</sup>

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<sup>61</sup> See e.g. P Gahan, *Employer Greenfields Agreements in Victoria*, Report to the Office of the Workplace Rights Advocate, Melbourne, 2007.

<sup>62</sup> Until the introduction of the 'fairness test' in May 2007: see C Sutherland, 'All Stitched Up? The 2007 Amendments to the Safety Net' (2007) 20 *Australian Journal of Labour Law* 245.

<sup>63</sup> See further A Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32 *Australian Bulletin of Labour* 27.

<sup>64</sup> WR Act (as amended), s.704(1).

<sup>65</sup> WR Act (as amended), s.706.

<sup>66</sup> See e.g. *Boeing Australia Ltd v Australian Workers Union* (2006) 148 IR 466; *Association of Professional Engineers, Scientists and Managers of Australia v Telstra Corporation Ltd* [2008] AIRC 734.

<sup>67</sup> *Industrial Relations Act 1996* (NSW) s.134(4); *Fair Work Act 1994* (SA) s.76A; *Industrial Relations Act 1999* (Qld) s. 146; *Industrial Relations Act 1979* (WA) s. 42. See A Forsyth, 'Chapter 21: Collective Bargaining' in B Creighton and A Stewart, *Labour Law*, 5<sup>th</sup> ed, The Federation Press, Sydney, 2010, 717 at 728-729.

<sup>68</sup> For example, in relation to WA, which is widely considered to have had the most developed GFB rules among the state jurisdictions, Gillan et al report there were only 49 applications under the relevant provisions lodged with the Western Australian Industrial Relations Commission between 2002 and 2008: M Gillan, D Caspersz and D White, 'Test of Faith: Good Faith Bargaining in Western Australia' (2011) 24 *Australian Journal of Labour Law* 95, at 102.

<sup>69</sup> See further *ibid*; and (on the moves toward a national workplace relations system) see R Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22 *Australian Journal of Labour Law* 2009.

## 2.2 Overview of the Fair Work Act bargaining provisions

A central policy objective for the government in implementing the Fair Work Act reforms was to restore the primacy of collective agreement making in the federal industrial relations system.<sup>70</sup> Section 3 of the FW Act states that the statute's overall objective is 'to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.' This is to be achieved, among other ways, 'through an emphasis on enterprise level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.'<sup>71</sup>

The 2009 legislation removed the former distinction between union and non-union agreements, and provides for collective bargaining and agreement-making to occur primarily at the enterprise level.<sup>72</sup> Multi-employer bargaining is provided for in certain circumstances: for 'single interest' employers,<sup>73</sup> for employers wishing to engage in such bargaining on a voluntary basis;<sup>74</sup> and through a special 'low-paid bargaining' stream.<sup>75</sup> Both single-enterprise and multi-enterprise agreements can take the form of a 'greenfields agreement', which must be negotiated with a union having rights of industrial coverage over the work to be performed under the agreement.<sup>76</sup>

The FW Act provides for a significantly enhanced role for the national industrial tribunal in overseeing bargaining and resolving disputes that arise during the bargaining process. In particular, FWA has been given a range of powers to facilitate collective bargaining and agreement-making. These powers are set out in Part 2-4 of the legislation, the objects of which are stated in s.171 as follows:

- (a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and
- (b) to enable FWA to facilitate good faith bargaining and the making of enterprise agreements, including through:
  - (i) making bargaining orders; and
  - (ii) dealing with disputes where the bargaining representatives request assistance; and
  - (iii) ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay.

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<sup>70</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, para [r.135]

<sup>71</sup> FW Act, s.3(f).

<sup>72</sup> FW Act, ss.12 (definition of 'enterprise agreement') and 172(2)(a), providing for the making of 'single-enterprise agreements'.

<sup>73</sup> FW Act, s.172 (2)(a), (5) and Part 2-4, Division 10; for example, related corporate entities, joint venturers, franchisees and other employers with common bargaining interests such as independent schools and public hospitals.

<sup>74</sup> FW Act, s.172(3)(a), providing for the making of 'multi-enterprise agreements'. Protected industrial action and orders to enforce the GFB obligations are not accessible in relation to the making of these agreements.

<sup>75</sup> FW Act, Part 2-4, Division 9 (see further below).

<sup>76</sup> FW Act, s.172(2)(b), (3)(b), (4).

While the FW Act has provided the tribunal with a more expansive role in overseeing bargaining, it is important to emphasise that the drafters of the statute intended that these provisions would generally operate in the background. Most employers and employees would voluntarily and successfully bargaining collectively without FWA's assistance, and the statutory provisions were intended to be drawn upon only where parties encountered difficulties in bargaining that they could not resolve themselves.<sup>77</sup>

The following mechanisms are available under Part 2-4 of the FW Act to facilitate bargaining:

- Majority support determinations

An employee bargaining representative may apply to FWA for a *majority support determination* (MSD) under s.236, where a majority of the employees to be covered by an agreement want to bargain but their employer does not. The effect of an MSD is to trigger the obligation on an employer to notify employees of their representation rights,<sup>78</sup> and to enliven the GFB obligations in s.228.

- Scope orders

A bargaining representative (of either an employer or employees) may apply to FWA under s.238 for a *scope order* to resolve a dispute over the appropriate coverage of a proposed enterprise agreement.

- Bargaining orders

A bargaining representative may apply to FWA under s.229 for a *bargaining order*, where he or she has concerns that another bargaining representative is not meeting one or more of the GFB requirements set out in s.228(1). These requirements, which apply to all bargaining representatives, are to: attend and participate in meetings; disclose relevant (but not commercially sensitive or confidential) information; respond, and given genuine consideration to, proposals from other bargaining representatives; recognise and bargain with other representatives; refrain from 'capricious or unfair' conduct that undermines freedom of association or collective bargaining; and recognise/deal with the other bargaining representatives. A series of serious and persistent breaches of bargaining orders can lead to the making of a *serious breach declaration* by FWA under s.235. This in turn opens the possibility for FWA to make a *bargaining related workplace determination* under s.269 (i.e. an arbitrated outcome of the dispute).

- FWA assistance during bargaining

A bargaining representative for a proposed enterprise agreement may apply under s.240 for FWA assistance in resolving a bargaining dispute. FWA may conciliate the dispute, and use other powers under the FW Act such as conducting compulsory conferences or making recommendations, but may not arbitrate unless all parties agree.

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<sup>77</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, paras [r.114] and [r.163].

<sup>78</sup> See FW Act, s.173(1), (2)(b); on bargaining representatives, see further below.



- Low-paid authorisations

Employee bargaining representatives seeking to obtain a multi-enterprise agreement for low-paid employees may apply to FWA under s.242 for a *low-paid authorisation*, which is intended to assist employees who have not traditionally had access to collective bargaining. The making of a low-paid authorisation triggers a multi-employer GFB process overseen by FWA. In this low-paid bargaining stream, FWA may arbitrate an agreement (i.e. make a *special low paid workplace determination*) where certain requirements are met, including that no existing collective agreement is in place and arbitration is necessary as a last resort because the parties are unable to reach agreement.<sup>79</sup>

The relevant statutory provisions for each of these mechanisms are reproduced and examined in detail in subsequent chapters of this report.

### 2.2.1 Other relevant provisions of the Fair Work Act

While this study focuses on the operation of the mechanisms within the FW Act designed to facilitate bargaining, several other statutory provisions are of particular relevance. First, s.176 specifies the persons who are 'bargaining representatives' for proposed enterprise agreements (other than greenfields agreements).<sup>80</sup> This concept of the bargaining representative is central to the operation of Part 2-4 of the FW Act, as it is only bargaining representatives who are eligible to apply for the various orders and determinations relating to bargaining (discussed above). Under s.176(1)(a), an employer is taken to be a bargaining representative for a proposed enterprise agreement, although it may also appoint another bargaining representative (such as an employer organisation or a consultant) in writing.<sup>81</sup> Under s.176(1)(c) and (4), an employee may appoint any person (including him or herself) in writing to be a bargaining representative. Where an employee is a union member and does not appoint someone else to be his or her bargaining representative, the union is automatically taken to be the employee's bargaining representative.<sup>82</sup> A union cannot be a bargaining representative for an employee unless it is entitled to represent the industrial interests of that employee.<sup>83</sup> A novel effect of these provisions is that employers may now be compelled to bargain with a number of employee bargaining representatives, including representatives from different unions covering different parts of the workforce, along with representatives appointed by individuals or elected by groups of employees.<sup>84</sup>

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<sup>79</sup> FW Act, ss.260, 262-263; low-paid workplace determinations may also be made by consent between the parties, see ss.260-261.

<sup>80</sup> See further A Forsyth, 'The Evolving Pluralistic Approach to Employee Representation at the Enterprise in Australia' in R Blanpain (ed), *Systems of Employee Representation at the Enterprise: A Comparative Study*, Kluwer Law International, 2012, 1 at 19-24; J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 141-146.

<sup>81</sup> FW Act, s.176(1)(d).

<sup>82</sup> FW Act, s.176(1)(b).

<sup>83</sup> FW Act, s.176(3).

<sup>84</sup> Under ss. 230 and 231 of the FW Act, a bargaining representative may apply to FWA for a bargaining order to address problems arising from having to deal with multiple bargaining representatives.

A second provision of particular relevance to this study is s.595 of the FW Act, which sets out FWA's general powers to deal with disputes. Under s.595, FWA may deal with a dispute as it considers appropriate, including through mediation or conciliation, or by making a recommendation or expressing an opinion. Where FWA is expressly empowered to do so under or in accordance with another provision of the FW Act (including by making any orders it considers appropriate), FWA may deal with a dispute by arbitration.<sup>85</sup> Section 595 also provides that, in dealing with a dispute, FWA is able to exercise any powers it has under Subdivision B, Division 3 of Part 5-1 of the FW Act. These include, for example, the power of the tribunal to inform itself in any way it considers appropriate<sup>86</sup> such as by requiring a person to attend a conference;<sup>87</sup> requiring a person to provide copies of documents, records or other information;<sup>88</sup> or holding a conference or hearing.<sup>89</sup>

A third set of provisions that are of importance to this study are those governing how FWA is to discharge its functions under the FW Act. Section 577 states that FWA is required to perform its functions and exercise its powers in a manner that is: (a) fair and just; (b) is quick, informal and avoids unnecessary technicalities; (c) is open and transparent; and (d) promotes harmonious and cooperative workplace relations. Section 578 identifies matters that FWA must take into account in performing its functions, including (of particular relevance for this study) the objects of the FW Act and objects of a relevant part of the legislation; and 'equity, good conscience and the merits of the matter'.

### 2.3 Early assessments of the FW Act bargaining regime

Before proceeding to the main body of the report, it is important to recognise that a number of other scholars and commentators have made important contributions to understanding the FW Act bargaining framework. There are three main strands to this literature.

First, a number of scholars have analysed the FW Act in historical perspective, identifying the distinctive features of the legislation and evaluating the extent to which it continues and/or departs from earlier statutory regimes.<sup>90</sup>

Second, efforts have been made to assess the operation of the Australian bargaining rules in comparison with other jurisdictions where union recognition and GFB principles have been in operation for some time.<sup>91</sup>

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<sup>85</sup> For example, under s.240(4), FWA may arbitrate a bargaining dispute where all parties agree that it should do so.

<sup>86</sup> FW Act, s.590(1).

<sup>87</sup> FW Act, ss.590(2)(a), 592(1).

<sup>88</sup> FW Act, s.590(2)(c).

<sup>89</sup> FW Act, ss.590(2)(h)-(i), 592-593.

<sup>90</sup> See e.g. R Naughton, 'The Role of Fair Work Australia in Facilitating Collective Bargaining', in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012, 68; M Bray and A Stewart, 'Assessing the Australian Commitment to Collective Bargaining: How Distinctive is the Fair Work Regime?', Paper delivered at the 'Voices at Work' Research Project Australasian Meeting, RMIT University, Melbourne, 20-21 July 2012.

<sup>91</sup> A Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1; B Creighton and P Nuttall, 'Good Faith Bargaining Down Under' (2012) 33 *Comparative Labor Law & Policy Journal* 257; S Dorsett and G Lafferty, 'Good Faith and the *Fair Work Act*: Its Potential, in Light of the New



Third, of particular relevance to this report is the small but growing body of work seeking to examine and assess the operation of the bargaining rules in the FW Act since they commenced operation on 1 July 2009, and the impact of the new bargaining rules on the extent and nature of collective bargaining in Australia.<sup>92</sup> In some of these studies, the authors have expressed views on the operation of the specific mechanisms available to facilitate bargaining under Part 2-4 of the Act, which we discuss briefly below.

At this point, we also note the analysis of the FW Act carried out recently by the independent panel which conducted a post-implementation review of the legislation, at the request of the Minister for Employment and Workplace Relations.<sup>93</sup> The Fair Work Act Review Panel examined, among other things, the extent to which the provisions in Part 2-4 are meeting their stated objectives (see above). While emphasising that '[t]he operation of these provisions is still very much in its infancy and the law as to what conduct is and is not proscribed is far from settled,'<sup>94</sup> the Panel concluded that the provisions in Part 2-4 of the Act have 'largely been effective in meeting their objective.'<sup>95</sup> The Panel also identified that FWA intervention in the form of orders relating to bargaining occurred in respect of less than 1% of agreements approved by the tribunal under the FW Act. At the same time, the various mechanisms available under Part 2-4 'have had an indirect positive influence on bargaining'.<sup>96</sup> In summary, the Review Panel found that:

*'The FW Act has extended the benefits of collective agreements to approximately an additional 440,000 employees. It has provided employees with a greater voice in the bargaining process by facilitating collective bargaining when a majority of employees wish to do so and by allowing employees to be effectively represented by their union.'*<sup>97</sup>

A number of commentators have ventured tentative assessments as to the effectiveness of the MSD mechanism in the FW Act. Efforts to assess the impact of MSDs have largely involved analysis of published FWA decisions, although another approach commonly used to assess the impact of these provisions has been to analyse their impact on well-known bargaining disputes

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Zealand Experience' (2010) 21(1) *Economic and Labour Relations Review* 53; R Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining under the Fair Work Act 2009' (2012) 25 *Australian Journal of Labour Law* 130. See also A Bukarica and A Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand*, The Federation Press, Sydney, 2012; and the various contributions found in B Creighton and A Forsyth (eds.), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>92</sup> A Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1; R Cooper and B Ellem, 'Fair Work and the Re-regulation of Collective Bargaining' (2009) 22 *AJLL* 284; R Cooper and B Ellem, 'Getting to the Table: Fair Work and Collective Bargaining' in B Creighton and A Forsyth (eds.), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>93</sup> J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012. Note that the period of operation of the FW Act examined by the Review Panel was 1 January 2010-31 December 2011 (the first two years of full operation of the legislation).

<sup>94</sup> *Ibid*, 129.

<sup>95</sup> *Ibid*, 151.

<sup>96</sup> *Ibid*, 152

<sup>97</sup> *Ibid*, 153 (footnote omitted).

during the Work Choices era, such as Telstra and Cochlear.<sup>98</sup> The prevailing view among those who have sought to assess the operation of MSDs is that these determinations are relatively easy to obtain, and are working fairly effectively to compel reluctant employers to bargain where it can be clearly shown that a majority of employees wish to do so.<sup>99</sup> A number of commentators have also observed that, to date, MSDs appear to be avoiding unnecessarily financial cost and logistical complexity,<sup>100</sup> long drawn out union recognition battles and the adoption of ‘union busting’ tactics and endless litigation.<sup>101</sup> The Fair Work Act Review Panel reached similar conclusions, finding that the available evidence ‘firmly suggests that the [MSD] provisions are successfully addressing employer reluctance to bargain in circumstances where a majority of employees wish to do so’<sup>102</sup> and have ‘demonstrably encouraged enterprise bargaining’.<sup>103</sup> They also noted that: ‘There is also anecdotal evidence that the mere availability of [an MSD] has encouraged bargaining.’<sup>104</sup> Several commentators, however, have emphasised that while the MSD mechanism has brought some reluctant employers to the bargaining table, there is less evidence to suggest that MSDs have in fact led to the widespread negotiation of collective agreements.<sup>105</sup>

The findings as to the impact of the GFB provisions have been more mixed. Forsyth concluded from his analysis of FWA decisions during the first 15 months of operation of the GFB rules that:

*‘Bargaining orders have been useful in addressing certain employer resistance strategies (e.g. bypassing union representatives, submitting agreement to ballot prematurely, and direct dealing in the form of unilateral pay increases). However, FWA has permitted other*

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<sup>98</sup> See e.g. R Cooper and B Ellem, ‘Getting to the Table: Fair Work and Collective Bargaining’ in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>99</sup> A Forsyth, ‘The Impact of “Good Faith” Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, 48; R Cooper and B Ellem, ‘Getting to the Table: Fair Work and Collective Bargaining’ in B Creighton and A Forsyth (eds.), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>100</sup> T Wetherell, ‘Majority Support Determinations under the Fair Work Act 2009,’ *Law Institute Journal* 2011, 44.

<sup>101</sup> See e.g. A Forsyth, ‘Chapter 21: Collective Bargaining’ in B Creighton and A Stewart, *Labour Law*, 5<sup>th</sup> ed, The Federation Press, Sydney, 2010, 743; A Forsyth, ‘The Impact of “Good Faith” Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, 36-38; B Creighton and P Nuttall, ‘Good Faith Bargaining Down Under’ (2012) 33(2) *Comparative Labor Law and Policy Journal* 257, 295.

<sup>102</sup> J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 132.

<sup>103</sup> *Ibid*, 130.

<sup>104</sup> *Ibid*, 131 (footnote omitted); note also the Review Panel’s finding that ‘... it is reasonable to infer that at least in some cases the lodgement of a [MSD] application has itself led to an employer agreeing to bargain, thereby removing the need to pursue the application.’

<sup>105</sup> A Forsyth, ‘The Impact of “Good Faith” Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, 48; R Cooper and B Ellem, ‘Getting to the Table: Fair Work and Collective Bargaining’ in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012.

*debatable employer tactics (e.g. direct communication with employees, and restructuring during [collective bargaining]).'*<sup>106</sup>

More recently, Forsyth and Stewart have expressed the view that, by permitting the types of employer conduct identified above: 'FWA can be seen to have taken a minimalist approach to the obligations set out in s 228(1), which arguably limits their effectiveness as a mechanism to achieve the policy objective of *promoting* collective bargaining'.<sup>107</sup> This view appears to be largely shared by Cooper and Ellem, who have expressly concurred with Forsyth's findings above, and further noted that FWA has also shown a strong deference to the 'realities of bargaining' which has somewhat limited the impact of bargaining orders.<sup>108</sup> A more positive analysis, however, was presented by the Fair Work Act Review Panel. Its members expressed the view that the GFB provisions - and their interpretation by FWA - are proving to be 'flexible and responsive to the particular bargaining circumstances being considered', and that they 'encompass a balanced approach to regulating bargaining conduct'.<sup>109</sup> The Panel rejected union and employer submissions arguing for amendments to the GFB rules, due to the 'relatively early stage of operation of these provisions and the unsettled nature of many of the matters at issue, further, there were 'advantages to a less prescriptive approach' which retained discretion in FWA 'to address a wide and disparate range of conduct'.<sup>110</sup> The Review Panel also found that the 'mere availability' of bargaining orders 'has had an indirect impact on union bargaining conduct' (i.e. by providing employers with an avenue to address conduct in breach of the GFB requirements).<sup>111</sup>

In contrast to MSDs and the GFB provisions, there has been very little evaluation of the extent to which FWA is playing a role in assisting parties to resolve disputes through its use of scope orders or s.240 of the FW Act. The latter would appear particularly anomalous given that this is the most widely used of all bargaining mechanisms under Part 2-4. Use of s.240 was briefly examined by the Fair Work Act Review Panel, which observed that there was scope for FWA to play a more proactive role in bargaining disputes; and highlighted a number of protracted recent disputes where the tribunal appears to have assisted in the ultimate resolution.<sup>112</sup> Overall, however, there is very little consideration of how s.240 is being utilized by parties or how FWA is approaching its functions under this provision of the FW Act. On scope orders, the Review Panel made the following assessment: '... we believe that scope orders play a minor, but

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<sup>106</sup> A Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1, 48.

<sup>107</sup> A Forsyth and A Stewart, *Submission to the Fair Work Act Review*, February 2012, 14.

<sup>108</sup> R Cooper and B Ellem, 'Getting to the Table: Fair Work and Collective Bargaining' in B Creighton and A Forsyth (eds.), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

<sup>109</sup> See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 138.

<sup>110</sup> *Ibid*, 133; see also 138.

<sup>111</sup> *Ibid*, 153.

<sup>112</sup> *Ibid*, 149. The Review Panel recommended that FWA's powers of compulsory conciliation in bargaining disputes should be expanded, including enabling the tribunal to intervene in such disputes on its own motion. This recommendation was a response to many submissions to the Fair Work Act Review which argued for FWA to have a greater role in arbitrating intractable bargaining disputes. The Review Panel rejected these calls: '... we are reluctant to recommend a general expansion of compulsory arbitration powers unless we can identify a circumstance in which the bargaining system is failing and it is in the public interest to address this failure' (*ibid*, 148).

not insignificant, part in the bargaining framework, primarily as a vehicle for assisting the parties to resolve scope issues between themselves.<sup>113</sup>

Finally, a number of commentators have ventured tentative assessments of the operation of the low-paid bargaining stream. Overwhelmingly, these assessments have identified shortcomings with the low-paid bargaining provisions that have come to light since the legislation came into effect. These include the complexity of the provisions, and the reluctance of FWA to include within a low-paid authorisation those employers which have had an enterprise agreement in the past.<sup>114</sup> The Fair Work Act Review Panel found that: ‘... the low-paid bargaining provisions are very much in their infancy and it is not yet possible to assess their effectiveness in meeting their objectives.’<sup>115</sup>

## 2.4 Conclusion

The FW Act seeks to promote collective bargaining and agreement making at the enterprise level. Part 2-4 of the legislation contains a number of mechanisms directed at achieving this objective. Both in promoting bargaining and providing a reinvigorated role for the national industrial relations tribunal in supervising agreement-making, the bargaining rules in the FW Act constitute a clear departure from those found in the preceding regime. At the same time, however, the rules currently in operation do not constitute a return to the pre-Work Choices model or to the model of enterprise bargaining first introduced in the early 1990s. While some aspects of the bargaining framework have endured since that time, Part 2-4 of the FW Act introduces a number of mechanisms and concepts which constitute largely uncharted territory in the context of Australian industrial relations.

The remainder of this report adds to the growing body of evidence and analysis which explores how the FW Act bargaining rules have been operating in practice – and, in particular, the role that FWA is playing in supervising bargaining through the mechanisms available under Part 2-4.

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<sup>113</sup> Ibid, 139: note also, after observing that many scope order applications are withdrawn, the Review Panel’s view that ‘in many cases agreement on scope was reached by the parties subsequent to a scope order application being made’.

<sup>114</sup> See e.g. A Forsyth and A Stewart, *Submission to the Fair Work Act Review*, February 2012, 18; R Naughton, ‘The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?’ (2011) 24 *Australian Journal of Labour Law* 214

<sup>115</sup> J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 151.

### 3 METHODOLOGY

In examining the operation of Part 2-4 of the *Fair Work Act 2009* (Cth) (FW Act) in its first three years of operation, and evaluating the effectiveness of Fair Work Australia (FWA) in enabling and facilitating collective bargaining, this project has drawn on different sources of data. The compilation and analysis of these various forms of evidence has enabled us to maximise the amount of research data available, and to provide a detailed picture of the role and impact of the tribunal under Part 2-4 of the legislation. In this chapter of the report, we provide a description of our data sources and how we have analysed them for the purpose of drawing inferences and making conclusions. In doing so, our aim is to make clear how we have sought to corroborate evidence across sources, as well as to provide an account of the potential limitations associated with these data sources and the form of analysis we have pursued.

We have drawn from four principal sources of data:

- Quarterly reports on agreement-making made publicly available by the Commonwealth Department of Education, Employment and Workplace Relations (DEEWR);
- Unit record file data drawn from FWA's own case management system;
- Relevant decisions and orders relating to applications made under Part 2-4 of the FW Act during the first three years of its operation; and
- Qualitative evidence drawn from interviews with parties who have been involved in one or more applications to FWA under Part 2-4 of the FW Act.

The first two of these data sources are quantitative, while the second two sources are qualitative. The two quantitative sources have been used to understand the broad trends in bargaining and in the use of the various provisions under Part 2-4 of the FW Act. This analysis is presented in Chapters 3 to 5. Our analytical approach in analysing these quantitative data sources was to rely on descriptive statistics rather than bivariate or multivariate analysis. Whilst we do so, we have also undertaken some tests of statistical significance, notably in terms of looking at whether distributions across categories were significantly different from a random distribution. As reporting these statistics did not add any new insights to our analysis, we have simply reported descriptive statistics in graphical form for ease of exposition.

The qualitative sources are then used in subsequent chapters to gain insight into the parties' perceptions of FWA's role in the bargaining process, and to ascertain whether, and in what way, the new legislative framework has altered the dynamics of collective bargaining and the types of outcomes the parties have pursued.

Below, we provide a more detailed description of each of the data sources used in this study and how they have been used to evaluate the role of FWA in shaping bargaining processes and outcomes.

### 3.1 DEEWR's Workplace Agreement Database

The first source of data we have used is drawn from DEEWR's Workplace Agreement Database (WAD). WAD records detailed information about the content of all workplace agreements approved by FWA (and its predecessors) for the period since the introduction of the Enterprise Bargaining Principles in the October 1991 National Wage Case<sup>116</sup> to the present. That is, WAD represents a census of all statutory agreements concluded and certified across both the public and private sectors, and across all industries. It is the only comprehensive source of data on the incidence of agreements in Australia. In 2012, DEEWR reported that WAD now contains detailed information on approximately 115,000 agreements. On average around 8000 agreements are added to the database annually.<sup>117</sup>

For each unit record, WAD provides data for approximately 200 fields covering the following matters:

- the parties to the agreement;
- industry and sector;
- duration of agreements,
- number of employees covered;
- conditions of employment; and
- average annual wage increases.<sup>118</sup>

These detailed unit record data are generally not publicly accessible. However, trends and key characteristics are published in DEEWR's *Trends in Federal Enterprise Bargaining* publication. This publication has been produced quarterly by DEEWR and its predecessors since 1992. Drawing on the unit records files contained in WAD, it provides summary data on agreement making covering key dimensions of bargaining arrangements, including:

- the total number of agreements in each quarter;
- the average number of individuals covered by agreements;
- the average annual wage increase per employee covered by agreements (excluding performance pay, one-off bonuses, profit-sharing, etc.); and
- the average effective duration of agreements.<sup>119</sup>

These data are provided separately for new agreements lodged in each quarter as well as for all agreements that are current in each quarter. The estimates are disaggregated for the private and public sectors, as well as by industry using the Australian and New Zealand Standard Industry Classification (ANZSIC).

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<sup>116</sup> See *National Wage Case decision*, October 1991 (1991) 39 IR 217.

<sup>117</sup> DEEWR, 'The Workplace Agreement Database.' Available at: <<http://www.deewr.gov.au/WorkplaceRelations/Pages/AustralianEnterpriseAgreementsData.aspx>>. Last accessed 18 September 2012.

<sup>118</sup> See *ibid*.

<sup>119</sup> Average effective duration is defined as the difference in months between certification, commencement or the date of first wage increase (whichever comes first), and expiry date or last wage increase (whichever comes last) or termination data: *ibid*.

We have used this data source to provide both a contextual overview of agreement making since 1991, and to assess the impact of the bargaining provisions of the FW Act on the incidence of agreement-making. Our findings from this analysis are presented in Chapter 4.

### 3.2 FWA's case management data

The second source of data for this study is drawn from the FWA's own case management system. FWA has provided access to a limited number of data fields on a confidential basis that enable an examination of the volume and nature of the tribunal's work under Part 2-4 in the first three years of the FW Act's operation. These data files cover the following:

- application number;
- provision of the FW Act under which the application was made;
- date of lodgement;
- a non-standard industry code based on award coverage;
- registry office where the application was lodged;
- parties to the application; and
- the result or outcome associated with each application.

This data has enabled the analysis reported in Chapter Five to be undertaken. Drawing upon this data, we report on:

- the total number of applications made by parties under the relevant provisions in Part 2-4 of the FW Act each month during the first three years of operation of the legislation;
- the distribution of applications by matter type, industry, and state;
- the source of applications (unions, employers, employer associations or individuals); and
- the proportion of applications that have resulted in orders being made.

In using this data it should be noted that some fields have been recoded. This was necessary for two reasons. First, as we note above, the industry code used by FWA does not employ the standard industry classifications used by the Australian Bureau of Statistics (ABS), but categorises applications based on an industry category derived from the award on which the agreement was based. For our purposes, this rendered comparison with other official data sources impossible. We have therefore sought to concord the industry classifications used by FWA with the ANZSIC classification. In most instances, this did not prove difficult. However for some industry categories used by FWA, the ANZSIC equivalent was difficult to determine. In these cases, we consulted the relevant award and relied on the detailed classification information published by the ABS.<sup>120</sup> Where some FWA categories straddle ANZSIC classifications, we then examined information relating to the parties to the matter and the published decision (where available) to determine the final categorisation. For this reason, our

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<sup>120</sup> See ABS, Australian and New Zealand Standard Industrial Classification (ANZSIC), ABS, 1993 Catalogue Number 1292.0; and ABS, Australian and New Zealand Standard Industrial Classification (ANZSIC), Revision 1.0, ABS 2006 Catalogue Number 1292.0. Available at: <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/A77D93484DC49D63CA25712300056842?opendocument>> (last accessed 18 September 2012).

analysis of the distribution of matters across industry should be viewed as estimates rather than as definitive.

Second, we have modified and recoded FWA's categorisation of outcomes associated with each application. This was required partly because FWA modified its classification of outcomes after the first twelve months of compiling their case management records. This rendered comparisons over time difficult. Further, some categories were either overlapping, or could be collapsed into a broader classification without any real loss of information. In a number of cases it was simply not possible to determine the outcome of a specific application definitively from the case management records. In these cases, the outcome was recorded as 'Don't Know'.

### **3.3 Published decisions and orders**

The third way in which we seek to understand the tribunal's role in facilitating bargaining is through conventional legal analysis of relevant FWA decisions and orders. This study has sought to catalogue and analyse all published decisions and orders of the tribunal made under Part 2-4 of the FW Act between 1 July 2009 and 30 June 2012.

These decisions and orders assist us to understand how the tribunal is approaching its supervisory role in bargaining under the legislation; how it is exercising the significant discretion it is given under the relevant provisions; and how it is interpreting and applying key concepts in the statutory provisions, such as majority support and good faith bargaining. Our analysis of these decisions and orders are reported in Chapters 6 to 10.

### **3.4 Interviews**

To provide a more complete picture of the role and influence of FWA in supervising bargaining, evidence has been gathered directly from parties who have dealt with FWA in relation to one or more proceedings under Part 2-4 of the FW Act. The evidence drawn from these semi-structured interviews is reported in Chapters 6 to 10. Potential interviewees were identified from the contact details of representatives included in the FWA case management database system.

Our aim was to balance a number of factors and achieve a sample of participants that:

- included employer and employee bargaining representatives;
- included representatives of organisations and individual parties to matters;
- reflected the industry distribution of different types of applications; and
- covered both public and private sector workplaces.

In total, 50 interviews were completed over the period February to July 2012. These 50 interviews related to approximately 150 (or 8%) of the 1785 applications made under Part 2-4 in the first three years of operation of the legislation. These interviews were conducted with:

- 25 union representatives;
- 23 employer representatives; and
- 2 employees who acted as their own bargaining representative (and as bargaining representative for other employees).



The interviewees were drawn from a broad range of industries, including:

- mining;
- manufacturing;
- construction;
- transport, postal and warehousing;
- information media and telecommunications;
- financial and insurance services;
- professional, scientific and technical services;
- public administration and safety;
- education and training;
- arts and recreation services; and other services.

While we sought interviews from all sectors, it was not possible to recruit interviewees from some industry categories. For example, no interviews were conducted with participants drawn from electricity, gas and water, wholesale or retail trade, or administrative and support services.

While our choice of interviewees within each industry sector was made randomly, a decision was made to over-sample in those sectors where most applications had been lodged and to over-sample with respect to the types of applications most commonly lodged under Part 2-4 of the FW Act. This meant that, for example, in the rental, hiring and real estate services sector, where just three applications were made, few attempts were made to recruit interviewees; whereas in the manufacturing sector, a larger number of invitations were issued and, consequently, a larger number of interviews were concluded. With respect to the type of application, we sought to interview greater numbers of parties involved in bargaining order and s. 240 applications than we did scope order applications.

In some sectors, no positive responses were received to the invitation to participate in an interview. When no or insufficient responses were received from potential participants, second and third - round invitations were issued. For example, while a number of invitations were issued to union representatives and employers involved in matters from the electricity, gas and water sector, and to employers in financial and insurance services, no positive responses were achieved. Fortunately, interviews were possible in all sectors associated with significant numbers of applications and with respect to all types of applications.

The majority of interviewees were located in Melbourne and Sydney, with a smaller number located in Brisbane and in regional areas of Australia. The breakdown by state is as follows:

- 27 interviews in Victoria;
- 12 interviews in NSW;
- 10 interviews in Queensland; and
- 1 interview in South Australia.

We used four semi-structured interview protocols to guide these interviews; one for interviews involving union representatives, one for employer representative interviews, one for non-union employee bargaining representatives and one for parties involved in applications made under the low paid bargaining provisions. Each interview lasted between half an hour and 2 hours. For most interviews we were able to ensure that two of the four researchers on the project

participated in the interview, although this was not always possible. This enabled us to begin the process of inductively identifying key themes and concerns across interviews, and also provided one means by which we were able to ensure that the use of the interview protocols was broadly similar across interviews. Nonetheless, it should be noted that rather than providing a fixed path for each interview, the interview protocols were used as a checklist to ensure all key issues we had identified as important were covered. Typically, however, each interview took its own path, often involving discussion of themes which were not anticipated or included in our protocol.

All interviews were recorded and transcribed. These transcriptions were then thematically coded using the NVivo 10 software program.<sup>121</sup> This approach followed the general recommendations for generating qualitative data codes based on key words and phrases and frequency of usage.<sup>122</sup> NVivo 10 allows researchers to code and analyse large volumes of qualitative data, such as interview transcripts, as well as to make connections between a variety of different qualitative (and quantitative) sources. In this study, for example, it enabled us to cross-check interview responses with themes drawn from the analysis of published decisions and orders. Importantly, the use of NVivo 10 enabled the researchers to closely dissect each interview and identify key themes which emerged and to assess the extent of consistency and differences in information provided by different respondents.

### 3.5 Limitations

In undertaking this analysis, it is important to be mindful of the limitations associated with the data sources used.

The first set of limitations is associated with our two quantitative sources. To begin with, neither of these sources were collected for the purpose of this research and, whilst they have proved invaluable in exploring the general trends in bargaining, they do not always provide the level of detail required to address the questions that this study sought to answer.

This issue was compounded by limitations associated with the data generated from FWA's case management system. We have already indicated what these issues were and how we sought to address them. Of particular concern was the need to recode and concord the classification of data (for example, industry classifications) into a more standardised and choate set of categories. This inevitably introduces some degree of error in the process of coding, and means that the data we present should be viewed as providing estimates, not definite measures of actual counts. In the case of the coding of outcomes of the various applications made under Part 2-4 of the FW Act, it was not always possible to determine the actual outcome. This, as we note above, reflected ambiguity and change in the codes used by FWA. Where we could not find external information to verify outcomes, these cases were classified simply as 'Don't Know'. While this applied to a minority of cases, it nonetheless affects estimates of the different outcomes and therefore any assessment of the effectiveness of the legislative provisions – and FWA's role in particular – in influencing bargaining outcomes.

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<sup>121</sup> See, e.g., J Siccama and S Penna, 'Enhancing Validity of a Qualitative Dissertation Research Study by Using Nvivo.' (2008) 8(2) *Qualitative Research Journal* 91.

<sup>122</sup> See, e.g., A Coffey and P Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies*, Sage, Thousand Oaks, California, 1996.

It is also important to note a number of issues associated with the qualitative evidence used in this study. First, the review of cases and decisions using more conventional legal analysis is by its nature more impressionistic and subjective. This, of itself, is not necessarily a weakness. However, where such subjective assessments are made without appropriate corroboration across data sources, then it may raise questions about the validity of the findings made. In this study, we have explicitly sought to draw on all the published decisions and orders available, as well as to corroborate across our different sources of data – especially the interview data. Where this is done, it is explicitly noted in the text of the chapters.

Second, the interview data are drawn from a minority of participants in applications and proceedings, thus raising the question of representativeness. Although we have taken great care to ensure that we balance a range of considerations in generating the sample of participants (see above), we cannot make any specific claims about the representativeness of this group of interviewees. It would be desirable to have completed interviews with all parties to applications made under the relevant provisions. However, our capacity to do so reflects a number of challenges associated with this type of qualitative research. Interviews are time and resource-intensive, and depend on the co-operation of interviewees to participate and disclose. As we note above, efforts to elicit participation were not always successful. The major reason for this was the fact that we addressed our invitations to individuals who had represented their employing organisations (employers or unions) in matters before FWA. In many cases, these persons had moved on, and so our invitations to interview could not be pursued. In fact, in a majority of cases where individuals remained at the same organisation and could be contacted, the invitation to participate in an interview was accepted. In some instances, however, parties declined to participate on the basis that they did not see the value in doing so. In other instances, we faced a degree of suspicion, and concern about the consequences should disclosure of anything they might say (along with their identity) be communicated to FWA. In many cases we were able to assure them that confidentiality and anonymity would be respected; in other cases, despite assurances, some parties declined to participate.

Interviews also varied in terms of their quality and the amount of useful information that could be gleaned from them. Again, this was an expected part of this phase of the research. Nonetheless, we are confident that the inferences we have drawn reflect the experience of many participants involved in bargaining and/or making agreements and who draw on FWA in the process. Many of the same themes featured consistently across interviews. As Chapters 6 to 10 of the report show, a number of distinctive patterns in responses were evident. As the process of conducting interviews continued, the interpretation of this source of data had to a large degree converged.

## 4 AN OVERVIEW OF AGREEMENT-MAKING UNDER THE FAIR WORK ACT

As outlined in Chapter 2, legislative support for enterprise agreement-making has evolved significantly since the earliest enterprise bargaining reforms were introduced at the federal level in Australia in the early 1990s. The most recent phase of these developments has taken the form of the collective bargaining provisions contained in Part 2-4 of the *Fair Work Act 2009* (Cth)(FW Act).

In this Chapter of the report, we examine trends in agreement-making under the FW Act within the longer-run incidence of agreement-making since 1991. The aim of analysing the quantitative data on agreement-making is to provide one means of assessing the extent to which the new bargaining provisions have been successful in achieving their policy objective of promoting collective bargaining. It was noted in Chapter 3 that data on the incidence of agreement-making and key characteristics of these agreements are drawn from the WAD maintained by DEEWR. These trends are reported in the DEEWR *Trends in Enterprise Bargaining* publication, which is released quarterly. Data are currently available for the period December 1991 to March 2012.

### 4.1 The number of enterprise agreements lodged

Figure 1 reports the long-run trend in the number of enterprise agreements lodged across all industry sectors for the period from the December Quarter 1991 through to the March Quarter 2012: Panel A reports the number of new agreements lodged in each quarter, whilst Panel B reports the number agreements that were current – or ‘live’ – in each quarter for the period over which we have data. Figure 1 reports these data for all industries, as well as for the public and private sectors separately.

The lodgement data reported in Figure 1 reveal a clear cyclical pattern in the number of agreements lodged over the entire period.<sup>123</sup> However, within this cyclical pattern, annualised data show that the number of agreements lodged increased in most years. Of particular interest for our purposes is the significant spike in the number of agreements lodged in the June quarter 2009 – the period immediately prior to the commencement of the FW Act.<sup>124</sup> This quarter recorded the largest number of agreements for any quarter over the entire period from the March quarter 1992. Undoubtedly this reflects a ‘FW Act effect’, but perhaps an unintended one. We would speculate that this sharp rise in the number of agreements lodged was motivated in many instances by the desire to have an agreement lodged prior to the commencement of the FW Act. Although not reported here, our analysis of WAD data made publicly available shows that this spike in lodgements was accounted for largely by an increase in the number of non-union collective agreements lodged. Although the data provide no direct evidence, we believe

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<sup>123</sup> A separate analysis of the data at the standard industrial division level (not shown) reveals that this cyclical pattern is most evident in the construction industry, coinciding with major bargaining rounds in that sector. Although not as marked, the same cyclical pattern is evident in other industry sectors over the period for which data are available.

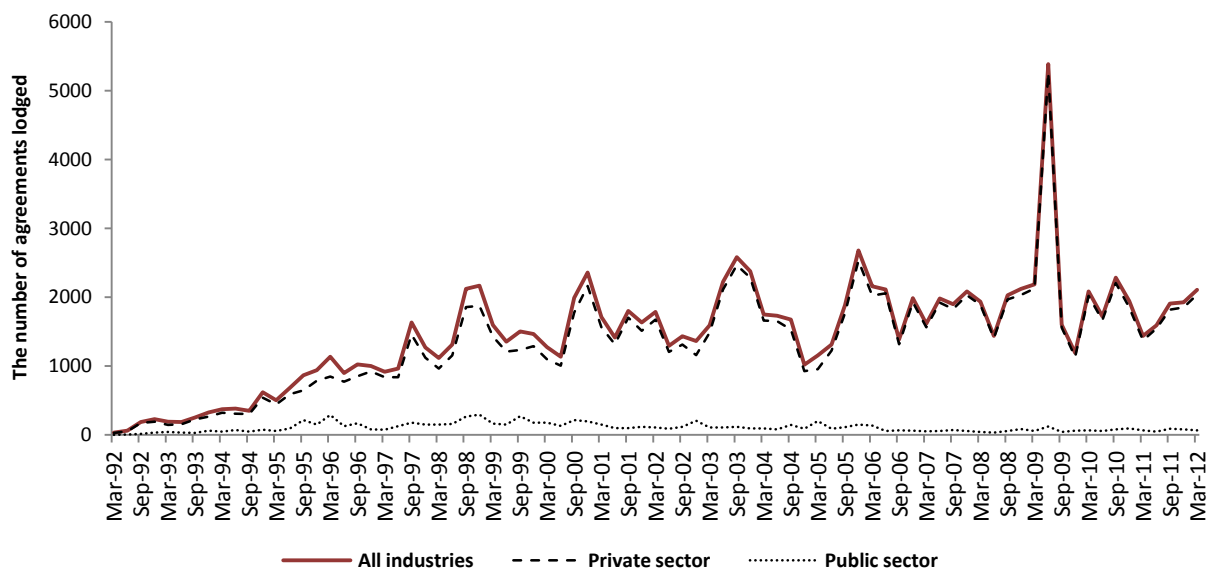
<sup>124</sup> This spike is evident across all sectors (not shown). It pre-dates the operative date of the FW Act, but includes the transition period in which all agreements made under federal legislation were subject to a re-introduced ‘no disadvantage test’ (that is, from March 2008 to June 2009).

that in the majority of these cases, limited or no bargaining (or negotiation) occurred between the employer and employees in the making of these agreements.

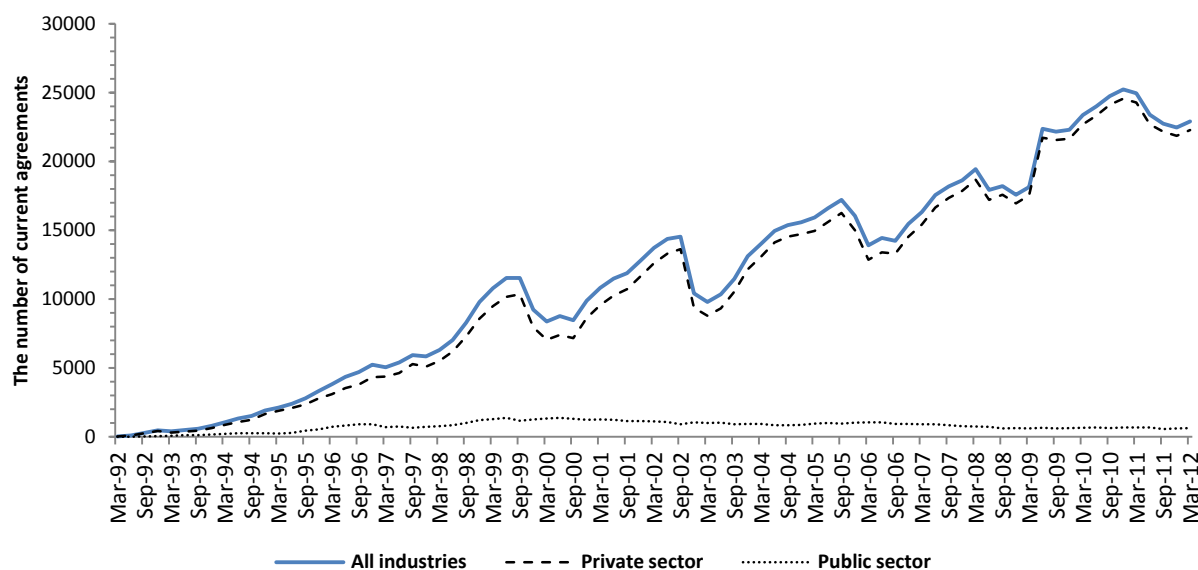
In the period following this initial spike, the number of agreements lodged is similar to or less than the same periods in the previous two years. This tapering off in the rate of growth in the number of agreements lodged is more clearly illustrated in Panel B, which reports the number of current agreements in each quarter. Here, the rise in the number of current agreements is evident between the March and June quarters of 2009, with a subsequent downturn in the number of current agreements evident from the December quarter 2010. This downturn in the total number of agreements lodged appears significant, although a reversal of this trend is evident in the first quarter of 2012.

**Figure 1** The number of agreements, all sectors, 1992- 2012

Panel A: The number of agreements lodged in each quarter



Panel B: The number of current agreements in each quarter



**Source:** DEEWR, *Trends in Federal Enterprise Bargaining* (Trends Historical, 1992-2012). These are quarterly data for the period from the March quarter 1992 to the March quarter 2012.

## 4.2 The number of employees covered by enterprise agreements

Figure 2 reports the number of employees covered by enterprise agreements in each quarter for the period from the December quarter 1991 through to March quarter 2012. Again, we report coverage for all agreements that were lodged (Panel A) and current (Panel B) in each quarter.

Whilst it is difficult to discern any clear pattern from new agreements lodged in each quarter, the data for all current agreements shows a steady upward trend in the number of employees covered by enterprise agreements over this 20-year period. Indeed, Figure 2 shows that from the June quarter 2009 to June quarter 2011, the rate of growth increased significantly, with the number of employees covered by enterprise agreements increasing from just over 2 million to almost 2.5 million workers – a growth rate of around 20%. This compares with an increase in the number of employees covered over the previous two years of just 2.5%. Whilst the second half of 2011 was associated with a decrease in the total number of workers covered by enterprise agreements, the overall growth rate since mid-2009 remains significantly above the trend level for the period from 1991.

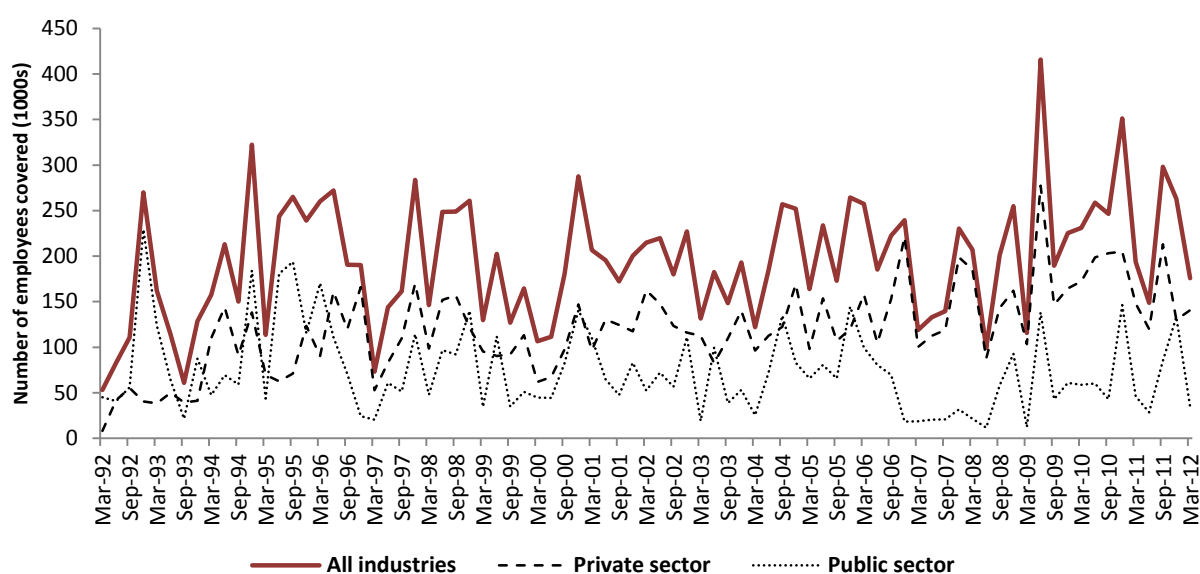
Figure 2 also shows that the coverage of all current agreements has trended upwards over the period since 1992. Of note is the sharp increase that was reported in Figure 1 in the number of agreements lodged and current in the June quarter 2011, which translated into an increase in the rate of growth in the number of employees covered by current agreements. Between the March quarter 2009 and June quarter 2009, the number of employees covered by current agreement rose from 1,755,200 employees to 2,050,700 employees – an increase of approximately 16.8%. As a proportion of the total number of persons employed, this represents an increase from 16.1% to 18.8%. Over the two year period from the March quarter 2009 to the March quarter 2011, the increase in the number of employees covered by current registered agreements has been in the order of 45.4%, increasing to 2,551,400 employees. As a proportion

of all employed persons, by March 2011, approximately 23.4 % of employed persons were covered by a current registered agreement.<sup>125</sup>

However as Figure 2 shows, the number of persons covered by current agreements fell from a high of 2,569,500 employees in the June quarter 2011 to 2,439,100 employees in the March quarter 2012 – a fall in the number of employees covered of approximately 5.1 % over these four quarters. Not surprisingly this translates into a fall in the proportion of all employees covered by a current registered agreement. Based on these WAD estimates of coverage, we calculate that by the March quarter 2012, the proportion of employees covered by a current registered agreement had fallen to 21.3%.

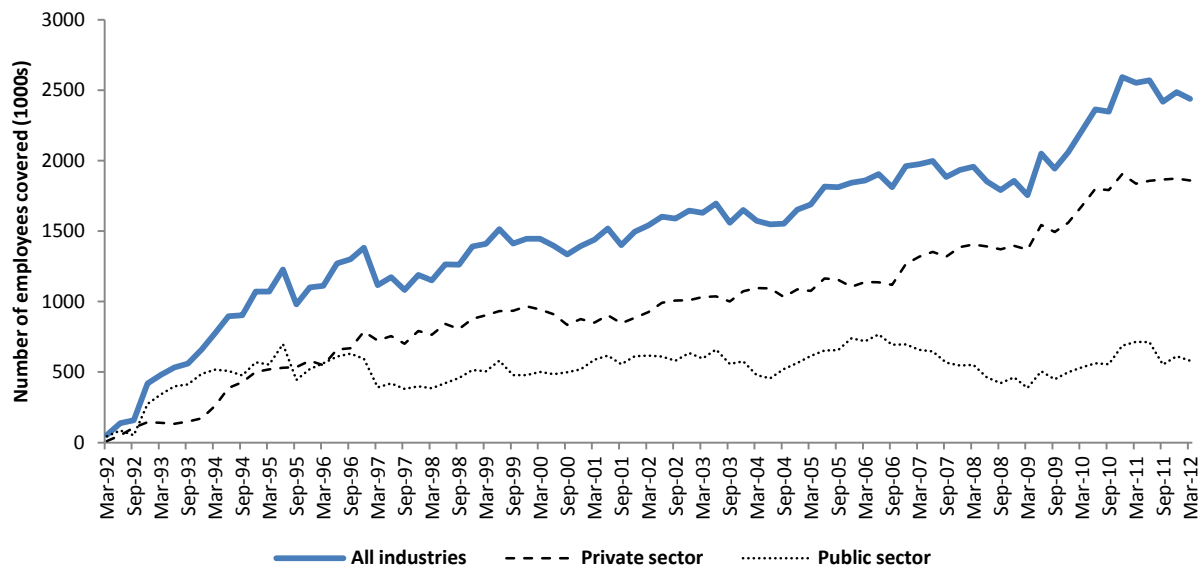
**Figure 2** The number of employees covered by agreements, all sectors, 1992 – 2012

Panel A: All agreements lodged in the quarter



<sup>125</sup> These estimates differ considerably from those included in DEEWR, *Fair Work Act Review Background Paper*, January 2012, 13. That report estimates that the number of employees in Australia covered by registered and unregistered collective agreements grew from 39.8% of the workforce in 2008 to 43.4% in 2010. It is important to note that the estimates provided here are for registered agreements only and are provided as a proportion of all employed persons, not the labour force.

Panel B: All agreements current in the quarter



**Source:** DEEWR, *Trends in Federal Enterprise Bargaining* (various issues). These are quarterly data for the period from the March quarter 1992 to the March quarter 2012.

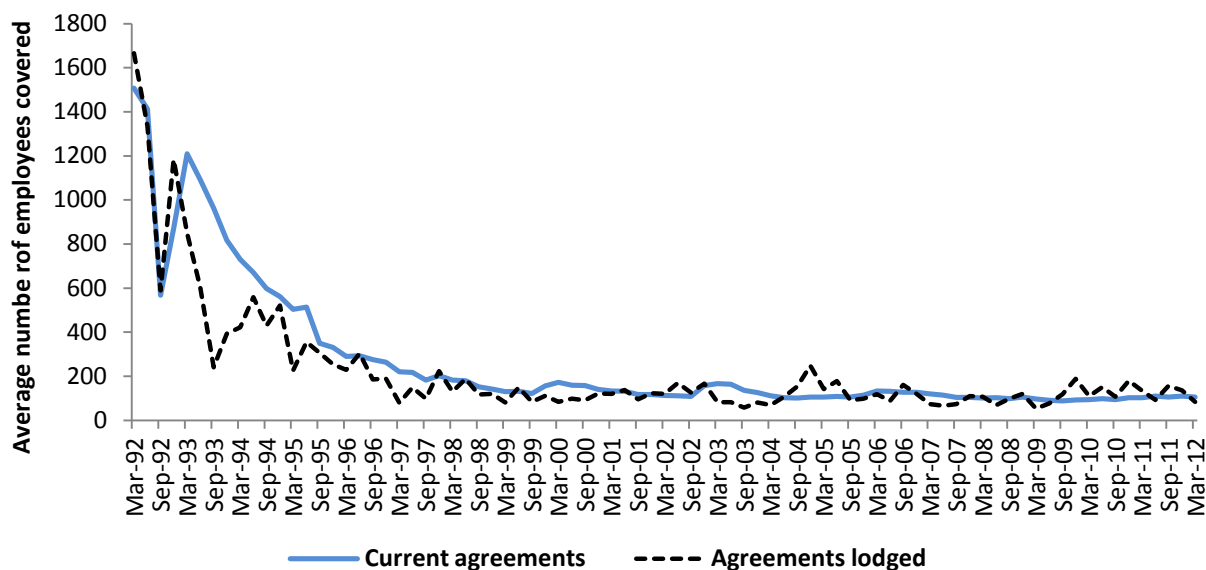
Figure 3 extends this analysis by examining trends in the average number of employees covered by agreements. This figure reveals two important trends.

First, over the course of the first decade following the October 1991 National Wage Case in which principles for enterprise bargaining were determined, the average number of employees covered by registered agreements has declined steeply. This fall largely reflects shifts in federal government policy relating to enterprise bargaining in the public sector, which has evolved from a relatively centralized process to a more decentralised one. Nonetheless, this trend is also evident for private sector agreements.

Second, and more significantly for this study, the average coverage of enterprise agreements has remained relatively stable since the late 1990s. This figure suggests that the passage of the FW Act has had no appreciable impact on the average size of enterprise agreements that have been approved. This is the case for both private sector and public sector agreements.



**Figure 3** The average number of employees covered by agreements, all sectors, 1992 – 2012



**Source:** DEEWR, *Trends in Federal Enterprise Bargaining* (various issues). These are quarterly data for the period from the March quarter 1992 to the March quarter 2012.

### 4.3 Impact of the Fair Work Act on the incidence of bargaining

To what extent have the collective bargaining provisions contained in the FW Act influenced the incidence and coverage of agreement-making?

The data presented in this chapter suggest that the FW Act has not had a significant effect on the *incidence* of agreement-making (i.e., the number of agreements concluded and lodged with FWA). While legislative changes have had some impact on the variations in lodgement activity – for example the spike in lodgements that occurred in the June quarter 2011 – there is no evidence that the FW Act has had any effect on the longer run trends in the number of agreements lodged. However, the data nonetheless show a clear consequence for the *coverage* of agreements. As reported above, the June 2009 quarter marks the beginning of an accelerated growth in the number of workers covered by collective agreements – and stands in contrast to the decline in coverage that had commenced during the ‘Work Choices’ period.<sup>126</sup> This increase in the number of employees covered has, generally, been at a higher rate than the general growth in the number of persons employed, resulting in an increase in the proportion of workers covered by enterprise agreements – although it should be noted that the last four quarters for which we have data have been associated with a decline in the proportion of employed persons covered by enterprise agreements.

Although we have not presented any detailed analysis here, the evidence suggests that there has also been a significant shift in the *type* of agreements being registered – notably the extent of union involvement in agreement-making. In a recently published analysis of this same data source, Gahan and Pekarekshov that while the Work Choices period was associated with a

<sup>126</sup> Workplace Relations Amendment (Work Choices) Act 2005 (Cth); see further Chapter 2 of this report.

significant increase in the both the number of non-union agreements and the proportion of the workforce covered by them, the FW Act has been associated with a distinct reversal of this trend.<sup>127</sup> In particular, using data for the period to December 2011, they find that the number of union agreements have grown faster than non-union agreements.<sup>128</sup> This finding is consistent with the recent conclusion of the Fair Work Act Review Panel.<sup>129</sup>

In interpreting the trends described in this chapter, it is also important to keep in mind the distinction between *agreement-making* and *collective bargaining*. This reflects the fact that, historically, the Australian institutional framework for agreement-making differs significantly from other national systems of bargaining.<sup>130</sup> The term ‘agreement-making’ refers to any process which employees (or their representatives) and employers (or their representatives) seek to utilize for the purpose of entering into an agreement regulating terms and conditions of employment that is legally enforceable. Whilst it can generally be anticipated that the process will involve negotiation or the use of a third party to conciliate, mediate or arbitrate, at various points in time the Australian legal system has recognized other processes as legitimate ways of finalizing an industrial agreement.<sup>131</sup> ‘Collective bargaining’, in contrast, refers to a particular process through which employers and/or their representatives and employees and/or their representatives seek to reach an agreement through negotiation. Prior research suggests that many agreements made under federal industrial legislation are effectively instruments drafted by employers and, where ‘collective’ in nature and require the endorsement of a majority of employees to be registered under the applicable statute, may not be the product of any sort of bargaining process.<sup>132</sup>

The data presented in this Chapter of the report provide a basis to conclude that the provisions in Part 2-4 of the FW Act have been instrumental in encouraging *agreement-making*. However, it is not clear from our analysis of the WAD data that the legislation – or the role of FWA – has facilitated *collective bargaining*. In order to examine the role of FWA in assisting employers, employees and unions to make or negotiate enterprise agreements, it is therefore necessary to go beyond these aggregate data. In the remainder of this Report, we provide our assessment of the ways in which, over the first three years of operation of the FW Act, the parties have sought

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<sup>127</sup> See further P Gahan and A Pekarek, ‘The Rise and Rise of Collective Bargaining in Australia, 1991-2011’ (2012) 22 *Labour and Industry* 195.

<sup>128</sup> P Gahan and A Pekarek, ‘Collective Bargaining and Agreement-Making in Australia: Evolution of the Legislative Framework and Agreement-Making in Practice’, in B Creighton and A Forsyth (eds) *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012, 213.

<sup>129</sup> See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 142-143.

<sup>130</sup> See P Gahan and A Pekarek, ‘The Rise and Rise of Collective Bargaining in Australia, 1991-2011’ (2012) 22 *Labour and Industry* 195.

<sup>131</sup> See A Forsyth, ‘Enterprise Agreements’ in Breen Creighton and Andrew Stewart, *Labour Law*, 5<sup>th</sup> edition, Federation Press, Sydney, 2010.

<sup>132</sup> P Gahan and A Pekarek, ‘Collective Bargaining and Agreement-Making in Australia: Evolution of the Legislative Framework and Agreement-Making in Practice’, in B Creighton and A Forsyth (eds) *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012, 213. This reflects earlier analysis reported by van Wanrooy, Wright and Buchanan. See B van Wanrooy, S Wright and J Buchanan, *Who Bargains? Report for the NSW Office of Industrial Relations*, Workplace Research Centre, University of Sydney, 2009, 10.

to involve FWA in negotiating and concluding agreements, through the use of applications made under Part 2-4 of the FW Act and the outcomes of these applications.

## 5 THE ROLE OF FAIR WORK AUSTRALIA IN RESOLVING BARGAINING DISPUTES UNDER PART 2-4 OF THE FAIR WORK ACT: AN OVERVIEW

In this chapter, we present an overview of the extent to which parties have used Fair Work Australia (FWA) to facilitate collective bargaining and the resolution of bargaining-related disputes. We also examine the outcome of applications made under the relevant provisions of the *Fair Work Act 2009* (Cth)(FW Act). The following analysis draws on data from FWA's case management system during the first three years of the legislation's operation.

### 5.1 Trends in the number of applications made

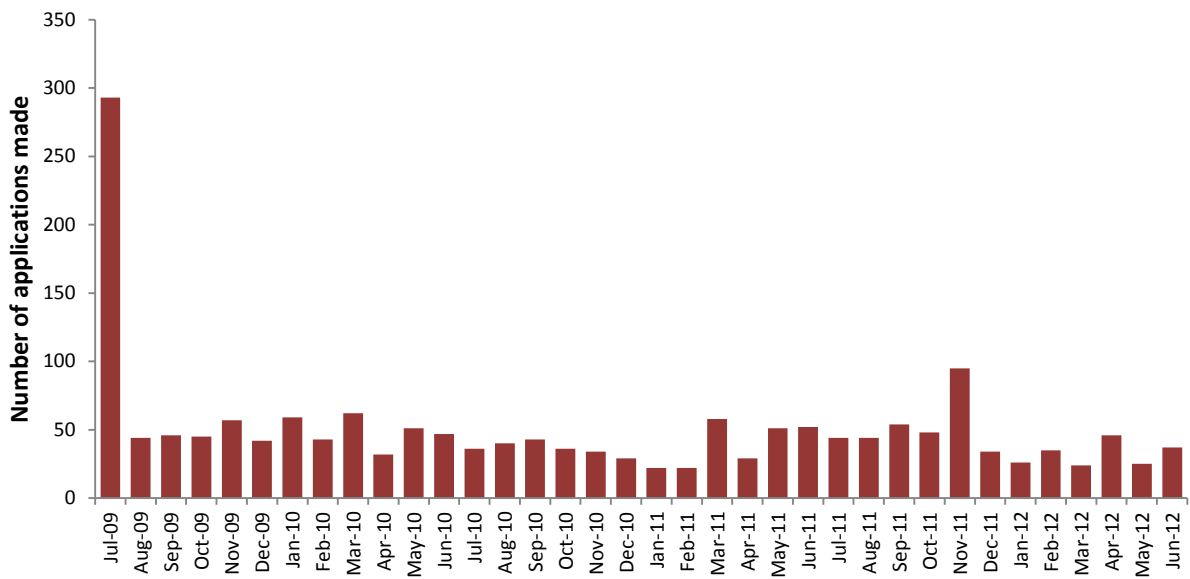
**Figure 4** reports the total number of applications under Part 2-4 lodged each month, irrespective of the type, over the same period of time (July 2009-June 2012):

- Over this period, 1785 applications were made – an average of 49.6 each month.
- In just 8 of these 36 months was the number of applications under Part 2-4 greater than the average for the entire period.
- The most striking feature of this figure is the large number of applications made in the first month of the FW Act's operation, when 293 applications were lodged with FWA.
- The 293 applications lodged in July 2009 represent 16.4% of all applications under Part 2-4 in the first 3 years of the legislation's operation.
- The vast majority of the 293 applications lodged in June 2009 (275 applications, or 94%) were seeking FWA's assistance in resolving bargaining disputes under s.240.

**Figure 5** reports the number of applications made under the various provisions in Part 2-4 of the FW Act seeking assistance or a determination/order from FWA. It reports the total number of applications lodged in each month over the period 1 July 2009 to 30 June 2012.

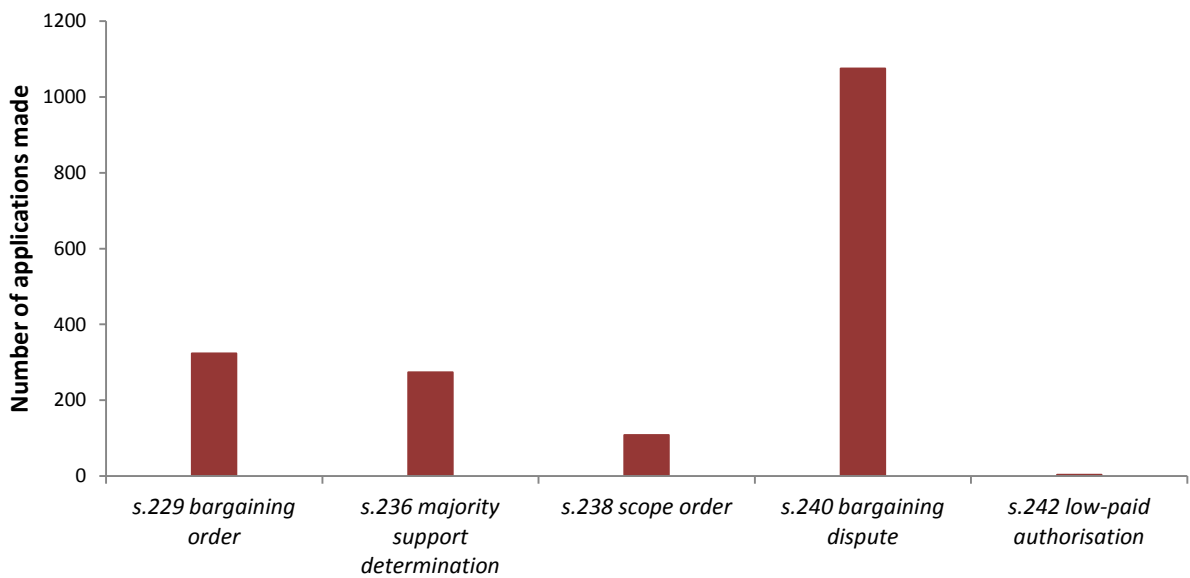
- Over this period, a total of 1785 applications were lodged.
- The vast bulk of these applications (1075 or 60.2%) were made under s.240 (applications to FWA for assistance to resolve a bargaining dispute).
- This compares with:
  - 324 applications for a bargaining order (s.229);
  - 274 applications for a majority support determination (s.236);
  - 108 applications for a scope order (s.238); and
  - just 4 applications for a low-paid authorisation (s.242).

**Figure 4** Applications lodged under Part 2-4, monthly



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 5** Applications lodged under Part 2-4, by type



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

The available data also enable us to examine who lodges these applications. **Figure 6** summarises this data.

- Almost three-quarters of all applications (1327, or 74.3%) were lodged by a representative union.

This compares with:

- 20.0% of applications (357) being lodged by an employer;
- 5.5% (98) being lodged by individuals; and
- just three applications being made by an employer organisation.

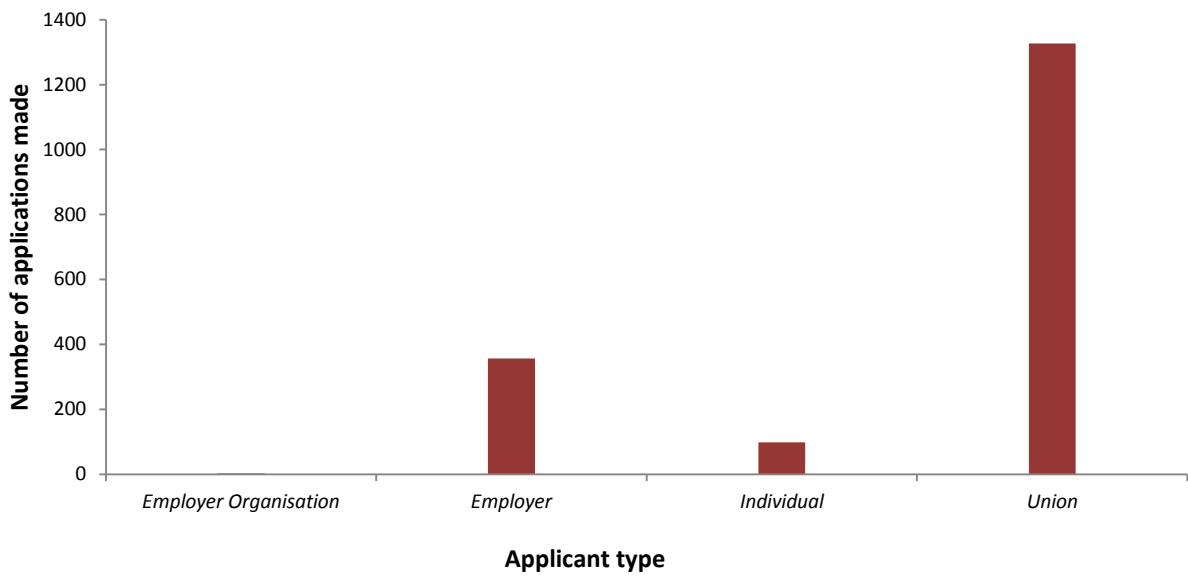
In order to identify any differences between states in relation to lodgement activity, the number of applications lodged in each registry office was also examined. Where more than one registry office was located within a state, the lodgement counts were aggregated. These data are reported in **Figure 7**:

- 865 (48.6%) of all applications made under Part 2-4 were lodged in Victoria. This compares with the following number (proportion) of applications lodged in each state:
- 352 (19.8%) in NSW;
- 254 (14.3%) in Queensland;
- 111 (6.2%) in South Australia;
- 106 (6.0%) in Western Australia;
- 45 (2.5%) in the ACT;
- 33 (1.9%) in Tasmania; and
- 14 (0.8%) in the Northern Territory.

While the data do not provide us with a means to ascertain the reasons for these differences, it seems reasonable to suggest that the patterns observed in **Figure 7** reflect a number of factors, including state-level differences in:

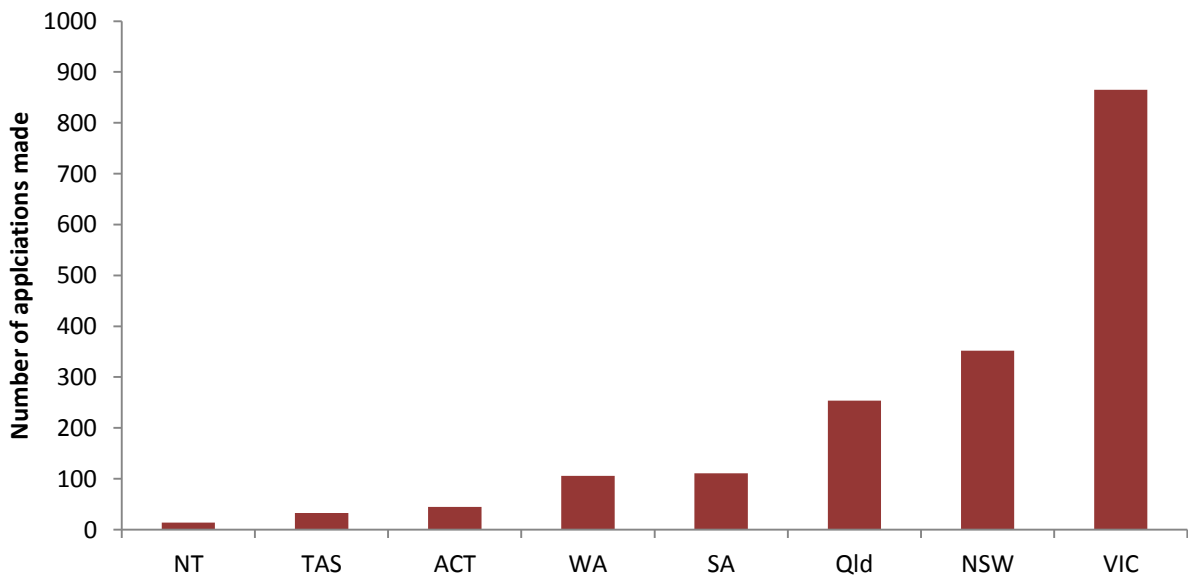
- the distribution of employment across industries;
- union density and the pattern of union bargaining activity; and
- the fact that FWA and many national unions are 'headquartered' in Victoria.

**Figure 6** Applications lodged under Part 2-4, by applicant type



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 7** Applications lodged under Part 2-4, monthly, by state/territory



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

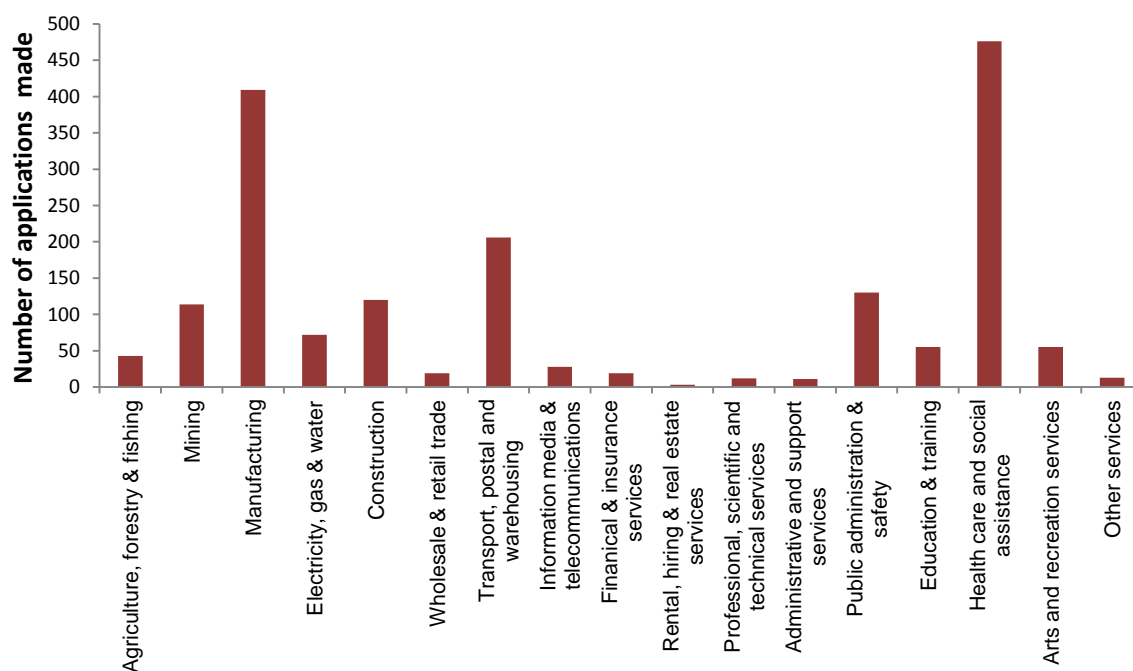
Variations in lodgement activity across different industry sectors were also examined. This is reported in **Figure 8** below:

- Three industries in particular account for approximately two-thirds (65.2%) of all applications made over this period, namely:
  - healthcare and social services (476 applications, or 26.7%);
  - manufacturing (409 applications, or 22.9%); and
  - transport, postal and warehousing (206 applications or 11.5%).

Again, while the data do not provide us with a means to directly assess the reasons for the patterns observed in **Figure 8**, it is likely to reflect the fact that the above industries are typically associated with higher than usual levels of union membership and collective bargaining activity.

- Other significant sectors include:
  - public administration and safety (130 applications or 7.3%);
  - construction (120 applications, or 6.7%); and
  - mining (114 applications, or 6.4%).

**Figure 8** Applications lodged under Part 2-4, by industry



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

## 5.2 Detailed analysis of applications made under Part 2-4 of the FW Act

In this section a more detailed analysis of applications made under Part 2-4 is reported. This more detailed analysis focuses on trends in the various types of applications made under specific provisions. This analysis provides important context to the analysis of FWA decisions and orders and the interview data reported in subsequent chapters.



### 5.2.1 Majority support determinations

It was noted in Chapter 2 that majority support determinations (MSDs) are a key feature of the bargaining framework established under the FW Act. An employee bargaining representative may apply to FWA for an MSD under s.236 of the FW Act, where an employer refuses to bargain and it can be demonstrated that a majority of the relevant employees wishes to bargain collectively. The effect of an MSD is to compel an employer to come to the bargaining table: while an MSD is not (of itself) an enforceable order, where an employer continues to refuse to bargain after an MSD is made, an employee bargaining representative may apply to FWA for a bargaining order (based on the employer's refusal to comply with the good faith bargaining obligations).

The availability of a mechanism to compel a reluctant employer to the bargaining table constitutes a key departure from the former statutory regime. Under the *Workplace Relations Act 1996* (Cth) (WR Act), there was no legal compulsion upon employers to bargain collectively, even where a majority of employees had indicated their preference for being covered by a collective agreement. The refusal of employers to negotiate collectively gave rise to a number of well-known and protracted bargaining disputes during the late 1990s and 2000s. The Explanatory Memorandum to the *Fair Work Bill 2008* explicitly identified the failure of the WR Act to provide a mechanism to address and resolve these types of disputes as a rationale for the introduction of MSDs – see Chapter 6 for a more detailed discussion of these issues.

FWA's case management database indicates that:

- In the first three years of the FW Act's operation, there were 274 applications for MSDs made under s.236 of the legislation.
- Almost all of these applications were lodged by unions:
  - in 2 instances, the application was made by an employer (despite the fact that an application for an MSD may only be made by an *employee* bargaining representative); and
  - in 6 cases, MSD applications were made by an individual.

**Figure 9** reports the number of applications for MSDs lodged each month over the period July 2009-June 2012. Generally speaking, no discernible pattern in the number of MSD applications made each month is evident.

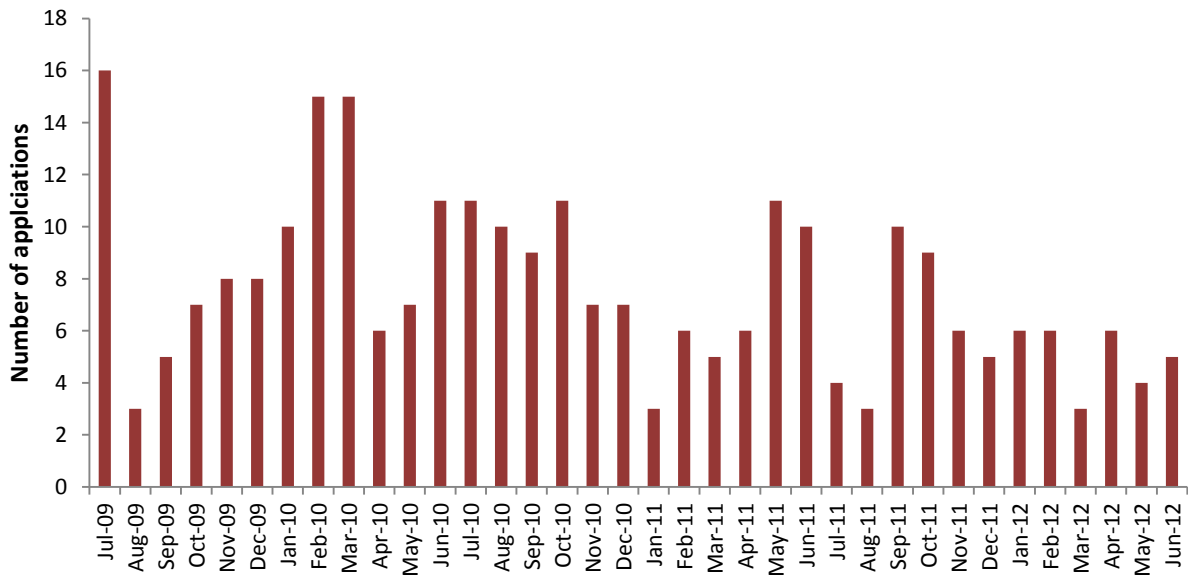
- On average, around 9 MSD applications were lodged each month.
- When examined on an annual basis, the number of applications made has fallen steadily since the FW Act became operational.
- In the first year after the commencement of the FW Act, 111 MSD applications were lodged.
- This compares with 96 and 67 applications, respectively, in the second and third years of operation of the legislation.

While the reasons for this (modest) drop in the number of MSD applications after the first twelve months are not clear, other research suggests that in many instances employers now appear to be more willing to accept union demands for recognition for collective bargaining, without employees/unions needing to formally lodge an MSD application. This is discussed in more detail in Chapter 6.

**Figure 10** reports the distribution of MSD applications by industry. This figure indicates that recognition of a union for collective bargaining has been more highly contested in certain industries:

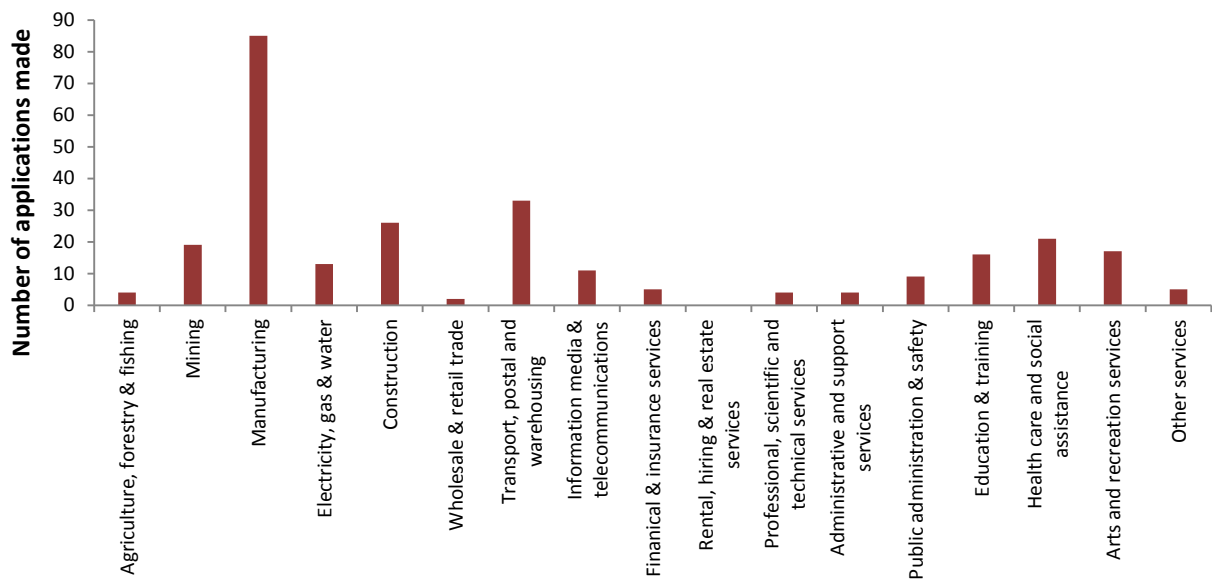
- Manufacturing accounts for the largest proportion of all MSD applications lodged in the first three years since the commencement of the FW Act: of the 274 MSD applications lodged, 85 (or 31.0%) came from manufacturing.
- This compares with:
  - 33 MSD applications from transport, postal and warehouse services;
  - 26 from construction;
  - 21 from healthcare and social services;
  - 19 from mining
  - 17 from arts and recreational services;
  - 16 from education and training; and
  - 13 from electrical, gas and water.

**Figure 9** Applications for majority support determinations, monthly total



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 10** Applications for majority support determinations, by industry



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 11** reports outcomes for the 274 MSD applications lodged over the first three years after the commencement of the FW Act:

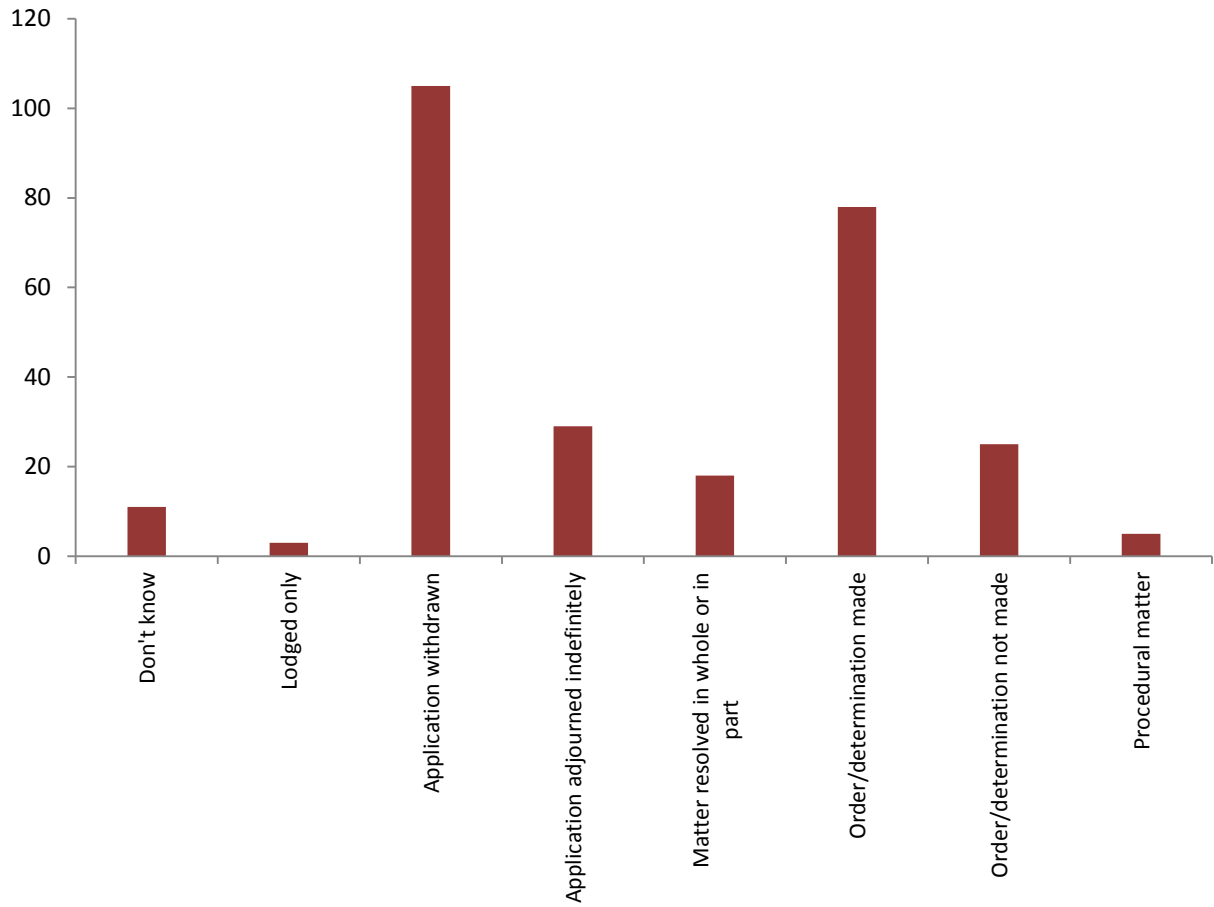
- A significant proportion of all applications for MSDs were successful:
  - 78 of the 274 applications made (or 28.5%) resulted in a determination being issued; and
  - a further 18 applications (6.6%) were recorded as being ‘resolved in whole or in part’.<sup>133</sup>

It is clear from Figure 11 that a relatively high proportion of MSD applications were withdrawn by the applicant before proceeding to final determination: half of all MSD applications made (137, or 50.0%) did not proceed to a hearing (i.e. these applications were lodged only, withdrawn or adjourned indefinitely). This may reflect a number of factors. Analysis of the evidence from our interviews and published decisions suggests that:

- once an application proceeds to a hearing, the prospects of an MSD being issued are relatively high;
- in most cases, the evidence of majority support is relatively ‘clear cut’ so that where an employer believes the union has adequate evidence, they will agree to bargain prior to the application being heard; and employers have generally encountered difficulty in defending MSD applications, and are aware that there are only limited bases upon which to successfully defend an application for an MSD where the applicant has credible evidence of majority support.

<sup>133</sup> This classification of outcome was used in the first 12 months over which the case management database was compiled by FWA. Due to the ambiguous nature of this outcome classification, it was not possible for us to allocate these matters into other outcome categories.

**Figure 11** Applications for majority support determinations, by outcome



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

## 5.2.2 Scope orders

The scope order provisions of the FW Act provide a mechanism through which FWA may resolve disputes that arise during bargaining concerning the group(s) of employees which the proposed agreement is to cover. A bargaining representative for an enterprise agreement can apply under s.238 for a scope order, where he or she is concerned that the bargaining is not proceeding fairly or efficiently because the agreement will not cover the appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

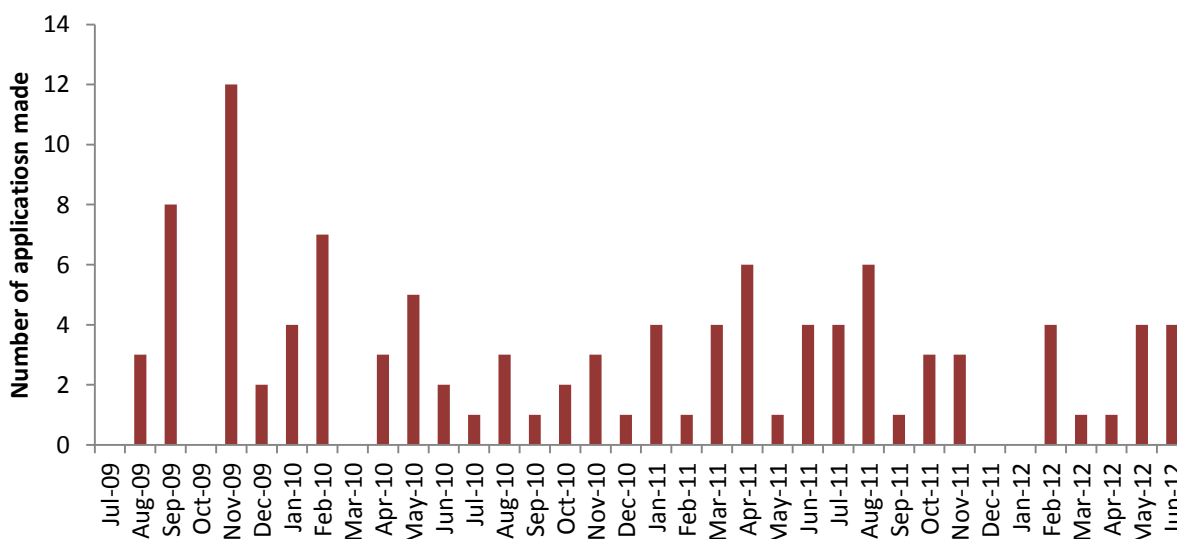
**Figure 12** reports the total number of scope order applications made between July 2009 and June 2012. During this period, a total of 108 applications were lodged with FWA:

- **Figure 12** reveals that during the first twelve months of the FW Act's operation, 46 applications for scope orders were made – or 42.6% of all scope order applications made in the first three years.
- 31 applications for scope orders were then made in each of 2010-11 and 2011-12.
- The highest number of applications was recorded in November 2009 (12); this accounts for 11.1% of all scope order applications made over the three-year period between July 2009 and June 2012.

**Figure 13** reports the identity of the parties making applications for a scope order:

- The overwhelming majority of applications for scope orders – 96, or 88.9 % of the 108 applications lodged – were made by unions.
- This compares with:
  - 9 applications made by an employer; and
  - 3 applications lodged by an individual applicant.

**Figure 12** Number of applications lodged, scope orders, monthly total



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 13** Applications for scope orders, by applicant type



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

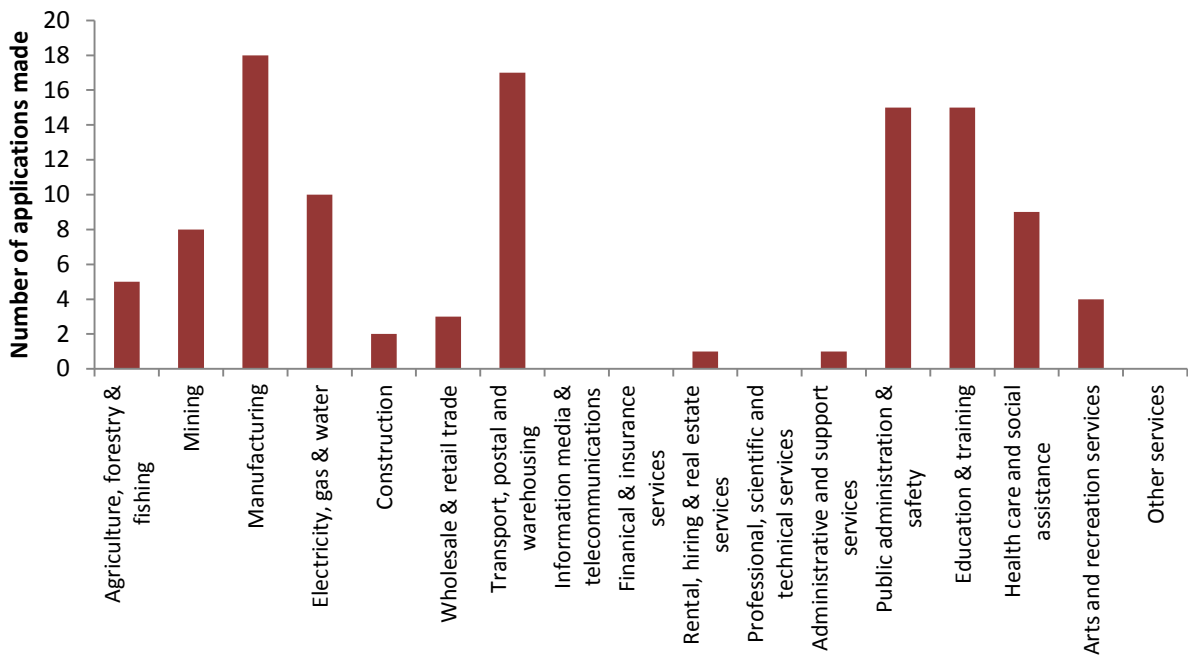
**Figure 14** reports the distribution of scope order applications by industry. This shows a pattern that is broadly similar to that for MSD applications (reported above):

- Manufacturing accounted for 18, or 16.7% of scope order applications – the largest number of any industry.
- This compares with:
  - 17 scope order applications (15.7%) in transport, postal and warehousing;
  - 15 (13.4%) in education and training;
  - 15 (13.4%) in public administration;
  - 10 (9.3%) in electricity, gas and water services; and
  - 9 (9.7%) in healthcare and social assistance.

Finally, **Figure 15** reports the outcomes of all applications for scope orders:

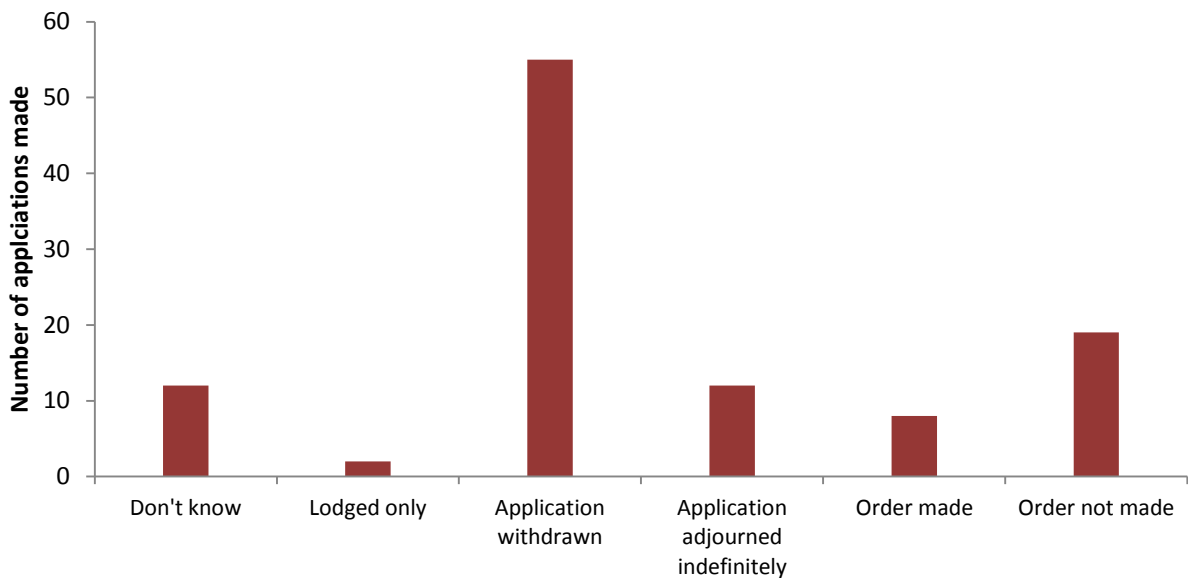
- The overwhelming majority of scope order applications – 83, or 76.9% – were withdrawn (69), adjourned indefinitely (12), or lodged only (2).
- In 12 cases it was not possible to determine the outcome from FWA’s records.
- Of the remaining 27 applications that proceeded to a hearing:
  - 19 (70.4%) resulted in a scope order being issued; and
  - 8 (29.6%) resulted in an order not being issued.

**Figure 14** Applications for scope orders, by industry



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 15** Applications for scope orders, by outcome



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

### 5.2.3 Bargaining orders

It was noted in Chapter 2, and again in Chapter 8, that the introduction of good faith bargaining obligations is widely regarded as one of the major reforms introduced by the FW Act. Section 228(1) sets out six good faith bargaining requirements that employer and employee bargaining

representatives are required to meet. These obligations apply once an employer initiates bargaining or agrees to an employee bargaining representative's request to begin bargaining. They may also be triggered by the making of an MSD, a scope order or a low-paid authorisation.

There were 324 applications for bargaining orders lodged with FWA during the first three years of the FW Act's operation, representing 18.2% of all applications made under Part 2-4.

**Figure 16** reports the number of bargaining order applications made each month over the period July 2009-June 2012:

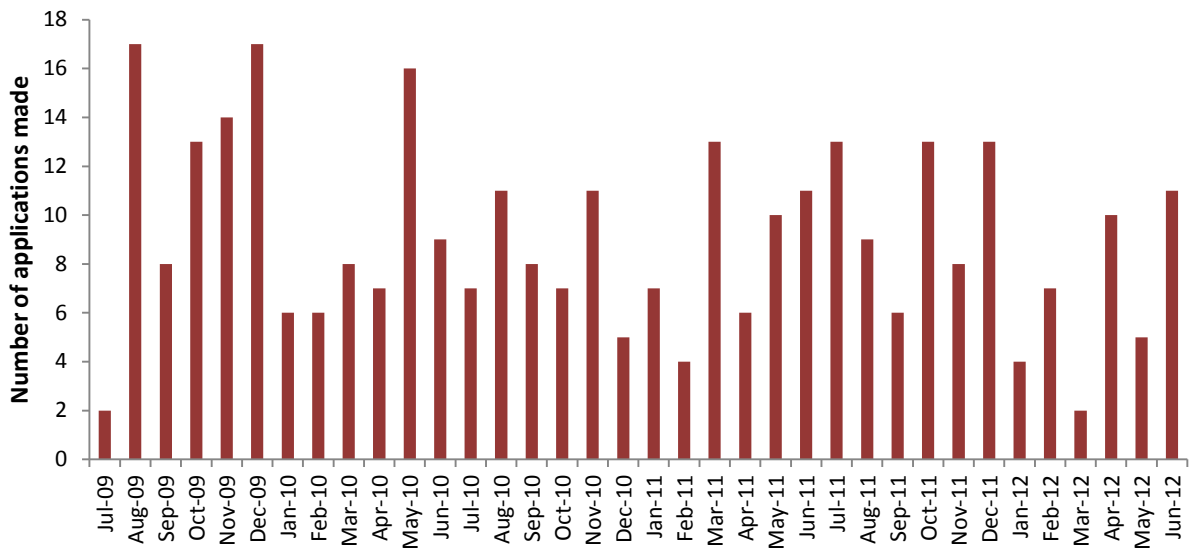
- From this figure it is difficult to discern any distinctive trend in the monthly lodgement of applications for bargaining orders over the three years since the commencement of the FW Act. However, annualised data show a reasonably steady flow of applications over this period.
- In the first year following the commencement of the FW Act, 123 applications for bargaining orders were made; and
- 100 and 101 applications were made in the second and third years respectively.

**Figure 17** reports the identity of the applicants seeking bargaining orders:

- The majority (252, or 77.7%) of bargaining order applications were made by unions.
- Compared with the other types of applications to FWA examined earlier in this chapter, a larger proportion of bargaining order applications were made by employers - 43 applications (13.3%) were made by employers or employer associations.
- 29, or 9.0% of all applications for bargaining orders, were made by individuals.

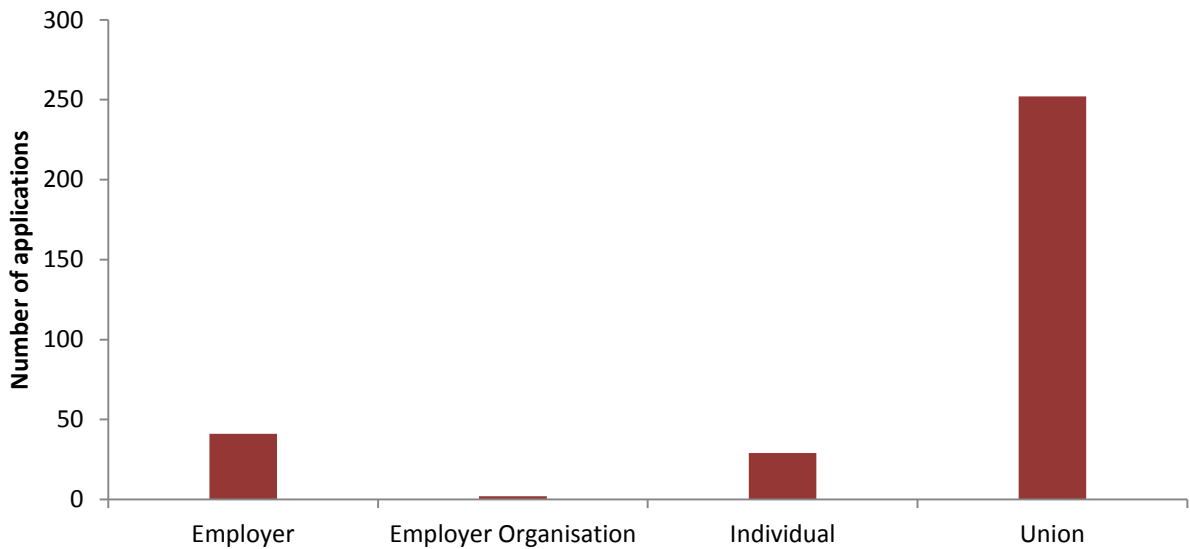


**Figure 16** Applications for bargaining orders, monthly total



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 17** Applications for bargaining orders, by applicant type



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 18** reports the distribution of bargaining order applications by industry:

- A large proportion of these applications were concentrated in the following industries:
- 79 bargaining order applications were made in manufacturing (24.4%);
- 42 in healthcare and social assistance (13%);
- 39 in transport, postal and water services (12.0%);
- 29 in mining (9.0%);
- 28 in construction (8.6%); and
- 15 in arts and recreation services (4.6%)

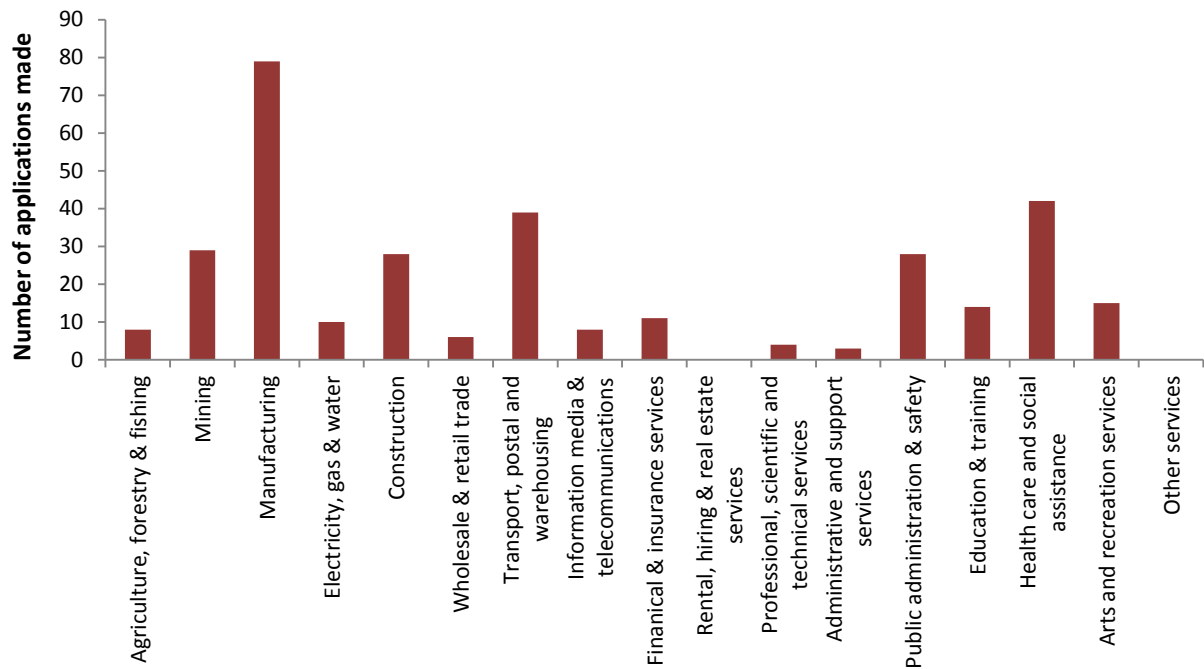
**Figure 19** reports outcomes associated with all applications for bargaining orders:<sup>134</sup>

- In almost two-thirds of all applications (61.7%, or 200 cases), the application was adjourned indefinitely.
- The next most common outcome was that no order was issued; this occurred in 60 cases, representing 18.8 % of all applications for bargaining orders.
- In 23 cases (7.1%) it was not possible to determine the outcome based on FWA's records.
- In the remaining cases where FWA dealt with applications for bargaining orders (45 cases, or 15.8% of all applications):
  - 23 cases (7.1%) resulted in orders being issued;
  - 16 cases (4.9%) were resolved in whole or in part;
  - 2 cases (less than 2%) related to a procedural matter.

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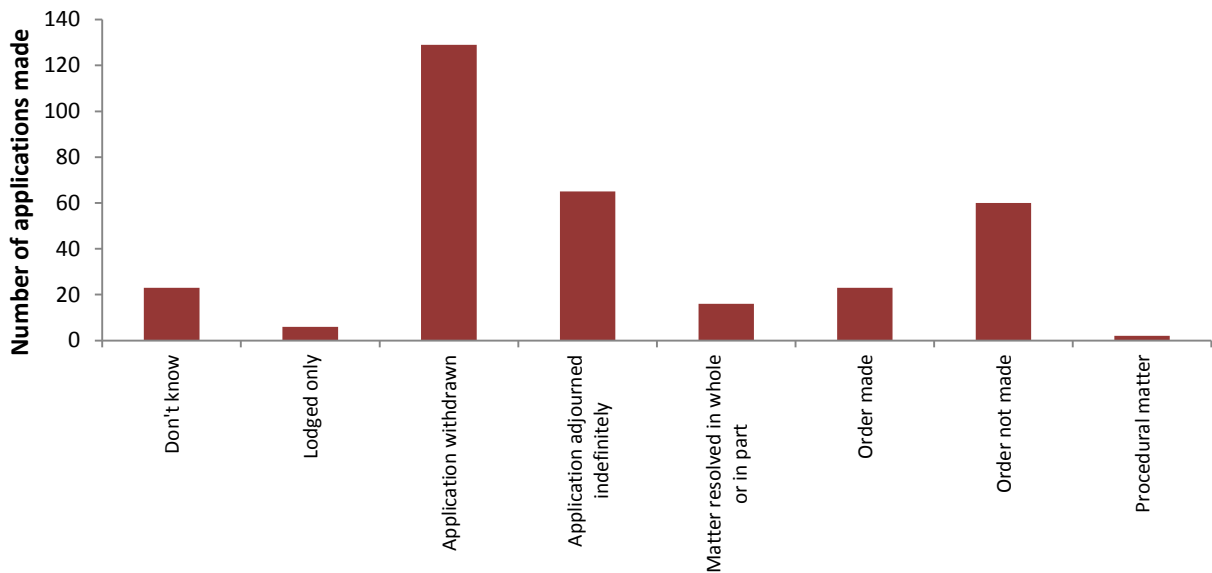
<sup>134</sup> As we note in Chapter 3, in a number of these cases it was not possible to determine the outcome that had occurred from FWA records. Moreover, coding had altered over time. Hence, a number of applications are recorded as "Don't Know".

**Figure 18** Applications for bargaining orders, by industry



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 19** Applications for bargaining orders, by outcome



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

### 5.2.4 FWA assistance in resolving bargaining disputes

Under s.240 of the FW Act, a bargaining representative may apply to FWA for assistance in resolving a bargaining dispute. FWA may deal with a dispute in a number of ways, including by

mediation or conciliation, or by making a recommendation or expressing an opinion.<sup>135</sup> While lodgement of an application under s.240 does not require the agreement of the other bargaining representatives, FWA can only arbitrate where all parties have requested it to do so.<sup>136</sup> FWA has considerable discretion in determining which powers it may exercise in order to resolve a bargaining dispute including, for example, by directing a person to attend a conference.<sup>137</sup>

While the capacity for parties to access the assistance of FWA for the purposes of resolving bargaining-related disputes is by no means a novel feature of the federal industrial relations framework, the scope of s.240 and the powers enjoyed by the tribunal in dealing with a dispute are wider than under the former statutory regime. Under Work Choices, parties could agree to refer a dispute arising in the course of bargaining for a proposed collective agreement to the Australian Industrial Relations Commission,<sup>138</sup> but the Commission could not compel a person to do anything and could not arbitrate even where the parties wanted it to do so.<sup>139</sup>

In the first three years of operation of the FW Act, 1075 applications were made under s.240 seeking assistance from FWA in resolving a bargaining dispute. These applications account for 60.2% of the total number of applications under Part 2-4 that we examine in this report.

**Figure 20** shows the number of these applications made each month over the period of this study. Of particular note are:

- The large number of s.240 applications made immediately following the introduction of the FW Act.
- Following this initial spike, the number of applications lodged under s.240 has remained stable for the entire period to June 2012.

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<sup>135</sup> FW Acts.595(2).

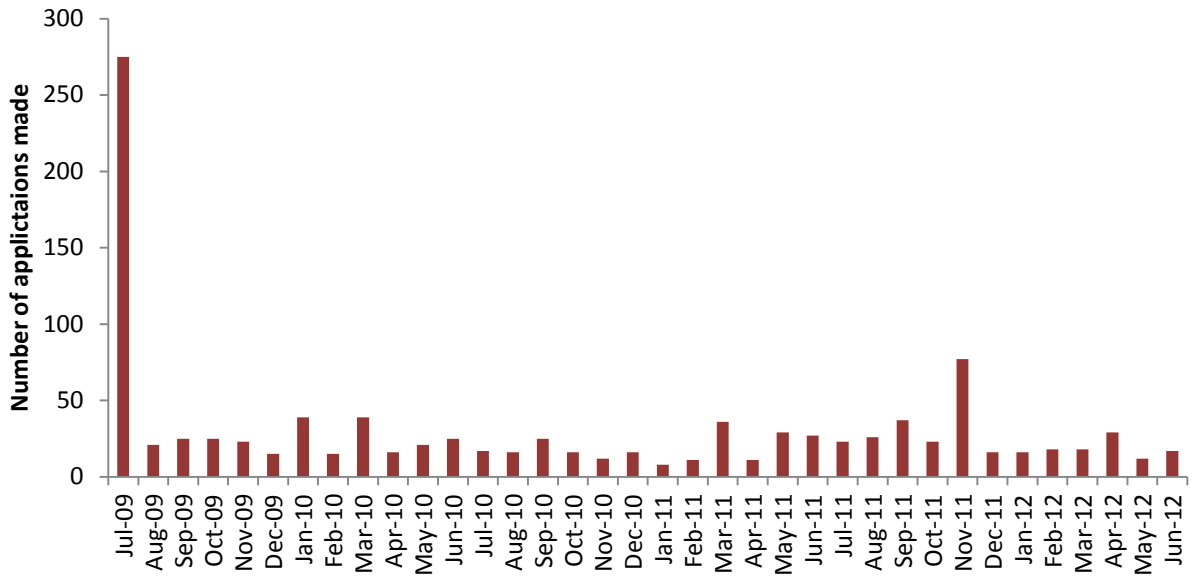
<sup>136</sup> FW Act ss.240(4), 595(3).

<sup>137</sup> See further FW Acts. 595(4).

<sup>138</sup> WR Acts.704(1).

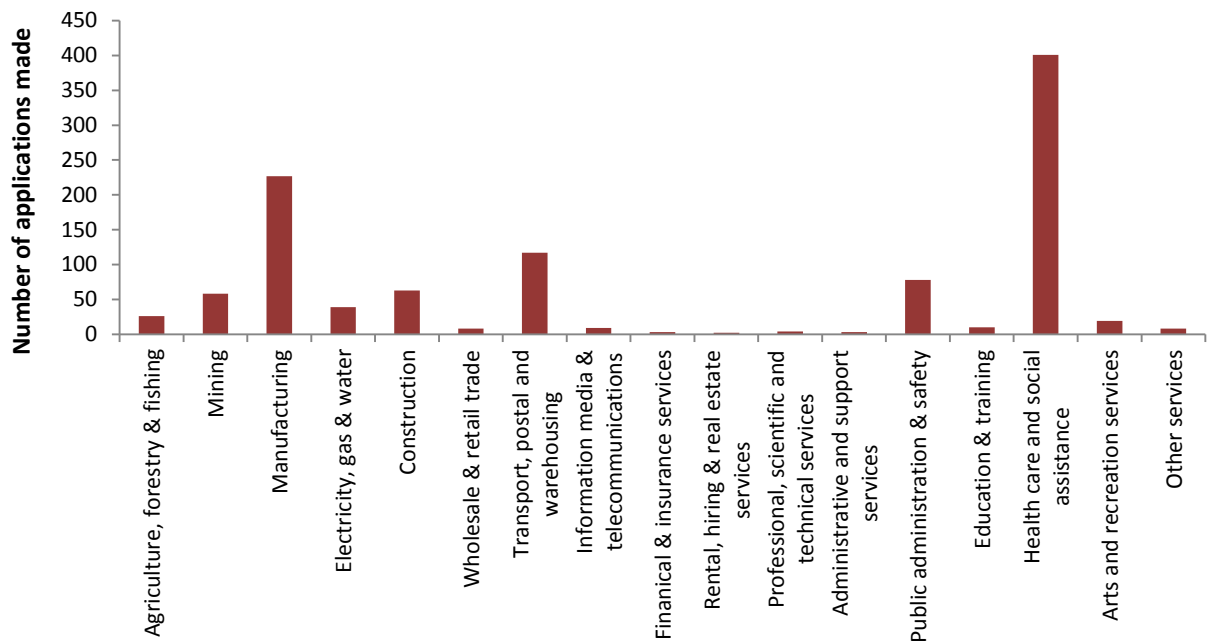
<sup>139</sup> WR Act s.706. For discussion of the operation and impact of these provisions see A Forsyth, 'Dispute Resolution under Work Choices: The First Year' (2007) 18 *Labour and Industry* 21.

**Figure 20** Number of applications made seeking assistance with bargaining disputes, monthly total



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 21** Applications made, FWA assistance with bargaining disputes, by industry



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

**Figure 21** reports the distribution of s.240 applications by industry. Again, it shows that these applications have been somewhat unevenly distributed across industry sectors:

- Three sectors – the same sectors found to be the most frequent users of most other forms of application available under Part 2-4 – account for almost three-quarters of all applications under s.240:
  - healthcare and social assistance (401 applications, or 37.3%);
  - manufacturing (227 applications, or 21.1%); and
  - transport, postal and warehouse services (117 applications, or 10.9%).
- Other sectors, in which it might be expected that FWA involvement in bargaining disputes might be prominent, account for a significant smaller proportion of all applications, notably:
  - public administration and safety (78, or 7.3% of applications made);
  - construction (63, or 5.9% of applications made); and
  - mining (58, or 5.4% of applications made).

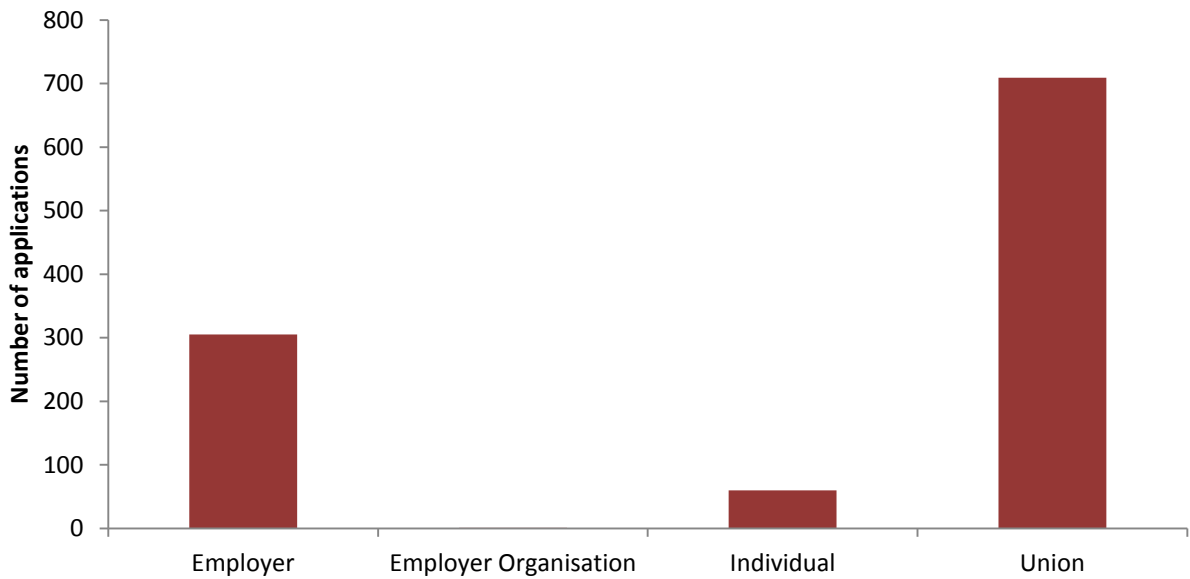
**Figure 22** reports the identity of applicants in s.240 matters:

- Unions accounted for 709 (or 66.0%) of all applications under s.240.
- A significant number of applications were made by employers (306, or 28.5% of s.240 applications).
- A small proportion (60, or 5.7%) were made by individuals.

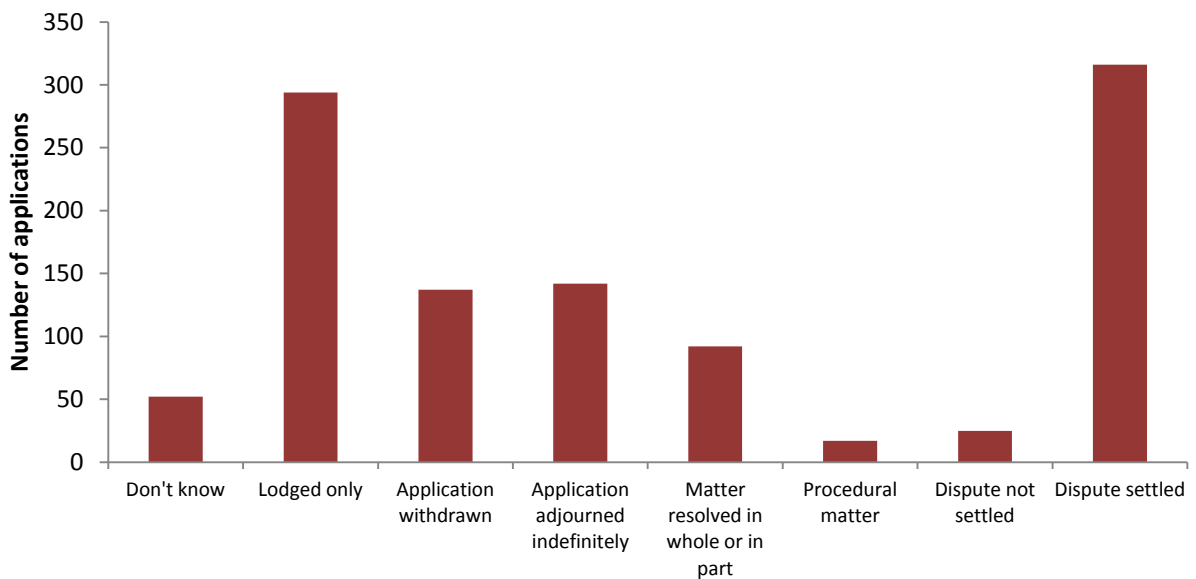
**Figure 23** reports the outcomes of s.240 applications:

- In a large number of cases (573, or 53.3%), the application did not proceed to any significant involvement of FWA. These include applications that were:
  - lodged only (294 cases, or 27.4% of the total);
  - withdrawn (137 applications, or 12.7%); or
  - adjourned indefinitely (142 applications or 13.2%).
- In 450 (or 41.9%) of the s.240 applications made in the three years following the commencement of the FW Act, FWA exercised its dispute resolution powers:
  - In 408 cases (37.9%), the dispute was either settled by FWA using its conciliation powers (316 cases, or 29.4%), or was resolved by FWA in whole or in part (92 cases, or 8.6%).
  - In just 25 cases (or 3.4% of s.240 applications), the dispute was not settled by FWA.
  - In 52 (or 4.8% of cases) it is not possible to determine the outcome of the matter from FWA's records.

**Figure 22** Applications made, FWA assistance with bargaining disputes, by applicant type



**Figure 23** Applications made, FWA assistance with bargaining disputes, by outcome



**Source:** Compiled from Fair Work Australia case management database. Data are for the period 1 July 2009 to 30 June 2012.

These figures indicate that s.240 is an important avenue for negotiating parties to access the assistance of the tribunal during bargaining. This was confirmed in our interview data (see further Chapter 9).

### 5.2.5 Low-paid authorisations

The low-paid bargaining provisions of the FW Act have been identified as one of the most novel features of the bargaining framework.<sup>140</sup> These provisions are intended to assist low-paid employees who have not historically had the benefit of, or who face substantial difficulty undertaking, enterprise-level collective bargaining.<sup>141</sup> Under s.242 of the FW Act, a bargaining representative or eligible union may apply to FWA for a 'low-paid authorisation'. The effect of this authorisation is to enable FWA to facilitate the making of a multi-enterprise agreement,<sup>142</sup> as well as to enliven obligations on those subject to the authorisation to bargain in good faith. Where the parties subject to a low-paid authorisation fail to reach agreement, and providing a number of requirements are met, FWA may make a low-paid workplace determination.<sup>143</sup>

Three applications for a low-paid authorisation have been made under s.242 since the FW Act commenced operation. The first two applications, made by United Voice (formerly the Liquor, Hospitality and Miscellaneous Workers' Union) and the Australian Workers' Union of Queensland in relation to employers in the government-funded aged care sector, were lodged in May 2010 and dealt with jointly by FWA.<sup>144</sup> A low-paid authorisation was granted by FWA with respect to 175 of these employers on 29 July 2011. This authorisation remains in force and the parties are currently engaged in negotiations for a multi-enterprise agreement to operate in the aged care sector.

The other low-paid authorisation application was submitted by the Australian Nursing Federation in November 2011, in relation to nurses employed in private sector general practice clinics and medical centres. This application is currently before FWA.

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<sup>140</sup> See, e.g., R Naughton, 'The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?' (2011) 24 *Australian Journal of Labour Law* 214.

<sup>141</sup> FW Act s.241 and House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, para [992].

<sup>142</sup> The specific powers of FWA to assist parties in negotiating a multi-enterprise agreement in the low-paid bargaining stream are set out in FW Act s.246 (see further Chapter 10 of this Report).

<sup>143</sup> FW Act Part 2-5, Division 2.

<sup>144</sup> Application by United Voice and the Australian Workers' Union of Employees, Queensland [2011] FWAFB 2633.



## 6 GETTING PARTIES TO THE TABLE: ARE MAJORITY SUPPORT DETERMINATIONS WORKING?

Majority support determinations (MSDs) are a key feature of the bargaining framework established under Part 2-4 of the *Fair Work Act 2009* (Cth) (FW Act). An employee bargaining representative may apply to Fair Work Australia (FWA) for an MSD where an employer refuses to bargain and it can be demonstrated that a majority of the relevant employees wishes to bargain collectively. An MSD is not of itself an enforceable order.<sup>145</sup> However, where an employer continues to refuse to bargain after an MSD is made, the bargaining representative who sought the MSD may apply to FWA for a bargaining order to require the employer to bargain.<sup>146</sup>

The availability of a mechanism to compel a reluctant employer to the bargaining table constitutes a key departure from the former statutory regime. Under the *Workplace Relations Act 1996* (Cth) (WR Act), there was no legal compulsion upon employers to bargain collectively, even when a majority of their employees wished to do so. As Cooper and Ellem explain, the WR Act ‘largely allowed employers themselves to decide whether and to what extent they would bargain with unions.’<sup>147</sup> The refusal of employers to negotiate collectively gave rise to a number of well-known and protracted bargaining disputes during the late 1990s and 2000s.<sup>148</sup> The Explanatory Memorandum to the Fair Work Bill 2008 explicitly identified the failure of the WR Act to provide a mechanism to address and resolve these types of disputes as a rationale for the introduction of MSDs.<sup>149</sup>

### 6.1 The legislative framework

The legislative provisions governing MSDs are found in ss.236 and 237 of the FW Act. These provisions are reproduced below.

#### SECTION 236 MAJORITY SUPPORT DETERMINATIONS

**236(1) [Definition]** A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to FWA for a determination (a **majority support determination**) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.

**236(2) [Application must specify persons to be covered]** The application must specify:

- (a) the employer, or employers, that will be covered by the agreement; and

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<sup>145</sup> See, e.g., *AWU v BlueScope Steel Ltd t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011) at [6].

<sup>146</sup> That is, based on breach(es) by the employer of the good faith bargaining (GFB) obligations: see ss.228, 230(2)(b) and Chapter 8 of this Report.

<sup>147</sup> R Cooper and B Ellem, ‘Getting to the Table? Fair Work, Unions and Collective Bargaining’ in B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective*, Routledge, New York, 2012, 135.

<sup>148</sup> See, e.g., J Whittard et al, ‘Collective Bargaining Rights under the *Workplace Relations Act*: The Boeing Dispute’ (2007) 18(1) *Labour and Industry* 1; R Cooper and B Ellem, ‘“Less than Zero”: Union Recognition and Bargaining Rights in Australia 1996 – 2007’ (2011) 52 *Labor History* 49.

<sup>149</sup> See House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, at [r.136].

- (b) the employees who will be covered by the agreement.

## **SECTION 237 WHEN FWA MUST MAKE A MAJORITY SUPPORT DETERMINATION**

### *Majority support determination*

**237(1)** FWA must make a majority support determination in relation to a proposed single-enterprise agreement if:

- (a) an application for the determination has been made; and
- (b) FWA is satisfied of the matters set out in subsection (2) in relation to the agreement.

### *Matters of which FWA must be satisfied before making a majority support determination*

**237(2)** FWA must be satisfied that:

- (a) a majority of the employees:
  - (i) who are employed by the employer or employers at a time determined by FWA; and
  - (ii) who will be covered by the agreement;want to bargain; and
- (b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and
- (c) that the group of employees who will be covered by the agreement was fairly chosen; and
- (d) it is reasonable in all the circumstances to make the determination.

**237(3) [FWA discretion as to appropriate method]** For the purposes of paragraph 2(a), FWA may work out whether a majority of employees wants to bargain using any method FWA considers appropriate.

**237(3A) [Clarification]** If the agreement will not cover all of the employees of the employer or employers covered by the agreement, FWA must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organizationally distinct.

### *Operation of determination*

**237(4)** The determination comes into operation on the day on which it is made.

An employer which breaches an MSD will not incur a penalty. Rather, as indicated above, where an MSD is in effect and the employer continues to refuse to bargain, the employee bargaining representative may then apply to FWA for a bargaining order to compel the employer to bargain.<sup>150</sup>

In the first three years of operation of Part 2-4 of the FW Act, FWA received 274 applications for MSDs, and made 78 determinations.<sup>151</sup> The tribunal published 55 decisions considering the operation of the MSD provisions, including three decisions by Full Benches of FWA. The ways in which FWA has interpreted and applied the key requirements set out in these provisions are discussed below.

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<sup>150</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, paras [976].

<sup>151</sup> For detailed analysis, see Chapter 5 of this Report.

## 6.2 Determining whether an employer has not already agreed to bargain or initiated bargaining

In order to issue an MSD, FWA must be satisfied that the employer has not already agreed to bargain or initiated bargaining.<sup>152</sup> A Full Bench of FWA in *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* held that an employer may indicate its willingness to bargain during the course of the process leading to the determination of an MSD application.<sup>153</sup>

A number of employers have sought to defend MSD applications by submitting that they had not refused to bargain, but that the timing of the union's request to commence bargaining was not convenient or suitable. This line of argument, however, has met with little success. In *AMWU v Seawind Catamarans Pty Ltd*, it was submitted that the employer did not oppose collective bargaining per se, but simply needed more time for both management and employees to be educated about the implications of collective bargaining.<sup>154</sup> This argument was rejected by Commissioner Harrison, who expressed his view that the employer's opposition to the application appeared to be based more on a desire to postpone the bargaining for commercial considerations. The Commissioner also emphasized that the making of an MSD does not (of itself) trigger a timetable for bargaining or an obligation to bargain.<sup>155</sup> In *AMWU v Christie Tea Pty Ltd*, the employer provided evidence to the tribunal that it had responded to the union's request that bargaining commence by seeking a six month delay in the commencement of negotiations. Commissioner Hampton found that the absence of any formal commitment by the employer to bargain, 'other than the vague notion that a delay until next year was sought' meant that the employer (effectively) 'had not yet agreed' to bargain.<sup>156</sup>

In *LHMU v Coca-Cola Amatil (Aust) Pty Ltd*, the Full Bench emphasised that 'agreeing to bargain' for purposes of s.237(2)(b) does not mean that an employer must make any concessions in relation to the scope or content of the proposed agreement.<sup>157</sup> In upholding Senior Deputy President O'Callaghan's original finding that the tribunal had no jurisdiction to issue the MSD sought by the union, as the respondent had already agreed to bargain, the Full Bench found that once bargaining has commenced, s.237 has no work to do: the scheme of the FW Act provides for scope orders as the appropriate mechanism through which to resolve disputes over the coverage of a proposed agreement.<sup>158</sup> The tribunal reached a similar conclusion in *Australian Institute of Marine Power Engineers, Queensland Branch v Port of Brisbane Corporation*, where the union argued that the employer had refused to bargain as it had refused to agree to negotiate a separate enterprise agreement to cover chief engineers.<sup>159</sup> In rejecting the application on the basis that the employer had agreed to bargain, although not in the form that the applicant would prefer, Senior Deputy President Richards pointed out that – as a result of

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<sup>152</sup> FW Act s.237(2)(b).

<sup>153</sup> [2009] FWA 668 (28 October 2009) at [44] and [45]. See also *ASU v Telecommunications Industry Ombudsman* [2012] FWA 716 (20 January 2012), where the tribunal dismissed the MSD application after accepting evidence of correspondence (dated 2 days before the hearing) to all employees and the union advising them of the employer's agreement to bargain.

<sup>154</sup> [2009] FWA 1510 (4 December 2009).

<sup>155</sup> *Ibid*, [11].

<sup>156</sup> [2011] FWA 6956 (13 October 2011) at [34].

<sup>157</sup> [2009] FWA 668 (28 October 2009) at [38].

<sup>158</sup> *Ibid*, [29]. See further Chapter 7 of this Report.

<sup>159</sup> [2010] FWA 4419 (15 June 2010).

the employer's agreement to bargain – the union had the capacity to apply for bargaining orders and other mechanisms under the FW Act to facilitate the bargaining process.<sup>160</sup>

One of the other main mechanisms available to 'kick-start' bargaining is the taking of protected industrial action under Part 3-3 of the FW Act. After several FWA decisions considering the relationship between MSDs and protected action,<sup>161</sup> a Full Court of the Federal Court of Australia held in *JJ Richards and Sons Pty Ltd v Fair Work Australia*<sup>162</sup> that a union may seek to compel an employer to bargain by instigating the process for taking protected action – without first having to obtain an MSD.<sup>163</sup> This issue has been the subject of considerable debate, and the Fair Work Act Review Panel recommended that the effect of the *JJ Richards* decision be overturned by an amendment to the FW Act: '... the capacity for protected industrial action to be taken to persuade an unwilling employer to bargain tends to undermine the [MSD] provisions, and represents a clear 'disconnect' with the new bargaining regime in the FW Act.'<sup>164</sup> However, we do not explore this matter further here, as the framework for protected industrial action generally falls outside the focus of this Report.

### 6.3 The time at which majority support is to be tested

Under s.237(2)(a) of the FW Act, FWA must be satisfied that majority support for bargaining exists among the employees who will be covered by a proposed enterprise agreement within a workplace, 'at a time determined by Fair Work Australia'. The tribunal has taken two different approaches to determining the relevant time to count the total number of employees to be covered by the proposed agreement, for purposes of ascertaining whether there is majority support for bargaining.

In *CFMEU v CBI Constructors Pty Ltd*, Deputy President McCarthy found that the appropriate time for determining whether a majority of employees want to bargain was the time when employees employed by CBI signed a petition indicating that they wanted to bargain.<sup>165</sup> The tribunal was required in this case to determine whether majority support for bargaining existed in a workplace with significant fluctuations in the number of employees. CBI had opposed the union's application for an MSD on the basis that, at the time the petition was signed, the number of employees at the project was being rapidly reduced due to the completion or reduction of works. As a consequence, it was unlikely that any collective agreement reached would cover many of those employees who had signed the petition. Under s.237(2)(a), CBI argued, FWA had to be satisfied that the population of employees for purposes of determining whether majority support existed were actually going to be covered by the agreement. This argument was rejected by Deputy President McCarthy.

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<sup>160</sup> Ibid, [28].

<sup>161</sup> See, e.g., *JJ Richards and Sons Pty Ltd v TWU* [2010] FWAFB 9963 (23 December 2010) and [2011] FWAFB 3377 (1 June 2011).

<sup>162</sup> [2012] FCAFC 53 (20 April 2012).

<sup>163</sup> Ultimately, the TWU obtained an MSD to compel JJ Richards to bargain collectively: *TWU v JJ Richards and Sons Pty Ltd* [2012] FWA 5609 (2 July 2012).

<sup>164</sup> See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 176-177.

<sup>165</sup> [2010] FWA 2164 (15 March 2010).

In refusing leave to appeal, a Full Bench of FWA rejected CBI's argument that the correct process for FWA to follow under s.237(2)(a) was to assess which employees, if any, would be covered by the proposed agreement; and then ascertain that a majority of *those* employees wanted to bargain.<sup>166</sup> The term 'employees who will be covered by the proposed agreement', according to the Full Bench, did not call for a prediction as to which particular employees would be covered by the agreement once it was made.

In several other matters, however, the tribunal has taken a different approach this issue. In an early decision, Senior Deputy President Richards ruled that under s.237(a), FWA is required to calculate the number of employees employed by an employer from the date that the tribunal is asked to make the determination.<sup>167</sup> More recently, in *AWU v Stagecraft Pty Ltd*, whether or not the AWU was able to demonstrate that a majority of employees wanted to bargain depended on when the count of the total number of employees was taken.<sup>168</sup> If it was taken at the time the petition was signed, four of the seven employees supported bargaining, whereas if the count was taken at the time of the first hearing (as submitted by the employer) the union would not be able to demonstrate a majority (with four out of nine or ten employees supporting bargaining). Deputy President McCarthy rejected the union's argument that, if a date later than the petition date was used, an employer would have the scope to employ other employees to ensure there was no majority, finding that the appropriate time was the date of the first hearing.

Another question that has arisen in MSD applications is whether the words 'at a time' in s.237(2)(a)(i) require that the views of employees be ascertained at a single point of time. Commissioner Raffaelli in *The Broken Hill Town Employees' Union* rejected this position, as it was untenable on a practical basis: many industries and workplaces do not allow for employees to be present at any one time or day, and it was acceptable for the views of employees to be ascertained over a period of days.<sup>169</sup>

In *Transport Workers' Union of Australia*, FWA considered whether a significant lapse of time between when the count of employees in favour of bargaining was taken, and the time when the application was heard in the tribunal, rendered the count unreliable.<sup>170</sup> More than six months had elapsed between when the TWU had organised its petition and the hearing of the application by FWA, which was provided with evidence of changes to the number of employees at the site and a shift in their membership during this period. In light of these considerations, Commissioner Lewin decided to retest the level of support among the workforce for bargaining, concluding that:

*"There is no statutory impediment to making the determination based on the material indicating a majority at mid 2011. In fact, it may perhaps be reasonably open to infer that at all material times, including the present, a majority is evident in the relevant sense. However, I have decided that before making a determination I will require a contemporaneous demonstration of the majority of employees wanting to bargain in a*

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<sup>166</sup> *CBI Constructors Pty Ltd v CFMEU* [2011] FWAFB 7642 (9 November 2011).

<sup>167</sup> *ASU v Regent Taxis Ltd t/a Gold Coast Cabs* [2009] FWA 1642 (10 December 2009), at [14]. This approach was cited favourably and applied by Senior Deputy Kaufman in *NUW v CMC Coil Steels Pty Ltd* [2010] FWA 410 (22 January 2010) at [26].

<sup>168</sup> [2012] FWA 2417 (22 March 2012).

<sup>169</sup> [2011] FWA 4331 (11 July 2011).

<sup>170</sup> [2012] FWA 3559 (1 June 2012).

*manner more currently certain than the material before me would allow. While mid 2011 and less certainly early 2012 could possibly be determined as the relevant times for the purposes of determining whether a majority of the relevant employees want to bargain, I consider it appropriate to determine the present as the time at which the relevant majority exists or otherwise is the better course. This is so, in my view, for two reasons. The first is immediate certainty; the second is to allow the employees currently employed to constitute the electorate for the purposes of establishing the majority in order for the determination to issue in that event.*<sup>171</sup>

The question whether the making of a MSD could be delayed, so as to enable an employer-initiated ballot ascertaining the views of the relevant employees to be held in the near future, was examined in *CFMEU v Xstrata Ulan Surface Operations Pty Ltd*.<sup>172</sup> The CFMEU had presented to the tribunal in early June 2012 a petition, conducted in late March to early May 2012, demonstrating that 47 employees (out of a total of 54) wished to bargain collectively. Xstrata disputed the application on the basis that the making of an MSD should be delayed until after an Australian Electoral Commission (AEC)-conducted secret ballot of employees, requested by Xstrata, was to be held a week later. The company argued that to do otherwise would constitute a denial of natural justice. This argument was rejected by Commissioner Roberts:

*‘There is only a short time lapse until [the ballot requested by Xstrata was to be held] and it is superficially tempting to delay my decision until the ballot result is known. However, I find that it is incumbent on me to consider the application on the materials and evidence available to me ... In my view, it is not open to me to delay making an order in circumstances where I have sufficient grounds to do so, based on some future possible different expression of views from employees of [the company]. In making this decision, I have not been influenced by speculative argument from either side in relation to such matters as alleged influence being brought to bear on employees to either have taken a particular course or to take a particular course in the future.*<sup>173</sup>

## 6.4 Evidence of majority support

Section 237(3) provides FWA with significant discretion to determine how majority support among the relevant employees to be covered by the proposed agreement is to be ascertained. The Explanatory Memorandum to the *Fair Work Bill 2008* explains that the types of evidence that FWA may consider suitable include evidence of union membership, petitions, surveys, written statements or ballots of employees.<sup>174</sup>

### 6.4.1 Petitions, surveys, ballots and other evidence of majority support

In considering applications for MSDs, FWA has demonstrated a preparedness to consider, and accept, a range of methods to demonstrate majority support.<sup>175</sup> The most common way of

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<sup>171</sup> Ibid, [40].

<sup>172</sup> [2012] FWA 4798 (7 June 2012).

<sup>173</sup> Ibid, [21].

<sup>174</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, [r.166] and [979].

<sup>175</sup> See e.g. *LHMU v MSS Security Pty Ltd* [2010] FWA 314 (20 January 2010); *ASU v Regent Taxis Ltd T/A Gold Coast Cabs* [2009] FWA 1642 (10 December 2009).

demonstrating majority support has been through petitions,<sup>176</sup> and the case law now firmly establishes that this is an acceptable method.<sup>177</sup> Other forms of evidence accepted by the tribunal have included employee signatures on union ‘pledge cards’;<sup>178</sup> and union-conducted surveys.<sup>179</sup>

Employers have challenged petitions on a number of grounds, including:

- the genuineness of the names and signatures, including whether employees had been coerced into signing;<sup>180</sup>
- that the employees did not know or understand what they were signing;<sup>181</sup>
- that the union provided misinformation to the employees concerned;<sup>182</sup>
- that the petition included signatures of employees outside the scope of the proposed agreement;<sup>183</sup>
- that employees were not given the opportunity to seek advice prior to signing;<sup>184</sup> and
- that the employees were not accorded privacy when signing the petition.<sup>185</sup>

FWA has recognised that circumstances may arise where a petition cannot be relied upon as a basis for the tribunal to determine whether majority support for bargaining exists.<sup>186</sup> Examples have included where there was some evidence that ‘the petition had been falsely derived’ or the signatures had been obtained by duress,<sup>187</sup> or where the proposition put to workers in the

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<sup>176</sup> The Fair Work Act Review Panel referred to DEEWR analysis of 49 MSD decisions, which found petitions, surveys and other methods were used to determine majority support in 71% of cases, while ballots (see below) were used in 22% of cases see J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 131.

<sup>177</sup> See e.g. *CFMEU v Xstrata Ulan Surface Operations Pty Ltd* [2012] FWA 4798 (7 June 2012); *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* (2009) 187 IR 141; *AWU v Flocast Pty Ltd* [2010] FWA 308 (21 January 2010); *AWU v BlueScope Steel Ltd t/as Bluescope Lysaght* [2010] FWA 874 (8 February 2010); *NUW v Corporate Express Pty Ltd* [2012] FWA 1811 (7 March 2012); *The Broken Hill Town Employees’ Union* [2011] FWA 4331 (11 July 2011); *AMIEU v Continental Smallgoods Pty Ltd* [2010] FWA 2673 (6 April 2010); *CFMEU v Mammoet Pty Ltd* [2009] FWA 1945 (24 December 2009); *CFMEU v Xstrata Glendell Mining Pty Ltd* [2009] FWA 1682 (22 December 2009); *AMWU v Seawinds Catamarans Pty Ltd* [2009] FWA 1510 (4 December 2009); *AMWU v Kinkaid Printing Pty Ltd T/A Cadillac Printing* [2009] FWA 1123 (16 November 2009).

<sup>178</sup> See e.g. *LHMU v MSS Security Pty Ltd* [2010] FWA 314 (20 January 2010); *ASU v Regent Taxis Ltd T/A Gold Coast Cabs* [2009] FWA 1642 (10 December 2009). In both these cases, however, the applications for MSDs were unsuccessful as the unions were unable to demonstrate majority support.

<sup>179</sup> See e.g. *AMWU v Seawinds Catamarans Pty Ltd* [2009] FWA 1510 (4 December 2009).

<sup>180</sup> See e.g. *AWU v BlueScope Steel Ltd t/as Bluescope Lysaght* [2010] FWA 874 (8 February 2010); *AMWU v Edlyn Foods Pty Ltd* [2011] FWA 7928 (16 November 2011).

<sup>181</sup> See e.g. *NUW v Corporate Express Pty Ltd* [2012] FWA 1811 (7 March 2012); *The Broken Hill Town Employees’ Union* [2011] FWA 4331 (11 July 2011); *AWU v The Austral Brick Co Pty Ltd t/as Austral Bricks* [2010] FWA 5819 (11 August 2010).

<sup>182</sup> See e.g. *AWU v BlueScope Steel Ltd t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011).

<sup>183</sup> See e.g. *AWU v The Austral Brick Co Pty Ltd t/as Austral Bricks* [2010] FWA 5819 (11 August 2010), where the group of employees whom the AWU originally addressed concerning the petition and who signed the petition included employees engaged under statutory individual employment agreements.

<sup>184</sup> See e.g. *CFMEU v Mammoet Pty Ltd* [2009] FWA 1945 (24 December 2009); *CFMEU v Sunbury Wall Frames & Trusses (Aust) Pty Ltd* [2010] FWA 3682 (10 May 2010).

<sup>185</sup> See e.g. *CFMEU v Sunbury Wall Frames & Trusses (Aust) Pty Ltd* [2010] FWA 3682 (10 May 2010).

<sup>186</sup> *AMWU v Edlyn Foods Pty Ltd* [2011] FWA 7928 (16 November 2011).

<sup>187</sup> *AMWU v Kinkaid Printing Pty Ltd/ T/A Cadillac Printing* [2009] FWA 1123 (16 November 2009) at [13].



petition was confusing or unclear.<sup>188</sup> However, in the absence of persuasive evidence creating doubt as to the veracity of a petition, FWA has proven very reluctant to accept employer submissions that it not accept petitions organised by the applicant for an MSD as evidence of majority support.<sup>189</sup>

The precise wording of the petition or ballot question has been the subject of dispute or concern in a number of MSD applications. For example in *CFMEU v Freo Group Ltd*,<sup>190</sup> the employer unsuccessfully opposed the union's application for an MSD on the basis that the petition relied upon by the union had asked employees if they wanted the CFMEU to 'represent' them as their 'bargaining agent.' There was a material difference, argued the employer, between an employee wanting the CFMEU to be his or her 'bargaining agent' and an employee wanting to 'bargain.' In rejecting an application for a stay of the decision to issue an MSD, Vice President Lawler referred to evidence from the union delegates that they had explained the significance of the petition to the employees. The Vice President emphasized that 'so far as the requirement in s.237(2)(a) is concerned, it is necessarily implicit in an employee wanting a union to be his/her bargaining representative that the employee wants to bargain.'<sup>191</sup>

In *AMWU v Seawind Catamarans Pty Ltd*, the wording of an employer-conducted ballot was the focus of contention in the tribunal.<sup>192</sup> Shortly after the AMWU collected signatures on its petition, the company administered its own survey and sought to rely on this in FWA to demonstrate that the majority of employees had not understood the implications of signing the union petition. The preamble to the employer survey read: 'If this application is approved it will effectively mean that employee relations at Seawind Catamarans will become under the control of the AMWU, a result that would be irreversible in the future.' Commissioner Harrison expressed 'severe reservations' about the employer survey, noting its wording was 'not an accurate representation of the implications or the meaning of the [FW] Act', was 'emotive in its language' and tended to 'skew somewhat the results'. The Commissioner relied, instead, on the simply worded union petition.<sup>193</sup>

#### 6.4.2 When will FWA arrange for a secret ballot?

In a number of MSD applications where the parties have been in dispute over whether majority support for bargaining exists among the relevant employees, FWA has suggested that the parties agree to an independently-conducted ballot. This generally involves the parties agreeing over the appropriate body to conduct the ballot; the information to be provided to employees and the wording of the ballot question; the timing of the ballot; and protocols over the conduct of the ballot. This approach seems to have met with varying degrees of success.<sup>194</sup>

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<sup>188</sup> *AMWU v Edlyn Foods Pty Ltd* [2011] FWA 7928 (16 November 2011) at [7].

<sup>189</sup> See e.g. *AWU v Bluescope Steel Limited t/as Bluescope Lysaght* [2010] FWA 874 (8 February 2010); *AMWU v Kinkaid Pty Ltd T/A Cadillac Printing* [2009] FWA 1123 (16 November 2009); *AMWU v Edlyn Foods Pty Ltd* [2011] FWA 7928 (16 November 2011); *NUW v Corporate Express Pty Ltd* [2012] FWA 1811 (7 March 2012).

<sup>190</sup> [2010] FWA 3489 (30 April 2010).

<sup>191</sup> *Ibid*, [11].

<sup>192</sup> [2009] FWA 1510 (4 December 2009).

<sup>193</sup> *Ibid*, [3].

<sup>194</sup> The parties managed to reach such an agreement (and an MSD was subsequently made following the ballot) in *NUW v GKK Enterprises Pty Ltd* [2011] FWA 5531 (5 September 2011). In contrast, in *BlueScope*



In several instances, the tribunal has demonstrated a willingness to take proactive steps to satisfy itself as to whether an MSD should be issued. In doing so, some FWA members have indicated that the legislature intended that FWA should adopt such an approach, where the tribunal is uncertain as to whether a majority of the workforce supports collective bargaining based on the evidence offered by an MSD applicant.<sup>195</sup> In *APESMA, The Collieries' Staff Division v Endeavour Coal Pty Ltd*, Commissioner Roe expressed his view that support for this kind of approach is found in the objects, and Part 2-4, of the FW Act:

*'The circumstances of this whole matter suggest that the employer is advocating individual bargaining and the union is advocating collective bargaining. The Act clearly encourages and facilitates collective bargaining. There are some doubts from the words of the alternative petition that the employees may, in fact, be seeking collective bargaining but not necessarily with APESMA. I, of course, am not in any way determining that matter but simply suggesting that, given the form of the petition, there are some doubts.*

*A majority support determination is still appropriate, even if the agreement sought in the end does not end up being with the union. I have particular regards for the objects of the Act and, in particular, objects 3C, 3E and 3F of the legislation, and also section 171, which is the objects of the enterprise bargaining part of the legislation, part 2-4, and section 171, clearly directed at facilitating good faith bargaining and the making of enterprise agreements. ...*

*Therefore given the objects of the legislation, I think it is appropriate in the circumstances of this matter that the Tribunal should take further steps to identify whether or not a majority support determination should be made on the basis of the application.'*<sup>196</sup>

Employers opposing applications for MSDs frequently argue that a secret ballot should be ordered to determine whether majority support exists, and to enable employees to express their views in private so as to avoid being pressured to sign a petition or other document indicating support for collective bargaining. However, FWA has been cautious to emphasize that it will only order a secret ballot where it is satisfied in the particular circumstances of the case that this is the appropriate course to ascertain the views of employees.<sup>197</sup>

The leading case on whether a secret ballot is necessary to ascertain majority support is *AMWU v Cochlear Ltd*.<sup>198</sup> The parties in this matter had long been involved in a protracted and bitter dispute as the employer sought to resist the AMWU's efforts to collectively bargain. In fact, this dispute was cited in the regulatory analysis accompanying the *Fair Work Bill 2008* as an example of the type of workplace where MSDs may be effective.<sup>199</sup> Soon after Part 2-4 of the FW

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*Steel Limited t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011), the parties were unable to agree over issues such as who would bear the costs of the ballot and the appropriate wording of the ballot question.

<sup>195</sup> See e.g. Commissioner Lewin in *Transport Workers' Union of Australia*, Transcript B2011/4015 (4 April 2012), at PN4597.

<sup>196</sup> [2010] FWA 7497 (28 September 2010), [9].

<sup>197</sup> See e.g. *AWU v BlueScope Steel Limited t/as Bluescope Lysaght* [2010] FWA 874 (8 February 2010).

<sup>198</sup> [2009] FWA 67 (4 August 2009).

<sup>199</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, [r.136]. See also the discussion of the Cochlear dispute, including the MSD process under the FW Act, in A Forsyth, "The Impact of "Good Faith" Obligations on Collective Bargaining Practices and

Act came into effect, the AMWU applied for an MSD on the basis of a survey conducted by the union of production staff at Cochlear from April to July 2009. This survey showed that 171 out of the 177 respondents wanted to be represented by the AMWU in negotiations for a collective agreement, and that 167 out of the 177 employees wanted a collective agreement. According to the company, the total number of employees to be covered by the proposed agreement numbered around 320. The company disputed the evidence of majority support offered by the union on a number of bases, including that some of the survey forms had been completed fraudulently. In justifying his decision to arrange for the AEC to conduct a postal ballot of the relevant employees, Commissioner Harrison observed:

*'Given the multicultural nature of the workforce and the controversy between the parties over some time, the survey was in my view a positive initiative for which I have no criticism. In my view this was a legitimate exercise to ascertain the views of employees as a precursor to negotiations with the company. I have no reason to doubt the integrity or genuine intent of persons involved in conducting the survey. I am however not fully satisfied that the methodology utilised can reasonably withstand the scrutiny required for the purposes of a determination of the type being sought in these proceedings.'*<sup>200</sup>

Commissioner Harrison proceeded to emphasise the 'wide discretion' held by FWA to determine whether a majority of employees want to bargain, and that *'[e]ach application will stand on its own facts and circumstances.'*<sup>201</sup> The Commissioner further identified as considerations informing the tribunal's decision in this matter the long history of the dispute, and the consequent risk that the persistence of doubt about the employees' intentions would fuel further litigation and appeal processes.<sup>202</sup> Following the endorsement of collective bargaining by almost 60% of Cochlear employees in the secret ballot, FWA issued an MSD.<sup>203</sup>

Since the *Cochlear* decision, FWA has resisted attempts by employers to argue the necessity for a secret ballot on the basis of the multicultural nature of the workforce and the degree of 'controversy' between the employer and the union.<sup>204</sup> In *LHMU v MSS Security Pty Ltd*, for example, Commissioner Cloghan expressed the following view:

*'Although it may seem trite, I would be surprised if there is a workforce, in the length and breadth of Australia, that is not multicultural to a lesser or greater extent. Secondly, to infer that, as a result of it being a multicultural workforce, it is necessary to conduct an AEC ballot ... is demeaning to the intelligence and understanding of the workforce ...*

*As for the second "arm" of the employer's argument for a secret ballot that "controversy" exists between the Employer and Union, I consider this unremarkable and exists, again, to*

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Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1, 42-43.

<sup>200</sup> *AMWU v Cochlear Ltd* [2009] FWA 67 (4 August 2009), [1].

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *AMWU v Cochlear Ltd* [2009] FWA 125 (20 August 2009). The Cochlear dispute has also involved applications for bargaining orders by both the employer and the union; see Chapter 8 of this Report.

<sup>204</sup> See e.g. *AMIEU v Continental Smallgoods Pty Ltd* [2010] FWA 2673 (6 April 2010); *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377 (in this case, the employer responded to correspondence from the union indicating that it wished to commence negotiations for a collective agreement by circulating a memo to employees attaching a pro forma letter of resignation from the union).

*a greater or lesser extent over the lifetime of any such relationship between unions and employers.’<sup>205</sup>*

Other considerations taken into account by FWA members, in rejecting employer concerns over the inability of their workforce to understand union petitions, include evidence that the employer itself did not circulate any documents to employees in a language other than English, and evidence from the union that it had asked bilingual colleagues to translate the material for their colleagues.<sup>206</sup> Other members of the tribunal have distinguished the *Cochlear* decision on the basis of the protracted nature of that dispute and the degree of hostility between the parties in that case.<sup>207</sup> In *CFMEU v Xstrata Ulan Surface Operations Pty Ltd*,<sup>208</sup> Commissioner Roberts decided to accept a petition (the legitimacy of which had not been contested by the employer) as establishing majority support, rather than waiting for the outcome of an AEC ballot organised by the employer at the request of several employees: ‘it is not open to me to delay making [an MSD] in circumstances where I have sufficient grounds to do so, based on some future possible different expression of views from [the] employees’.<sup>209</sup>

Analysis of the case law indicates that FWA, in deciding to order a secret ballot, has based this decision on factors such as:

- doubt over the integrity of the petition;<sup>210</sup>
- evidence of significant employee turnover since support for collective bargaining was first tested;<sup>211</sup>
- the same employees having signed more than one petition indicating contrary views (see further below);<sup>212</sup> and
- in some instances, the union applicant for an MSD itself seeking to establish majority support on the basis of a ballot.<sup>213</sup>

The case for retesting employee support by way of a ballot appears to be strengthened where the evidence proffered to support the MSD application indicates only a narrow majority in favour of collective bargaining.<sup>214</sup>

In *AWU v BlueScope Lysaght*,<sup>215</sup> FWA was asked to consider three competing petitions that purported to demonstrate the preferences of 48 production and maintenance employees at the employer’s facility in South Australia: the first organised by the union and signed by 30 employees; the second organised by the company and signed by 31 employees (including some who had earlier signed the union petition); and the third provided directly to the tribunal by a BlueScope employee (indicating that 33 employees were not in favour of bargaining). Senior Deputy President O’Callaghan concluded that the employees had been given a substantial

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<sup>205</sup> [2010] FWA 314 (20 January 2010), [57] and [59] (footnote omitted).

<sup>206</sup> *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377 (1 December 2009).

<sup>207</sup> See e.g. *AMIEU v Continental Smallgoods Pty Ltd* [2010] FWA 2673 (6 April 2010).

<sup>208</sup> [2012] FWA 4798 (7 June 2012).

<sup>209</sup> *Ibid*, [21].

<sup>210</sup> *TWU v M.J. Rowles Pty Ltd* [2012] FWA 955 (2 February 2012).

<sup>211</sup> *Ibid*.

<sup>212</sup> *AWU v BlueScope Steel Limited t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011).

<sup>213</sup> See e.g. *CFMEU and AWU v IPA Personnel Pty Ltd* [2012] FWA 511 (17 January 2012).

<sup>214</sup> *TWU v M.J. Rowles Pty Ltd* [2012] FWA 955 (2 February 2012).

<sup>215</sup> *AWU v BlueScope Steel Limited t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011).

amount of contradictory information by the disputing parties, and that the signing of different petitions by the same employees at different times (demonstrating conflicting views) gave rise to significant confusion. In light of these considerations, the Senior Deputy President ordered that the AEC conduct a ballot of the relevant employees, with FWA to bear the costs.<sup>216</sup>

### **6.4.3 Measures taken by FWA relating to the conduct of ballots and other means of establishing majority support**

FWA members have shown varying degrees of willingness to direct parties as to appropriate behaviour in the period between the ordering and the conduct of the ballot. For example, in *ASU v Telecommunications Industry Ombudsman*, Commissioner Smith determined that FWA would conduct a secret ballot of the relevant employees and directed the parties not to engage in any conduct designed to influence the employees in their vote. The Commissioner then prepared an information sheet for distribution to employees with the voting paper.<sup>217</sup> In *AWU v BlueScope Lysaght*,<sup>218</sup> Senior Deputy President O’Callaghan directed that the ballot occur on the basis that both parties be given the opportunity to put their positions to employees. The Senior Deputy President emphasized, however, that the content and the manner of any communication with employees was a matter for the parties and should reflect a common sense and practical approach. Finally, Senior Deputy President O’Callaghan required BlueScope Lysaght management to provide to each relevant employee, in a timely manner, FWA’s order and an information sheet about the agreement-making process and where to go for further information.

In *CFMEU v Oz Linemarking Pty Ltd*, an independent ballot of employees was ordered after the tribunal was presented with evidence which ‘effectively cancelled out the claims made by both sides.’<sup>219</sup> The parties then agreed on Commissioner Ryan conducting a ballot of the relevant employees and the wording of the ballot paper. The Commissioner then addressed the employees directly and gave both parties the opportunity to do the same. This process involved a second ballot due to the closeness of the result in the first ballot.<sup>220</sup> In several other cases where a secret ballot was ordered, Commissioner Roe has directed that paid meetings of no more than 30 minutes be held between the employees and the union prior to the conduct of the ballots.<sup>221</sup>

In *APESMA, The Collieries’ Staff Division v Endeavour Coal Pty Ltd*, the employer raised doubts over whether the petition provided by the union clearly established majority support. With the parties’ consent, Vice President Lawler sent a letter to all relevant employees, advising them of the position of both parties and requesting that employees who had signed the original petition

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<sup>216</sup> In *TWU v M.J. Rowles Pty Ltd* [2012] FWA 955 (2 February 2012), the employer and the union agreed to share the costs of having the AEC conduct the ballot.

<sup>217</sup> [2012] FWA 66 (17 January 2012).

<sup>218</sup> *AWU v BlueScope Steel Limited t/as Bluescope Lysaght* [2011] FWA 7525 (8 November 2011).

<sup>219</sup> [2010] FWA 8485 (3 November 2010), [2].

<sup>220</sup> *Ibid*, [8]-[9].

<sup>221</sup> *IEUA v Academy of Interactive Entertainment* [2010] FWA 7733 (5 October 2010) and PR501685 (14 September 2010); *APESMA, The Collieries’ Staff Division v Endeavour Coal Pty Ltd* [2010] FWA 7497 (28 September 2010).

contact his associate by email if they had changed their mind, or if they had not signed the original petition but now wanted to bargain.<sup>222</sup>

A final issue that has arisen in the context of determining whether majority support exists, is the apparent lack of any avenue through which unions can ascertain the number of relevant employees in a workplace among whom support for bargaining is to be tested.<sup>223</sup> In *ASU v Gold Coast Cabs*,<sup>224</sup> where the ASU's MSD application failed as it fell short of a majority, Senior Deputy President Richards observed that there was no obligation on an employer to disclose the total number of its employees:

*'...the FW Act provides no arrangements for the disclosure of a list of employees to allow an applicant for a majority support determination to ascertain whether a majority of employees want to bargain, such that issues [in dispute] might be obviated at an earlier point.'*<sup>225</sup>

This also proved to be the downfall of the union's application for an MSD in *LHMU v MSS Security Pty Ltd*.<sup>226</sup> Having accepted that the union had met all other requirements of the relevant provisions, Commissioner Cloghan found that it had failed to provide evidence of majority support. The union had not known the precise size of the workforce and proceeded on the assumption that 70 to 80% of the employees supported bargaining; this proved to be incorrect, and the union actually fell short of the majority needed for the application to succeed.

It should be noted that, in several cases, FWA has addressed this issue by ordering the employer to disclose to the tribunal the number of relevant employees that form the basis for ascertaining whether majority support for collective bargaining exists.<sup>227</sup> In some other cases, the employer has voluntarily provided this information.<sup>228</sup>

## 6.5 Other bases for employer challenges to MSD applications

In addition to the grounds discussed above, employers have challenged MSD applications on a number of bases – going beyond arguments that one or more of the statutory requirements for making an MSD have not been met – most of which have proven unsuccessful. These have included contentions that an MSD application was discriminatory (because it sought to facilitate the making of an agreement that would exclude most of the employer's workforce);<sup>229</sup> that the MSD provisions require that FWA not accept evidence gathered retrospectively, but instead formulate an appropriate method of determining majority support and apply this

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<sup>222</sup> [2010] FWA 7497 (28 September 2010). This approach was overtaken by the receipt by Vice President Lawler of a second petition from employees, some of whose names were on the original petition, indicating that they wanted to 'opt out' of bargaining. Subsequently, Commissioner Roe ordered that a secret ballot be held.

<sup>223</sup> This limitation in the MSD provisions has been noted by union practitioners. See e.g. T Wetherell, 'Majority Support Determinations under the Fair Work Act 2009', *Law Institute Journal*, June 2011, 44; and Interviewee 36a.

<sup>224</sup> *ASU v Regent Taxis Ltd T/A Gold Coast Cabs* [2009] FWA 1642 (10 December 2009).

<sup>225</sup> *Ibid*, [15].

<sup>226</sup> [2010] FWA 314 (20 January 2010).

<sup>227</sup> See e.g. *TCFUA v Kennon Auto Pty Ltd* [2009] FWA 1377 (1 December 2009), [17].

<sup>228</sup> See e.g. *United Voice v Berkeley Challenge Environmental Services Pty Ltd* [2011] FWA 3422 (1 June 2011).

<sup>229</sup> *AWU (Qld) v Peace Lutheran Church Gatton Inc T/A Anuha Services* [2011] FWA 4054 (27 June 2011).

prospectively;<sup>230</sup> and that an MSD application should fail because the union was pursuing unlawful and unpermitted content in its log of claims for the agreement.<sup>231</sup>

In a number of cases, employers have successfully challenged the capacity of the union to lodge an MSD application, on the basis that the union is not entitled to represent the workers in question and is therefore not a valid employee bargaining representative under s.176 of the FW Act.<sup>232</sup> In several other instances this kind of argument by employers has failed, with FWA finding that the union in question had rights of industrial coverage over the relevant workers, and could therefore make an MSD application on their behalf.<sup>233</sup>

Finally, a number of employers have (unsuccessfully) sought to defend MSD applications by arguing that FWA cannot be satisfied that it would be reasonable in the circumstances to make the determination (a requirement under s.237(2)(d) of the FW Act). In *AMWU v Christie Tea Pty Ltd*, for example, the employer argued that it was reasonable for the employer to continue to rely on the modern award and to have FWA determine wage adjustments; and that the bargaining process would be a distraction to the business at a time when recent capital commitments were being incorporated into their operations.<sup>234</sup> While noting that FWA must have regard to all relevant circumstances when assessing the reasonableness of making an MSD, Commissioner Hampton concluded that:

*‘The desire of the majority of employees is an important consideration and supported by the scheme of the Act. There is also nothing unreasonable or inappropriate about seeking to advance a resolution of the issues proposed by the union for consideration in the bargaining process.’*<sup>235</sup>

Similarly, in *ASU v Equity Valet Parking Pty Ltd*, Vice President Watson rejected the employer’s submission to the effect that it was not reasonable to make an MSD given that it is a small employer; and that FWA is required, in the exercise of its discretion, to have regard to the object in s.3(g) of the legislation that the special circumstances of small and medium-sized companies be acknowledged. The Vice President indicated that the size of the employer’s undertaking did not constitute grounds to suggest that it would be unreasonable to permit collective bargaining.<sup>236</sup>

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<sup>230</sup> *The Broken Hill Town Employees’ Union* [2011] FWA 4331 (11 July 2011).

<sup>231</sup> *NUW v CMC Coil Steels Pty Ltd* [2010] FWA 410 (22 January 2010).

<sup>232</sup> See s.176(1)(b) and (3), discussed in Chapter 2 of this Report; and see e.g. *Heath v Gravity Crane Services Pty Ltd* [2010] FWA 7751 (5 October 2010), where FWA rejected a union official’s argument that he had been appointed as bargaining representative in a ‘personal’ capacity (rather than the union, which did not have coverage rights over the relevant employees, being appointed as bargaining representative). See also *Technip Oceania Pty Ltd v Tracey* [2011] FWA 6551 (7 November 2011), discussed in Chapter 8 of this Report.

<sup>233</sup> See e.g. *ASU v IBM Australia Pty Ltd* [2010] FWA 3340 (7 May 2010); *AWU v Debco Pty Ltd* [2011] FWA 4393 (14 July 2011). In *Transport Workers’ Union of Australia* [2012] FWA 3559 (1 June 2012), the unsuccessful challenge to the applicant union’s ability to seek an MSD was brought by a rival union which also asserted rights of industrial coverage over the relevant employees.

<sup>234</sup> [2011] FWA 6956 (13 October 2011).

<sup>235</sup> *Ibid*, [42].

<sup>236</sup> *ASU v Equity Valet Parking Pty Ltd* [2011] FWA 2036 (4 April 2011), [27].

## 6.6 Determining whether the group of employees to be covered has been ‘fairly chosen’

Before making an MSD, FWA must be satisfied that that the group of employees who will be covered by the proposed agreement was fairly chosen.<sup>237</sup> The FW Act further specifies that, where the agreement will not cover all of the employees of the relevant employer(s), FWA must - in deciding whether the group of employees who will be covered was fairly chosen - take into account whether that group is geographically, operationally or organizationally distinct.<sup>238</sup> The requirement that the group of employees to be covered by an agreement be ‘fairly chosen’ is discussed in detail in Chapter 7, as it is also a key factor as to which the tribunal must be satisfied before making a scope order.<sup>239</sup> Analysis of decisions, in which employers have disputed the making of an MSD because the fairly chosen requirement was not met, suggests that FWA has taken a practical approach that promotes rather than impedes access to bargaining (while also pointing out that it is not the tribunal’s role under the MSD provisions to determine the scope of a proposed agreement).<sup>240</sup>

For example, in *AWU v Debco Pty Ltd*, Commissioner Bissett concluded that she could not be satisfied that the group of employees proposed by the AWU to be covered by the agreement was fairly chosen, largely because attempting to distinguish a group of employees on the bases identified by the union may not provide certainty as to who would and would not be covered by the agreement.<sup>241</sup> The Commissioner proceeded to propose a slight adjustment to the union’s proposal, so as to ensure that the group of employees to be covered by the MSD was fairly chosen, taking into account operational and organizational characteristics.<sup>242</sup> In *AWU v The Austral Brick Co Pty Ltd T/A Austral Bricks*, Commissioner Hampton accepted that the union’s proposed group of three employees was fairly chosen.<sup>243</sup> While these employees were part of a larger group of 14 or so production workers, all the other employees were on statutory individual agreements (with the effect that they were not eligible to participate in collective bargaining unless those arrangements were terminated or had expired). Commissioner Hampton indicated that:

*‘to not allow the group to be defined in this manner, would in effect deny any group of employees (where some of their cohort were engaged on unexpired individual transitional agreements) from seeking to bargain. Such would be contrary to the objects and scheme of the [FW] Act.’<sup>244</sup>*

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<sup>237</sup> FW Act s.237(2)(c).

<sup>238</sup> FW Act s.237(3A).

<sup>239</sup> FW Act s.238(4)(c), (4A).

<sup>240</sup> See e.g. *CEPU v Monadelphous Engineering Associates Pty Ltd* [2010] FWA 6357 (19 August 2010); *Union of Christmas Island Workers* [2011] FWA 5099 (4 August 2011).

<sup>241</sup> [2011] FWA 4393 (14 July 2011).

<sup>242</sup> *Ibid*, [87].

<sup>243</sup> [2010] FWA 5819 (11 August 2010). Note that by the time this application was heard, the issue whether the proposed group of employees was fairly chosen was no longer in dispute; however, the tribunal proceeded to express its view on this issue.

<sup>244</sup> *Ibid*, [15].

## 6.7 When will FWA revoke a majority support determination?

In *BHP Coal Pty Ltd v APESMA*, the tribunal considered the circumstances in which it would revoke an MSD.<sup>245</sup> Almost two years after an MSD had been made by FWA in relation to APESMA members at its Broadmeadow mine, BHP Coal applied for revocation of the determination under s.603 of the FW Act. While conceding that the original determination was appropriately made, the company argued that circumstances had changed. In particular, in response to discussions with a number of employees, the company had conducted a vote which demonstrated that there was no longer majority support for a collective agreement.<sup>246</sup> While accepting that the tribunal had the power to revoke an MSD, APESMA argued that this power should be exercised with ‘considerable caution’ and only in ‘exceptional circumstances’.<sup>247</sup> The union further submitted that the entire conduct of the employer should be taken into account when considering whether to revoke the MSD, not simply the outcome of the vote, as the employer had undertaken ‘... a concerted campaign to overturn the determination.’<sup>248</sup> In rejecting the employer’s application, Commissioner Spencer indicated that the MSD had been ‘competently made’; and she was not persuaded by the evidence that revocation was appropriate.<sup>249</sup>

## 6.8 Assessing the impact of the MSD provisions

The analysis of published decisions above suggests that FWA has taken a relatively flexible and non-legalistic approach to the task of determining whether majority support for collective bargaining exists – the key pre-condition for making an MSD under s.237 of the FW Act. Members of the tribunal have also shown initiative in ascertaining the views of employees, where the evidence of majority support presented by an applicant for an MSD is equivocal.

Our interview data supports the conclusion that the MSD provisions have been fairly effective in compelling employers to bargain, where a majority of their workers wish to do so. Many of the interviewees - both employers and unions - expressed the view that the provisions, and FWA’s pragmatic approach to their interpretation and application, have facilitated the commencement of bargaining in many cases.

For a number of union representatives interviewed, the MSD provisions were one of the most positive features of the new bargaining framework established under Part 2-4 of the FW Act. For example:

*‘The best thing is the majority support determinations I think. ... [I]t gives you the ability to bring them to the bargaining table, whereas before they could just stonewall forever.’<sup>250</sup>*

*‘I think that’s a real improvement on previous legislation. ... [U]sually it’s with new employers and it’s a bit of an eye opener for them to go “Oh, OK, a majority of mine ... [wants a collective agreement]”. I think most of the time with majority support*

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<sup>245</sup> [2012] FWA 4435 (20 June 2012).

<sup>246</sup> Ibid, [14].

<sup>247</sup> Ibid, [15]-[16].

<sup>248</sup> Ibid, [50].

<sup>249</sup> Ibid, [59].

<sup>250</sup> Interviewee 3a.



*determinations, because often people will join a union and it will be direct debit, the company won't know about it and it's a bit of a surprise to the company that there is that much support for an agreement.*<sup>251</sup>

*'I think the majority support determinations are ... pretty useful for our union and organising.'*<sup>252</sup>

The reluctance of FWA to entertain legalistic and complex arguments by employers in opposition to MSD applications was identified by a number of interviewees as a key element in the effectiveness of the MSD mechanism in practice:

*'[T]he case law has developed to a point that the ability to object is confined.'*<sup>253</sup>

*'There is nothing in [the FW Act] that ... allows us to prevent some union whipped up, majority determination out the back from actually happening.'*<sup>254</sup>

At the same time, however, it was also emphasised by several union representatives (across different industries) that the approach of their unions to the preparation of applications for MSDs within workplaces had developed significantly over the first several years of the FW Act's operation, so as to minimise the possibility of challenges. This included consideration of matters such as how they gathered evidence of majority support, and the timeframes within which they organised and lodged MSD applications.<sup>255</sup> This strategic approach to the use of the MSD mechanism is also likely to be a factor in the relatively high success rate of MSD applications, when compared with applications under other provisions of Part 2-4 of the FW Act.<sup>256</sup>

The interviews also revealed that the MSD provisions, and the way in which they have been interpreted and applied by Fair Work Australia, are having an important 'shadow effect'.<sup>257</sup> This effect (operating at a more general level) was identified and discussed in Chapters 2 and 5 with respect to the number of applications made under Part 2-4 of the FW Act. The interview data supports the conclusion that many employers are now agreeing to bargain without a determination needing to be issued, or even without a bargaining representative having to formally lodge an MSD application. This effect was noted by both employers and union representatives across a range of industries. Interviewees who had lodged MSD applications explained that they had withdrawn these prior to the hearing as the employer had agreed to bargain in the period between the application being lodged and the first hearing.<sup>258</sup> As one interviewee explained, 'where we persevere and we can get the numbers, and get the petitions,

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<sup>251</sup> Interviewee 11a.

<sup>252</sup> Interviewee 44a.

<sup>253</sup> Interviewee 23a. See also Interviewee 11a.

<sup>254</sup> Interviewee 9b.

<sup>255</sup> Interviewee 23a; Interviewee 44a.

<sup>256</sup> See further Chapter 5 of this Report.

<sup>257</sup> This effect has also been observed by others: see e.g. J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 22, 131; P Burns, C Gardner and R Doyle, *Bargaining under the Fair Work Act – A Freehills Retrospective*, Vol. 2, 2010-2011, 4; A Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1, 45-47.

<sup>258</sup> Interviewee 39a, Interviewee 23a; Interviewee 24a; and Interviewee 44a.

and be confident, then usually the employer sees the writing's on the wall.'<sup>259</sup> Another interviewee observed that, when presented with evidence of a petition, the response of smaller employers was now often 'you know what, I don't want to spend money on lawyers, let's just talk about an agreement.'<sup>260</sup>

For other interviewees, even going through the motions of compiling evidence of majority support was no longer always necessary: '*... just the existence of the MSD [provisions] means that an employer is far more likely to agree to bargaining ...*'.<sup>261</sup> As a union representative explained:

*'[I]t's very rare that we have to apply for or get orders for majority support but the fact that that's available is an incredibly useful tool in initiating bargaining with employers who wouldn't otherwise want to do that when they're aware their employees do.'*<sup>262</sup>

A number of employers interviewed also recognised that the MSD provisions were having their intended effect. As one HR manager of a large company, with a long history of bargaining, observed of the new bargaining provisions:

*'... [A] corporate would need to be able to demonstrate why, with an Act that has a strong disposition to collective bargaining, why a group of employees should be exempt, or all of their employees should be exempt ...*

*I think it's conducive to reaching agreement, because it creates an environment where the onus is on the party not wanting to collectively bargain, they have to demonstrate why.*

*And it's a high hurdle, so it encourages engagement.'*<sup>263</sup>

It was further observed that it was often now only employers very hostile to bargaining who sought to defend applications for MSDs, where there was evidence of majority support:

*'... [M]y experience is that it has to be a really entrenched position of the employer to contest these. They have to be really motivated to want to keep the union out ... I mean the [name of company] one, they were absolutely adamant that they weren't going to have a union negotiated enterprise agreement and they were throwing the kitchen sink at it.'*<sup>264</sup>

*'Smart employers, where it's really clear that there's majority support, aren't going to force the union to go through the process of getting a majority support determination, most of them will agree a long way before that. It's only when they're very obstinate that you end up having to go and get orders.'*<sup>265</sup>

While the interviewees generally expressed the view that they believed the MSD provisions were operating as intended, there was still some concern voiced – from both employers and unions – that the process could be unfairly manipulated.<sup>266</sup> Union representatives expressed

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<sup>259</sup> Interviewee 36a.

<sup>260</sup> Interviewee 38a.

<sup>261</sup> Interviewee 23a.

<sup>262</sup> Interviewee 44a.

<sup>263</sup> Interviewee 28b.

<sup>264</sup> Interviewee 3a.

<sup>265</sup> Interviewee 44a.

<sup>266</sup> See e.g. Interviewee 3a and Interviewee 13b.

concern over employer practices such as bullying and intimidating workers who showed support for bargaining or for the union; holding repeated one-on-one meetings with employees leading up to a scheduled majority support ballot;<sup>267</sup> refusing to maintain casual employees who may become members; and increasing the pool of workers to be covered by an agreement, to make it more difficult for the union to achieve a majority.<sup>268</sup> Several employers interviewed expressed their belief that petitions conducted by unions in their workplaces had not been explained fully to workers or that workers had been intimidated into signing them. Overall, however, our interviews revealed little evidence that the majority support mechanism had led to a significant growth in the types of intense, protracted and costly disputes over union recognition or ‘union-busting’ tactics that have accompanied union recognition procedures in some other jurisdictions.<sup>269</sup>

## 6.9 Conclusion

The MSD mechanism was introduced to remedy what was perceived to be a serious deficiency in the bargaining framework under the WR Act: the ability of an employer to refuse to engage in collective bargaining, even where its workforce wished to do so, and the protracted disputes which often arose as a consequence. This chapter has examined the extent to which the MSD provisions of the FW Act have successfully addressed this deficiency in their first three years of operation.

Analysis of the case law and interview data shows that ss.236-237 of the FW Act are largely achieving their objective. Many applications for MSDs have been lodged, and many employers who would otherwise be reluctant to bargain have been compelled to do so. Our analysis demonstrates that the role of FWA in interpreting and applying the MSD provisions has been particularly important in determining their practical impact. The tribunal has generally adopted a pragmatic and flexible approach to MSD applications, which has facilitated the commencement of bargaining where there is credible evidence of majority support (primarily in the form of petitions signed by employees). FWA’s refusal to mandate secret ballots as a matter of course, as well as its reluctance to revoke an MSD once made, appear to have been important in reducing the scope for ‘union busting’ tactics of the kind found in North American labour law systems to develop in Australia. The failure of many creative employer strategies seeking to contest applications for MSDs has further reduced the scope for protracted litigation around these provisions.

Of course, the MSD process is often just the first step in the bargaining process. While the MSD mechanism has the capacity to bring parties to the negotiating table, the extent to which they bargain effectively and ultimately enter into a collective agreement is less clear. This is the subject of Chapter 8 of this Report.

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<sup>267</sup> Interviewee 46a.

<sup>268</sup> Interviewee 8a.

<sup>269</sup> See further A Forsyth, ‘The Impact of “Good Faith” Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States’ (2011) 16 *Canadian Labour and Employment Law Journal* 1, 36-38.

## 7 WHO IS TO BE COVERED BY THE AGREEMENT? RESOLVING DISPUTES OVER SCOPE

The scope order provisions of the *Fair Work Act 2009* (Cth) (FW Act) provide a mechanism through which Fair Work Australia (FWA) may resolve disputes over the boundaries of the employee constituency for purposes of testing employee views on (for example) whether a majority of them want collective bargaining so that FWA should make an MSD, or whether certain employees want to be covered by a particular agreement. Sections 238-239 enable both employee and employer bargaining representatives to seek FWA involvement in determining the appropriate shape of employee bargaining units for these purposes. A bargaining representative for an enterprise agreement can apply under s.238 for a scope order, where he or she is concerned that the bargaining is not proceeding fairly or efficiently because the agreement will not cover the appropriate employees, or will cover employees that it is not appropriate for the agreement to cover. The scope order provisions were introduced by the government to provide an alternative to the taking of industrial action as the principal means of resolving disputes over the scope of an agreement.<sup>270</sup>

### 7.1 The legislative framework

#### SECTION 238 SCOPE ORDERS

*Bargaining representatives may apply for scope orders*

**238(1)** A bargaining representative for a proposed single-enterprise agreement may apply to FWA for an order (a **scope order**) under this section if:

- (a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and
- (b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

*No scope order if a single interest employer authorisation is in operation*

**238(2)** Despite subsection (1), the bargaining representative must not apply for the scope order if a single interest employer authorisation is in operation in relation to the agreement.

*Bargaining representative must have given notice of concerns*

**238(3)** The bargaining representative may only apply for the scope order if the bargaining representative:

- (a) has given a written notice setting out the concerns referred to in subsection (1) to the relevant bargaining representatives for the agreement; and

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<sup>270</sup> See House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, paras [651], [983]. See further J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 268-269.

- (b) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
- (c) considers that the relevant bargaining representatives have not responded appropriately.

*When FWA may make scope order*

**238(4)** FWA may make the scope order if FWA is satisfied:

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

Matters which FWA must take into account

**238(4A)** If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement, FWA must, in deciding for the purposes of paragraph (4)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

*Scope order must specify employer and employees to be covered*

**238(5)** The scope order must specify, in relation to a proposed single-enterprise agreement:

- (a) the employer, or employers, that will be covered by the agreement; and
- (b) the employees who will be covered by the agreement.

*Scope order must be in accordance with this section etc.*

**238(6)** The scope order:

- (a) must be in accordance with this section; and
- (b) may relate to more than one proposed single-enterprise agreement.

*Orders etc. that FWA may make*

**238(7)** If FWA makes the scope order, FWA may also:

- (a) amend any existing bargaining orders; and
- (c) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by FWA, or take such other actions, as FWA considers appropriate.

## SECTION 239 OPERATION OF A SCOPE ORDER

**239** A scope order in relation to a proposed single-enterprise agreement:

- (a) comes into operation on the day on which it is made; and
- (b) ceases to be in operation at the earliest of the following:
  - (i) if the order is revoked—the time specified in the instrument of revocation;
  - (ii) when the agreement is approved by FWA;
  - (iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
  - (iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

As noted in Chapter 5 of this report, between 1 July 2009 and 31 June 2012, there were 108 applications for scope orders, of which 19 were successful. The vast majority of applications were made by a union seeking a scope order to assist in overcoming employer resistance to the union's preferences regarding the appropriate coverage of an agreement.<sup>271</sup>

### 7.2 FWA's application of the jurisdictional prerequisites in s.238

In a number of cases, applications for scope orders have failed on the basis that the applicant failed to meet the jurisdictional prerequisites in s.238. Most of these decisions have focused on the notification requirements in s.238(3), although the timing at which applications have been lodged has been an issue in several cases.<sup>272</sup> In an early decision examining the relevant notification provisions, SDP O'Callaghan emphasised that:

*'The requirements in subsection 238(3) must be regarded as prerequisites for the making of an application for a scope order. A scope order is but one of a range of mechanisms available to Fair Work Australia to facilitate the bargaining process. It is a significant step in that it may form a foundation for other actions and has the real potential to impact on the negotiation process. In contrast to the prerequisites for the making of a bargaining order set out in section 229, which allow Fair Work Australia to consider a bargaining order application even if it does not comply with certain of the prerequisites established within that section, section 238 does not provide the capacity for Fair Work Australia to waive the requirement that these prerequisites be met ...'*<sup>273</sup>

The absence of any power for FWA to consider an application where the requirements in s.238(3) have not been met was subsequently confirmed by a Full Bench of FWA.<sup>274</sup>

One issue to arise in relation to the notification requirements in s.238(3) is who constitutes a 'relevant bargaining representative' for the purposes of the requirement to provide notice of the applicant's concerns prior to lodging a scope order application. This issue was examined by

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<sup>271</sup> See, eg, *APESMA v Australian Red Cross Blood Service* [2010] FWA 3911 (25 May 2010).

<sup>272</sup> See, eg, *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 320 (18 September 2009), where it was held that the application was lodged 'prematurely', and *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 320 (18 September 2009). At least two applications have failed, for example, because the applications were lodged too late in the bargaining process, after bargaining had effectively been concluded: see *RTBU and ASU v Australian Rail Track Corporation Ltd* [2010] FWA 6428 (31 August 2010); *Property Sales Association of Queensland, Union of Employees* [2010] FWA 5653 (27 July 2010)

<sup>273</sup> *LHMU v Coca-Cola Amatil (Aust) Pty Ltd* [2009] FWA 320 (18 September 2009) at [33].

<sup>274</sup> *AMIEU v Woolworths Limited* [2010] FWA 1625 (3 March 2010) at [19].

a Full Bench of the tribunal in *AMIEU v Woolworths Limited*.<sup>275</sup> In this case, Woolworths and the SDA had agreed in principle to an agreement, which also covered a number of members of the AMIEU. The AMIEU argued that the other parties were seeking to make a 'four walls' agreement and had marginalised and excluded it from the negotiations. It sought a scope order which would have had the effect of excising its members from the proposed agreement. Prior to lodging its application for a scope order, the AMIEU had notified the company of its concerns but, while it had copied the SDA into its letters to Woolworths, it had not directly notified the SDA of its concerns.

The Full Bench upheld Senior Deputy President Richards' decision at first instance that the jurisdictional requirements in s.238(3) had not been met because the AMIEU had only notified the respondent of its concerns, not all 'relevant bargaining representatives'. SDP Richards had concluded:

*'Whilst the basis for distinguishing "relevant" bargaining representatives from all bargaining representatives in the bargaining process might be fraught, in my view it would at least extend to those bargaining representatives who are complicit (directly or indirectly) in the "concerns" which have been the subject of the written notice under s.238(3) of the FW Act ...'*<sup>276</sup>

The Full Bench confirmed that the SDA was a 'relevant bargaining representative' on the basis that '[i]t could be expected to have a view on the AMIEU's concerns as a participant in the bargaining process and it might not have agreed to support an agreement with the revised scope. That would likely be a consideration of significance for Woolworths and in the bargaining. ... It needed to be included in the process by operation of the Act.'<sup>277</sup>

In *CFMEU v Veolia Environmental Services Australia Pty Ltd*,<sup>278</sup> the union's application was dismissed on the grounds that, while the union had provided the requisite notice of its concerns to the company, it had failed to notify other bargaining representatives involved in the negotiations of its concerns. On the facts, the tribunal was satisfied that, under s.238(3), the union was required to notify the other bargaining representatives, as their responses on issues about negotiating for separate state agreements or a different scope would be significant for the company and for the CFMEU. Further, there was insufficient evidence of any attempts by the union to establish whether other bargaining representatives had been appointed before lodging the application. However, Senior Deputy President Cartwright also recognised the difficulties (for scope order applicants) posed by the notification requirements, in that there was no

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<sup>275</sup> [2010] FWAFB 1625 (3 March 2010).

<sup>276</sup> *AMIEU v Woolworths Ltd* [2009] FWA 849 (16 November 2009) at [115].

<sup>277</sup> See also *AMWU (WA Branch) v Airflite Pty Ltd* [2010] FWA 1723 (2 March 2010). In granting the union's application in this case, Commissioner Cloghan described as 'disingenuous' the employer's argument that the union had failed to meet the notice requirements in s.238(3) because it had failed to convey its concerns to four individual workers who had appointed themselves bargaining representatives, as the company had refused to disclose the identity of the four employees and had negotiated with them separately despite a union request that all representatives be present.

<sup>278</sup> [2010] FWA 9211 (30 November 2010).

mechanism under the FW Act through which the applicant here was made aware of the existence or identity of other bargaining representatives.<sup>279</sup>

### 7.3 The MFB Case

In an early test case on the operation of the scope order provisions, *United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board ('MFB Case')*,<sup>280</sup> both the employer and the union had made competing scope order applications. The UFU argued that there should be a single agreement covering all employees including Commanders and Assistant Chief Fire Officers. The union was the bargaining representative for these ranks of employees, as well as for operational employees below them. The Metropolitan Fire and Emergency Services Board (MFB) maintained that the proposed agreement should not cover Commanders and Assistant Chief Fire Officers, who should instead be covered by two separate agreements. The MFB sought a scope order that the proposed enterprise agreement should be limited to operational employees below the rank of Commander and Assistant Chief Fire Officer.

The Full Bench decided that a scope order in the terms sought by the MFB should be made. In reaching this conclusion, members of the Full Bench made a number of observations concerning the interpretation of the scope order provisions. In circumstances where a group of employees wishes to be covered by an enterprise agreement, as in this case, the Full Bench found that the view of the employees is a significant factor, but is not necessarily determinative: 'while weight should be given to the views of the employees potentially affected, it may be that a proper consideration of the matters specified in ss.238(4) and (4A) in a particular case may make it appropriate to make a scope order contrary to the views of the employees potentially affected.'<sup>281</sup>

The Full Bench rejected the employer's submission that FWA should limit the circumstances in which an order might be made to situations where one of the bargaining representatives is pursuing an agreement with a proposed scope that is unfair. The Full Bench stated that the relevant considerations under ss.238(4)(b) and (c) are whether the scope order will promote the fair and efficient conduct of bargaining, and whether the specified group is fairly chosen. In a given case it may be that a number of employee groupings would be fair, but the immediate issue on a scope order application is whether the group specified in the proposed scope order is fairly chosen.<sup>282</sup>

The Full Bench also rejected the UFU's argument that as a matter of statutory construction there should be a preference for an agreement that covers as much of an enterprise as possible. The Full Bench held that s.238 permits a scope order to be made which does not apply to the whole enterprise. In deciding whether a group is fairly chosen, FWA must take into account whether the group is distinct by reference to geographical, operational or organisational circumstances. The words, 'geographical,' 'operational' and 'organisational' should be given their ordinary and

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<sup>279</sup> This decision formed the basis of the Fair Work Act Review Panel's recommendation that s.238(3) be amended. See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 138-139.

<sup>280</sup> [2010] FWA FB 3009 (14 April 2010).

<sup>281</sup> Ibid, [53]. See also *AMWU v Shinagawa Refractories Australasia Pty Ltd* [2011] FWA 5935 (7 September 2011).

<sup>282</sup> [2010] FWA FB 3009 (14 April 2010), [54]-[55].



natural meanings. The fact that a group is not distinct according to these considerations can be an indicator that it is not fairly chosen, but this is not a necessary conclusion in all circumstances.<sup>283</sup>

## 7.4 Promoting the fair and efficient conduct of bargaining

A key issue to arise under the scope order provisions has been the application of the requirement that the making of an order must promote the fair and efficient conduct of bargaining.<sup>284</sup> Several applications for scope orders have been determined on the basis of FWA's interpretation of this criterion, and its application to the facts of each case. It has been less common for scope order decisions to have turned on the requirement that the group of employees who will be covered by the agreement specified in the scope order was fairly chosen.<sup>285</sup>

The tribunal's application of the 'fair and efficient bargaining' criterion has not yielded a clear set of principles, with decisions largely explained according to the circumstances of each case.<sup>286</sup> For example, in *HSUA v Royal District Nursing Service*,<sup>287</sup> the HSUA, ANF and the employer were engaged in bargaining, with the employer proposing to replace the current single agreement with two new agreements: one to cover nursing staff and one to cover professional and support staff. The HSUA sought a scope order for a single enterprise agreement covering all of the employer's staff, on the basis that this is what their members preferred and that splitting the agreement had the potential to adversely affect the professional and support staff. The HSUA also argued that there were a number of common issues and claims, and therefore it would be more efficient to deal with these just once rather than in two separate negotiation processes. Commissioner Roe rejected the employer's argument that two agreements would mean that the bargaining was less efficient as representatives would need to attend negotiating meetings even where time was being spent on matters not relevant to all of them. Commissioner Roe observed:

*'In my view the concept of "efficiency" in bargaining is not narrowly about administrative efficiency or minimising the time and resources required for a particular output. In my view the concept of an efficient bargaining process also includes the concept of an effective process for all parties involved.'*<sup>288</sup>

Overall, the Commissioner was satisfied that the order would promote the fair and efficient conduct of bargaining and made the order.

In a number of cases, employers have successfully argued that the bargaining structure sought by the union through the scope order application would fail to promote fair and efficient bargaining. In *ASU v City of Perth*,<sup>289</sup> for example, the union applied to have a small group of

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<sup>283</sup> Ibid, [56].

<sup>284</sup> FW Act, s.238(4)(b).

<sup>285</sup> See eg *APESMA v Australian Red Cross Blood Services and Others* [2011] FWA 2914 (25 May 2011); *Australian Nursing Federation* [2012] FWA 452 (7 February 2012); *The Reject Shop Ltd v NUW* [2011] FWA 5481 (19 August 2011).

<sup>286</sup> See eg *Wattyl Australia Ltd v LHMU* [2010] FWA 2587 (31 March 2010).

<sup>287</sup> [2011] FWA 8033 (24 November 2011); upheld on appeal in *Royal District Nursing Service Limited v HSUA and ANF* [2012] FWAFB 1489 (1 March 2012).

<sup>288</sup> [2011] FWA 8033 (24 November 2011), [53].

<sup>289</sup> [2011] FWA 2897 (2 June 2011).

employees removed from the scope of a proposed agreement and instead included in a proposed replacement agreement, on the basis that the issues concerning those employees were holding up the finalisation of the primary agreement. Commissioner Cloghan rejected the application, expressing the view that the provisions provided the tribunal with powers to facilitate the bargaining process, not to intervene in cases where an applicant argues that part of the workforce to be covered by the proposed agreement will be ‘substantially worse off’ as a result.<sup>290</sup>

*‘... it would be inconsistent with the scheme of the FW Act to shave off a section of employees into a separate agreement each and every time the bargaining representatives could not reach agreement on the content of a proposed replacement agreement for those particular employees. The inability to reach agreement in negotiation is not unusual but that does not mean that bargaining is not proceeding efficiently and fairly.’<sup>291</sup>*

FWA members have taken a number of different approaches to deciding union applications for scope orders where the union, like the ASU in *City of Perth*, has argued that the bargaining is not proceeding fairly because the interests of a minority of employees is being overwhelmed by the interests of the majority.

In *NUW v Super Retail Group Ltd*,<sup>292</sup> the union argued that its members, employed in the distribution centre of a retail chain, should be able to bargain for an agreement separately to sales staff employees, represented by the SDA. In its decision, the tribunal placed emphasis on the interests of the employer in having one agreement cover its enterprise. Deputy President Hamilton concluded from the employer’s evidence: “... overall I accept that the respondent has legitimate business interests in maintaining the present arrangement of one agreement to cover all employees, and that there is some force in its view that bargaining on such a basis is both efficient and fair. These considerations on balance outweigh, in my view, other considerations that I am required to have regard to including the views of employees affected by the order.”<sup>293</sup>

On the other hand, in *Australian Salaried Medical Officers Federation v Commonwealth of Australia as represented by the Department of Human Services*,<sup>294</sup> Senior Deputy President Drake upheld the union’s application for an order allowing it to bargain for an agreement covering medical advisers employed by the Department of Human Services (DHS). The Commonwealth opposed the application on the basis that there should be a single DHS agreement covering all its employees. The tribunal recognised that it was the preference of the Australian Public Service, when negotiating agreements, to have one agreement per agency where possible. However, Senior Deputy President Drake also emphasised that the medical officers had a history of separate coverage, and that there appeared “no identifiable benefit except the hobgoblin of consistency to justify the inclusion of these medical officers in a whole of agency agreement.”<sup>295</sup> The Senior Deputy President observed that the 29 medical officers were a discrete group of professionals among just under 37,000 employees proposed to be covered by the agreement, and had high level conditions comparable to those enjoyed by Senior Executive

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<sup>290</sup> Ibid, [57].

<sup>291</sup> Ibid, [59].

<sup>292</sup> [2012] FWA 3753 (13 June 2012).

<sup>293</sup> Ibid, [37].

<sup>294</sup> [2011] FWA 5920 (20 October 2011).

<sup>295</sup> Ibid, [26].

Service employees: “I was satisfied that the ability of these particular employees to bargain fairly and efficiently regarding their conditions in the face of any community of interests with the vast number of employees on ordinary classifications, who would have no interest in maintaining the conditions of the medical professionals, was nil.”<sup>296</sup>

In *APESMA v Australian Red Cross Blood Services and Others*,<sup>297</sup> the union sought a scope order which would have had the effect of excluding medical scientists from a proposed agreement covering employees of the Red Cross. Commissioner Hampton held that it was not enough for an applicant for a scope order to argue that removing a sub-set of employees would result in fair and efficient bargaining. The applicant must demonstrate that the making of the order would promote, that is encourage and facilitate, bargaining that is fairer and more efficient *than if no order was made*. That assessment is to take into account the interests of all relevant parties who are subject to the bargaining process, not just those who are seeking the order, and involve the weighing up of the relevant considerations touching upon the issue.<sup>298</sup>

## 7.5 Interaction of scope orders and other mechanisms available under Part 2-4 of the FW Act

Experience to date indicates that disputes over scope can sometimes inhibit the commencement of collective bargaining negotiations under the FW Act. A number of FWA decisions have established that scope orders, rather than majority support determinations, are the appropriate statutory mechanism for resolving disputes about agreement coverage.<sup>299</sup> In a number of other cases, FWA has held that unions have breached the requirement that the bargaining representative who made the scope order application has met/is meeting the good faith bargaining requirements, thereby precluding a scope order from being made.<sup>300</sup>

## 7.6 Impact of the scope order provisions

The relatively small number of scope order applications in the first three years of operation of Part 2-4 of the FW Act suggests that, for the most part, the parties to enterprise bargaining negotiations determine the scope of their proposed agreement without use of the scope order provisions.<sup>301</sup> As reported in Chapter 5, only 25% of scope order applications result in a decision being issued, with the majority of applications being refused by the tribunal.

Despite interviewing a number of parties that had been involved in scope order applications, our interview data has not revealed a great deal about how the scope order provisions are operating or viewed by parties. Parties did not, as a general rule, appear to hold strong views on the operation of these provisions. It may be that, by chance, our sample of participants did not include many unions or employers with experience of disputes or issues concerning scope.

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<sup>296</sup> Ibid, [24].

<sup>297</sup> [2011] FWA 2914 (25 May 2011).

<sup>298</sup> Ibid, [64]-[66].

<sup>299</sup> See *eg LHMU v Coca-Cola Amatil Aust Pty Ltd* [2009] FWA 101 (19 August 2009), upheld on appeal in *LHMU v. Coca-Cola Amatil Aust Pty Ltd*, [2009] FWAFB 668 (28 November 2009).

<sup>300</sup> For examples of matters where FWA held that unions had not been engaged in good faith bargaining, and were therefore not permitted to proceed with a scope order application, see *NUW v Super Retail Group Ltd* [2012] FWA 3753 (13 June 2012); *Capral Ltd v AMWU and CEPU* [2010] FWA 3818 (19 March 2010).

<sup>301</sup> See also interviewee 39a.

One of the union representatives we interviewed was of the view that the availability of scope orders allows for more efficient resolution of disputes over agreement coverage than would otherwise be available. This interviewee's union had been involved in a successful scope order application where an employer was trying to negotiate an agreement on a state-by-state basis, whereas the union argued it was better to have a national agreement. The interviewee observed that, if not for the scope order provisions, the matter would have been addressed:

*'... the traditional way - by going out on strike I guess ... But it would have been a stalemate. ... [I]t would have been a much more drawn out process and perhaps not successful like it was.'*<sup>302</sup>

However, other union representatives we interviewed were of the view that the FW Act requirements for successfully obtaining a scope order (as interpreted by FWA) were too restrictive or 'stringent'.<sup>303</sup> Some expressed the view that FWA had placed insufficient emphasis on the views of employees concerning the appropriate bargaining unit. In one instance, a union representative explained that the provisions had been used by an employer to 'divide and conquer', by relying on the scope order provisions to prevent smaller worksites (where workers had less bargaining power) from being joined with larger sites where employees had greater economic leverage in bargaining negotiations. This interviewee noted, however, that this was a limitation of the statutory provisions themselves, rather than the way in which they have been interpreted and applied by the tribunal.<sup>304</sup>

It is relevant here to note the findings of the Fair Work Act Review Panel concerning the impact of the scope order provisions. In its report, the Panel observed:

*'... that refusal to grant a scope order may in many cases help to resolve a dispute, as it may make the unsuccessful applicant more likely to accept the scope that the other bargaining party wants. DEEWR examined five of the unsuccessful scope order applications in the 2010–11 period and found that agreements were ultimately concluded in each case. We also note that the number of applications withdrawn in the same period was almost half of the number of applications made. This suggests to us that in many cases agreement on scope was reached by the parties subsequent to a scope order application being made.'*<sup>305</sup>

While the finding that many scope order applications are withdrawn is interesting, it does not necessarily support the Review Panel's conclusion that the parties have reached agreement on the disputed question of scope. There are a number of other possible scenarios: the applicant may have decided that their application did not have strong prospects of success; a decision may have been made to take protected industrial action instead; or the agreement may have been put to a ballot and approved, thus finalising the matter.

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<sup>302</sup> Interviewee 26a.

<sup>303</sup> Interviewee 41a.

<sup>304</sup> Interviewee 36a.

<sup>305</sup> J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 139 (footnotes omitted).

## 7.7 Conclusion

We are reluctant to conclude that scope issues have been insignificant in the context of enterprise bargaining under the FW Act. However, it has been difficult to gauge the impact of the scope order provisions on the strategies and practices of unions and employers given the relatively low number of applications, and the fact that even fewer have proceeded to a decision. We were also surprised at the level of ambivalence shown toward these provisions by our interviewees.

Our impression is that FWA members have shown a reluctance to interfere in the bargaining process on the issue of the appropriate scope of a proposed agreement. They have also approached the scope order provisions in a more technical manner than some of the other provisions relating to good faith bargaining, although it appears that this is largely because the provisions require them to do so. It may be that this has caused some reluctance on the part of unions and employers to make use of ss.238-239 in resolving any disputes about the scope of bargaining that have arisen in practice.

## 8 HOW THE PARTIES BARGAIN: THE NATURE AND REACH OF THE GOOD FAITH BARGAINING OBLIGATIONS

The introduction of good faith bargaining (GFB) obligations is widely regarded as one of the most significant reforms introduced by the *Fair Work Act 2009* (Cth) (FW Act). As we explained in Chapter 2 of this Report, while GFB has been a long-standing feature of some overseas collective bargaining systems, experience with this concept in Australian labour law has been more limited. The Australian Industrial Relations Commission (AIRC) was given powers to make orders giving effect to GFB requirements under federal legislation which operated between 1993 and 1996, and some state industrial tribunals have been armed with similar powers. With many decided cases, the first three years of operation of the GFB framework under the FW Act provide the best opportunity (to date) to examine the adaptation of GFB to the Australian context.

Section 228(1) of the FW Act enumerates six GFB obligations that employer and employee bargaining representatives are required to meet. These obligations apply once an employer initiates bargaining or agrees to an employee bargaining representative's request to bargain. They may also be triggered by the making of a majority support determination (MSD), a scope order or a low-paid authorisation. The GFB obligations are enforceable through various orders/declarations that can be made by Fair Work Australia (FWA), and through court processes.

As outlined in the Explanatory Memorandum to the *Fair Work Bill 2008*, the GFB obligations were introduced to facilitate agreement-making and to prevent protracted bargaining disputes:

*'Good faith bargaining requirements aim to ensure that all bargaining representatives act in an appropriate and productive manner when working towards a collective agreement. The requirements also facilitate improved communication between bargaining representatives, which is expected to reduce the likelihood of industrial action ...*

*During agreement making, where representatives are failing to bargain in good faith, the good faith bargaining requirements will act to avoid protracted disputes by allowing FWA to make orders. This facilitation of agreement making is in the interests of both bargaining representatives and the general public'.<sup>306</sup>*

The Explanatory Memorandum also made it clear that the GFB requirements are intended to enable FWA to make bargaining orders relating to procedural matters only.<sup>307</sup> The GFB provisions are not intended to compel parties to reach agreement, or to agree to terms that they do not wish to.<sup>308</sup> This reflects the limitations that the AIRC found applied to the 1993-1996 GFB laws.<sup>309</sup>

The substance of the GFB obligations is set out in s.228, which is reproduced below:

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<sup>306</sup> House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, [r.169]-[r.170].

<sup>307</sup> *Ibid*, [r.168].

<sup>308</sup> *Ibid*, [r.165].

<sup>309</sup> See further Chapter 2.

## **Section 228 BARGAINING REPRESENTATIVES MUST MEET THE GOOD FAITH BARGAINING REQUIREMENTS**

**228(1) [Definition]** The following are the *good faith bargaining requirements* that a bargaining representative for a proposed enterprise agreement must meet:

- (a) attending, and participating in, meetings at reasonable times;
- (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- (c) responding to proposals made by 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.

**228(2) [Non-requirements]** The good faith bargaining requirements do not require:

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

Where a bargaining representative believes that another bargaining representative is breaching any of these requirements – or has concerns that bargaining is not proceeding efficiently or fairly because there are multiple bargaining representatives – he or she can apply to FWA for a bargaining order.<sup>310</sup> FWA has significant discretion in determining whether to make a bargaining order and in what form it should be made.<sup>311</sup> Breach of a bargaining order may result in the imposition of a civil penalty (by the Federal Court or Federal Magistrates Court),<sup>312</sup> and/or the making of a serious breach declaration by FWA,<sup>313</sup> which provides the basis for the tribunal to issue a bargaining-related workplace determination.<sup>314</sup>

In the first three years of operation of Part 2-4 of the FW Act, there were 324 applications for bargaining orders lodged under s.229, of which 23 (around 7%) were successful.<sup>315</sup>

This Chapter examines the nature and reach of the GFB provisions, as they have been interpreted and applied by FWA. It begins by examining FWA's general approach to the obligations, before briefly considering how FWA has approached the jurisdictional prerequisites to making a bargaining order (as set out in s.229). We then consider how the tribunal has interpreted and applied the six GFB obligations in s.228(1), identifying tactics and conduct that have been found by FWA to be either compatible or incompatible with the GFB requirements.

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<sup>310</sup> FW Act, s.229.

<sup>311</sup> FW Act, ss.230-231.

<sup>312</sup> FW Act, ss.539, 546. These courts also have powers to issue injunctions and make other orders to enforce a bargaining order.

<sup>313</sup> FW Act, ss.234-235. No applications for serious breach declarations were made during the first three years of the legislation's operation.

<sup>314</sup> FW Act, Part 2-5, Division 4. No bargaining-related workplace determinations were made during the first three years of the legislation's operation.

<sup>315</sup> For further analysis, see Chapter 5 of this Report.

Lastly, we draw on the interview data to explore the extent to which, and how, the GFB requirements are impacting upon bargaining behaviour at the workplace level.

## 8.1 FWA's general approach to the GFB obligations

Before proceeding to examine FWA's decisions in relation to particular types of bargaining conduct, it is useful to make several observations on FWA's general approach to the GFB provisions. First, overall, FWA appears to have adopted a fairly cautious approach to the making of bargaining orders under the FW Act. This approach became evident in a case decided early on in the life of the new provisions, in which Vice President Watson cautioned that:

*'The nature of powers under Part 2—4 of the Act have not been considered by a Full Bench of Fair Work Australia. Clearly the powers need to be exercised with caution and subject to the powers and limitations contained in the Act while endeavouring to give effect to the intention of the legislature.'*<sup>316</sup>

Shortly afterwards, in *LHMU v Foster's Australia Limited*, Senior Deputy President Kaufman emphasised that: 'FWA should be slow to interfere in the legitimate tactics undertaken by parties during the bargaining process unless an applicant for a bargaining order has demonstrated that there are sound reasons for so doing.'<sup>317</sup> This statement was subsequently cited with approval by a number of members of the tribunal.<sup>318</sup> In *LHMU WA Branch v Hall and Prior Aged Care Organisation and Others*, Commissioner Cloghan further observed that: 'The Act is framed in such a way of expectations that parties will conduct themselves in the normal "rough and tumble" of bargaining negotiations, without the intervention of the Tribunal.'<sup>319</sup> Senior Deputy President O'Callaghan, in *LHMU v Coca-Cola Amatil (Aust) Pty Ltd*, expressed the view that: '[t]he operation of a bargaining order is a significant step which has an obvious and intended capacity to alter the way in which the bargaining process operates ...'.<sup>320</sup> Similarly, in *CFMEU v Iluka Resources Limited*, Commissioner Williams observed that, as a general proposition, the tribunal should not 'unnecessarily interference in the process of bargaining'.<sup>321</sup>

Secondly, in applying the GFB provisions to particular facts, FWA has pointed to the need to take into account the broader context in which the particular behaviour has taken place. In an early decision, *Total Marine Services Pty Ltd v MUA*, Commissioner Thatcher explained that:

*'In applying the [GFB] provisions, I will adopt an 'even handed assessment of the industrial context, of demands, conduct, and character of the negotiators and negotiations, in which it becomes an issue ...'*<sup>322</sup>

A similar view was expressed by Commissioner Hampton several months later, when he indicated that:

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<sup>316</sup> *NUW v Chep Australia Ltd* [2009] FWA 202 (11 September 2009) at [39].

<sup>317</sup> [2009] FWA 750 (28 October 2009) at [20].

<sup>318</sup> See eg *FSU v Commonwealth Bank of Australia* [2010] FWA 2690 (9 April 2010); *LHMU WA Branch v Hall and Prior Aged Care Organisation and Others* [2010] FWA 1065 (11 February 2010).

<sup>319</sup> [2010] FWA 1065 (11 February 2010), at [24].

<sup>320</sup> [2009] FWA 153 (31 August 2009) at [41].

<sup>321</sup> [2011] FWA 7922 (16 November 2011) at [83].

<sup>322</sup> [2009] FWA 290 (16 September 2009) at [40].



*'the requirements of s.228 must be applied in the particular circumstances of each case. Whilst general principles may emerge from other decisions of Fair Work Australia ..., the pursuit of simple, flexible and fair collective bargaining requires that the particular circumstances, dynamics and context of each application be weighted in applying the statutory requirements.'*<sup>323</sup>

This approach to the provisions was endorsed by a Full Bench of FWA in one of the leading authorities on the operation of the GFB provisions, *CFMEU v Tahmoor Coal Pty Ltd* ('*Tahmoor Coal*):

*'Whether a party observes or fails to observe the [GFB] requirements set out in s.228 (1) is to be determined in light of all of the relevant circumstances. While at one level this is stating the obvious ... the question will rarely be decided by reference to one action or series of actions ...'*<sup>324</sup>

A third general observation that can be made relates to the extent to which FWA, in interpreting the scope of the GFB obligations, has been willing to draw upon case law from other jurisdictions that have long-established GFB regimes.<sup>325</sup> In *Endeavour Coal Pty Ltd v APESMA*, a Full Bench of FWA noted that whilst approaches taken with respect to GFB obligations in other jurisdictions were 'of interest': 'the jurisprudence developed in different industrial relations and legislative contexts must be viewed with caution in considering the good faith bargaining obligations under the Fair Work Act.'<sup>326</sup> This followed on from the earlier Full Bench decision in *Tahmoor Coal*, which had emphasised that: 'it would be undesirable to read into the legislation concepts which do not already appear in it for the purpose of explaining its operation. That approach is likely to lead to error in the construction and application of the provisions.'<sup>327</sup> To date, FWA's reluctance to explicitly consider and engage with the case law from other jurisdictions appears to be facilitating the development of an approach to GFB which diverges in a number of important respects from the approaches taken in other jurisdictions (particularly under North American GFB laws).<sup>328</sup>

## 8.2 FWA's approach to the jurisdictional requirements in s.229

Section 229 of the FW Act specifies a number of prerequisites that must be met before FWA will deal with an application for a bargaining order:

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<sup>323</sup> *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26 February 2010) at [44].

<sup>324</sup> [2010] FWA 3510 (5 May 2010) at [24].

<sup>325</sup> See eg Commissioner Smith in *FSU v Commonwealth Bank of Australia* [2010] FWA 2690 (9 April 2010) at [58].

<sup>326</sup> [2012] FWA 1891 (22 March 2012) at [21].

<sup>327</sup> [2010] FWA 3510 (5 May 2010) at [24]. It should be noted, however, that decisions reached in other jurisdictions have been referred to by a number of FWA members in some cases: see eg *AMWU and APESMA v DTS Food Laboratories* [2009] FWA 1854 (21 December 2009) at [15].

<sup>328</sup> See further A Forsyth, 'The Impact of "Good Faith" Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States' (2011) 16 *Canadian Labour and Employment Law Journal* 1; A Bukarica and A Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand*, The Federation Press, Sydney, 2012; B Creighton and A Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, New York, 2012.

- the applicant must be a bargaining representative for a proposed single-enterprise agreement,<sup>329</sup> or a bargaining representative for a multi-enterprise agreement (where a low-paid authorisation is in operation);<sup>330</sup>
- the application must be made no more than 90 days before the nominal expiry date of an existing enterprise agreement (if one applies to the employees to be covered by the proposed agreement);<sup>331</sup> or after an employer to be covered by the proposed agreement has requested under s.181(1) that employees approve the agreement, but before the agreement is so approved;<sup>332</sup> otherwise, at any other time;<sup>333</sup> and
- the applicant must have notified the other bargaining representative(s) of the applicant's concerns about their alleged failure to comply with the GFB obligations,<sup>334</sup> given the other bargaining representative(s) a reasonable time to respond,<sup>335</sup> and reached the view that the other bargaining representative(s) have not responded appropriately to the applicant's concerns.<sup>336</sup>

Under s.229(5) of the FW Act, FWA is given discretion to consider an application for a bargaining order – despite the notification requirements in s.229(4) not having been complied with – where the tribunal ‘is satisfied that it is appropriate in all the circumstances to do so.’

In *CFMEU v Boulderstone Pty Ltd*, Senior Deputy Richards expressed the view that the jurisdictional requirements for bargaining order applications set out in s.229 ‘should not be taken to be a significant bar to the applicant being entitled to have the substantive application heard.’<sup>337</sup>

In relation to the notice requirements in s.229(4), and FWA’s discretion to waive these requirements under s.229(5), the case law confirms that members of the tribunal have generally adopted a practical approach to these provisions, taking into account factors such as: the context in which the bargaining dispute has arisen; the history of bargaining; the conduct of the parties; and the extent of the parties’ experience with bargaining. For example, in *LHMU v*

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<sup>329</sup> FW Act, s.229(1). The provisions dealing with employer and employee bargaining representatives are discussed in Chapter 2 of this Report. In *Technip Oceania Pty Ltd v Tracey* [2011] FWA 6551 (7 November 2011), a Full Bench of FWA held that a union official could not apply for a bargaining order, where he had been appointed as bargaining representative by a number of employees who were not members of that union (and where the union did not have coverage rights over the work performed by those employees). See also *NUW v Chep Australia Ltd* [2009] FWA 202 (11 September 2009); and *Heath v Gravity Crane Services Pty Ltd* [2010] FWA 7751 (5 October 2010), discussed in Chapter 6 of this Report.

<sup>330</sup> FW Act, s.229(2). This means that bargaining orders cannot be obtained for multi-enterprise agreements, other than in the low-paid bargaining stream.

<sup>331</sup> FW Act, s.229(3)(a)(i).

<sup>332</sup> FW Act, s.229(3)(a)(ii). In *The Broken Hill Town Employees’ Union v Barrier Social Democratic Club Ltd* [2012] FWA 1096 (14 February 2012), Vice President Watson rejected the union’s application for a bargaining order on the basis that the application was lodged *after* the employer’s proposed agreement had been approved by employees.

<sup>333</sup> FW Act, s.229(3)(b).

<sup>334</sup> FW Act, s.229(4)(a)-(b). Note that such notice need only be provided to the bargaining representative(s) about whose conduct the applicant has concerns, rather than *all* other bargaining representatives for the agreement: *CFMEU v Ostwald Bros Pty Ltd* [2012] FWA 1870 (6 March 2012).

<sup>335</sup> FW Act, s.229(4)(c).

<sup>336</sup> FW Act, s.229(4)(d).

<sup>337</sup> [2012] FWA 1356 (16 February 2012), at [10].

*Carinya Care Services*,<sup>338</sup> Commissioner Cloghan found that it was appropriate to apply s.229(5) and proceed to hear the LHMU's claim for bargaining orders, despite the union having only provided the employer with 1.5 hours' notice of its concerns before lodging the application. In light of the 'uncivil' and 'antagonistic' statements by the employer towards the union, the tribunal was satisfied that the LHMU would not expect a response to its concerns that it could consider adequate.<sup>339</sup> In both *ASU v Queensland Tertiary Admissions Centre Ltd*<sup>340</sup> and *CFMEU v Boulderstone Pty Ltd*,<sup>341</sup> Senior Deputy President Richards found that the urgency created by employers requesting employees to vote on proposed agreements warranted the exercise of FWA's discretion under s.229(5), so that the unions' applications for bargaining orders could be heard.<sup>342</sup>

In refusing to exercise FWA's discretion to waive the notification requirements in *Health Services Advocates & Mediators v St Vincent's & Mercy Private Hospital Pty Ltd*, Commissioner Gooley took into consideration that the applicant (a consultant acting as a bargaining representative for a number of employees) was an experienced representative; and that she was aware of her obligation to notify the union (as another bargaining representative) of her concerns (under s.229(4)), but had chosen not to do so until after lodging the application as part of a deliberate strategy to deal with the issue solely with the employer.<sup>343</sup>

FWA has also demonstrated a reluctance to entertain highly technical arguments in relation to the s.229 prerequisites for a bargaining order application.<sup>344</sup> In *FSU v Commonwealth Bank of Australia*, Commissioner Smith rejected the employer's submission that it had been given insufficient time to respond to the union's concerns.<sup>345</sup> The union had notified the bank of its concerns in writing on 24 December 2009, and lodged its application with FWA on 8 January 2010. According to Commissioner Smith:

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<sup>338</sup> [2010] FWA 6489 (2 September 2010).

<sup>339</sup> *Ibid*, [33], [96].

<sup>340</sup> [2009] FWA 53 (29 July 2009).

<sup>341</sup> [2012] FWA 1356 (16 February 2012).

<sup>342</sup> See also, eg, *ASU v Global Tele Sales Pty Ltd* [2011] FWA 3916 (22 June 2011). On the timing of enterprise agreement ballots (and whether an employer's submission of an agreement to ballot while negotiations are ongoing breaches the GFB requirements), see "FWA's approach to specific bargaining tactics" below.

<sup>343</sup> [2012] FWA 1890 (15 March 2012). For other examples of cases where FWA found that the applicant had failed to meet the notice requirements in s.229(4), but the tribunal did not exercise its discretion under s.229(5) to hear the application, see *LHMU v Mingara Recreation Club Ltd* [2009] FWA 1442 (1 December 2009) at [21]; *LHMU v Coca-Cola Amatil (Australia) Pty Ltd* [2009] FWA 153 (31 August 2009) at [39]-[43]; and *Re E Morcom* [2009] FWA 694 (20 October 2009).

<sup>344</sup> See eg *LHMU v Carinya Care Services* [2010] FWA 6489 (2 September 2010) at [63]-[65] (dismissing an argument that the application had not been brought against the correct entity/employer bargaining representative); and *CFMEU v Boulderstone Pty Ltd* [2012] FWA 1356 (16 February 2012), where FWA rejected the company's argument that the union had not met s.229(4)(a) as it had not made out the case that the company was indeed breaching the GFB requirements. Senior Deputy President Richards determined that: 'On the case before me I am able to find the CFMEU to have articulated such a concern that appears to me to be genuinely held, and I am not inclined to conduct any wider enquiry than that.' Any further inquiry would go into the substantive matters of the application, and the Senior Deputy President doubted that Parliament had intended s.229(4) to operate in this way: see [2012] FWA 1356 at [14]-[15]. On this issue, see also *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others* [2011] FWA 6326 (16 September 2011) at [56]-[59].

<sup>345</sup> [2010] FWA 2690 (9 April 2010).

*These are not inexperienced parties. Even the finest slicing of arguments should not be allowed to give way to technicalities which conceal rather than illuminate the relationship. To do otherwise would be to introduce into notions of good faith bargaining endless technical arguments rather than permitting the process identified by s.3(f) of the Act to operate. Section 3(f) states: (f) Achieving productivity and fairness through an emphasis on enterprise-level collective bargaining by simple good faith bargaining ...<sup>346</sup>*

### **8.3 The requirement that bargaining has commenced, or certain orders are in operation**

Under s.230(2) of the FW Act, FWA cannot make a bargaining order unless it is satisfied that one of the following applies:

- the parties have agreed to bargain or have initiated bargaining;<sup>347</sup> or
- a MSD, a scope order or a low-paid authorisation is in operation in relation to the proposed agreement.

Cases dealing specifically with the requirement in s.230(2)(a) that an employer must have ‘agreed to bargain’, before a bargaining order can be made against it, indicate that:

- FWA will closely examine the conduct of the employer (through its representative(s)) and the actions of its board, to establish whether the employer has shown any intention to be involved in agreement negotiations;<sup>348</sup>
- once an employer has commenced involvement in negotiations, a dispute about the coverage of the proposed agreement will not result in a finding that the employer has not ‘agreed to bargain’.<sup>349</sup>

### **8.4 Ensuring adequate participation in the bargaining process**

The GFB obligations in s.228(1)(a), (c) and (d) of the FW Act are directed at ensuring that bargaining representatives participate in the bargaining process properly. They require bargaining representatives to meet with the other bargaining representatives involved in negotiations for a proposed agreement; to give genuine consideration to the proposals put forward by other bargaining representatives; and to respond to those proposals in a timely manner, providing reasons for such responses.

The following types of conduct have been found by FWA to have breached s.228(1)(a), (c) and/or (d):

- an employer not involving a union bargaining representative in meetings and discussions about a proposed agreement;<sup>350</sup>

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<sup>346</sup> Ibid, [24] (emphasis in original).

<sup>347</sup> The operation of the similar requirement applicable to MSD applications (s.237(2)), including relevant case law, is discussed in Chapter 6 of this Report.

<sup>348</sup> *Queensland Nurses' Union of Employees v The Corporation of the Roman Catholic Diocese of Toowoomba T/A Lourdes Home for the Aged, Lourdes Home Hostel* [2009] FWA 1553 (7 December 2009).

<sup>349</sup> *IEU v Catholic Church Endowment Society Inc and The Catholic Diocese of Port Pirie Inc* [2009] FWA 927 (3 November 2009).

<sup>350</sup> *ASU v Queensland Tertiary Admissions Centre Ltd* [2009] FWA 53 (29 July 2009).

- an employer holding just two short meetings with the union, at which little or no discussion took place, before putting a proposed agreement to ballot;<sup>351</sup>
- an employer telling a union that it no longer wished to continue bargaining for an agreement after two agreement proposals had been put to ballot and rejected;<sup>352</sup>
- an employer failing to respond to a draft agreement provided by the union on the basis that it was 'entitled to take a hard or inflexible position in relation to bargaining';<sup>353</sup>
- an employer informing the union that it was not prepared to consider any further changes to a proposed agreement, and that it would be distributing the proposal to employees after holding just two short meetings (in which a number of matters in the union's log of claims had not been discussed);<sup>354</sup>
- an employer simply responding to a union's log of claims by saying it was 'unrealistic';<sup>355</sup>
- a union 'revising' its wages claim from 5% to 10% after lengthy negotiations and two unsuccessful agreement ballots;<sup>356</sup>
- an employer 'effectively refusing' to meet the union, until the union was ready to negotiate four separate enterprise agreements, knowing that the union wanted one agreement;<sup>357</sup>
- several unions, wanting a single agreement rather than separate site agreements as preferred by the employer, refusing to attend meetings scheduled by the employer, failing to provide logs of claims, and giving limited responses to the employer's proposals;<sup>358</sup>
- union bargaining representatives informing the employer that its proposal was "sub-standard" without any further explanation;<sup>359</sup> and
- an employer refusing to meet the union at proposed times and failing to provide reasons as to why the times proposed by the union were unreasonable.<sup>360</sup>

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<sup>351</sup> *NUW v Defries Industries Pty Ltd* [2009] FWA 88 (18 August 2009). On the timing of enterprise agreement ballots, see "FWA's approach to specific bargaining tactics" below.

<sup>352</sup> *ASU v NCR Australia Pty Ltd* [2010] FWA 6257 (16 August 2010). See also *CPSU v Red Bee Media Australia Pty Ltd* [2010] FWA 9253 (7 December 2010).

<sup>353</sup> *TWU v United Resource Management Pty Ltd* [2010] FWA 8765 (12 November 2010).

<sup>354</sup> *NUW v Ross Cosmetics Australia Pty Ltd* [2012] FWA 3252 (18 April 2012). On the timing of enterprise agreement ballots, see "FWA's approach to specific bargaining tactics" below.

<sup>355</sup> *AMIEU v T & R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26 February 2010). This response was described by Commissioner Hampton (at [54]) as 'dismissive and very general', and as one which did not 'actually assist the parties to advance their negotiations in any way'.

<sup>356</sup> *ASU v NCR Australia Pty Ltd* [2010] FWA 6257 (16 August 2010).

<sup>357</sup> *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others* [2011] FWA 6326 (16 September 2011) at [84]-[86].

<sup>358</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v ASU, APESMA, CEPU and AMWU* [2010] FWA 4821 (30 July 2010).

<sup>359</sup> *Ibid.*

<sup>360</sup> *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others* [2011] FWA 6326 (16 September 2011).

In contrast, FWA has found that the following types of conduct did not breach the requirements in s.228 (1)(a), (c) and/or (d):

- an employer refusing to provide paid leave to an individual employee bargaining representative (acting on behalf of a larger number of employees), to enable him to participate in negotiations;<sup>361</sup>
- an employer meeting only once with a union which became involved as bargaining representative very late in the negotiation process, and insisting that a vote on the proposed agreement proceed.<sup>362</sup>

FWA has shown a willingness to supervise the process of bargaining by ensuring that parties comply with the process requirements in s.228(1)(a) and (c)-(d) of the FW Act.<sup>363</sup> However, the tribunal has also indicated that it will examine the entire context of the bargaining, and has stressed that ‘delays, lack of feedback and hiatus in negotiations [do] not automatically reflect bad faith bargaining by any party.’<sup>364</sup> FWA has also given some latitude to employers who are negotiating their first enterprise agreement, in recognition of the fact that ‘enterprise bargaining negotiations are difficult affairs, especially where there is not an accustomed method of conducting such negotiations at a particular enterprise.’<sup>365</sup>

Another major issue that has arisen concerning the operation of the GFB obligations in s.228(1)(a), (c) and (d) of the FW Act is the extent to which bargaining representatives must demonstrate a commitment to the bargaining process (and ultimately, to reaching an agreement), rather than simply ‘going through the motions’. This issue has also arisen in cases involving alleged breaches of the GFB requirements set out in s.228(1)(e)-(f). Further, it brings into consideration the import of the qualifications to the GFB obligations in s.228(2), i.e. that bargaining representatives are not required to make concessions during bargaining or to reach agreement on particular terms. These matters are examined in the discussion of “surface bargaining” below.<sup>366</sup>

## 8.5 Disclosing relevant information

Section 228(1)(b) of the FW Act requires bargaining representatives to disclose relevant information (other than confidential or commercially sensitive information) in a timely manner. This provision provides FWA with considerable discretion as to what type of information should (or should not) be required to be disclosed by bargaining representatives.

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<sup>361</sup> Such a refusal did not amount to the employer preventing the employee bargaining representative from attending meetings and participating in bargaining, as other arrangements could be made to enable this to occur: *Sergeant Richard Bowers v Victoria Police* [2011] FWA 2862 (13 May 2011) at [27]-[29].

<sup>362</sup> *ASU v Global Tele Sales Pty Ltd* [2011] FWA 3916 (22 June 2011). On the timing of enterprise agreement ballots, see “FWA’s approach to specific bargaining tactics” below.

<sup>363</sup> See, eg, some of the decisions referred to under “What types of bargaining orders has FWA made to remedy breaches of the GFB requirements?” below.

<sup>364</sup> *AMWU – Western Australian Branch v Airflite Pty Ltd* [2010] FWA 1723 (2 March 2010) at [49].

<sup>365</sup> See eg *HSU v Sunnyfields* [2011] FWA 8366 (decision delivered on transcript, 21 October 2011, at [PN242]).

<sup>366</sup> See “FWA’s approach to specific bargaining tactics” below.

In *ASU v Australian Taxation Office*,<sup>367</sup> Commissioner Deegan concluded that satisfying s.228(1)(b) does not require that a bargaining representative provide information to satisfy the requirements of the other party, only that it provide 'relevant information' in a timely manner. The ASU had sought orders compelling the ATO to provide answers to three questions about the employer's pay offer, but which the ASU argued the ATO had yet to answer adequately. The ATO responded that it had provided relevant information in a timely manner, and made a genuine effort to respond to the questions; however it was unable to respond in greater detail as the questions put by the union were broad, complex and ambiguous. Commissioner Deegan refused to make the bargaining order, finding that the evidence demonstrated that the ATO had made considerable efforts to respond to the ASU's questions. The Commissioner was careful to note, however, that she was not willing to accept the broad proposition that a bargaining representative would never be required to compile information to meet the requirements imposed by s.228(1)(b).<sup>368</sup>

The obligation in s.228(1)(b) was considered by a Full Bench of FWA in *Endeavour Coal Pty Ltd v APESMA*.<sup>369</sup> The Full Bench indicated that whether information is confidential or commercially sensitive will 'involve a decision on a question of fact in each case where that quality is asserted.'<sup>370</sup> The Full Bench further confirmed that it was appropriate for FWA to play a role in assessing whether information being sought is relevant, and if so, whether it is confidential or sensitive and therefore should be protected from disclosure.<sup>371</sup>

Circumstances in which parties have been found to have failed to comply with their obligations under ss.228(1)(b) include:

- an employer failing to disclose to an employee bargaining representative that it was intending to put a proposed agreement to ballot;<sup>372</sup>
- an employer failing to indicate to the union that any changes to the employer's draft would only be considered if provided by a certain date;<sup>373</sup>
- an employer omitting to share with the union a document which identified which matters in the union's draft agreement the employer considered 'negotiable' and which were 'non-negotiable', therefore denying the union the opportunity to consult with its members on whether it should continue to pursue the 'non-negotiable' matters;<sup>374</sup>

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<sup>367</sup> [2011] FWA 5407 (18 August 2011).

<sup>368</sup> See also *ANF v Victorian Hospitals' Industrial Association* [2012] FWA 285 (10 January 2012), where Commissioner Jones rejected the union's submission that VHIA had breached s.228(1)(b) by failing to provide responses to a pro-forma survey to be completed by employers, with over 95 questions. The Commissioner, applying *ASU v Australian Taxation Office*, noted that whilst the requirement in s.228(1)(b) may require a party to compile information, the union's request involved the collection and provision of a 'substantial body of data' and the VHIA had consistently informed the ANF of the difficulties entailed in providing the information: see [2012] FWA 285 at [102].

<sup>369</sup> [2012] FWA 1891 (22 March 2012).

<sup>370</sup> *Ibid*, [64].

<sup>371</sup> *Ibid*, [65].

<sup>372</sup> *Re Alphington Aged Care and Mary Mackillop Aged Care* [2009] FWA 301 (17 September 2009); *NUW v Defries Industries Pty Ltd* [2009] FWA 88 (18 August 2009) at [70]. See also *NUW v Ross Cosmetics Australia Pty Ltd* [2012] FWA 3252 (18 April 2012).

<sup>373</sup> *NUW v Defries Industries Pty Ltd* [2009] FWA 88 (18 August 2009).

<sup>374</sup> *Ibid*.

- an employer refusing to provide de-identified information to the union detailing the number of employees at specific classification levels and their current hourly rates of pay;<sup>375</sup>
- a group of employers (which fell within the definition of ‘single interest employers’ under the FW Act) failing to disclose to the union that they had commenced the process of making an enterprise agreement to cover only one of the four companies in the corporate group;<sup>376</sup>
- two unions omitting to respond to the employer’s request that they provide details of their bargaining claims.<sup>377</sup>

An important limitation was identified, in *Queensland Nurses’ Union of Employees v TriCare Limited*,<sup>378</sup> on what constitutes ‘relevant’ information that must be provided, if requested, under s.228(1)(b). The union sought the provision of financial information relating to the business, including its consolidated accounts. Commissioner Spencer held that the employer did not have to provide this kind of information, as it had not asserted in the negotiations that it was financially unable to meet the union’s claims: ‘... I am satisfied that the [employer] did not assert an incapacity to pay during negotiations and that it has not breached s.228(1)(b) in not disclosing [the requested financial] information.’<sup>379</sup>

While FWA has had few opportunities to consider the limitation on its powers to order the disclosure of information which is not ‘confidential or commercially sensitive’, it has in several decisions shown an unwillingness to require disclosure of information where the party defending the application has argued that the information is commercially sensitive and the tribunal did not consider its disclosure necessary to assist the bargaining process.<sup>380</sup>

## 8.6 FWA’s approach to specific bargaining tactics

During bargaining, employer and employee bargaining representatives have open to them a range of tactics which they can strategically deploy to place pressure on the other party. These range from exchange of information through to industrial action, and what have been described as more ‘ethically questionable negotiating tactics’<sup>381</sup> such as withholding or misrepresenting

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<sup>375</sup> *CPSU v Red Bee Media Australia Pty Ltd* [2010] FWA 9253 (7 December 2010). Senior Deputy President Hamberger accepted that this information was relevant to the bargaining process as, without it, it would be difficult for the union to work out whether the employer’s wage proposal would actually lead to an increase in wages.

<sup>376</sup> *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others* [2011] FWA 6326 (16 September 2011).

<sup>377</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v ASU, APESMA, CEPU and AMWU* [2010] FWA 4821 (30 July 2010).

<sup>378</sup> [2010] FWA 7416 (23 September 2010).

<sup>379</sup> *Ibid*, [33]. On the requirement that information requested under s.228(1)(b) must be relevant, see also *Dudfield v Australian Federal Police* [2011] FWA 5406 (19 August 2011).

<sup>380</sup> See eg *ASU v Global Tele Sales Pty Ltd* [2011] FWA 3916 (22 June 2011) at [35]; and *AMIEU v Woolworths Limited* [2009] FWA 849 (16 November 2009), upheld on appeal in *AMIEU v Woolworths Limited* [2010] FWA 1625 (3 March 2010).

<sup>381</sup> M Lee, ‘Crafting Remedies for Bad Faith Bargaining, Coercion and Duress: “Relative Ethical Flexibility” in the Twenty-First Century’ (2005) 18 *Australian Journal of Labour Law* 1, 28. Note that in *CFMEU v Shinagawa Refractories Australasia Pty Ltd* [2011] FWA 8304 (16 December 2011), Commissioner Macdonald stated (at [26]) that the GFB requirements in the FW Act ‘do not say that the parties should adopt a particular ethical approach to the negotiations’.



information, and unilaterally changing working conditions. In the first three years of operation of the GFB provisions, FWA has been asked to rule on the legitimacy of a range of tactics or conduct. Many applications for bargaining orders have been based on alleged breaches of the prohibition on capricious or unfair conduct that undermines freedom of association or collective bargaining (s.228(1)(e)), and/or the related requirement to recognise and bargain with the other party's bargaining representative (s.228(1)(f)). While most of the decisions in this area have related to actions or tactics adopted by employers during bargaining, unions have also been found to have breached these provisions in several instances.

### 8.6.1 Unacceptable bargaining tactics

The following forms of conduct or tactics have been found by FWA to breach one or more of the GFB requirements in s.228(1) of the FW Act.

#### *Refusing to negotiate while industrial action is taking place*

FWA has rejected the argument that an employer's GFB obligations end when a union takes protected industrial action. In *CPSU v Red Bee Media Australia Pty Ltd*,<sup>382</sup> the employer had informed the CPSU that it considered the union's decision to take industrial action as triggering the end of the GFB process. Senior Deputy President Hamberger found that such a contention was inconsistent with the scheme of the FW Act, which recognizes that the taking of protected industrial action (provided it was taken in accordance with Part 3-3 of the legislation) is a legitimate bargaining tactic,<sup>383</sup> which has no bearing on the other bargaining representative's obligation to comply with the GFB requirements.

#### *Surface bargaining*

Surface bargaining – or 'going through the motions' of bargaining without having any real intention of reaching an agreement – has been found to breach the GFB requirements in s.228(1) of the FW Act, although there is uncertainty over FWA's powers to prevent this kind of conduct through bargaining orders due to the operation of s.228(2). This matter was considered by a Full Bench of FWA in *Endeavour Coal Pty Ltd v APESMA (Collieries' Staff Division)*.<sup>384</sup> APESMA had been seeking to enter into an enterprise agreement with Endeavour Coal in relation to its members at the Appin Mine in New South Wales. FWA issued an MSD in July 2010, and the parties held 12 meetings between August 2010 and August 2011, when an impasse had been reached. APESMA applied for a bargaining order on the grounds that the company was not bargaining in good faith, as it had no real intention of entering into an enterprise agreement. The company argued that it was not obliged under the GFB obligations to bargain in a manner that it did not wish to, and that if APESMA wished to change the status quo, it must persuade Endeavour Coal to do so and convince it of the terms and conditions to be included in any proposed agreement.

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<sup>382</sup> [2010] FWA 9253 (7 December 2010).

<sup>383</sup> See also *LHMU v Foster's Australia Pty Ltd* [2009] FWA 750 (29 October 2009), where Deputy President Kaufman emphasised the legitimacy of protected industrial action during bargaining; and *TWU v Veolia Transport Queensland Pty Ltd* [2011] FWA 5691 (23 August 2011) at [68].

<sup>384</sup> [2012] FWA 1891 (22 March 2012).

A Full Bench of FWA upheld the decision of Commissioner Roberts at first instance to issue a bargaining order,<sup>385</sup> finding that: ‘In effect the parties must take reasonable steps and make reasonable efforts towards making an enterprise agreement.’<sup>386</sup> In the Full Bench’s view, it is contrary to the GFB obligations for an employer to engage in bargaining in a manner that is ‘a mere sham or pretence’ by ‘going through the motions of bargaining without any real intention to enter into an agreement’.<sup>387</sup> The Full Bench found further support for this interpretation in the objects of the FW Act, and of Part 2-4 in particular, which include the promotion of GFB:

*‘In general the legislative scheme might be described as one which seeks to promote agreement making but which does not compel parties to make concessions or to reach agreement. There is nothing inconsistent about encouraging parties to make agreements - and imposing an obligation upon them to try to do so - but at the same time not compelling parties to make concessions in bargaining. An agreement remains what the name implies.’<sup>388</sup>*

In the instant case, the Full Bench determined that the employer had ‘participated in the bargaining process but [had] not [made] any substantive contribution to the possible content of an enterprise agreement or put proposals of its own’.<sup>389</sup> The Full Bench proceeded to make orders which, among other things, required the company to ‘put its negotiating position’.<sup>390</sup> In doing so, the Full Bench was cautious to emphasise the distinction between this requirement, and requiring a party to make concessions or put a different negotiating position to the one it wants to put (both of which are prohibited by s.228(2)).<sup>391</sup>

However, in subsequent proceedings in the Federal Court of Australia, a number of the orders made by the Full Bench were found to be beyond FWA’s powers under the FW Act.<sup>392</sup> Justice Flick essentially endorsed the Full Bench’s approach to the GFB obligations, holding that a party cannot sit ‘mute’ or act as a ‘disinterested suitor’ by merely rejecting proposals advanced by other bargaining representatives:<sup>393</sup>

*‘It is concluded that once a “majority support determination” has been made, Endeavour Coal must thereafter approach “bargaining” with the Association with a genuine (or “good faith”) objective or intention of concluding an “enterprise agreement” – if possible. What is required is that those participating in the “bargaining” must keep an “open mind” as to the prospect of ultimately reaching agreement ... It is further concluded that a “bargaining representative” may be held to have fallen short of the “requirements” set forth in s 228(1) if there is a failure to put forward for consideration a proposal or a counter-proposal or suggested terms which may be acceptable. The manner in which Endeavour Coal approaches “bargaining” is, subject to s 228(1), largely a matter for it to determine.’*

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<sup>385</sup> APESMA, *The Collieries’ Staff Division v Endeavour Coal Pty Ltd* [2012] FWA 13 (4 January 2012).

<sup>386</sup> [2012] FWA 1891 (22 March 2012) at [26].

<sup>387</sup> Ibid, [30].

<sup>388</sup> Ibid, [27].

<sup>389</sup> Ibid, [32].

<sup>390</sup> Ibid, [48].

<sup>391</sup> Ibid; see also at [49].

<sup>392</sup> *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764 (19 July 2012). We note this decision due to its importance, although it falls outside the first three years of operation of Part 2-4 of the FW Act.

<sup>393</sup> Ibid, [35]; see also [43].

*Section 228(1) does not require a party to “bargain” in any particular manner... [W]ithin the bounds of the “good faith bargaining requirements” set forth in s 228(1), Endeavour Coal is certainly not required to put self-interest to one side. Indeed, s 228(2) clearly contemplates that no party to the bargaining process is required to do so.*<sup>394</sup>

Justice Flick also observed that the end objective of the bargaining process is the reaching of an enterprise agreement between the parties (if possible).<sup>395</sup> However, while upholding the Full Bench’s decision in relation to surface bargaining, Justice Flick set aside three of the four orders made by the Full Bench on the basis that they exceeded the limitations placed on the tribunal’s powers by s.228(2) of the FW Act. The orders that were found to exceed FWA’s powers included those requiring Endeavour Coal to ‘provide a list of subject matter that Endeavour ... would be prepared to include in an enterprise agreement’ to APESMA, and requiring the employer to identify its points of agreement and disagreement with the latest draft of the enterprise agreement and to propose terms that it would be prepared to enter into.<sup>396</sup> According to Justice Flick:

*‘With great respect to the expertise and experience of the Full Bench, it is concluded that Order 1 is beyond power. Fair Work Australia’s power to make orders is confined (inter alia) to directing things to be done to ensure compliance by one or more of the “bargaining representatives” with the “good faith bargaining requirements” (s 231(1)(a)). Order 1 requires things to be done which s 228(2) specifically provides are not required to be done in order to comply with the “good faith bargaining requirements”. An order requiring Endeavour Coal to list the “subject matter” that it “would be prepared to include in an enterprise agreement” trespasses into the area of requiring Endeavour Coal to accept that “subject matter” as part of any final agreement that may be reached. Although it does not require Endeavour Coal to reach agreement on the “terms that are to be included in the agreement” (s 228(2)(b)), it does require Endeavour Coal to make a “concession” as to that “subject matter” which it would be “prepared to include” (s 228(2)(a)).’<sup>397</sup>*

His Honour expressed the view that an order requiring FWA to list the subject matter it *may* be prepared to include in an agreement, might be within power.<sup>398</sup>

The issue of surface bargaining has also been considered by single members of the tribunal. In *APESMA v BHP Coal Pty Ltd*,<sup>399</sup> the union argued that the company had engaged in surface bargaining as it had not prepared any draft agreement, proposed any draft clauses, proposed any subject matter for negotiation, or agreed on even the most uncontroversial clauses advanced by the union.<sup>400</sup> The parties had met 11 times over 18 months to negotiate an

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<sup>394</sup> Ibid, [34] (emphases in original).

<sup>395</sup> Ibid, [45].

<sup>396</sup> Ibid, [60], extracting Order 1 made by the FWA Full Bench on 23 March 2012.

<sup>397</sup> Ibid, [62] (emphases in original). His Honour also found (at [73]) that orders requiring Endeavour Coal to ensure that it is represented by a person who has the capacity to make decisions and give reasons for the company’s responses were invalid, as the tribunal has no power to make stipulations as to the identity of a bargaining representative. See further “What types of bargaining orders has FWA made to remedy breaches of the GFB requirements?” below.

<sup>398</sup> Ibid, [63].

<sup>399</sup> [2012] FWA 4435 (20 June 2012). At the time of writing, this decision is under appeal to a Full Bench of FWA (Case No 2012/4512).

<sup>400</sup> Ibid, [26].

agreement to cover APESMA members at BHP's Broadmeadow mine. The company's conduct throughout the bargaining process was attributed (by APESMA) to an 'ideological' position that it did not want a collective agreement to cover staff employees at the mine.<sup>401</sup> The company argued that it had participated in the bargaining process, but it was not required under the FW Act to make concessions or reach agreement.<sup>402</sup> In rejecting the union's application, Commissioner Spencer observed that, while at first glance the facts might suggest the Full Bench decision in *Endeavour Coal v APESMA* was applicable,<sup>403</sup> 'a close analysis is required of the bargaining' to assess whether it was a 'sham or pretence' and whether the conduct of BHP was capricious or unfair.<sup>404</sup> The Commissioner went on to determine that: 'In response to the Full Bench Decision in *Endeavour* and APESMA's correspondence, BHP specifically articulated their bargaining position in writing ... as required'; therefore, the company had not engaged in capricious or unfair conduct, or breached any of the other GFB obligations in s.228(1).<sup>405</sup>

In *AMWU v Cochlear Limited*,<sup>406</sup> where the parties were unable to conclude an agreement during negotiations over a very long period, Commissioner Cargill decided that the employer had breached the GFB requirement in s.228(1)(d) by failing to respond to the union's proposals in a timely manner.<sup>407</sup> Overall, however, the Commissioner rejected the union's arguments that the employer had essentially engaged in surface bargaining, finding that both parties were at fault:

*'... the AMWU and Cochlear have had a rather difficult relationship for some time. Such a situation does not provide the best base for bargaining. ... The evidence shows that both parties have been responsible for delays in the process. In my view it is neither helpful nor necessary for me to apportion blame for particular delays.'*<sup>408</sup>

### **Providing misleading information to employees<sup>409</sup>**

FWA has found that the provision of misleading information to employees by either an employer or a union may constitute a breach of the GFB obligations, particularly s.228(1)(e). In *NUW v Ross Cosmetics Australia Pty Ltd*,<sup>410</sup> Commissioner Roe found that the employer breached the GFB requirements where it provided misleading information to employees about the proposed agreement and its effect on existing entitlements; altered the notice of representational rights 'in a manner that was potentially misleading' about the role of the

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<sup>401</sup> Ibid, [27], [31]-[32].

<sup>402</sup> Ibid, [29], [63]-[64], [106].

<sup>403</sup> Note that Commissioner Spencer's decision was handed down prior to Justice Flick's decision in *Endeavour Coal Pty Ltd v APESMA* (discussed above).

<sup>404</sup> [2012] FWA 4435 (20 June 2012) [99].

<sup>405</sup> Ibid, [101]; see also [108].

<sup>406</sup> [2012] FWA 5374 (3 August 2012). We note this decision due to its importance, although it falls outside the first three years of operation of Part 2-4 of the FW Act. See also the discussion of the Cochlear bargaining dispute in Chapter 6 of this report.

<sup>407</sup> Ibid, [545], [548]. other breaches of the GFB requirements on the part of the company, identified by Commissioner Cargill, included its refusal to allow the union access to the lunchroom at the company's premises for purposes of meeting with employees: see [564].

<sup>408</sup> Ibid, [543]; see also [544], [549].

<sup>409</sup> See also the discussion of "Direct dealing" - employer communication with employees during bargaining", under "Acceptable bargaining tactics" below.

<sup>410</sup> [2012] FWA 3252 (18 April 2012).

employer bargaining representatives'; and implied in its communications to employees that certain claims by the union were unlawful.<sup>411</sup>

However, FWA has distinguished between the provision of misleading information, which is considered to be an illegitimate bargaining tactic in contravention of the GFB requirements, and the legitimate practice whereby a bargaining representative 'forcefully put(s) its account of the bargaining directly to employees for their information or to attempt to persuade them to support a proposed agreement'.<sup>412</sup> In one of the earlier cases to consider this issue, *LHMU WA Branch v Hall and Prior Aged Care Organization and Others*,<sup>413</sup> Commissioner Cloghan accepted that the employer's use of emotive language or 'bargaining spin' when communicating with employees during bargaining was not inconsistent with its GFB obligations.<sup>414</sup> Both parties, according to the Commissioner, had engaged in the 'rough and tumble' of bargaining, which included the distribution of 'robust documentation'; and the fact that they had both put their 'own (best) perspective on information circulated' was 'a normal dimension to negotiations' and did not constitute bad faith.<sup>415</sup>

In a similar vein, Vice President Watson stated as follows in *NUW v Patties Foods Ltd*:

*'Although the integrity of communications is important, it must be remembered that there will inevitably be extensive communications between the various parties and stakeholders engaged in the negotiations of an enterprise agreement. The parties will adopt an approach to their communications which they believe will best achieve their objectives. Some of these communications could well be robust, controversial and at times even disrespectful or mistaken. In my view, in the absence of a pattern of deliberate improper communications, an applicant will find it difficult to establish that a single communication constitutes capricious or unfair conduct of the requisite type.'*<sup>416</sup>

This approach has been followed in a number of decisions of the tribunal. In *Wilson Security Pty Ltd; MSS Security Pty Ltd; G4S Custodial Services Pty Ltd v United Voice*,<sup>417</sup> Commissioner Lewin agreed with the employers that the union had unfairly represented their proposals for the terms of an agreement on its campaign website. However, the Commissioner was not satisfied on the evidence that the statement had the effect of undermining bargaining between the parties.<sup>418</sup> In *Jupiters Limited v United Voice*, Commissioner Asbury rejected an application for bargaining orders lodged by the company, alleging that the union had contravened s.228(1)(e) by distributing material to staff and patrons that misrepresented a wages offer made by the company during negotiations for an agreement.<sup>419</sup> The Commissioner observed that a deliberate misrepresentation by a union official who was a bargaining representative could form the basis

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<sup>411</sup> Ibid, [47], [50].

<sup>412</sup> Ibid, [48]. See also *TWU v Veolia Transport Queensland Pty Ltd* [2011] FWA 5691 (23 August 2011); *NUW v Patties Foods Ltd* [2011] FWA 4103 (1 July 2011).

<sup>413</sup> [2010] FWA 1065 (11 February 2010).

<sup>414</sup> Ibid, [23].

<sup>415</sup> Ibid, [24], [27].

<sup>416</sup> [2011] FWA 4103 (1 July 2011) at [21].

<sup>417</sup> [2011] FWA 6038 (9 September 2011).

<sup>418</sup> Ibid, [7].

<sup>419</sup> [2011] FWA 8317 (5 December 2011).

of a bargaining order:<sup>420</sup> ‘a union ... has an obligation to accurately and fairly report to [its members] on the progress of bargaining’, including any offers made by the employer’.<sup>421</sup> However, in this case, the union had ‘... done no more than exercise its right as a bargaining representative to criticise the approach taken by Jupiters to bargain and wages outcomes.’<sup>422</sup> The Commissioner concluded that: ‘... it is not misrepresentation for a Union engaged in robust enterprise bargaining negotiations, presented with a range of scenarios for wage increases, to highlight to its members the lowest outcome available under those scenarios.’<sup>423</sup>

The question whether a bargaining representative must have *intended* to mislead employees or another bargaining representative, in order to breach the GFB obligations, was considered in *TWU v Veolia Transport Queensland Pty Ltd*.<sup>424</sup> The union applied for bargaining orders against the company on the basis that it had issued a series of staff bulletins, which contained incorrect statements about the rights of TWU members to take protected industrial action. Commissioner Asbury found that the company had breached s.228(1)(e), by making ‘incorrect or ambiguous statements about the rights of employees in the bargaining process, including the right to take protected industrial action’.<sup>425</sup> In the Commissioner’s view: ‘... it is not necessary for the conduct to be intentionally misleading or to constitute misrepresentation, in order for a finding to be made that it is capricious or unfair’.<sup>426</sup> The company’s incorrect statements ‘undermined the ability of union members to participate in collective bargaining to the full extent provided under the [FW] Act’.<sup>427</sup>

### *Refusing to allow union delegates to participate in negotiations*

In several cases, FWA has been asked to consider whether employers acted capriciously or unfairly when they sought to exclude union delegates from participating in bargaining. In *Flinders Operating Services Pty Ltd T/A Alinta Energy v ASU, APESMA, CEPU and AMWU*,<sup>428</sup> four unions argued that the employer had acted in bad faith when it refused to permit delegates (elected by co-workers, but not formally nominated as bargaining representatives) to attend negotiation meetings. The company argued that it only owed GFB obligations to bargaining representatives. Commissioner Hampton recognised that unions acted through individuals authorised under their rules to do so, and that in the context of bargaining this meant that delegates or officials might be involved in the process on behalf of union members.<sup>429</sup> However, such rights flowed entirely from the union's status as a bargaining representative under the FW Act:

*‘Where a delegate is given a role under the rules of the union to represent the union and is authorised as necessary to do so in relation to a proposed agreement, in my view they might well have rights and obligations but in that case they do so as part of and on behalf*

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<sup>420</sup> Ibid, [32].

<sup>421</sup> Ibid, [38].

<sup>422</sup> Ibid, [47].

<sup>423</sup> Ibid, [48].

<sup>424</sup> [2011] FWA 5691 (23 August 2011).

<sup>425</sup> Ibid, [55], [65].

<sup>426</sup> Ibid, [62].

<sup>427</sup> Ibid, [68].

<sup>428</sup> [2010] FWA 4821 (30 July 2010).

<sup>429</sup> Ibid, [152].

*of the union which remains the bargaining representative under the [FW] Act. Where a delegate is not authorised under the rules but rather by informal nomination from the members short of nomination as a bargaining representative under the [FW] Act, they are clearly not bargaining representatives and have no individual rights or obligations in that particular context.*<sup>430</sup>

The Commissioner continued that it would often be unfair or capricious for an employer to refuse to recognise the role of union delegates in the bargaining process. This did not mean that there is an automatic right for every delegate to attend meetings and, as employees, permission to leave their workplace and/or their assigned work is required. However:

*'...provided that the attendance of one or more delegates is reasonable and can be accommodated without undue compromise to the operational requirements of the business, a refusal to allow them to attend could in my view itself represent a breach of s228(1)(e) of the Act.'*<sup>431</sup>

On the facts before the tribunal, Commissioner Hampton ruled that while there had been a dispute over the number of delegates that could attend the meetings, there was insufficient evidence that the employer had unreasonably prevented their attendance to find it had acted in bad faith.<sup>432</sup>

A similar issue arose in *LHMU v Carinya Care Services*,<sup>433</sup> where the union sought bargaining orders after the employer sought to exclude two delegates from an initial negotiating meeting on the basis that they were not bargaining representatives. Commissioner Cloghan found that the two delegates had been elected to the bargaining team consistent with the union's rules, and the employer's refusal to permit them to participate in the meetings impeded efficient and fair bargaining.<sup>434</sup> Not only were they entitled to participate in the bargaining, but more generally 'to assert that workplace employee delegates are unable and unauthorised to participate in negotiations as part of the LHMU bargaining team, is the antithesis of an enterprise agreement between employers and employees.'<sup>435</sup> Further, in light of the framework of union rights and privileges under both the FW Act and the *Fair Work (Registered Organisations) Act 2009* (Cth), the employer's attempts to exclude the delegates was "sudden and irregular" and constituted behaviour "that was capricious, unfair and intended to impair the collective bargaining process".<sup>436</sup>

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<sup>430</sup> Ibid, [153].

<sup>431</sup> Ibid, [154].

<sup>432</sup> Ibid, [156]-[160]; see also [155], outlining the factors to be considered in determining whether the attendance of union delegates at bargaining meetings is 'reasonable'.

<sup>433</sup> [2010] FWA 6489 (2 September 2010).

<sup>434</sup> Ibid, [76].

<sup>435</sup> Ibid, [88] (emphasis in original).

<sup>436</sup> Ibid, [89]-[91].

### ***Putting a version of an agreement to ballot that is different to the final version provided to the other bargaining representatives***<sup>437</sup>

In *AMWU v Coates Hire Operations Pty Ltd T/A Coates Hire Limited*,<sup>438</sup> Commissioner Macdonald found that the employer had breached s.228(1)(e) when it had, at the last minute, distributed (with the proposed agreement to go to ballot), a flyer providing that the first 4.5% wage increase would be back-paid if the agreement was approved by employees. While the employee bargaining representatives had been informed of the employer's intention to put the agreement to ballot and provided with a copy of the agreement, they had not been made aware of the back pay offer. Commissioner Macdonald rejected the employer's submission that the offer of back pay was merely 'an administrative action' by the CEO, finding it was more appropriately '... characterised as a bargaining item that would otherwise be put on the bargaining table as an inducement (perhaps amongst other bargaining items) to seal a deal. It was an item that should have been put to the other bargaining representatives ... for their consideration.'<sup>439</sup> The Commissioner also found that the employer had breached s.228(1)(e) by shifting the date in the proposed agreement by which a process of standardization of pay rates was to be achieved, from one agreed between the parties (the first pay increase following FWA's approval of the agreement) to April 2015.<sup>440</sup>

In contrast, in *CFMEU v Shinagawa Refractories Australasia Pty Ltd*,<sup>441</sup> Commissioner Macdonald did not accept the union's argument that the company had breached the GFB requirements when it submitted to ballot a draft agreement that did not include certain clauses that had previously been agreed upon. The company argued that changed economic circumstances affecting the business compelled it to terminate negotiations and put its version of the agreement to ballot. In refusing the union's application for a bargaining order, the Commissioner held that the GFB requirements: 'do not impose an obligation on a party to take a particular approach to negotiations or prescribe the use of tactics. There is no prescription against say, the withdrawal by one party of previously agreed terms, clauses or conditions ...'.<sup>442</sup> Further, the ballot process would determine whether employees accepted or rejected the employer's proposals.<sup>443</sup>

### ***'Direct dealing' – direct offers to employees or unilateral changes to working conditions during bargaining***

One of the most controversial issues to have arisen in relation to the scope of the GFB provisions is the extent to which s.228(1)(e) and (f) permit employers to deal directly during bargaining with employees who are represented by a union or other bargaining representative. 'Direct dealing' can encompass the employer bypassing the employees' bargaining representative(s) through offers of improvements to employment conditions, or making changes to existing

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<sup>437</sup> See also "Withdrawal, or reneging upon, already agreed items at a later stage in the negotiation process" under "Acceptable bargaining tactics" below.

<sup>438</sup> [2012] FWA 3357 (19 April 2012).

<sup>439</sup> *Ibid*, [39].

<sup>440</sup> *Ibid*, [45].

<sup>441</sup> [2011] FWA 8304 (16 December 2011).

<sup>442</sup> *Ibid*, [25]. See also *Queensland Nurses' Union of Employees v TriCare Limited* [2010] FWA 7416 (23 September 2010).

<sup>443</sup> [2011] FWA 8304 (16 December 2011)[27].



conditions. Another form of direct dealing is where the employer simply seeks to communicate with employees directly, rather than through their bargaining representative(s).<sup>444</sup>

In one of the earlier cases to consider the issue of unilateral changes to existing conditions, *FSU v Commonwealth Bank of Australia*,<sup>445</sup> Commissioner Smith was asked to determine whether the employer breached s.228(1)(e) when it granted two automatic wage increases to employees after informing the union that it would not make a pay offer in agreement negotiations. The Commissioner found that the bank's conduct – in putting different positions to employee bargaining representatives and to the employees directly – undermined collective bargaining:

*'Without travelling more broadly into the concept of unilaterally altering terms and conditions of employment during bargaining, it cannot be that an employer is negotiating in good faith if it is able to alter terms and conditions [of] employment of persons, on whose behalf bargaining is taking place, for reasons other than those advanced to the bargainers.'*<sup>446</sup>

However, the bargaining order made by Commissioner Smith to address the employer's capricious/unfair conduct was limited to requiring the union to be advised of any further unilateral adjustments of conditions (rather than requiring the employer to put a pay offer in the negotiations, as sought by the union).<sup>447</sup>

In *Endeavour Coal Pty Ltd v APESMA*,<sup>448</sup> a Full Bench of FWA recognised that unilateral changes by an employer to the terms of employment contracts for new and existing staff to be covered by a proposed agreement may constitute unfair conduct which could be addressed through an appropriate bargaining order:

*'[Such an order] is directed towards preserving the integrity of the bargaining process by ensuring that changes are not made unilaterally in relation to matters which are still the subject of negotiation between the parties. ... This is not an unreasonable restriction during the bargaining process and whilst parties are endeavouring to make an agreement. It seeks to preserve the status quo during the bargaining and does not require the parties to make concessions or to reach agreement on terms to be included in an enterprise agreement.'*<sup>449</sup>

Even more clearly constituting unfair or capricious conduct that undermines freedom of association or collective bargaining, in FWA's view, is where an employer seeks to separate individual employees from the collective group. In *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others*,<sup>450</sup> Commissioner Ryan found that an employer breached s.228(1)(e) when it ran a 'carefully orchestrated process' to separate individual workers from the collective

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<sup>444</sup> This is discussed under "Acceptable bargaining tactics" below.

<sup>445</sup> [2010] FWA 2690 (9 April 2010).

<sup>446</sup> Ibid, [68].

<sup>447</sup> Ibid, [60]-[62], [70].

<sup>448</sup> [2012] FWA 1891 (22 March 2012). This aspect of the Full Bench's decision was upheld in the subsequent Federal Court decision in this matter: see *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764 (19 July 2012) at [67]-[70].

<sup>449</sup> Ibid, [55].

<sup>450</sup> [2011] FWA 6326 (16 September 2011).

and to remove the AMWU from the bargaining process by offering those employees a 3% pay rise if they revoked the union's status as their bargaining representative.<sup>451</sup>

However, the implementation by employers of changes to certain kinds of employment arrangements during bargaining has, in a number of decisions, been found not to breach the GFB requirements. In *APESMA v BHP Coal Pty Ltd*,<sup>452</sup> Commissioner Spencer rejected the union's submission that BHP had breached its obligations under s.228 in making unilateral changes to its policies on housing, working flexibility and travel and overtime allowances. The Commissioner accepted the company's evidence that it had traditionally provided these entitlements to staff outside the collective agreement, and further: 'There is no indication that BHP altered its position or practices in relation to providing these entitlements to undermine or subvert the bargaining process or provide benefits outside the bargaining process to discourage employees from seeking to participate in it.'<sup>453</sup>

A similar approach was taken by Commissioner Williams in *AWU v Woodside Energy Limited*,<sup>454</sup> where the company's implementation of transitional roster arrangements for employees during bargaining was found to be in accordance with the GFB requirements. The Commissioner emphasised that 'not all unilateral acts by a bargaining representative during negotiations for an agreement that another party objects to will necessarily be unfair or capricious';<sup>455</sup> and that '[t]o require a company to refrain from making changes to its operations solely because the change involved issues raised during bargaining ... would be unreasonable.'<sup>456</sup> Commissioner Williams distinguished the facts before him from those in *FSU v Commonwealth Bank of Australia*, where the employer '... acted to undermine a claim made during bargaining by unilaterally granting the claim in part so there was little left for the union to pursue in collective bargaining', as in the instant case claims around rostering could still be advanced by the AWU during negotiations for the new agreement.<sup>457</sup>

Finally, in *LHMU v Coca-Cola Amatil (Australia) Pty Ltd*,<sup>458</sup> the union failed to obtain a bargaining order to restrain the employer from implementing a proposed restructure of part of its manufacturing plant during agreement negotiations. The company's actions, according to Senior Deputy President O'Callaghan, were motivated by a desire to improve its competitive position in response to the recent loss of 20% of its manufacturing business; and in such circumstances, the company's objectives were not 'fanciful, vindictive nor whimsical.'<sup>459</sup>

### ***Conducting a flawed ballot process***

In *Coates Hire Operations Pty Ltd T/A Coates Hire Limited*,<sup>460</sup> the tribunal found that the employer's conduct of a flawed secret ballot process constituted a breach of the GFB requirements. These flaws included evidence suggesting that the ballot could not accurately be

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<sup>451</sup> Ibid, [75]-[77].

<sup>452</sup> [2012] FWA 4435 (27 June 2012).

<sup>453</sup> Ibid, [78]; see also [79]-[80].

<sup>454</sup> [2012] FWA 4332 (30 May 2012).

<sup>455</sup> Ibid, [93], referring to the FWA Full Bench decision in *Tahmoor Coal*.

<sup>456</sup> Ibid, [97].

<sup>457</sup> Ibid, [102].

<sup>458</sup> [2009] FWA 153 (31 August 2009).

<sup>459</sup> Ibid, [47]. See also *AWU v Woodside Energy Limited* [2012] FWA 4332 (30 May 2012) at [96]-[97].

<sup>460</sup> [2012] FWA 3357 (19 April 2012).

described as a 'secret' ballot due to the potential for managers to identify how their employees voted at some sites;<sup>461</sup> and some employees having inadvertently been denied the opportunity to vote.<sup>462</sup> Commissioner Macdonald rejected the company's argument that these were issues that should be raised when FWA came to consider whether to approve the agreement:

*'The view I take is that issues about the ballot process that are raised before the ballot takes place are issues for consideration under the good faith bargaining guidelines. Issues raised about the ballot process after the ballot has taken place are issues to be raised before FWA during the approval of the voted up enterprise agreement application before FWA.'*<sup>463</sup>

On the other hand, Commissioner Macdonald in *CFMEU v Shinagawa Refractories Australasia Pty Ltd* suggested that the union's concerns about the employer's proposed ballot process could be raised by the union in opposition to approval of the agreement by FWA.<sup>464</sup>

In *NUW v Ross Cosmetics Australia Pty Ltd*,<sup>465</sup> Commissioner Roe determined that, while matters going to the ballot process were relevant to the agreement approval process, there was nothing in the legislative scheme to suggest that they could not also be dealt with in an application for a bargaining order under s.229.<sup>466</sup> The Commissioner found that the employer had breached s.228(1)(e) by conducting a ballot process that required employees to identify how they voted to the employer, and holding the vote at a time when many employees would be on leave which 'may unreasonably restrict [the employees'] access to discussion and representation'.<sup>467</sup>

## 8.6.2 Acceptable bargaining tactics

The following kinds of conduct or tactics have been found by FWA not to contravene any of the GFB requirements in s.228(1) of the FW Act.

### *Submitting a proposed agreement to ballot without the approval of other bargaining representatives*

A major issue that FWA has considered in a number of cases is whether an employer's submission of a proposed agreement to a vote of employees, without the approval of the employee bargaining representatives involved in the negotiations, constitutes a breach of s.228(1)(e) and/or (f). The prevailing view is that an employer will not breach its GFB obligations if it submits an agreement to ballot once the negotiations have reached an impasse.

In *ASU v Queensland Tertiary Admissions Centre Ltd*,<sup>468</sup> the first successful application for a bargaining order under the FW Act, Senior Deputy President Richards put a proposed agreement ballot on hold after finding that the employer had contravened s.228(1)(e) and (f) by excluding the union from discussions about the agreement and failing to recognise the union as

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<sup>461</sup> Ibid, [54]-[55].

<sup>462</sup> On this latter concern, however, Commissioner Macdonald observed (ibid, [57]) that it was 'an issue to be addressed by the company' rather than a breach of the GFB requirements.

<sup>463</sup> Ibid, [51] (emphasis in original).

<sup>464</sup> [2011] FWA 8304 (16 December 2011) at [28].

<sup>465</sup> [2012] FWA 3252 (18 April 2012).

<sup>466</sup> Ibid, [54].

<sup>467</sup> Ibid, [50].

<sup>468</sup> [2009] FWA 53 (29 July 2009).

a bargaining representative.<sup>469</sup> In *NUW v Chep Australia Ltd*,<sup>470</sup> Vice President Watson (while declining to do so on the facts before him) indicated that FWA has the power to delay agreement ballots 'for a short time', so long as this 'does not in substance deny employees the opportunity to vote for an agreement.'<sup>471</sup>

In *AMWU and APESMA v DTS Food Laboratories*,<sup>472</sup> Commissioner Smith accepted the employer's submission that the negotiations had reached the point of 'impasse' and so it would be reasonable for the employer to seek the views of its employees on the proposed agreement.<sup>473</sup> The Commissioner emphasised, however, that submitting a proposed agreement to ballot *before* negotiations had stalled would contravene s.228(1)(f), as '[i]t would not be dealing openly and honestly with those who have been charged with the responsibility of seeking to reach an agreement. It would be going behind the authorized bargainers in circumstances where no challenge is made to their *bona fides*.'<sup>474</sup> In Commissioner Smith's view, the relevant question was whether 'the stage [has] been reached where further discussions would simply represent activity rather than any possible achievement.'<sup>475</sup> In *LHMU WA Branch v Hall and Prior Aged Care Organisation and Others*, a similar approach was taken by Commissioner Cloghan, who found that the essential question in determining whether an employer had acted reasonably by putting a proposed agreement to ballot was whether the bargaining 'had reached an end point' or 'an impasse'.<sup>476</sup>

This issue was dealt with decisively in *Tahmoor Coal*,<sup>477</sup> where a Full Bench of FWA found that the company had not engaged in capricious or unfair conduct by submitting a proposed agreement to an employee ballot following over 15 months of negotiations, during which the parties had met some 50 times. The Full Bench observed as follows:

*'Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the [GFB] requirements, it will not always be so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot.'*<sup>478</sup>

The Full Bench went on to provide some guidance as to how to determine when an agreement may be put to ballot without breaching the GFB requirements, noting that the Commissioner at first instance and the parties had all referred to the notion of 'impasse' or 'stalemate'.<sup>479</sup> Alternatively, it may be asked whether the employee bargaining representatives still needed an opportunity to discuss the company's latest proposal, or 'whether negotiations had reached

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<sup>469</sup> Ibid, [12]-[16]. See also *NUW v Defries Industries Pty Ltd* [2009] FWA 88 (18 August 2009).

<sup>470</sup> [2009] FWA 202 (11 September 2009).

<sup>471</sup> Ibid, [43]. See also *AMIEU v T&R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26 February 2010).

<sup>472</sup> [2009] FWA 1854 (21 December 2009).

<sup>473</sup> Ibid, [18].

<sup>474</sup> Ibid, [14] (footnote omitted).

<sup>475</sup> Ibid, [16].

<sup>476</sup> [2010] FWA 1065 (11 February 2010) at [37] and [41].

<sup>477</sup> [2010] FWA 3510 (22 May 2010). For an extensive analysis of this decision and its broader implications, see A Bukarica and A Dallas, *Good Faith Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand*, The Federation Press, Sydney, 2012.

<sup>478</sup> [2010] FWA 3510 (22 May 2010) at [30].

<sup>479</sup> Ibid.

such a stage that the employer was entitled to put its proposal to a ballot in order to see if progress could be made.’<sup>480</sup>

FWA has subsequently applied the ‘impasse’ test in a number of cases, permitting an employer to submit a proposed agreement to ballot where a deadlock in negotiations has been reached.<sup>481</sup> However, an employer may not request employees to vote on an agreement based on a premature unilateral conclusion that an impasse has been arrived at – for example, where there are still claims from the union that the employer has not responded to.<sup>482</sup>

A number of decisions appear to have adopted a somewhat more permissive approach to an employer’s unilateral submission of an agreement to ballot, in some instances questioning the necessity of an impasse having to be reached.<sup>483</sup> In *ASU v Global Tele Sales Pty Ltd*,<sup>484</sup> the union’s application for a bargaining order to prevent a proposed agreement ballot was refused by Vice President Watson, partly on the basis that the union had sought to become involved in the negotiations at a late stage.<sup>485</sup> This decision is also important as the Vice President upheld the right of an employer to submit an agreement to ballot, where it has followed the requirements set out in the agreement-making provisions of Part 2-4 of the FW Act:

‘It appears to me that the process of agreement making between an employer and its employees at a workplace in accordance with the provisions of the [FW] Act is a process of collective bargaining. The ASU appears to infer that only through its involvement can collective bargaining occur. I am unable to find any support for that notion in the [FW] Act.’<sup>486</sup>

### **‘Direct dealing’ - employer communication with employees during bargaining**

Although, as discussed earlier, other forms of direct dealing such as direct offers to employees and unilateral alteration of existing conditions have been found to breach the GFB requirements, FWA has given employers far more latitude to communicate directly with employees during bargaining.

A contrary indication was provided in a recommendation issued by Deputy President Drake, early on in the life of the GFB provisions in *AMWU v Transfield Australia Pty Ltd*,<sup>487</sup> as follows: ‘Transfield will not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives

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<sup>480</sup> Ibid.

<sup>481</sup> See eg *Queensland Nurses’ Union of Employees v TriCare Limited* [2010] FWA 7416 (23 September 2010); *AMWU v Coates Hire Operations Pty Ltd T/A Coates Hire Limited* [2012] FWA 3357 (19 April 2012). See also *CFMEU v Iluka Resources* [2011] FWA 7922 (16 November 2011), where Commissioner Williams found that the company had not breached the GFB requirements when, after deciding unilaterally to submit a draft agreement to a ballot which resulted in a tied vote, it proceeded with a second ballot rather than resuming negotiations with the union.

<sup>482</sup> *NUW v Ross Cosmetics Australia Pty Ltd* [2012] FWA 3252 (18 April 2012).

<sup>483</sup> See eg *CFMEU v Boulderstone Pty Ltd* [2012] FWA 1356 (16 February 2012).

<sup>484</sup> [2011] FWA 3916 (22 June 2011).

<sup>485</sup> Ibid, [34]-[39]. See also *CFMEU v Ostwald Bros Pty Ltd* [2012] FWA 2484 (23 March 2012).

<sup>486</sup> [2011] FWA 3916 (22 June 2011)[41]; see also [26]-[29]. See further Chapter 4 of this report. Note also Vice President Watson’s decision in *The Broken Hill Town Employees’ Union v Barrier Social Democratic Club Ltd* [2012] FWA 1096 (14 February 2012), including the observation (at [24]) that: ‘The process [of the employee ballot on the agreement] essentially then became a battle for the hearts and minds of the employees who decide whether to approve the agreement.’

<sup>487</sup> [2009] FWA 93 (14 August 2009).

directly, in meetings or by text or other telephonic messages'; and: 'Transfield will deal with all officers and delegates of the bargaining agent representatives who are authorised by their organisations to conduct negotiations'.

However, in *LHMU v Mingara Recreation Club Ltd*,<sup>488</sup> Vice President Watson found that an employer's refusal to allow a union bargaining representative to attend a management-staff meeting held to discuss bargaining was not a contravention of the GFB requirements. The Vice President indicated that the employer had not refused to meet with the union and had not denied the union any information or access to employees. He stated:

*'The obligations under the [FW Act] relate to genuine recognition and genuine bargaining activities with other bargaining representatives. They do not preclude concurrent communication and discussion with the employees who may be requested to approve the agreement. In my view, an employer is free to meet with its employees to discuss employment issues, including matters relevant to enterprise bargaining in the absence of bargaining representatives. Widespread communication is to be encouraged – not regulated, diminished or monopolised.'*<sup>489</sup>

Similar views were subsequently expressed by Senior Deputy President Richards in *Queensland Nurses' Union of Employees v Roman Catholic Diocese of Toowoomba T/A Lourdes Home for the Aged, Lourdes Home Hostel*<sup>490</sup> and by Commissioner Cloghan in *LHMU WA Branch v Hall and Prior Aged Care Organisation and Others*.<sup>491</sup> In the latter case, the Commissioner held that 'it would be uncommon for employers not to communicate with their employees', and that such meetings did not per se constitute breaches of the GFB requirements. He was careful to add, however, that in certain circumstances, the content and conduct of direct meetings with employees may breach the GFB requirements.<sup>492</sup>

The issue of direct dealing in the form of employer communications with employees first came before a Full Bench of FWA in *Tahmoor Coal*.<sup>493</sup> During the period in which negotiations were under way between the company and the CFMEU, the employer held a series of meetings with its employees on agreement proposals and sent material to their homes outlining its bargaining positions. The company did not provide the union with advance notice of these actions, nor invite the union to the management-staff meetings. Then the company – contrary to the union's wishes – indicated that it intended to put the agreement to ballot.<sup>494</sup> The union argued that such direct dealing between the employer and employees without the union present constituted bad faith, as it had 'the natural effect of weakening or undermining [collective bargaining], by diminishing the authority of the employees' bargaining representative.'<sup>495</sup> However, the Full Bench found that in circumstances where negotiations had been ongoing for a long period of time and the parties were unable to reach agreement, 'it was not capricious or unfair conduct

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<sup>488</sup> [2009] FWA 1442 (1 December 2009).

<sup>489</sup> *Ibid*, [19].

<sup>490</sup> [2009] FWA 1553 (7 December 2009) at [54]-[59].

<sup>491</sup> [2010] FWA 1065 (11 February 2010) at [35]-[36].

<sup>492</sup> *Ibid* [36].

<sup>493</sup> [2010] FWAFB 3510 (22 May 2010).

<sup>494</sup> On this aspect of the decision, see "Submitting a proposed agreement to ballot without the approval of other bargaining representatives" above.

<sup>495</sup> [2010] FWAFB 3510 (22 May 2010) at [19].

for Tahmoor to seek to explain its negotiating position to the employees directly.<sup>496</sup> Of relevance, according to the Full Bench, was that the meetings with employees were not oppressive in any way, the material provided to them was not misleading, and the company continued to meet with the union, which was also able to meet with the employees itself to put its view on bargaining developments.<sup>497</sup>

While the principle of employer liberty to communicate with employees directly during bargaining was confirmed by the Full Bench in *Tahmoor Coal*, as indicated above, other decisions have established that the provision of misleading information to employees will likely constitute a breach of the GFB requirements.<sup>498</sup>

### *Withdrawal, or renegeing upon, already agreed items at a later stage in the negotiation process*

A number of FWA decisions have confirmed that bargaining representatives may shift position during agreement negotiations, and even withdraw or renege upon agreed claims, without contravening their GFB obligations.<sup>499</sup> However, in another decision, an employer successfully argued that two unions had breached s.228(1)(e) by shifting their position as to the groups of employees that the agreement should cover, very late in the bargaining process.<sup>500</sup>

### *Failing to adhere to agreed bargaining protocols*

Another issue that FWA has addressed is whether a bargaining representative is in breach of s.228(1)(e) where it fails to conform with 'bargaining protocols' agreed to by the parties. In *ANF v Victorian Hospitals' Industrial Association*,<sup>501</sup> Commissioner Jones found that the union, by publicly releasing confidential documents, had breached bargaining protocols that had been agreed upon between the parties in s.240 conciliation proceedings before FWA. However, it was found that this conduct did not amount to a breach of s.228(1)(e), partly because the union had given an undertaking that the conduct would not occur again.<sup>502</sup> In *AMWU v Cochlear Limited*,<sup>503</sup> Commissioner Cargill found that the union had not breached s.228(1)(e) when it refused to meet with the employer under previously agreed bargaining protocols: '... [the protocols] do not amount to a binding contract between the parties but are merely administrative rules or arrangements which were supposed to assist the bargaining process. ... [Instead they] have become an impediment to bargaining.'<sup>504</sup>

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<sup>496</sup> Ibid, [28].

<sup>497</sup> Ibid, [29].

<sup>498</sup> See "Providing misleading information to employees", under "Unacceptable bargaining tactics" above.

<sup>499</sup> See eg *CFMEU v Shinagawa Refractories Australasia Pty Ltd* [2011] FWA 8304 (16 December 2011); *Queensland Nurses' Union of Employees v TriCare Limited* [2010] FWA 7416 (23 September 2010). See also *AWU v Woodside Energy Limited* [2012] FWA 4332 (30 May 2012) at [69], dealing with an employer's 'genuine change of mind' about whether to hold an employee ballot on a proposed agreement.

<sup>500</sup> *Capral Ltd v AMWU and CEPU* [2010] FWA 3818 (19 May 2010) .

<sup>501</sup> [2011] FWA 9068 (23 December 2011).

<sup>502</sup> Another issue considered in *ANF v Victorian Hospitals' Industrial Association* was whether a party can be meeting its GFB obligations where it is effectively under the control of a third party that is not at the bargaining table. Commissioner Jones rejected the union's submission that the VHIA was incapable of complying with its GFB obligations because it was insufficiently independent of the Victorian Government.

<sup>503</sup> [2012] FWA 5374 (3 August 2012).

<sup>504</sup> Ibid, [568].



### *Pursuing a strategy to secure an arbitrated outcome*

In *ANF v Victorian Hospitals' Industrial Association*,<sup>505</sup> the union argued that the VHIA had failed to meet its GFB obligations by deliberately seeking to delay the negotiations with a view to engineering the circumstances for an arbitrated outcome to occur (in accordance with a leaked Victorian Government cabinet document). After examining the leaked document, Commissioner Jones found that the strategy outlined in that document set out a number of options, including arbitration, but also 'an acceptable agreement' as the Government's preferred outcome.<sup>506</sup> As a result, adherence to the strategy did not amount to a breach of s.228(1).

### *Refusing to allow paid union meetings*

In *LHMU v Foster's Australia Pty Ltd*,<sup>507</sup> FWA found that the employer had not engaged in capricious or unfair conduct by refusing to grant the union permission to hold paid meetings with its members to discuss agreement negotiations and the possibility of taking protected industrial action.

### *Hard bargaining*

FWA has found that parties may engage in 'hard bargaining' – firmly maintaining a negotiating position – without breaching the GFB obligations.<sup>508</sup> The tribunal has emphasised, however, that while hard bargaining is permissible, it must nonetheless be 'genuine' bargaining.<sup>509</sup>

## **8.7 Is it reasonable in the circumstances to make a bargaining order?**

Section 230(1)(c) of the FW Act places a further jurisdictional requirement in relation to the making of a bargaining order, as it requires FWA to be satisfied that it is reasonable in all the circumstances to make the order. In *Endeavour Coal Pty Ltd v APESMA (Collieries' Staff Division)*, a Full Bench of the tribunal determined that this requirement 'needed to be addressed before an order could be made', and the failure of the FWA member at first instance to do so was a jurisdictional error (requiring the Full Bench to consider whether it had been reasonable in the circumstances to make the bargaining orders that had been made below).<sup>510</sup>

## **8.8 Limitations on the capacity of FWA to make bargaining orders**

Section 255(1) of the FW Act specifies that the GFB provisions do not empower FWA to make an order that requires, or has the effect of requiring:

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<sup>505</sup> [2012] FWA 285 (10 January 2012).

<sup>506</sup> Ibid, [58].

<sup>507</sup> [2009] FWA 750 (28 October 2009).

<sup>508</sup> See eg *AMWU v Coates Hire Operations Pty Ltd*, B2009/10656; *Coates Hire Operations Pty Ltd v AMWU*, B2009/10658 (unreported); *LHMU WA Branch v Hall and Prior Aged Care Organization and Others* [2010] FWA 1065 (11 February 2010).

<sup>509</sup> *AMWU and APESMA v DTS Food Laboratories* [2009] FWA 1854 at [16]. See also the discussion of "surface bargaining" above.

<sup>510</sup> [2012] FWA 1891 (22 March 2012) at [38]-[39]. For examples of other decisions considering/applying the requirement in s.230(1)(c), see *IEU v Catholic Church Endowment Society Inc and The Catholic Diocese of Port Pirie Inc* [2009] FWA 927 (3 November 2009); *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 3554 (6 May 2010); *TWU v Veolia Transport Queensland Pty Ltd* [2011] FWA 5691 (23 August 2011).



- particular content to be included or not included in a proposed enterprise agreement;
- an employer to request that employees approve a proposed enterprise agreement; or
- an employee to approve, or not approve, a proposed enterprise agreement.

The application of this provision has arisen, for example, in the context of FWA's consideration of whether to make a bargaining order delaying or postponing an employer's submission of a proposed agreement to ballot.<sup>511</sup> In *NUW v Chep Australia Ltd*, Vice President Watson observed that:

*'Section 255 clearly prevents the Tribunal from requiring an employee to vote against a proposed enterprise agreement. An order that would have the same effect is also not available. I do not believe that the limitation is necessarily confined to orders which relate to the outcome of bargaining. In some cases orders may infringe the section if they deal merely with process issues. Whether a particular order is contrary to s 255 depends on the nature of the order, and the effect of the order in the circumstances of the case.'*

*In my view, the better interpretation of the provisions is that an order that delays a vote, provided it be only for a short time and does not in substance deny employees the opportunity to vote for an agreement, is not precluded by s 255. In a given case the facts will need to be considered to determine whether intervention of this nature by deferring a vote has the effect precluded by s 255.'*<sup>512</sup>

In *TWU v United Resource Management Pty Ltd*, Commissioner Cambridge found that s.255 (along with s.228(2)) prevented FWA from making orders requiring the parties to meet until agreement was reached:

*'It would seem that the concept of FWA requiring parties to meet until agreement was reached would introduce a degree of compulsion for agreement making that is not envisaged by the Act.'*<sup>513</sup>

## 8.9 What types of bargaining orders has FWA made to remedy breaches of the GFB requirements?

Section 230(1) of the FW Act sets out certain matters that a bargaining order made by FWA must specify, such as the actions to be taken by a bargaining representative to ensure that they meet the GFB requirements. Section 230(2) then provides some examples of the kinds of bargaining orders that FWA may make.

According to a Full Bench of FWA in *Endeavour Coal Pty Ltd v APESMA (Collieries' Staff Division)*, bargaining orders made by the tribunal:

*'... should be directed towards ensuring that the good faith bargaining requirements are met. They should address deficiencies identified in the bargaining process and be tailored to remedy any failure to meet the good faith bargaining requirements. The role of FWA is*

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<sup>511</sup> See "Submitting a proposed agreement to ballot without the approval of other bargaining representatives", under "Acceptable bargaining tactics" above.

<sup>512</sup> [2009] FWA 202 (11 September 2009) at [42]-[43]. See also, eg, *AMIEU v T&R (Murray Bridge) Pty Ltd* [2010] FWA 1320 (26 February 2012) at [70]-[74].

<sup>513</sup> [2010] FWA 8765 (12 November 2010) at [16].

*to facilitate bargaining by making orders dealing with those aspects of the good faith bargaining requirements which have not been met. The orders should be appropriate and practical having regard to the circumstances of the bargaining between the parties.*<sup>514</sup>

As discussed earlier in this Chapter,<sup>515</sup> a major issue that arose in *Endeavour Coal* was the extent of FWA's power to make orders addressing 'surface bargaining'. As Justice Flick stated at the conclusion of his decision in those proceedings, while the meaning of the GFB requirements imposed by s.228(1) 'are relatively easy to resolve': 'The difficulty is in the formulation of orders to give effect to those requirements without trespassing into the prohibited territory created by s.228(2).'<sup>516</sup>

In *Jupiters Limited v United Voice*, Commissioner Asbury reiterated the approach to making bargaining orders expressed in a number of other FWA decisions, as follows:

*'The exercise of the power to make a bargaining order is discretionary... and such an order may only be made if FWA is satisfied that it is reasonable in all of the circumstances to do so. ... It is first necessary to decide whether the power to make a bargaining order is triggered, and then, whether in all of the circumstances, it is reasonable that such an order is made.'*<sup>517</sup>

In cases where FWA has determined that one or more of the GFB requirements has been breached, the tribunal has made the following kinds of bargaining orders:

- requiring the parties to meet regularly and/or setting a timetable for such meetings;<sup>518</sup>
- requiring parties to participate in conciliation with the assistance of FWA;<sup>519</sup>
- requiring an employer to advise employee bargaining representatives within 24 hours of any internal decisions to increase the wages of employees who were the subject of bargaining, and to allow those representatives at least 14 days to respond to any proposed increase, before it became operative or employees could be told about it;<sup>520</sup>
- postponing an employee ballot on a proposed agreement for a period of time;<sup>521</sup>
- requiring that an employer have present, at the negotiations, a senior manager of the company with decision-making power;<sup>522</sup>

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<sup>514</sup> [2012] FWA FB 1891 (22 March 2012) at [43].

<sup>515</sup> See "Surface bargaining" under "Unacceptable bargaining tactics" above.

<sup>516</sup> *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764 (19 July 2012) at [78].

<sup>517</sup> [2011] FWA 8317 (5 December 2011) at [32] (footnotes omitted).

<sup>518</sup> *LHMU v Carinya Care Services*, PR501295 (2 September 2010); *NSW Nurses' Association v Macquarie Hospital Services Pty Ltd* [2010] FWA 6372 and PR500749 (24 August 2010).

<sup>519</sup> *Curragh Queensland Mining Pty Ltd v CEPU*, PR524980 (7 June 2012).

<sup>520</sup> *FSU v Commonwealth Bank of Australia* [2010] FWA 2690 (9 April 2010). In subsequent proceedings, the bank successfully applied for a variation to the order so as to require the union to undertake to keep confidential any pay offer made by the bank during the negotiations: [2010] FWA 4097 (1 June 2010).

<sup>521</sup> *NUW v Ross Cosmetics Australia Pty Ltd*, PR522252 (10 April 2012); *AMWU v Coates Hire Operations Pty Ltd T/A Coates Hire Limited*, PR522614, 19 April 2012; *TWU v Veolia Transport Queensland Pty Ltd*, PR513785 (24 August 2011); *AMIEU v T&R (Murray Bridge) Pty Ltd*, PR994119 (25 February 2010).

<sup>522</sup> *NUW v Ross Cosmetics Australia Pty Ltd*, PR522252 (10 April 2012); *APESMA, The Collieries' Staff Division v Endeavour Coal* [2012] FWA 13 (4 January 2012), although note that this order – while upheld on appeal to a Full Bench of FWA – was found to be beyond power by Justice Flick in *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764 (19 July 2012) at [73]: 'It is, with respect, largely a matter for Endeavour Coal to determine by whom it is to be "represented".' At the same time, his Honour also noted that: 'It may

- requiring an employer to preserve the *status quo* during bargaining with respect to the conditions of employment and contracts of existing or new employees who would be covered by the proposed agreement;<sup>523</sup>
- providing that as many union delegates "as are reasonable" should be permitted to attend bargaining meetings;<sup>524</sup>
- setting out key matters that should be dealt with in meetings between the parties, including the scope and number of agreements being sought;<sup>525</sup>
- requiring an employer to distribute a statement to its employees correcting an earlier notice of employee representational rights;<sup>526</sup>
- requiring union bargaining representatives to provide an employer with their logs of claims;<sup>527</sup>
- requiring parties to exchange comprehensive draft agreements.<sup>528</sup>

## 8.10 Assessing the impact of the good faith bargaining requirements

Our interviews revealed very mixed views as to the scope and impact of the GFB provisions. Views ranged from those who believed the GFB requirements were effecting cultural change in workplaces, through to those who were emphatic that the provisions had had no discernible impact on bargaining tactics or behaviour. The views of most participants in the study appeared to lie somewhere in between.

Before proceeding, it should be emphasised that the following data compiles and presents views from all interviewees who expressed a view as to the operation of the GFB provisions in the FW Act, not just those who were directly involved (either as an applicant or respondent) in an application for a bargaining order under s.229. It should also be noted that, in offering their views and talking about their experiences in relation to the GFB requirements in the FW Act, many interviewees were careful to emphasize that it was still 'early days' in the operation of these provisions and their reach was yet to be fully explored.

It should also be noted that a number of interviewees identified motivations for using the GFB provisions that were similar to those discussed in Chapter 9 (applications lodged under s.240 of the FW Act). In this sense, the utility of the GFB provisions lay in providing another avenue through which to access FWA assistance, rather than in addressing any perceived bad faith conduct or tactic adopted by another party. Motivations expressed by these interviewees for lodging applications for bargaining orders included, for example, to 'ramp up' a dispute and get

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well frustrate the orderly conduct of "*good faith bargaining*" if there was not present a person who could give meaningful instructions." (emphases in original)

<sup>523</sup> APESMA, *The Collieries' Staff Division v Endeavour Coal* [2012] FWA 13 (4 January 2012), upheld in *Endeavour Coal Pty Ltd v APESMA (Collieries' Staff Division)* [2012] FWAFB 1891 (22 March 2012) and subsequently by the Federal Court in *Endeavour Coal Pty Ltd v APESMA* [2012] FCA 764 (19 July 2012).

<sup>524</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v ASU, APESMA, CEPU and AMWU* [2010] FWA 4821 (30 July 2010).

<sup>525</sup> *Ibid.*

<sup>526</sup> *AMWU v Galintel Rolling Mills Pty Ltd T/A The Graham Group and Others*, PR514661 (16 September 2011).

<sup>527</sup> *Flinders Operating Services Pty Ltd T/A Alinta Energy v ASU, APESMA, CEPU and AMWU* [2010] FWA 4821 (30 July 2010).

<sup>528</sup> *ASU v NCR Australia Pty Ltd*, PR500593 (16 August 2010).

the other party's head office involved; or to show the other party that they were serious and willing to use the law where possible.<sup>529</sup>

### 8.10.1 Facilitating bargaining by regulating the bargaining process

Many interviewees – including those that had lodged or defended applications for bargaining orders under the FW Act, and those that had not had occasion to do so but had bargained under the new provisions – expressed the view that the GFB requirements were useful in ordering and facilitating the bargaining process. The following quotes are illustrative:

*I suppose the good faith bargaining provisions sort of provided an initial push for the company to get along and actually come to the bargaining table but ultimately to conclude it we had to go to industrial action, or threaten industrial action anyway.<sup>530</sup>*

*[W]e've found that ... applications for bargaining orders are a way of focusing the attention of the parties and of bringing them together.<sup>531</sup>*

One party which had successfully obtained a bargaining order against another bargaining representative explained how the order had facilitated the process:

*'So the bargaining order required that the company and the union meet [regularly] ... and we were able to get some amendments to the documents and perhaps some of the stuff that we thought was particularly bad, we were able to get amended. Now that's not to say that the final document was a document that we were rapt in, it wasn't. But it was a first agreement covering that site and certainly the good faith bargaining orders meant that we were able to have further discussion that was progressive before the [draft agreement was put to ballot].<sup>532</sup>*

In a number of circumstances, the act of lodging an application for a bargaining order appears to have been sufficient in itself to progress bargaining.<sup>533</sup> In one case, for example, a union had lodged an application under s.229 after months of perceived delay by the company in commencing bargaining. Prior to the hearing of the application, the company agreed to a schedule of meetings. In another case, an interviewee explained that making the application effectively 'pulled the company into line.'<sup>534</sup>

In other cases, the fact of one of the parties having to appear before the tribunal to defend an application for bargaining orders seemed to be sufficient to compel that party to continue negotiations:

*'... [B]asically the company kept giving us excuses for meeting, and we were more or less having one meeting every two months and it just wasn't going anywhere ... [F]rom a strategic point of view we think the fact that it can be brought to a head [through lodging*

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<sup>529</sup> Interviewee 22a.

<sup>530</sup> Interviewee 11a.

<sup>531</sup> Interviewee 22a.

<sup>532</sup> Interviewee 11a.

<sup>533</sup> Interviewee 11a; Interviewee 21a. This shows that the bargaining provisions are having a significant 'shadow effect'.

<sup>534</sup> Interviewee 41a.

*a GFB application] and they are required to show up and ... explain their behaviour, that in itself is a push ... The fact that they have to either get a legal rep or they have to justify themselves is enough to get it sorted and get it moving and back on track.*<sup>535</sup>

Another interviewee, whose application for bargaining orders against a small company negotiating its first collective agreement was unsuccessful, noted that the process nonetheless had an important effect:

*[T]hey certainly turned up to the next scheduled meeting ...'*<sup>536</sup>

The interviews also revealed that both employers and unions regularly draw upon the GFB obligations during bargaining, even when they do not need to access the tribunal. This may involve, for example, using the GFB obligations as the basis for a bargaining protocol or guidelines.<sup>537</sup> The GFB requirements also appear to be invoked by both unions and employers as a threat, often effectively. Many interviewees told us that they had issued verbal or written warnings to the other party indicating concerns over bad faith conduct, and threatening to lodge an application with FWA if the conduct was not rectified.<sup>538</sup>

Further exploring the 'shadow' effect of the new provisions, interviewees were asked whether the presence of the GFB requirements was influencing their own approach to, and conduct during, bargaining. Some interviewees believed the requirements had had a significant impact on their conduct, for example:

*'[I]t means you've got to be contemplating in a very real way ... what is being put to you and as does the company in terms of what we're putting forward as well. We do a lot more research now to sort of back up the claims that we're making, why we think you should be able to do this and why we think you can afford that and why it's good ...'*<sup>539</sup>

For others, however, the requirements had had no influence on their approach during bargaining or the tactics that they used.<sup>540</sup>

Many interviewees emphasised the value of the GFB obligations in establishing clarity around process obligations and in creating a more 'ordered bargaining forum than existed previously.'<sup>541</sup> Disclosing information and providing responses in writing were identified as requirements that can be useful in progressing bargaining:

*'The fact that there is some ability to have the process of bargaining reviewed has ... been incredibly useful.'*<sup>542</sup>

For others, the GFB obligations also assisted to avoid disputes in some cases. One union representative explained that the availability of bargaining orders was an important avenue and,

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<sup>535</sup> Interviewee 11a. See also Interviewee 26a.

<sup>536</sup> Interviewee 26a.

<sup>537</sup> Interviewee 32b; Interviewee 44a.

<sup>538</sup> Interviewee 11a; Interviewee 19a; Interviewee 25a; Interviewee 29a; Interviewee 38a; Interviewee 40b; Interviewee 4b; Interviewee 36a.

<sup>539</sup> Interviewee 8a. See also Interviewee 40b; Interviewee 42a.

<sup>540</sup> For example, Interviewee 23a; Interviewee 3a.

<sup>541</sup> Interviewee 21a.

<sup>542</sup> See eg Interviewee 44a.

he thought, had the capacity to resolve some disputes that arose during bargaining which would otherwise have led to the taking of industrial action by union members.<sup>543</sup>

While there appeared to be some consensus that the GFB requirements were influencing parties' behaviour with respect to the bargaining process, a few interviewees felt that the provisions were having a broader effect, and were – in at least some cases – effecting cultural change. For example, one interviewee whose union obtained a bargaining order and subsequently entered into a collective agreement with that employer for the first time, expressed her view that the fact that an agreement had been reached between the parties meant that next time the company would not be as apprehensive or reluctant to negotiate with the union. In this way, she believed, the GFB requirements had an instrumental and positive effect in 'changing the culture' at this workplace.<sup>544</sup> She also indicated, however, that the capacity of the provisions to effect change in such a manner were limited where the employer was particularly hostile and/or union membership in the workplace was low:

*'I think ultimately the good faith bargaining provisions ... play a role and it's an important role and I think, it's sort of changing culture in quite a lot of worksites but ultimately ... if the union is weak on site and the employer doesn't want to agree to an agreement ... I don't know if any good faith bargaining provisions can do anything much about that.'*<sup>545</sup>

Many other interviewees expressed a similar view as to the limitations of the GFB provisions. Other union representatives made the following observations:

*'There are some circumstances where they're useful. ... [I]n the bargaining with [name of company] for example, we actually did get some information ... and there are other circumstances where companies might put out information that seems misleading or something and you might have to say this is a breach of your obligations and you need to put out something rectifying it ... [So the GFB provisions] might make a difference at the margins in some cases ... , but it's never going to be any more than that, and it's going to come down to the same things that it always has ...'*<sup>546</sup>

*'At the end of the day the good faith bargaining provisions can be used to bring people to the table, can make them put certain information on the table, but ... they don't seem to assist in any way in terms of actually getting to some sort of outcome.'*<sup>547</sup>

*'[Good faith bargaining] does force them to bargain, it does keep the process ticking along, it gives you more opportunity to go back to your members to say, "Well look, now they've at least got to meet with us," but when you actually meet with them it's still, "Well, no, no, no, no, no, no." And that's where industrial action perhaps comes into it ...'*<sup>548</sup>

The limitations of the GFB requirements are demonstrated by their use in two disputes discussed by interviewees. In the first, a union successfully applied for bargaining orders to require the other party to provide information requested by the union. The union obtained the

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<sup>543</sup> Interviewee 21a.

<sup>544</sup> Interviewee 11a.

<sup>545</sup> Interviewee 11a.

<sup>546</sup> Interviewee 23a.

<sup>547</sup> Interviewee 36a.

<sup>548</sup> Interviewee 36a.

information it sought from the employer as to the impact of the employer's wages proposal on workers. Ultimately, however, this only entrenched the union's view that the offer was unacceptable and, at the time of the interview (around 18 months after the order was issued), the parties had yet to reach agreement.<sup>549</sup>

In relation to the second, a protracted bargaining dispute in which a union sought bargaining orders against an employer, the applicant explained that the bargaining order application resulted in the parties having much more contact with each other than they would otherwise have had and, in the absence of the provisions, the parties probably would not have spoken to each other in months. However, this interviewee noted that the relationship between the parties was still acrimonious and they were no closer to reaching an agreement.<sup>550</sup>

While most parties involved in bargaining disputes believed the GFB requirements were influencing parties' behaviour – at least at the level of process – some interviewees were deeply skeptical about the practical impact of the GFB obligations and believed they had had no discernible impact on bargaining. According to one experienced union representative:

*'The good faith bargaining provisions – they look good on paper but when push comes to shove at the negotiating table they really don't mean anything. They haven't changed the way negotiations happen. They haven't changed any of the outcomes.'*<sup>551</sup>

Similar views were expressed by other experienced industrial relations practitioners. One interviewee from a large manufacturing company, who had been involved in a protracted and bitter bargaining dispute which involved invoking a range of the provisions in Part 2-4 of the FW Act, expressed his view that the obligations may have slightly changed tactics during bargaining. However, they had by no means altered the dynamics of bargaining or modified the adversarial nature of the process: 'it's a tool, [but] it's a nonsense. It's what people work around.'<sup>552</sup> This view was shared by others, who emphasised the capacity of parties to comply procedurally with the requirements but still not to be bargaining in good faith.<sup>553</sup> Some offered the view that the provisions had not changed the behaviour of parties involved in agreement negotiations at all.<sup>554</sup>

In summary, the prevailing view among those interviewed appeared to be that the GFB obligations were of some practical assistance with the bargaining process, but ultimately of little assistance in securing an agreement or influencing the content of that agreement. Most interviewees emphasised the limitations of the GFB provisions, and noted that they ultimately did not change the power balance in the workplace. Ultimately, whether and in what form an agreement eventuated continued to be determined by the agendas and respective industrial strengths of the parties.

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<sup>549</sup> Interviewee 42a.

<sup>550</sup> Interviewee 12a.

<sup>551</sup> Interviewee 39a.

<sup>552</sup> Interviewee 13b.

<sup>553</sup> Interviewee 17a.

<sup>554</sup> Interviewee 1b.



### 8.10.2 Limitations of the GFB requirements

The limitations of the GFB requirements were a constant theme throughout the interviews. Overwhelmingly, it was union representatives and non-union employee representatives who were disappointed by the operation of the GFB provisions. While some employers interviewed were frustrated by what they perceived to be a lack of clarity around the meaning and scope of some of the specific requirements in s.228(1), most employers appeared equivocal or positive about the new provisions. Two quotes illustrate this well:

*‘But really good faith bargaining just hasn’t been a big deal for us ... [I]nitially we found that it was really something that we could use to our advantage, it certainly wasn’t used against us. And then that just petered off as people got used to it. And now we’re in Fair Work Australia because we can’t get a deal, that’s the only reason we’re in there.’<sup>555</sup>*

*‘We’re very comfortable with the good faith bargaining concept and I guess the way the law has developed in that area ...’<sup>556</sup>*

In contrast, a number of union representatives that we interviewed expressed disappointment in the limited reach of the GFB obligations in practice. Views differed, however, as to the cause of this limited effect. For some, it was a matter of how the provisions were drafted. For another interviewee, it was the pace at which applications for bargaining orders were dealt with that limited their potential. For others, it was the narrow interpretation of the provisions by FWA that limited their effect. As one union representative explained: ‘we really believed we would get a couple of [bargaining] orders that we were seeking ... [but] if the bar has to be so incredibly high, then what’s the point?’<sup>557</sup> Another expressed the view that ‘it’s just infuriating to see good faith narrowed down to the tiniest set of procedural obligations ...’.<sup>558</sup> It was also observed that the capacity to effect change through threatening to lodge an application was diminishing, because ‘everyone knows the tribunal is not exactly running around making orders all the time.’<sup>559</sup> Another interviewee similarly explained: ‘To get a commissioner to say this employer is not bargaining in good faith is incredibly difficult.’<sup>560</sup> Other views included the following:

*‘The provisions always had limited potential to change things and the tribunal’s application of them – both in terms of internal questions of construing the provisions and [the] practical sort of realities of how it’s applied – have limited the already limited potential of these provisions.’<sup>561</sup>*

*‘Three years ago you could be in negotiations and say, oh we’re going to bring an application [for bargaining orders] ... and people would ... get all toey but now it’s “bring it on”. I think people are alive to the fact that it really doesn’t do what the Act says it does.’<sup>562</sup>*

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<sup>555</sup> Interviewee 4b.

<sup>556</sup> Interviewee 40b.

<sup>557</sup> Interviewee 25a.

<sup>558</sup> Interviewee 29a.

<sup>559</sup> Interviewee 29a.

<sup>560</sup> Interviewee 39a.

<sup>561</sup> Interviewee 23a.

<sup>562</sup> Interviewee 39a.



In relation to the substance of concerns around the tribunal's interpretation of the requirements, three issues in particular emerged consistently through the interviews.

The first is the issue of third parties, and was somewhat surprisingly an issue identified by both union and employer interviewees. A number of union interviewees from different industries, both public and private sector, expressed frustration over the inability of the GFB obligations, and the tribunal, to assist in resolving a dispute where a third party exercised a high level of influence over wages and conditions of employment. For example:

*'... [T]hat's the problem with what is actually good faith because we kept exchanging documents, the talks went really well, but when it came to the crunch there was no more money.'*<sup>563</sup>

*'You've got these policy parameters being set by Government which in any other circumstance ... [would be] ... considered bad faith bargaining.'*<sup>564</sup>

*'... [O]ne of the problems ... with the good faith bargaining aspect of the Act, and this is a problem we experience in the Federal Public Service as well, is that there's not really any way to deal with a third party who is in effect controlling in some ways the negotiations, but if you're not bargaining with them directly you can't put them in the room, or you can't compel them to be in the room with Fair Work Australia.'*<sup>565</sup>

This issue was identified by another union interviewee as one of the major causes behind their failure to reach a new collective agreement with a private sector employer, despite months of negotiations:

*'And this was also one of our major sticking points ... that effectively there was a third party involved, being the parent company, who we had no ability to influence, or even just to talk to ...'*

*'We just had to, you know at the bargaining table we would consistently get the line, "Oh, you know, we're not allowed to do that, our parent company won't let us."'*<sup>566</sup>

The issue was also raised by a number of employers interviewed. One employer expressed frustration at not being able to deliver on an agreement reached through conciliation involving FWA, due to being overruled by the funder.<sup>567</sup> Another large employer in the public sector expressed the following view:

*'So we turn up and we try to bargain on the basis of a set of fundamental principles that neither of us can move from, and so very positionally based. And I don't think that the legislation actually assists us to do anything ...'*<sup>568</sup>

In several interviews, employers expressed views as to the capacity of union representatives to comply with the GFB obligations given their incapacity to secure authorisation for a deal

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<sup>563</sup> Interviewee 17a.

<sup>564</sup> Interviewee 38a.

<sup>565</sup> Interviewee 42a.

<sup>566</sup> Interviewee 42a.

<sup>567</sup> Interviewee 34b.

<sup>568</sup> Interviewee 35b.

reached in principle, and in one case this formed the basis of an application for a bargaining order.<sup>569</sup>

Secondly, a number of union representatives interviewed expressed their frustration at the extent to which FWA's interpretation of the GFB requirements permitted tactics which they regarded as bad faith. This included, for example, the issue of 'direct dealing' in the form of direct communication between an employer and its employees during bargaining.<sup>570</sup> For example:

*'There's been situations where it's been quite lengthy negotiations and they've just said we've had enough, like we're not negotiating with you any more, we're going to just put this to the workers, and through subtle persuasion I guess you could say putting it lightly, they've been able to get an agreement. Now people would look at that and say well the employees have given their consent, but it's usually not, I don't believe it's true consent, and it's certainly not good faith bargaining as far as I would see it ...'.<sup>571</sup>*

*'Particularly the direct dealing, like it almost renders the negotiations between the union and the company irrelevant if you can then go around and say well this is the offer, if you don't take it, [we're] going to go bankrupt, a whole lot of you will possibly be made redundant – can I have a show of hands? ...'.<sup>572</sup>*

There was a discernible sense of frustration and disappointment among a number of union representatives interviewed with respect to the inability of the GFB provisions to deal with very industrially aggressive or intransigent employers. In these types of cases, the provisions were considered weak and the way in which they have been interpreted by FWA was thought to have further limited their potential impact. Interestingly, this concern was voiced particularly strongly with respect to perceived illegitimate tactics adopted in industries and occupations where the tribunal has shown some reluctance to 'police' bargaining behaviour on the basis that the parties were operating in a mature or robust bargaining environment.<sup>573</sup>

A third issue to emerge from interviews with union representatives concerned the limited capacity of the GFB provisions (and related provisions, such as MSDs) – along with the tribunal's perceived unwillingness – to address surface bargaining. For example:

*'But of course the limitation on an MSD is that it doesn't convince the other side that an agreement is a good thing and a company like [name of company] can spin these things out if they want to.'<sup>574</sup>*

Another interviewee explained that she had sought – and successfully obtained – bargaining orders against a company when it formally agreed to bargain but explained to the union during bargaining meetings that it had no intention to reach an agreement. The effect of these bargaining orders, unsurprisingly, was limited:

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<sup>569</sup> See eg Interviewee 4b; Interviewee 33b.

<sup>570</sup> See eg Interviewee 39a; Interviewee 25a.

<sup>571</sup> Interviewee 39a.

<sup>572</sup> Interviewee 3a.

<sup>573</sup> See, e.g., *Tahmoor Coal* [2010] FWAFB 3510 (22 May 2010).

<sup>574</sup> Interviewee 46a.

*‘The tribunal obviously agreed with us, ordered the meetings but all that meant was that instead of saying “we don’t want any agreement”, they just said “we don’t want your agreement” ... And we never got anywhere ...’<sup>575</sup>*

A number of union interviewees saw the failure of the GFB obligations to adequately protect workers against surface bargaining as a particular issue where the workers had relatively little bargaining power. In such circumstances, employers were able to bargain indefinitely with little fear of effective industrial action being taken against them.<sup>576</sup>

## 8.11 Conclusion

Overall, our analysis of the case law relating to FWA’s application and interpretation of the GFB requirements in their first three years of operation has shown that:

- the process obligations (s.228(1)(a)-(d)) appear to be operating largely as intended, and in many instances are ensuring an orderly bargaining process through the provision of clear ground rules for the conduct of negotiations;
- the obligations which impact more directly on bargaining tactics (s.228(1)(e)-(f)) have operated to prevent certain kinds of behaviour that undermines the bargaining process, particularly by employers, such as attempts to separate employees out from the collective group through direct offers or unilateral improvements to existing conditions;
- however, a narrow interpretation of the obligations in s.228(1)(e)-(f) in some other cases has allowed employers significant latitude to (for example) communicate directly with employees during negotiations, and this is arguably not consistent with the objective of facilitating and promoting collective bargaining.

This statutory purpose is also undermined by FWA’s approach to when an employer may submit an agreement to a ballot of employees, which prioritises compliance with the *agreement-making* requirements over those applicable to GFB and *collective bargaining*.

Further, the tribunal’s approach to surface bargaining illustrates the inherent tension between the s.228(1) obligations and the s.228(2) limitation upon those obligations. There is little value in an outcome whereby surface bargaining has been found to breach s.228(1), but FWA is unable (under s.228(2)) to make orders giving effect to that interpretation.

Our interviews revealed a diversity of views and experiences in relation to the GFB requirements, and enable a number of observations to be made:

- The presence of a ‘shadow effect’ has already been observed with respect to the MSD provisions.<sup>577</sup> Our interviews revealed that the GFB requirements were also having a similar – though perhaps not as pronounced – effect.
- While it is impossible to draw definite conclusions from the limited data available, it would appear that the GFB requirements have had a very different meaning and impact for experienced as opposed to newer bargainers. For experienced bargainers, the GFB

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<sup>575</sup> Interviewee 24a.

<sup>576</sup> Interviewee 24a; Interviewee 46a.

<sup>577</sup> See Chapter 6 of this Report.

obligations were viewed as 'business as usual',<sup>578</sup> or alternatively were seen as useful tools to be used strategically and tactically (a few more 'tricks up our sleeve').<sup>579</sup> For new bargainers or those reluctant to bargain, the provisions do appear to be having some effect (sometimes in conjunction with the MSD provisions) in securing engagement in the process of bargaining. In these types of cases, the GFB obligations provide a useful reference guide as to acceptable conduct and processes.

- Union representatives expressed mixed views about the GFB obligations. Some were very positive and felt that the GFB requirements had had a strong moderating effect on behaviour and had facilitated bargaining and agreement making. Others, however, felt that the GFB obligations – as drafted and/or as interpreted by FWA - had only very limited potential to influence bargaining conduct.
- Overall, there appeared to be a sense that the GFB obligations 'civilise things to a certain extent'.<sup>580</sup> But participants, whether they had successfully used the provisions or not, were also acutely aware of their limitations. In particular, parties stressed the utility of the GFB obligations in improving the bargaining *process* only, rather than substantive outcomes.
- While several employers expressed some frustration over the lack of clarity with respect to the scope and meaning of some of the GFB requirements, most of those interviewed appeared relatively sanguine about the GFB obligations. Some thought that they had proven useful during bargaining and were a valuable tool for employers during negotiations, whilst others felt they did not have any bearing on the process.
- Finally, parties (mostly unions) with less industrial strength tended to view the GFB obligations more positively. A number of union interviewees explained explicitly that they considered utilising the GFB obligations when they lacked the strength or capacity to take protected industrial action effectively.<sup>581</sup> For example:

*'And in the end, that's what forces you to think about going to the tribunal – 'cause you think you can't bludgeon the other side.'*<sup>582</sup>

*'I think that good faith bargaining is very good... the changes are very good for some unions where the members don't have the collective grunt that we do.'*<sup>583</sup>

In summary, the GFB obligations in s.228 of the FW Act – and FWA's approach to construing these obligations in applications for bargaining orders – have proven a useful aid to the bargaining process in many instances. However, the relevant provisions of the FW Act have had limited effect in a number of intractable bargaining disputes which have occurred in the first three years of operation of Part 2-4 of the FW Act.

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<sup>578</sup> Interviewee 8a.

<sup>579</sup> Interviewee 39a.

<sup>580</sup> Interviewee 23a.

<sup>581</sup> Interviewee 22a; Interviewee 23a; Interviewee 5a.

<sup>582</sup> Interviewee 21a

<sup>583</sup> Interviewee 25a.

## 9 FACILITATING BARGAINING AND THE MAKING OF AGREEMENTS BY ASSISTING PARTIES TO RESOLVE BARGAINING DISPUTES

As well as giving Fair Work Australia (FWA) specific powers to make determinations, orders and authorisations, Part 2-4 of the *Fair Work Act 2009* (Cth) (FW Act) provides FWA with general powers to assist parties to resolve disputes that arise during bargaining. Under s.240(1) of the Act, a bargaining representative for a single-enterprise agreement or a multi-enterprise agreement in the low-paid stream may apply for the tribunal to assist in resolving a bargaining-related dispute. FWA may conciliate, mediate, make a recommendation or express an opinion or – providing both parties agree – arbitrate the dispute. FWA receives significantly more applications under s.240 of the Act than it does under any other provision in Part 2-4 of the Act. As reported in Chapter 5 of this Report, in the first three years of operation of the FW Act, the tribunal received 1075 applications under s.240.

This chapter does not follow the structure adopted in the previous three chapters: that is, examining published decisions made by FWA under the relevant provision of the Act, before turning to examine our findings from the interview data. This is because there are relatively few decisions made under s.240 publicly available, and because where decisions are made, they tend to be restricted to the facts of the case. Instead, this chapter examines the operation of s.240 by drawing on the qualitative interviews only. It examines the types of actors that tend to seek FWA assistance under s.240 and identifies a number of common reasons why they do so. It also examines the views of parties as to how the tribunal exercises its powers under this provision and the effectiveness of its interventions.

### 9.1 The legislative framework

The general power for FWA to assist parties to resolve disputes that arise during bargaining is found in s.240 of the Act:

#### **SECTION 240 APPLICATION FOR FWA TO DEAL WITH A BARGAINING DISPUTE**

*Bargaining representative may apply for FWA to deal with a dispute*

**240(1)** A bargaining representative for a proposed enterprise agreement may apply to FWA for FWA to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

**240(2) [One bargaining representative]** If the proposed enterprise agreement is:

- (a) a single-enterprise agreement; or
- (b) a multi-enterprise agreement in relation to which a low-paid authorisation is in operation;

the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

**240(3) [Clarification]** If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.

**240(4) [FWA may arbitrate]** If the bargaining representatives have agreed that FWA may arbitrate (however described) the dispute, FWA may do so.

As the terms of s.240 make clear, FWA may deal with a dispute in agreement negotiations following a request of one of the bargaining representatives for a proposed single-enterprise agreement or multi-enterprise agreement to which a low-paid authorisation applies. If the proposed agreement to which the dispute relates is any other type of multi-enterprise agreement, then FWA may only deal with the dispute where both parties have agreed for it to do so.<sup>584</sup> FWA does not have the capacity under s.240 (or under any other provision) to deal with a bargaining-related dispute on its own initiative.

Once a dispute has been referred to FWA it may deal with it ‘as it considers appropriate’, including by exercising any of the powers it has available to it under s.595 of the FW Act. Section 595 sets out FWA’s general powers to deal with disputes, and provides that FWA may mediate, conciliate, make a recommendation or express an opinion. It also provides that FWA may exercise any powers under Subdivision B, Division 3 of Part 5-1 of the FW Act. FWA may only arbitrate a bargaining dispute lodged under s.240 where both parties have agreed for it to do so.<sup>585</sup>

## 9.2 Who uses section 240?

The quantitative analysis of applications made under s.240 reported in Chapter 5 above indicates that two-thirds of all of these applications were initiated by union applicants – see Figure 20 in Chapter 5. However, over a quarter (28.5%) of applications were lodged by employers. Employers are significantly more likely to lodge applications under s.240 than under any other provision in Part 2-4 of the FW Act. As the analysis in Chapter 5 demonstrates, a handful of industries account for almost 70% of all applications made under s.240; namely: healthcare and social assistance (401 applications), manufacturing (227 applications), and transport, postal and warehouse services (117 applications).

The interview data provides further insight into the types of parties that avail themselves of FWA assistance through s.240 of the Act. While it is not possible to draw definitive conclusions, the interviews did reveal some insights.

It appears to be overwhelmingly trade unions and large, unionized employers in the public and private sector that use s.240.<sup>586</sup> A number of these organisations appeared to use this provision as a matter of course during bargaining rounds, and a single bargaining round would often involve a number of applications lodged under s.240.

As noted above, most s.240 applications are lodged by trade union representatives. Many of the union representatives interviewed for the project emphasised the value of the s.240 avenue during bargaining. One interviewee explained:

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<sup>584</sup> FW Act, s.240(3).

<sup>585</sup> FW Act, s.240(4).

<sup>586</sup> Interviewee 34b; Interviewee 33b; Interviewee 35b.

*'We've been involved in some bargaining disputes in the context of s.240 applications, and I think that's a great provision, that you don't need technical sort of disputes, you can just be having trouble in bargaining and you can use that.'*<sup>587</sup>

A number of employer parties interviewed also explained that they were often involved in conciliation under s.240 as a result of a union-initiated application. For some employers, the readiness of unions to seek the tribunal's assistance through s.240 was a source of frustration:

*'So, I think that, historically, the [name of organisation] and the [name of union] has traditionally used Fair Work to diffuse responsibility to a third party. And to that extent, we've got into the habit of, I think ... of misusing it. You know ... I'm in Fair Work at least two to three times a week...*

*'So it's almost like... going to the parent. It's going to the parent to say "We can't work this out." Or going to the parent and saying "We've worked it out. Is it OK, and can you ... make sure we do it?" It's a reflection on how bad the relationship is really.'*<sup>588</sup>

*'The culture that existed on this site, and I'm still trying to remove it, is I don't like your answer, we'll go to Fair Work Australia...'*<sup>589</sup>

*'I'd be a rich man if I had a couple of bucks every time the [name of union] representative/organiser said "You don't want to deal with them, go to Fair Work. You don't like that, we'll go to Fair Work.'*<sup>590</sup>

Many employers, however, were willing participants in s.240 applications. In many cases, union parties explained that they would, as a general rule, only lodge an application under s.240 where they knew - or were fairly certain - that they had the approval of the employer bargaining representative in doing so.

Many employers also perceived s.240 as a valuable avenue of assistance. For some employers, s.240 applications formed part of their bargaining strategies:

*'We've always got a number of collective agreements on the go... Our first point of call would always be to go to Fair Work Australia and we've got no difficulty whatsoever in being the applicant there. So it's part of the strategy that we have that to seek assistance from Fair Work Australia in these types of matters. Fortunately we don't have to do it very often but we'll continue to do that if things start getting difficult for us.'*<sup>591</sup>

*'... Initially when we reached impasse on [date], we said, "Well righto, well let's go to the Tribunal under section 240 on a mediation..."'*<sup>592</sup>

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<sup>587</sup> Interviewee 36a.

<sup>588</sup> Interviewee 34b.

<sup>589</sup> Interviewee 33b.

<sup>590</sup> Interviewee 9b.

<sup>591</sup> Interviewee 40b.

<sup>592</sup> Interviewee 28b.

*'I guess we wanted to look at the best decision to preserve relationships with our workforce, and that's why we sought ... support from Fair Work Australia to help overcome whatever the issues were preventing that agreement.'*<sup>593</sup>

*'I mean I guess one of the learning curves for me was very early on, you know it seemed to be a very reactive move of companies responding to Unions who tend to jump straight to Fair Work Australia. I think businesses need to be prepared – that if they stand in a strong position – they have the ability and right to access Fair Work Australia through their own applications, and ... I think it's a valuable mechanism to have.'*<sup>594</sup>

*'Look we always seem to be quite keen to use them [FWA] and we're usually only tempered by the union... we don't really have any qualms about going there when we've got to a point that we need to get the deal done... they're creative and can help you find solutions that you didn't think were there and that's the way we would usually pitch it to the unions – that they know what they're doing and they'll have ideas that we haven't thought of.'*<sup>595</sup>

A number of factors may help explain the observations above: that is, why s.240 tends to be used overwhelmingly by unions and larger, unionised employers. First, of course, it may be explained by the fact that it is primarily these larger, unionised enterprises that bargain. Second, and related to the first factor, many of those who work in these types of organisations have been involved in industrial relations for a significant time, and may hold - to varying degrees - a longstanding preference and almost instinctive tendency to look to the tribunal to resolve disputes.<sup>596</sup> Third, even where larger employers may be new bargainers, they nonetheless are more likely to seek legal advice or to have a specialized HR function, both of which increases the prospect that they will be aware of s.240 and may seek to use this avenue of assistance strategically.

### 9.3 The importance of section 240

The sheer number of applications lodged under s.240 of the FW Act suggests that this provision constitutes an important avenue for parties to access the assistance of the tribunal during bargaining. This is confirmed by our interview data, which also provided insights into *why* parties who used s.240 saw the provision as important.

For a number of interview participants, FWA's conciliation of a bargaining dispute had helped avoid, or had cut short, the taking of industrial action. This had, in turn, helped parties avoid costs associated with industrial action and, in some cases, avoid any costs being inflicted on the broader community. The following were just some of the responses given to the hypothetical question of what would have occurred had FWA not conciliated the dispute subsequent to a s.240 application:

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<sup>593</sup> Interviewee 33b.

<sup>594</sup> Interviewee 33b.

<sup>595</sup> Interviewee 4b.

<sup>596</sup> This enduring legacy has been observed by a number of commentators. See, e.g., Forbes-Mewett et al, who observe from their empirical research conducted in the early 2000s the 'continuing dependency on the Commission as part of the traditional industrial relations culture of referring disputes to an independent third party': H Forbes-Mewett, G Griffin and D McKenzie, 'The Australian Industrial Relations Commission: Adapting or Dying?' (2003) 11 *International Journal of Employment Studies*, 1, 9.



*'Without the Commission's involvement, I think what we would have wound up with ... [was] a hell of a fight, and we've got a pretty militant workgroup, and in the non kind of traditional areas as well, like IT, [industrial action] can have a pretty big impact on an organisation, and all sorts of different areas, we would have been in an enormous fight, probably with no end in sight.'*<sup>597</sup>

*'I think we might have ended up in a bit of a barney to put it that way. I think there might have been a bit of industrial action, there might have been some negative impact on the community as a result of that...'*<sup>598</sup>

*'Quite possibly, I think had we not gone through the FWA process... I think we would have had some period of industrial action.'*<sup>599</sup>

*'... this particular site... is well known for its industrial disputes. And I'm pretty sure that if [the section 240 application had not been lodged by the other party], it would have got to some sort of protected industrial action. But as a result of the parties getting together and using that mechanism that the company used to get us together before a senior Commissioner, it worked and the matter resolved... And yeah, [an] agreement was subsequently made.'*<sup>600</sup>

Another reason why s.240 was viewed as very important by many parties is that it is the least adversarial avenue through which to access the tribunal's assistance under Part 2-4 of the FW Act. A number of interviewees indicated a preference for lodging an application under s.240 than other provisions of Part 2-4 of the FW Act for this reason:

*'we don't always want to go for good faith bargaining orders, and sometimes the company hasn't done anything technically wrong, or wrong enough for the good faith bargaining orders to be in place, and where our relationship is not good anyway we find it's better to try to use a section 240 so that we can actually be doing the negotiations. A good faith bargaining order is a lot more like a litigious process, and can be a lot more alienating.'*<sup>601</sup>

*'... people seem to think if you agree to anything it's a compromise you should not be making because you must win. And I think what that does to everyone's advantage is try to take away this win concept of getting to an agreement, 'cause in the end if you just hold your position endlessly no-one's going to agree to anything.'*<sup>602</sup>

Another interviewee emphasised their organisation's preference for conciliation over a more 'adversarial' process with 'recorded decisions that set precedents that are hard to undo'.<sup>603</sup>

The importance of being able to access FWA without any specific wrongdoing was a clear theme in discussion about s.240 applications. As an employer representative from a large manufacturing company explained:

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<sup>597</sup> Interviewee 38a.

<sup>598</sup> Interviewee 33b.

<sup>599</sup> Interviewee 40b.

<sup>600</sup> Interviewee 8a.

<sup>601</sup> Interviewee 19a.

<sup>602</sup> Interviewee 17a.

<sup>603</sup> interviewee 42a.

*'I think there is a role for Fair Work Australia and I probably would seek their advice and input... I would rather go to Fair Work Australia than to have a dispute because a dispute is not good for any party. Employees potentially are going to lose wages, the company is going to lose productivity and output and it's going to damage employee relations and that's probably the most critical, because the other two things are short term. They happen for a week or two weeks and you move on but the employee relations and the change of culture can be long lasting... So I guess I always try and ... maintain good relations with the union, the bargaining representatives and the employees, and if it gets to a stage where I think all that is going the wrong way or it has the potential to damage the longer term relationships on site I think you should be able to go to Fair Work Australia and seek their assistance – without necessarily having breached any law... without the threat of any protective action... we just simply would like [FWA's] views about where we're at and if [the tribunal] think we're being stupid or they're being stupid ...'*<sup>604</sup>

Similar observations were made by union representatives:

*'We've been involved in some bargaining disputes in the context of 240 applications, and I think that's a great provision, that you don't need technical sort of disputes, you can just be in trouble in bargaining and you can use that...'*<sup>605</sup>

Finally, several parties emphasised the importance of s.240 applications in terms of the promptness with which tribunal members dealt with these matters. From their experience, a dispute lodged under s.240 was likely to be dealt with by FWA more quickly than applications lodged under other provisions of Part 2-4. One may speculate that this is due largely to the fact that conciliation under s.240 does not require the gathering of significant amounts of evidence or lengthy submissions that are required to progress applications under other provisions.

## **9.4 Why do parties seek FWA's assistance under section 240?**

Analysis of the interview data suggests that there are a number of common reasons why bargaining representatives – both employers and unions - seek the tribunal's assistance under s.240 of the FW Act. These are identified and discussed below. Of course, in many cases these motivations are not mutually exclusive but rather will figure to varying degrees simultaneously in decisions to lodge applications under s.240.

### **9.4.1 For assistance to resolve remaining issues in dispute towards the end of the bargaining process or where bargaining has reached an impasse**

For a number of parties, s.240 offered an important way to access FWA assistance once the pace of agreement negotiations had slowed. FWA's conciliation services were also identified as particularly useful where parties had made significant advances in negotiations but were unable to agree over several remaining issues.<sup>606</sup> In these types of circumstances, the views and suggestions put forward by an independent third party were considered important and assisted to progress the negotiations:

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<sup>604</sup> Interviewee 1b.

<sup>605</sup> Interviewee 36a.

<sup>606</sup> Interviewee 27b; Interviewee 2a; Interviewee 40b.

*'the third party and the sense of authority also helps in progressing the discussions a little bit.'*<sup>607</sup>

*'You know, ... it's just that third party.'*<sup>608</sup>

*'I bargained a lot over the years, but always on behalf of someone else, it's not my bank account that I make decisions based on, and quite often it does help .... to have a perceived or a real expert give some recommendations or some advice about, to both sides, to say, "Your claim is unrealistic; your claim is unrealistic," or "Have you thought of... in another industry we've resolved this roster issue by, or this fatigue issue by introducing these rostering or fatigue principles; have you looked at that?"*<sup>609</sup> *'It's having someone whom they're prepared to believe say, "These aren't outrageous claims that the Union's making."*<sup>610</sup>

For several union parties interviewed, this presence and assistance of a third party was particularly important when dealing with employers who were less experienced bargainers:

*'... so having the commissioner, and having an authority figure ... helps them to go, alright we can do this, or we should do this, or OK we have been doing this wrong. Things like that. So that's been helpful.'*<sup>611</sup>

*'there are situations, especially if you're dealing with a small, maybe medium size employer and you just need a bit of common sense to be injected into the process...'*<sup>612</sup>

A number of interviewees described the role played by FWA under s.240 as a 'circuit breaker' where bargaining had reached an impasse.<sup>613</sup> One union party explained the motivations behind a particular s.240 application:

*'... we had reached a point where we weren't making any progress in the negotiations, and we were really... seeking to have somebody with, I suppose with some authority and some... knowledge, assist with the process...'*

*'They weren't listening to us, so it's possible they might have listened to the source of authority on IR matters ...'*<sup>614</sup>

An interviewee from a large public employer identified similar reasons for lodging a s.240 application:

*'I just thought we needed the assistance of a third party to, to use old fashioned terminology, knock our heads together, and give us some assistance.'*<sup>615</sup>

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<sup>607</sup> Interviewee 19a.

<sup>608</sup> Interviewee 35b.

<sup>609</sup> Interviewee 17a.

<sup>610</sup> Interviewee 19a.

<sup>611</sup> Interviewee 19a.

<sup>612</sup> Interviewee 24a.

<sup>613</sup> Interviewee 2a; Interviewee 3a; Interviewee 40b.

<sup>614</sup> Interviewee 42a.

<sup>615</sup> Interviewee 35b.

It appears that in many cases it is not simply the presence of an independent third party but one with particular expertise and authority in industrial relations matters that is valued highly.

#### 9.4.2 To diffuse hostilities and promote more reasonable bargaining behaviour

Another common reason cited for lodging an application under s.240 was to secure the presence of a tribunal member at the negotiating table. This presence was seen as having an important moderating effect on the behaviour of parties. This effect may be particularly important where one party is being perceived as acting unreasonably or where relations between the parties have deteriorated throughout the bargaining process. In such cases, the tribunal may play an important role not only in moderating behaviour but also in shaping expectations of one or more of the parties. An extreme example of this was offered by one interviewee whose union, following a successful majority support determination application, was engaged in negotiations with a company who they described as having a very hostile attitude towards collective bargaining and to the union. The interviewee explained that they continued to use s.240 applications during the agreement negotiations because such conciliations, with bargaining representatives and a FWA Commissioner present, were 'the only time' the parties had useful discussions: 'the negotiations have been going better once we've been in the presence of a Commissioner, because it keeps the parties calm, it keeps our organiser calm'.<sup>616</sup>

This experience was echoed by another interviewee, who explained that whilst a particular s.240 application did not resolve the issues in dispute:

*'the employer's initial position was that they weren't even going to show up to the conference. Obviously ... even though there was no legal requirement for them to attend ... they felt like there was some pressure on them to actually participate in that process which, I think, was a positive.'*

*'it was the first time we'd gotten the employer to respond on a lot of our issues, even though we weren't really happy with their responses... It was at least the first time that we were able to talk to them... to engage with us in really meaningful way.'*<sup>617</sup>

Unions were not the only parties to see this moderating effect of FWA as helpful. One employer party had lodged a s.240 application in the face of a serious bargaining dispute and protracted industrial action observed:

*'we made application for [conciliation under s.240] because we were going through all this, threats and intimidation. But also the meetings were just not at all constructive... so we wanted to get into a forum where we had an independent person sitting there because that tends to make people at least make reasonable ... responses. And so we got into that and we went right through the claims. That was the first really civil meeting...'*<sup>618</sup>

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<sup>616</sup> Interviewee 19a.

<sup>617</sup> Interviewee 44a.

<sup>618</sup> Interviewee 46b.

### 9.4.3 As an 'exit strategy' and means of saving face where bargaining has become intractable

Writing on the role of the Australian Industrial Relations Commission almost a decade ago, Stewart observed that those who have never been involved in an industrial dispute should not *'underestimate the extraordinary usefulness of being able to blame the Commission for forcing representatives to shift from their previous stances.'*<sup>619</sup> The capacity to assign blame to the tribunal for having to adjust previously held positions was a strong theme emerging from the interviews, from both union and employer parties:

*'There may be times when we say to the employer... there's an issue where we actually, kind of, agree with the employer, but the membership aren't that keen on it and so, we're going to take it to Fair Work Australia and take along a posse of members and see if we can get a Commissioner to tell them that it's not that bad after all and they can accept the offer... [so] that will be, essentially, a consent situation between the employer and us going along. So, there are situations like that; situations where you might use it as a bit of an exit strategy, to get out of something where it's become intractable and no-one can back down.'*<sup>620</sup>

*'... the reality is that unions and sometimes employers use the Tribunal as a kind of a foil, you know you can't get it but you're not just going to turn around to your members and say, "We can't get it, so off you go..." so we get someone else to knock us back, and then we can blame them.'*<sup>621</sup>

*'And you know, being completely frank about it, it certainly helps me, and I know it helps people I negotiate with to go back to their principals if you like, and say, "Look, we've had an expert tell us that perhaps our claim for a..." – and I'm going to exaggerate here, but - "perhaps our claim for a 30% wage increase in the current global economic circumstance, or national economic circumstance, might be a little bit excessive, and looking at wage movements across the country, etcetera, etcetera, etcetera, we've been given a nod and a wink that we're probably not going to get 30%.'*<sup>622</sup>

*'I mean given the circumstances we're in, and I think any employer would be in the same position, that when you have some impositions, and we all do financially at the very least, these things costs hundreds of millions of dollars, and when I say the enterprise agreements, they're very significant ...well if you're given a position, the other side has a position, gee it's pretty hard to move from that unless you get a third party to come in and say, "Have you had a look at this?" or "Can you go back to your principals and tell them that this might be a better way to look at your problem?'"*<sup>623</sup>

*'... Some of the problems that we face, as do (I think) HR managers dealing with their respective operational managers, is the difficulty in dealing with expectation....[The*

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<sup>619</sup> A Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 245, 274.

<sup>620</sup> Interviewee 2a.

<sup>621</sup> Interviewee 21a.

<sup>622</sup> Interviewee 35b.

<sup>623</sup> Interviewee 35b.

*Commissioner] was able to talk to operational managers with a level of detail that I think surprised them. She was able to talk to our delegates with a level of detail that garnered her a lot of respect, and it meant that she was able to probably be the bad cop in some arguments to a greater extent than we could have been...'*<sup>624</sup>

Recommendations issued by FWA were identified as particularly useful instruments for the purposes of assisting in the settlement of disputes. As one interviewee succinctly explained the effect of a recommendation from FWA: '... it gives everybody the opportunity to feel OK about it...'.<sup>625</sup> Employer parties further explained:

*'I think [a recommendation is] a really powerful thing to allow the union to take back to the workforce, to say "Hey, this is what the Commissioner's saying, we're not going to push this any further.*

*So having an external party come in and issue a recommendation, with a stamp on it and a signature, and a whole lot of fancy titles at the top, they're going to hold us accountable to that.'*<sup>626</sup>

*We asked [the Commissioner] for a recommendation at the end of the process, that we could take our principals, our shareholders... to say that we've been through a process, the recommendation to settle these agreements is this, can we wear it? The unions at the same time gave an undertaking to take that recommendation to their members...'*<sup>627</sup>

One of these interviewees, however, proceeded to emphasise that recommendations were rather difficult to obtain, and to express their view that this may be because it requires a FWA member to weigh up significantly more information than they may have available to them through a conference.<sup>628</sup>

#### **9.4.4 To demonstrate that all efforts are being made to progress bargaining**

Another common reason why parties sought Tribunal assistance under s.240 was to demonstrate that a party was expending all efforts to reach an agreement: to demonstrate the party's bona fides. In many cases, this demonstration is directed at the workers to be covered by the proposed agreement, and was a strategy adopted by both unions and by employers:

*'So everything we look at is an organising opportunity, so if I'm in the Commission or if [name of other industrial officer] is in the Commission, or you know Fair Work, and members don't know about it, we're wasting our effort in our point of view. There's nothing to be achieved by our members not knowing us, not knowing about what we're doing.'*<sup>629</sup>

*'certainly it helps us to report back that we've gone in to Fair Work Australia, we try and do the right thing, we try to have... [a report back to] the employees... that we've been in*

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<sup>624</sup> Interviewee 38a.

<sup>625</sup> Interviewee 38a.

<sup>626</sup> Interviewee 33b.

<sup>627</sup> Interviewee 35b.

<sup>628</sup> Interviewee 33b.

<sup>629</sup> Interviewee 38a. See also Interviewee 5a.

*here, we've offered this, we think that this is a good message to send to employees, that you try to involve an independent person.*<sup>630</sup>

In high profile disputes, a s.240 application may also be used as a means of influencing public opinion through demonstrating that the party was genuinely bargaining and interested in resolving the dispute.<sup>631</sup>

Section 240 was also viewed strategically as a precursor to the use of other provisions in the FW Act. In this instance, parties seek to demonstrate their bargaining bona fides to the tribunal itself. As one experienced interviewee from a large employer explained the motivations behind their application:

*'...240, in the context of a 229 application by those that you're bargaining with, is a very useful avenue to get before the tribunal, because it's invariably heard first for obvious reasons... And you can present your bargaining credentials in a very informal way, and potentially, provided the tribunal member hearing the 240 is also hearing the 229, you have a very good chance of defeating it.'*<sup>632</sup>

Of course, this strategic use of s.240 would presumably be limited largely to experienced bargainers. It is also a strategy that is not limited to s.240 applications: similar considerations may motivate applications for bargaining orders.<sup>633</sup>

#### **9.4.5 To escalate a dispute to those with greater authority**

Another common reason for making a s.240 application that emerged from the interviews was the tendency for parties to lodge such applications where bargaining has reached an impasse, or where it had proved difficult to address important issues, or where interpersonal difficulties made negotiations especially protracted. In some cases, the bargaining may not be progressing simply because of the personalities of individuals involved. In others, it may be because those directly involved in negotiations were not perceived as having the authority to reach agreement. In these types of circumstances, FWA's involvement was seen as a means to trigger the involvement of more senior management and/or union officials who had the appropriate level of authority to conclude the negotiations:

*'It just got to the stage where the relationship between the organiser and the company needed some intervention.'*<sup>634</sup>

*'Particularly with industrial action I guess, [where things have] reached a sort of level of hostility that isn't perhaps conducive to getting the matter sorted, bringing in new faces, bringing in the industrial officer and perhaps a different company rep who would come along to Fair Work Australia, it might just give it a different angle.'*<sup>635</sup>

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<sup>630</sup> Interviewee 4b.

<sup>631</sup> Interviewee 5a.

<sup>632</sup> Interviewee 28b.

<sup>633</sup> Interviewee 12a; Interviewee 26a.

<sup>634</sup> Interviewee 23a.

<sup>635</sup> Interviewee 11a.

*'I tried to get [the negotiations] back on track by going to Fair Work Australia, getting their legal representative involved because part of the problem, as far as I saw it, was the human resources manager... he was sort of coming into the room, sitting down in the same place and like saying this is what we're going to do, we're going to do it this way, I'm not going to listen to such and such and so we sort of wanted him to be sidelined to some extent.'*<sup>636</sup>

Another party who lodged a s.240 application after months of bargaining explained:

*'we also used [the s.240 application] to get the corporate people involved, because sometimes the local people were too mired in the dispute...so we take it to Fair Work Australia and then they'll have to kick it upstairs and then we'll get at whatever the issue was ...'*<sup>637</sup>

#### **9.4.6 Where no other option is available**

Finally, s.240 applications also appeared to be lodged in cases where parties are frustrated by the lack of progress in bargaining, but did not perceive that any other option was available to them – either legally, or strategically – to progress the negotiations. In such cases, a s.240 application was seen as a means of getting a matter before FWA and then, hopefully, for a tribunal member to assist the parties in resolving the wider issues in dispute.

*'So I suppose we didn't have high hopes that this would be particularly successful, but we were just taking whatever options we had.'*<sup>638</sup>

*'We felt we had no other option. I mean we felt an obligation to give it as good a go as we could...'*<sup>639</sup>

In these circumstances, it would seem that it is often the party with less bargaining power that is motivated to initiate an application for FWA involvement. For unions, this may be where protected industrial action has proven, or is predicted to be, ineffective in progressing bargaining; and for employers, it may be where there is not considered to be any other mechanism for addressing the impact of industrial action that is being taken against the organisation.

### **9.5 When doesn't section 240 help?**

It was clear from the interviews that certain characteristics of a dispute may render it less amenable to resolution through a s.240 application. Section 240 relies upon the willingness of parties to engage in the process and to seek solutions to the dispute. Many of those interviewed expressed the view that conciliation by FWA under s.240 was only useful where both parties wanted to be involved and were committed to resolving the dispute. Where there is a high

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<sup>636</sup> Interviewee 31.

<sup>637</sup> Interviewee 2a.

<sup>638</sup> Interviewee 4b.

<sup>639</sup> Interviewee 23a.



degree of hostility between the parties or where one party is a reluctant participant, such processes are unlikely to be of assistance.<sup>640</sup>

Conciliation and mediation also clearly have their limitations where parties have entrenched positions. This was emphasised by a number of interviewees who had been involved in s.240 applications:

*'It depends on the willingness of the parties to achieve an outcome, and every circumstance is different.'*<sup>641</sup>

*'But when bargaining's at a certain point in terms of the company wanting to restructure and have [a] pretty entrenched position, there's nothing really you can do in the sense of a 240.'*<sup>642</sup>

*'It varies entirely based on ... the attitude of the parties. Fair Work Australia can't change the view of the parties and how they're going to behave.'*<sup>643</sup>

*'So really a lot of that stuff did not progress through the mediation and conciliation stage simply because the views of the parties were pretty much entrenched at the bargaining table. And while we sought aid [the employer] wasn't prepared to move on its general wages position at all...'*<sup>644</sup>

*'I'm not quite sure what FWA can do when you have an entrenched employer with unlimited resources to resist [and] who's saving money ... the longer an agreement spins out...'*<sup>645</sup>

A number of interviewees also emphasised the ineffectiveness of conciliation and mediation where the parties did not in fact have the capacity to resolve the dispute.

*'Look, the... negotiations with ... lots of big companies, don't take place at the formal negotiating table. They don't take place before a Commissioner. They take place in pubs and they take place over the phone. It takes... five minutes to negotiate an Agreement ...'*<sup>646</sup>

Finally, for one interviewee, FWA assistance to resolve a bargaining dispute was not helpful as they believed the tribunal was not a neutral forum, and was 'too soft' on unions.<sup>647</sup>

## 9.6 Views on what makes for effective conciliation

Drawing upon their experiences in FWA, many interviewees expressed their views as to what made for effective conciliation by the tribunal. The views expressed on this issue were surprisingly consistent, across employers and union interviewees, and across industries. It is important to emphasise that the discussion and observations in this section may apply not only

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<sup>640</sup> See, e.g. Interviewee 12a;

<sup>641</sup> Interviewee 35b.

<sup>642</sup> Interviewee 23a

<sup>643</sup> Interviewee 29a.

<sup>644</sup> Interviewee 17a.

<sup>645</sup> Interviewee 17a.

<sup>646</sup> Interviewee 29a

<sup>647</sup> Interviewee 32b.

to s.240 but also to conciliations undertaken by FWA in respect to applications lodged under other provisions in Part 2-4 of the FW Act.

A common theme emerging from the interviews was the distinction between the 'hands off', 'black letter law' approach adopted by some FWA members, and the more 'proactive' or 'fixer' approach adopted by others.<sup>648</sup>

*'In respect of section 240, different commissioners approach it in different ways, and some are more interventionist, some are less interventionist...'*<sup>649</sup>

*'... each Commissioner... is different, and will conduct these processes in a different way.'*<sup>650</sup>

*'Some members will be a bit more up front about saying "Look, .... you've got good grounds or you've got no good grounds here. You should take this position to the other side otherwise you'll lose". Others will take a very hands-off approach, saying "Look... what's your offer? What's your offer? Ok, that's the end of it. You'll have to make a bargaining order application.'*<sup>651</sup>

Overwhelmingly, interviewees expressed a preference for the more proactive type of intervention, which was seen as a more effective approach during conciliation and more likely to resolve the dispute:

*'...at least for our industry and our employers, having a more interventionist approach helps us.'*<sup>652</sup>

*'He tried very hard. He travelled to [location] on several occasions to try and broker a solution up there, and he came very, very close... [He] went out of his way to listen to the concerns of our members, obviously the company as well, and he went to extraordinary lengths to try and reach a solution... [and] his efforts weren't in vain because he got the parties a lot closer together, and ultimately the parties came to a solution without the Commission....'*<sup>653</sup>

*'surely if they play the more proactive role early on then it might eliminate some of the reactive role later on when people are looking to have protected action or they're already in dispute...'*<sup>654</sup>

The more proactive approach was illustrated well by one employer interviewed, who explained the process in relation to their s.240 application:

*'The Commissioner was particularly useful... I guess, you know, understanding the frustration felt from both parties at that table, that the parties listed in that dispute were*

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<sup>648</sup> Interviewee 38a; Interviewee 36a; Interviewee 37a; Interviewee 19a; Interviewee 35b; Interviewee 46a; and Interviewee 19a.

<sup>649</sup> Interviewee 19a.

<sup>650</sup> Interviewee 35b.

<sup>651</sup> Interviewee 46a.

<sup>652</sup> Interviewee 19a.

<sup>653</sup> Interviewee 36a.

<sup>654</sup> Interviewee 1b.

*not necessarily against each other, they were working around a very difficult workforce .... So the Commissioner called another conference... via video link with the actual workforce, to try and understand the issues relating to them, what was preventing the agreement from being approved...*

*Part of that process was that the agreement was not being approved not because necessarily they didn't agree with the agreement, [but] because of all the other issues that were happening on the site... So the Commissioner took a very clean view with the workforce about what was an EBA matter, and what was not an EBA related matter... [The Commissioner] explained that to the employees... And I think that was a hugely beneficial step in moving forward.'*<sup>655</sup>

Another interviewee explained a successful conciliation experience:

*'I remember in one case... he just sort of said alright, we're going to commit to meeting on this day and I'm going to clear my diary and I want you guys to have a good breakfast because we're not breaking until we've resolved this... and that was quite useful I think, [because people said] 'let's get serious about this'... this is actually a whole day of work that we could be doing something else...'*<sup>656</sup>

*'... sometimes you need the wisdom of Solomon, and sometimes you've got two parties that might be so far [apart]... But if you've got a really good Commissioner... he can really work that and find a way.'*<sup>657</sup>

One employer interviewee expressed his frustration with what he regarded as a reluctance on the part of the tribunal to take a more active approach to its task of settling disputes:

*'basically the tribunal and the whole function of Fair Work Australia has gone into neutral in terms of assisting the parties... we have very, very strong face to face negotiations [with the other party], no problem about that. But when parties do get to a point where they're not able to make headway, you can then [go] off to the tribunal and at least the tribunal can roll its sleeves up, get very animated with the parties and see what's happened. ... But our experience here was that it was pretty inadequate.'*<sup>658</sup>

A number of factors, techniques or approaches were repeatedly identified as being particularly effective in assisting parties resolve disputes, including:

- an FWA member gave some indication as to their view on what would transpire if the dispute was determined by FWA under another provision of the FW Act;
- where an FWA member had a strong understanding of the industry and the players involved in the dispute; and
- where FWA members provided for some kind of follow up so as to monitor progress after a certain period of time.

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<sup>655</sup> Interviewee 33b.

<sup>656</sup> Interviewee 3a.

<sup>657</sup> Interviewee 46b.

<sup>658</sup> Interviewee 47b.

Our finding that the parties – irrespective of whether they were union or employer representatives – are generally supportive of a more active and interventionist approach taken by some FWA members in the conciliating bargaining disputes is consistent with earlier research. Almost a decade ago, in a study examining the AIRC’s role and powers under the WR Act, Forbes-Mewett et al found from interviews with key informants and focus groups of tribunal users, that most supported a tribunal that was ‘more interventionist within the conciliation process to more effectively enable a settlement of the matters in dispute.’<sup>659</sup> Guidance and advice from tribunal members in resolving a dispute was considered particularly important. These researchers also found that, if the Commission was to meet its statutory obligation to prevent and settle industrial disputes, parties believed expected that it should have greater powers to compel parties to participate in dispute resolution. These findings are remarkably similar to those we drew from our interviews a decade later.

## 9.7 The scope for arbitration

Many employer and union parties interviewed expressed a strong preference for voluntary conciliation of disputes by the tribunal, as this enabled them to maintain control over the dispute and to adjust their level of participation with the tribunal as they saw fit.<sup>660</sup> As one experienced industrial relations practitioner, employed by a large company in the agricultural industry explained, ‘It’s the tribunal that I’m familiar with, and comfortable there, I know my way around it and know when I’m able to disengage from the tribunal if I need to.’<sup>661</sup> While this sense of maintaining some control over the dispute was identified as important by union and employer representatives, employers were more likely to stress the undesirability of arbitration as it was seen as losing control over the process.<sup>662</sup>

There were a number of interviewees, however, who expressed the view that FWA should be given enhanced powers to intervene in disputes, including the power to arbitrate in some instances. For some, FWA was seen to be ‘hamstrung’ by the limitations of s.240, in particular by the limits on its capacity to arbitrate disputes unless both parties were willing for it to do so. This limitation on its powers was seen by a number of informants as seriously constraining its ability to promote and facilitate collective bargaining. While many interviewees recognised that there were other avenues for facilitating bargaining (e.g., bargaining orders), these were seen as largely process-oriented and more litigious than an arbitrated outcome.<sup>663</sup> One interviewee observed with some frustration:

*‘But without the consent of both sides FWA is entirely powerless and that’s what we see with [name of company]. They don’t want to make an agreement. They didn’t want to make an agreement when we brought that 240, so 240 was completely empty.’<sup>664</sup>*

While these frustrations were generally voiced by union representatives, some employer informants interviewed were also unhappy with the limits on FWA’s statutory powers to

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<sup>659</sup> H Forbes-Mewett, G Griffin and D McKenzie, ‘The Australian Industrial Relations Commission: Adapting or Dying?’ (2003) 11 *International Journal of Employment Studies*, 1, 19.

<sup>660</sup> See, e.g., Interviewee 4b.

<sup>661</sup> Interviewee 28b.

<sup>662</sup> For example, Interviewee 28b; Interviewee 33b.

<sup>663</sup> See, e.g., Interviewee 44a.

<sup>664</sup> Interviewee 46a.

resolve bargaining disputes. For some, the object of dissatisfaction was the reluctance of FWA to require other parties to engage in the dispute resolution process. One employer interviewee explained in reference to the company's s.240 application:

*'So once that strike occurred I tried... I contacted [the tribunal] and said is there any way we can get... [if] we don't make progress on our own, is there any way we can get back with you? And we'd received legal advice on this point, but [the tribunal member] reaffirmed it. He said unless [name of union] are prepared to consent we cannot bring them back. And I said but it's irrational what's happening without your assistance. And he said well we can't bring them back.'*<sup>665</sup>

For other employer parties, arbitration was seen as desirable in certain circumstances:

*'... if I compare the current arrangements under the current Act with what I've been used to previously, there isn't - the tribunal no longer has very clear circuit breakers around disputes.*

*When I was [in former roles in other industries] ... there was a clear... you either win or you lose and you get on with it.*

*Those sort of tangible circuit breakers aren't there. The choices are 'you have a death of 1000 cuts or you bring the whole house down.'*<sup>666</sup>

*'Look, I think the capacity to arbitrate is probably something that's a little light on in the current Act... there's avenues to get there, I'm not saying you can't do that today, but it's not like it was when you could say, 'Hey look, we just can't agree here', and in the good old days the Commissioner actually comes aside and sits down and talks with you and says 'Look, I think you're going to get done here, here and here, why don't' you shift here', and we move on.'*<sup>667</sup>

While it is impossible to draw definitive conclusions based on the interview data collected for this study, it would appear that the preference for a more interventionist FWA, with greater powers to resolve disputes, was particularly apparent among employers who operated within industries and sectors with industrially powerful unions. This view was also stronger among experienced practitioners; for example, interviewees who had worked in industrial relations long enough to be able to compare bargaining under the FW Act with the experience of practising under state systems, generally expressed a preference for stronger tribunal powers.

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<sup>665</sup> Interviewee 46b.

<sup>666</sup> Interviewee 34b.

<sup>667</sup> Interviewee 49b.

## 9.8 Levels of awareness and understanding of section 240

Most of the parties involved in s.240 applications who were interviewed were 'repeat players' in industrial relations. They reported extensive working knowledge of the legislation under which they were operating and of tribunal processes. A strong theme that emerged from those interviewed with less experience with the tribunal, however, was the lack of knowledge and understanding of the s.240 processes.

Several interviewees expressed their wish for some kind of mechanism under the FW Act where parties could bring disputes on a 'no-fault' basis and without the risk of a binding order being made against them, suggesting a lack of awareness of the 240 mechanism.<sup>668</sup> There was also misunderstanding about the FWA processes and powers under this provision. Several of those interviewed, for example, appeared to hold the misapprehension that any application lodged under s.240 could trigger arbitration of the dispute. The lack of understanding of s.240 among significant numbers of employers was a phenomenon also observed by some of the employer parties interviewed with considerable experience in industrial relations. As one explained:

*'I think it's an element of they just don't understand the process enough to know that once you hit that first point of an application and you walk into a conciliation conference, you've walked into a non-prejudicial discussion about what potentially might happen, and you can leave ..., I think if businesses are honestly scared about accessing their rights under Fair Work to get assistance to deal with bargaining disputes, ... then they're not confident and don't understand the process enough ...'*<sup>669</sup>

Once again it is not possible to draw conclusions on these issues based on the interview evidence gathered for this study. Nonetheless, it would be reasonable to anticipate that the lack of awareness of the s.240 mechanism expressed by those interviewed, and the misconceptions about how it operates held by interviewees, are reflective of the broader population of parties who have not yet had cause to use any of the provisions under Part 2-4 of the FW Act.

## 9.9 Conclusion

Section 240 is the most widely used of all the avenues available under the FW Act directed at facilitating bargaining and agreement making. Quantitative analysis of applications made under this provision suggests that it is viewed as a very important avenue of assistance for parties during bargaining. This was confirmed by our interview data. The interviews enabled us to understand more about the types of parties using s.240 and their objectives in seeking FWA's assistance during bargaining. While interviewees identified a myriad of motivations for lodging s.240 applications, several common reasons emerged strongly. These included seeking assistance to progress bargaining when an impasse had been reached; to promote more reasonable behaviour among the bargaining representatives; as an exit strategy; to demonstrate bargaining *bona fides*; and to escalate a dispute to those with greater authority. In these

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<sup>668</sup> Interviewee 8a.

<sup>669</sup> Interviewee 33b.

circumstances, the involvement and assistance of an independent third party with expertise in industrial relations matters was considered to be of value.

Our interviews further suggested that while s.240 is a provision of the FW Act that is used frequently, it tends to be used overwhelmingly by 'repeat players' and experienced industrial relations practitioners. These users are often those with long-standing experience in union-management relations, and with a more pragmatic approach to collective bargaining. While not surprising, this suggests there is considerable scope for measures directed at promoting awareness of this avenue of assistance. This would seem even more important given the value of this avenue of assistance to progressing bargaining (according to those who have been involved in proceedings under this provision) and the fact that, if the FW Act is achieving its statutory objectives, there will presumably be more parties bargaining and so perhaps more scope for bargaining-related disputes to arise.

An interesting finding to emerge from the interviews was the overwhelming preference of those who had been involved in bargaining disputes for conciliators who adopted a proactive approach to conciliation. In many cases, this type of approach was more informal, where the conciliator was willing to engage with the parties and issues in dispute to a significant degree, and to put forward views and proposals directed at resolving the dispute. This type of assistance was widely regarded as being the most effective approach to the resolution of disputes that arose during bargaining.

Finally, while s.240 was widely regarded favourably, a number of limitations were identified with the provision. These went both to the way in which FWA sought to exercise its powers under the s.240 (e.g. the extent to which it was willing to require a party to participate), and to the statutory limitations on FWA's dispute resolution powers.

## 10 PROMOTING BARGAINING AMONG WORKERS HISTORICALLY EXCLUDED: ARE THE LOW-PAID BARGAINING PROVISIONS WORKING?

The low-paid bargaining provisions of the Fair Work Act 2009 (Cth) (FW Act) have been identified as one of the most novel features of the bargaining framework.<sup>670</sup> The Explanatory Memorandum to the FW Act states that these provisions are intended to assist low-paid employees who have not historically had the benefit of, or who face substantial difficulty undertaking, enterprise-level collective bargaining.<sup>671</sup>

Under s.242 of the FW Act, a bargaining representative or eligible union may apply to Fair Work Australia (FWA) for a 'low-paid authorisation'. The effect of this authorisation is to enable FWA to facilitate the making of a multi-enterprise agreement,<sup>672</sup> as well as to enliven obligations on those subject to the authorisation to bargain in good faith. Where the parties subject to a low-paid authorisation fail to reach agreement, and providing a number of requirements are met, FWA may make a 'low-paid workplace determination'.<sup>673</sup>

Only three applications for a low-paid authorisation have been made under s.242 since the FW Act commenced operation.<sup>674</sup> The first two applications, made by United Voice (formerly the Liquor, Hospitality and Miscellaneous Workers' Union) and the Australian Workers' Union of Queensland in relation to employers in the government-funded aged care sector, were lodged in May 2010 and dealt with jointly by FWA. A low-paid authorisation was granted by FWA with respect to 175 of these employers on 29 July 2011.<sup>675</sup> This authorisation remains in force and the parties are currently engaged in negotiations for a multi-enterprise agreement to operate in the aged care sector.

The application of the provisions by FWA in this decision is discussed below. To date, there has been no application made for a low-paid workplace determination in relation to this matter.

The other low-paid authorisation application was submitted by the Australian Nursing Federation in November 2011, in relation to nurses employed in private sector general practice clinics and medical centres. This application is currently before FWA.

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<sup>670</sup> See e.g. R Naughton, 'The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?' (2011) 24 *Australian Journal of Labour Law* 214; and R Cooper and B Ellem, 'Fair Work and the Re-regulation of Collective Bargaining' (2009) 22 *Australian Journal of Labour Law* 284.

<sup>671</sup> FW Act s.241 and House of Representatives, Commonwealth Parliament, *Fair Work Bill 2008: Explanatory Memorandum*, 2008, para [992].

<sup>672</sup> The specific powers of FWA to assist parties in negotiating a multi-enterprise agreement in the low-paid bargaining stream are set out in FW Act s.246.

<sup>673</sup> FW Act Part 2-5, Division 2.

<sup>674</sup> Not including an application lodged in November 2010 (in relation to the building and construction industry) but then withdrawn.

<sup>675</sup> *Application by United Voice and the Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633 (5 May 2011).



## 10.1 The legislative framework

The legislative provisions governing low-paid bargaining authorisations are found in Division 9 of Part 3-4 of the *FW Act*, sections 241-246. The objects of this Division are set out in s 241 and include:

- (a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and
- (b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and
- (c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and
- (d) to enable FWA to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

Section 243(1) provides that if an application for a low-paid authorisation is made, FWA *must* make the authorisation if it is satisfied that it is in the public interest to authorise to do so, taking into account the matters specified in ss.243(2) - (3), reproduced below:

*FWA must take into account historical and current matters relating to collective bargaining*

**243(2)** In deciding whether or not to make the authorisation, FWA must take into account the following:

- (a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
- (b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
- (c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
- (d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;
- (e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

*FWA must take into account matters relating to the likely success of collective bargaining*

**243(3)** In deciding whether or not to make the authorisation, FWA must also take into account the following:

- (a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;
- (b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;
- (c) the views of the employers and employees who will be covered by the agreement;
- (d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;

- (e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:
  - (i) would cover that employer; and
  - (ii) would not cover the other employers specified in the application.

If FWA decides to make a low-paid bargaining authorisation, another important element of the provisions is that FWA is empowered to grant assistance to the bargaining representatives. Section 246(2) provides that FWA may, on its own initiative, provide to the bargaining representatives for the agreement such assistance that FWA considers appropriate to facilitate bargaining for the agreement, and that FWA could provide if it were dealing with a dispute. Section 246(3) provides that FWA ‘may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if FWA is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.’

If the bargaining representatives for a proposed enterprise agreement pursuant to a low-paid authorisation are unable to reach agreement, the FW Act authorizes FWA to make a ‘low-paid workplace determination’ in circumstances specified under Division 2 of Part 2-5. In particular, s.262 provides that FWA must be satisfied that: the bargaining representatives for the proposed multi-enterprise agreement concerned are genuinely unable to reach agreement on the terms that should be included in the agreement; and there is no reasonable prospect of agreement being reached.

## 10.2 The application of the low-paid bargaining provisions by FWA

As noted above, there have only been three applications for low-paid authorisations (LPAs) made to date. The first two of these applications were made on behalf of employees in the residential aged care sector in specified areas of Australia performing work described in the *Aged Care Award 2010*, and enrolled nurses in the aged care sector in Western Australia. These applications were opposed by a number of individual employers and employer bodies. A Full Bench of FWA granted a low-paid authorisation in relation to these applications in May 2011, in the *Aged Care Case*.<sup>676</sup> There is yet to be a decision concerning the third application relating to private sector nurses.

In its decision in the *Aged Care Case*, a Full Bench of FWA stated that: ‘the legislative policy underlying the low-paid authorisation provisions is that while bargaining on a single enterprise basis is the preferred approach, multi-enterprise bargaining is permitted “to assist and encourage low-paid employees ... to make an enterprise agreement that meets their needs”.’<sup>677</sup>

The Full Bench observed that s.243 of the FW Act was critical to FWA’s jurisdiction. This section provides that FWA must make a low-paid authorisation where it considers that it is in the public interest for an authorisation to be made, and lists the matters that FWA must take into account in reaching its decision. The tribunal noted that it is not limited to these matters in determining

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<sup>676</sup> For a summary of the decision and FWA’s findings, see R Naughton, ‘The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?’ (2011) 24 *Australian Journal of Labour Law* 214.

<sup>677</sup> [2011] FWA FB 2633 at [11].

whether a particular authorisation is in the public interest. Overall, the tribunal considered a number of matters in applying the public interest test, including: 'the history of bargaining, the relative bargaining strength of the employers and employees and the high degree of commonality in the nature of residential aged care enterprises and, leaving aside employees to whom enterprise agreements apply, the conditions of the employees'.<sup>678</sup>

One of the key issues to be determined by FWA in deciding an application for a low-paid authorisation is whether the employees in question were 'low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level' in accordance with the terms of s.243(2)(a), and would therefore be assisted by a low-paid authorisation. The FW Act does not provide a definition of 'low-paid', and a number of interpretations were put to FWA by the parties in the *Aged Care Case*. In its decision, the Full Bench observed that: 'We have no doubt that in the context of the provisions of Division 9 the phrase is intended to be a reference to employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels.'<sup>679</sup>

Another question which arose in relation to the interpretation of s 243(2)(a) was whether a low paid authorisation could be made with respect to employees already covered by an enterprise agreement. The union applicants were seeking a low-paid authorisation for many such employees in the aged care sector. It was argued that these employees were nevertheless 'low-paid' employees who had faced difficulty in enterprise bargaining.

The Full Bench declined to accept the employers' argument that employees covered by enterprise agreements were precluded from seeking a low-paid authorisation, as these employees could still have faced substantial difficulty in collective bargaining at the enterprise level. The tribunal considered 'that the existence of enterprise agreements is a matter to be taken into account in deciding the scope of any authorisation we decide to make.'<sup>680</sup>

The tribunal accepted that many employees in the aged care sector were low paid and 'have not had access to collective bargaining or face substantial difficulty in bargaining at the enterprise level, or both':

*'We have no doubt that granting the authorisation would assist those employees by providing a framework for negotiation across the sector which will enable the applicants and potentially other bargaining representatives to make better use of resources and will simplify the bargaining process.'*<sup>681</sup>

However, the Full Bench decided to exclude employees covered by existing enterprise agreements because of a lack of sufficient evidence that a low-paid authorisation should extend to these employees:

*'We consider ... that it would be very difficult to analyse the terms of the agreements operating in the sector and the circumstances in which they were made with a view to deciding whether, despite the agreement, the authorisation should extend to the enterprise'*

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<sup>678</sup> Ibid, [36]

<sup>679</sup> Ibid, [2011] FWA FB 2633 (5 May 2011), [17].

<sup>680</sup> Ibid, [20].

<sup>681</sup> Ibid, [22]

*concerned. ...There may be other cases in which a different approach could be followed consistent with the legislative provisions.’<sup>682</sup>*

According to the union applicants, the effect of this decision was to exclude two-thirds of the 60,000 residential aged care workers covered by the application from the low-paid bargaining authorisation.<sup>683</sup>

Under s.243(3), the tribunal is also required to consider ‘matters related to the likely success of enterprise bargaining’. In its decision in the *Aged Care Case*, FWA noted that a number of the matters listed in s.243(3) require a prediction concerning the likely course of events should an authorisation be granted. For example, in relation to s.243(3)(a), concerning whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates, the tribunal noted that: ‘[i]f the prediction [concerning improvements to productivity and service delivery] is positive, clearly that favours the granting of the application.’<sup>684</sup> The Full Bench noted that there was insufficient evidence before the tribunal for a firm conclusion to be reached concerning this matter.

Section 243(3)(b) also requires the tribunal to make a prediction concerning “the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process.” The Full Bench in the *Aged Care Case* took the view that while it might be predicted that multi-employer bargaining would involve a multiplicity of bargaining agents, this would not necessarily render bargaining unmanageable:

*‘Whatever issues of this kind do arise, we are confident that solutions can be found if all representatives are committed to reaching a positive outcome. The tribunal also has the ability to assist. From the employer perspective, the degree of coordination between employers exhibited during these proceedings is encouraging. Video-conferencing and web-based communications can be used to reduce travel and other costs.’<sup>685</sup>*

The Full Bench also devoted some attention to two other matters to be considered under s.243(3). Under s.243(3)(d), the tribunal must consider “the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, who will be covered by the agreement”. In the *Aged Care Case*, the Full Bench accepted that this provision contemplated the extent to which the level of funding provided to the aged care sector was a factor in the setting of terms and conditions of employment by employers. The Full Bench declined to accept the employers’ argument that it should consider the likelihood that the federal Government would not increase funding in determining the application for a low-paid bargaining authorisation:

*‘... s.243(3)(d) requires an examination of the extent to which a person, which is not the employer, has control over the terms and conditions of the employees of the employers who will be covered by the agreement. The dominant role of the Australian Government*

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<sup>682</sup> Ibid, [38].

<sup>683</sup> ‘Bench excludes agreement-covered employees from low-paid industry bargaining’, *Workplace Express*, 5 May 2011. For a critique of this aspect of the decision, see A Forsyth and A Stewart, *Submission to FW Act Review*, 18–19.

<sup>684</sup> [2011] FWA FB 2633 at [29].

<sup>685</sup> Ibid, [31]; footnotes omitted.

*through the funding arrangements makes it such a person. That fact favours the grant of the application. Whether funding might increase if the authorisation were granted is an important question, but it would not be appropriate to make a finding about it even if we were in a position to do so'.<sup>686</sup>*

The tribunal must also predict whether the applicant 'is prepared to consider or respond reasonably to claims, or responses to claims' where an employer named in the application later proposes an agreement which would apply only to that individual enterprise, and would not cover the other employers named in the low-paid bargaining authorisation (s 243(3)(e)). The Full Bench understood this to be a reinforcement of 'the importance of single enterprise bargaining in the statutory scheme, even where a low-paid authorisation has been made'.<sup>687</sup> In other words, FWA must be satisfied that the applicants are prepared to bargain with individual employers who wish to bargain outside the multi-employer bargaining process that follows the granting of a low-paid authorisation.

Should FWA grant a low-paid authorisation, s.246 of the FW Act provides the tribunal with a number of powers to assist parties negotiating a multi-enterprise agreement, which it may exercise of its own initiative. These include the power to direct a person other than the 'employer' to attend a conference where that person exercises a significant degree of control over the terms and conditions of employment of relevant employees, if their participation in bargaining is necessary for an agreement to be made. FWA has not yet used any of these powers in relation to low-paid bargaining in the aged care sector. As noted above, in the *Aged Care Case*, the Full Bench observed that the Australian Government was a non-employer person exercising the requisite control over terms and conditions of employment in the in the aged care industry. However, following FWA's decision to grant a low-paid authorisation, the Government has participated in subsequent bargaining without being directed to do so by FWA.

### 10.3 Assessing the impact of the low paid bargaining provisions

Given the small number of applications that have been made under Division 9 of Part 2-4 of the FW Act, it is perhaps too early to reach any conclusions concerning the capacity of these provisions to deliver on their objectives. This was the view of the recent Fair Work Act Review.<sup>688</sup> However based on the existing applications and our interview data, it is possible to draw a number of tentative observations on the operation of these provisions in their first three years of operation.

First, there is some evidence to suggest that the provisions have resulted in more *enterprise-level* agreement making. Both union and employer parties to the aged care application interviewed for this study observed that the application and subsequent authorisation had inspired a number of enterprises to reach their own agreements and so to successfully apply to be removed from the authorisation. It is impossible to say, however, whether this increase in the number of agreements being made reflects increased *bargaining* in the sector, or simply agreement making. The parties themselves also expressed different views as to the desirability

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<sup>686</sup> Ibid, [33].

<sup>687</sup> Ibid, [34].

<sup>688</sup> See J Edwards, R McCallum and M Moore, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, Australian Government, Canberra, June 2012, 151.

of this increase in agreements at the enterprise-level. A union representative interviewed expressed her view that employers had been engaging in 'parallel bargaining' and that this was a deliberate strategy by employers to make the process costly for the trade unions involved.<sup>689</sup> An employer representative in the aged care sector that we interviewed, however, did not see the emergence of site-by-site bargaining as a negative result, on the basis that the low-paid authorisation had at least caused employers not previously engaged in enterprise bargaining to contemplate an enterprise agreement. Indeed, he suggested that the provisions should be amended so as to further promote and facilitate enterprise-level negotiations, through imposing a positive obligation on unions to prove that they had taken genuine and significant steps to negotiate with employers for single enterprise agreements prior to seeking an authorisation.<sup>690</sup>

It also appears to be the case that the granting of the low-paid authorisation has resulted in multi-employer bargaining between unions, employers and employer representatives in the sector that would not otherwise have occurred.<sup>691</sup> This was a central objective of the unions in making the application as it was seen as being less resource intensive and time consuming than 'site-by-site' bargaining. Moreover, the federal government has also been involved in the negotiations for a multi-employer agreement, another key objective of the unions in making the application.<sup>692</sup> According to the unions interviewed, the fact that negotiations have commenced and proceeded without the need for further FWA intervention disproves the argument put by employers in the *Aged Care Case* that multi-employer bargaining would not work.

Ultimately, the practical impact of the low paid bargaining provisions for low paid employees is not yet clear. In particular, it remains unclear whether low-paid bargaining will deliver better results for employees in the sector than site-by-site bargaining.<sup>693</sup> It also appears that, in relation to the aged care sector, the utility of the low paid bargaining provisions is being overtaken by the development of a 'Workforce Compact' between government, unions and aged care providers, as part of a broader package of comprehensive reforms to the Australian aged care sector.<sup>694</sup>

It is difficult to draw any overall conclusions as to how the tribunal has approached its task under the relevant provisions. On the one hand, the reluctance of the tribunal to develop and apply a definition of 'low paid' can be understood to facilitate entry to the low paid bargaining stream. On the other hand, its reluctance to include within the only authorisation it has yet made employers already respondent to enterprise agreements in the low-paid bargaining stream may be seen as significantly *narrowing* entry to the stream and thus its practical impact. According to the unions involved, at least, such an approach to the provisions undermines the statutory intent of increasing employment standards for the low-paid, not simply to provide access to enterprise bargaining for employees in low-paid industries who have not previously experienced enterprise bargaining. The unions involved have expressed their disappointment with this aspect of the decision. In the unions' view, existing enterprise bargaining outcomes in

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<sup>689</sup> Interviewee 45a.

<sup>690</sup> Interviewee 50b.

<sup>691</sup> One of the union representatives involved in the *Aged Care Case* told us that employers and their representatives had declined a request by the unions that they consent to a low-paid authorisation: Interviewee 45a.

<sup>692</sup> Interviewee 45a.

<sup>693</sup> Interviewee 45a.

<sup>694</sup> Interviewee 50b. See further: <http://www.agedcareaustralia.gov.au/>

the sector are barely above the minimum standards set by the National Employment Standards (NES) and modern awards, and with the exception of South Australia, these agreements cover the majority of employees in the sector.

However, FWA's decision appears to leave the door open for unions in the aged care sector to make another application with respect to the employees who were excluded on the basis that additional evidence is provided about the conditions of employees under specific agreements.<sup>695</sup> The decision is also confined to its facts, so would not prevent an application being made with respect to employees already covered by enterprise agreements in other jurisdictions. It is questionable, however, how practical this approach is – it would be highly resource intensive and, in reality, often unfeasible for an applicant for a low paid authorisation to include analysis of every potentially relevant existing agreement, to see whether the authorisation should extend to the enterprise concerned.

One observation that can be made with some certainty is that these provisions appear to an underutilized aspect of the enterprise bargaining provisions in Part 2-4 of the FW Act. There are a number of factors which may explain the low number of applications. First, unions have expressed concern that, although the *Aged Care* decision met statutory objectives in delivering access to bargaining to workers who have not previously had it, as they stand the low-paid bargaining provisions are unlikely to substantially improve the working conditions of low paid workers relative to the safety net standards provided by the NES and modern awards.<sup>696</sup> This is because of FWA's failure to include workers covered by enterprise agreements within the scope of the low-paid authorisation in the *Aged Care Case*, and because employers in the low paid stream are not compelled to bargain as part of that stream. Unions have also argued that they need to be able to take industrial action to put pressure on employers, and that the context of multi-employer bargaining is not sufficient justification to exclude industrial action.<sup>697</sup>

It remains to be seen whether FWA's capacity to assist the parties to bargain for a multi-enterprise agreement will have an impact on the outcome of bargaining, given that the tribunal has yet to become involved in bargaining in the aged care sector. Neither the union nor employer representatives involved in the *Aged Care Case* believed that FWA's power to provide conciliation and dispute resolution services would advance the negotiation of a multi-employer agreement pursuant to the low-paid authorisation.<sup>698</sup> Nor did those we interviewed believe that FWA's power to direct third parties, other than the legal employer, to attend conferences where there is a low-paid authorisation would have an impact.<sup>699</sup> An employer representative in the aged care sector noted:

*'A third party brought to the table is not compelled to do anything other than attend, so it remains to be seen whether this provision is useful. It should be noted that Government*

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<sup>695</sup> Interviewee 45a; see also R Naughton, 'The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?' (2011) 24 *Australian Journal of Labour Law* 214.

<sup>696</sup> Interviewee 45a. See also AWU *Submission to Fair Work Act Review*, 2012, 7; United Voice, *Submission to FW Act Review*, 2012, 23–24.

<sup>697</sup> Interviewee 45a.

<sup>698</sup> Interviewee 45a; Interviewee 50b.

<sup>699</sup> Interviewee 26a. See also S Charlesworth, 'Decent Working Conditions for Care Workers: The Intersections of Employment Regulation, the Funding Market, and Gender Norms' (2012) 25 *Australian Journal of Labour Law* 107, 127.

*representatives have attended negotiations so far without any requirement to do so by FWA (but without any real purpose or impact).<sup>700</sup>*

On the other hand, some commentators have taken a more optimistic view, suggesting that:

*'the naming of the federal government as having control over the wages and conditions of aged care sector workers could arguably place direct pressure on the government to address its role in the undervaluing of the skills and experience in low paid care work ... . Further, bringing the federal government to the bargaining table, even if not technically a party to the negotiations, means that if FWA were to arbitrate a collective agreement outcome governments might well find it more difficult to shrug off the funding implications of the arbitrated decision.'<sup>701</sup>*

Looking beyond the *Aged Care Case*, the low paid bargaining provisions could potentially allow FWA to involve private sector head contractors (with the ability to dictate the terms of service delivery or work processes) in a way which effectively sets a ceiling on the pay levels of employees of subcontractors or employers in the purchaser's supply chain.<sup>702</sup> However, to date there have been no attempts to make use of the provisions in this way.

Another significant aspect of the provisions that is yet to be tested is the capacity of FWA to arbitrate a first agreement (a low-paid workplace determination) in the event that the parties are not able to reach agreement through bargaining. Although FWA has not yet been called upon to use this power, one of the union representatives in the *Aged Care Case* indicated that the potential for arbitration influenced their use of the low-paid jurisdiction, on the basis that this would give the unions leverage in negotiating a multi-employer agreement with employers and their representatives.<sup>703</sup>

Academic commentators such as Naughton have suggested that the process for obtaining a low-paid authorisation, and the hurdles which must be overcome before a low-paid workplace determination will be granted, may impede the effectiveness of these provisions:

*'Even though the Aged Care case has seen the grant of a low-paid authorisation, the next step of obtaining a workplace determination—with its clear emphasis on the future bargaining conduct of the parties and the productivity, efficiency, and 'competitiveness' of individual enterprises — is likely to prove a significantly more difficult process.'<sup>704</sup>*

Perhaps for this reason, instead of seeking low-paid authorisations, some unions appear to be pursuing alternative avenues available under the FW Act for improving the working conditions of their members. In some cases, this might be because the ability of FWA to bring in third parties is not an advantage in a particular industry, either because there is no 'third party' with

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<sup>700</sup> Interviewee 50b.

<sup>701</sup> S Charlesworth, 'Decent Working Conditions for Care Workers: The Intersections of Employment Regulation, the Funding Market, and Gender Norms' (2012) 25 *Australian Journal of Labour Law* 107.

<sup>702</sup> R Cooper and B Ellem, 'Fair Work and the Re-regulation of Collective Bargaining' (2009) 22 *Australian Journal of Labour Law* 284, 301.

<sup>703</sup> Interviewee 26a.

<sup>704</sup> R Naughton, 'The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?' (2011) 24 *Australian Journal of Labour Law* 214, 237.



the funds to meet higher employment conditions, or because of difficulties in establishing that workers in the sector are low-paid.

However, even those unions representing members in industries or sectors where a low-paid bargaining authorisation is potentially available have pursued alternative strategies, such as the equal remuneration provisions under the FW Act or securing improvements to employment standards through the modern award review process. The ASU, for example, devoted significant resources to seeking an equal remuneration order in the community services sector, an industry with similar characteristics to aged care, rather than pursuing multi-employer bargaining through a low-paid authorisation.<sup>705</sup>

## 10.4 Conclusion

The potential for the low-paid bargaining provisions to facilitate multi-employer collective bargaining by low-paid employees is yet to be realised. This appears to be, in part, a result of FWA's interpretation of the provisions with regard to employees already covered by enterprise agreements, and in part a strategic decision by unions not to test the scope of the provisions beyond the *Aged Care* test case, and to instead look to other avenues under the FW Act for improving the working conditions of their members.

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<sup>705</sup> *Equal Remuneration Case* [2011] FWAFB 2700; see generally N Cortis and G Meagher, 'Recognition at Last: Care Work and the Equal Remuneration Case' (2012) 54 *Journal of Industrial Relations* 377; M Smith and A Stewart, 'A New Dawn for Pay Equity: Developing an Equal Remuneration Principle under the Fair Work Act' (2010) 23 *Australian Journal of Labour Law* 152. For a comparison of the ASU's strategy with that of the union applicants in the *Aged Care Case*, see S Charlesworth, 'Decent Working Conditions for Care Workers: The Intersections of Employment Regulation, the Funding Market, and Gender Norms' (2012) 25 *Australian Journal of Labour Law* 107.

## 11 KEY FINDINGS AND CONCLUSIONS

Chapter 1 of this Report describes the aims and scope of this study. It will be recalled that the principal aim is to assess how effective Fair Work Australia (FWA) has been in meeting its statutory obligations under the *Fair Work Act 2009* (Cth) (FW Act) to enable and facilitate bargaining. Doing so involves an assessment of both the statutory provisions governing bargaining in Part 2-4 of the FW Act, as well as the ways in which FWA has exercised its discretionary powers in supervising the bargaining process under these same provisions. As we indicated in Chapter 1, in broad terms it is hoped that the study will shed light on how the FW Act – both directly through matters brought before it by the parties under the various provisions contained in Part 2-4, as well as indirectly through the parties bargaining ‘in the shadow of the law’ – has influenced the extent and dynamics of enterprise bargaining in practice.

Chapter 2 provided the background and context for our study. This chapter traced the evolution of rules governing the conduct of enterprise bargaining in the Australian industrial relations system since the early 1990s, commencing with amendments to the *Industrial Relations Act 1988* (Cth) that were intended to facilitate the extension of agreement-making in both the unionized and non-unionized workforce. It was observed in Chapter 2 that the bargaining provisions contained in the FW Act, which took effect from 1 July 2009, represent a significant shift in approach from prior legislative reforms. For example, unlike the *Workplace Relations Act 1996* (Cth) (both in its original form and as amended by Work Choices), the FW Act sought to establish a legislative framework in which *collective bargaining* was the primary instrument for agreement-making. This was generally to be achieved through the promotion of enterprise-level collective bargaining founded on good faith bargaining (GFB) principles.

More significantly, the FW Act also created a number of mechanisms to facilitate collective bargaining and to assist the parties to resolve disputes that might arise at different stages of the bargaining process. An analysis of the operation of these mechanisms formed the focus of our data collection and analysis. In particular, this study examined the use of applications made under s.236 (majority support determinations (MSDs)), s.238 (scope orders), s.229 (bargaining orders), s.240 (bargaining disputes) and s.242 (low-paid authorisations).

Our assessment extends the small but growing body of empirical work seeking to map and evaluate how the new bargaining rules introduced under the FW Act have altered the behavior of the parties in the process of bargaining. To do so, this study drew on a number of different sources of evidence. In Chapter 3, we described the four principle sources of data upon which we relied:

1. DEEWRS’s Workplace Agreement Database (WAD);
2. FWA’s own case management data;
3. published decisions and orders made by FWA; and
4. qualitative evidence drawn from interviews with parties involved in FWA proceedings under Part 2-4 of the FW Act.

## 11.1 Macro-level trends in bargaining

The first of these sources of data enabled us to make a macro-level assessment of the impact of the FW Act on the overall incidence of agreement-making (see Chapter 4). For example, the WAD data enabled us to look at the number of agreements made (and current) in each quarter over the last 20 years or so, as well as the number of employees covered by these agreements, to assess whether the introduction of the FW Act was associated with any specific shifts in the historical trends in agreement-making.

This data revealed the continuation of a number of general trends in agreement-making that existed prior to the introduction of the FW Act. Most notably, the data showed the clear cyclical pattern in agreement-making as well as a general upward trend in both the number of agreements current in any quarter and the total number of employees covered by these agreements. Moreover, the average size of agreements does not appear to have altered significantly. Nonetheless, our analysis revealed that the FW Act did have some significant impacts on the pattern of agreement-making. First, there is a marked spike in the number of agreements lodged in the June quarter of 2009; that is, immediately prior to the FW Act becoming operative – the largest number recorded in any quarter since 1992. Second, this spike was accounted for by a large increase in the number of non-union agreements, suggesting that many of these were likely to be associated with a desire to avoid the potential effects of the bargaining provisions contained in the FW Act. Third, whilst the growth in non-union agreement-making was evident – and can be attributed to legislative reforms that took place – prior to the FW Act, the new legislation has not been associated with a reversal of this trend. Finally, the FW Act was associated with a marked increase in the number of employees covered by collective agreements. When taken as a proportion of all employed persons, by March 2012, 21.3% of all employees were covered by a federally registered collective agreement. This compares with 18.8% of all employed persons covered by federally registered collective agreements in the June quarter 2009. Interestingly, much of this growth in agreement coverage appears to have occurred in the private sector.

## 11.2 The role of FWA in resolving bargaining disputes

Beyond these macro-level trends, the WAD data cannot provide information about the role of FWA in facilitating bargaining. One means by which we sought to make an assessment of this was through an examination of FWA's own case management data. This data, we note in Chapter 3, is collected in relation to all applications made under Part 2-4 of the FW Act. An analysis of this data was presented in Chapter 5.

FWA's case management data revealed that over the first three years of operation of the FW Act, 1785 applications were lodged seeking some form of intervention from FWA to assist in resolving disputes that arose at different stages of the bargaining process. A significant proportion of these applications – 293 or 16.4% of all applications made – were lodged in the first month after the FW Act came into operation. The overwhelming majority of these applications (94%) were made under s.240 (bargaining disputes). Just as the FW Act was associated with a one-off spike in agreement-making prior to its introduction, these data also suggest that a demand for such intervention had 'stockpiled' until the FW Act came into operation.

Following this initial spike, FWA has faced a relatively stable flow of applications under Part 2-4. Again, in most cases, these applications were seeking assistance to resolve bargaining disputes under s.240. A number of other, perhaps unsurprising, results emerged from FWA's case management data. Most of the applications under Part 2-4 were lodged:

- by unions (74.3%);
- in Victoria (48.6%), New South Wales (19.8%) and Queensland (14.3%);
- in healthcare and social services (26.7%), manufacturing (22.9%), and transport, postal and warehousing (11.5%).

Chapters 6 through to 10 each provide detailed analysis of the various mechanisms through which FWA is able to facilitate bargaining under Part 2-4 of the FW Act. Based on the analyses presented in these chapters, it is possible to draw some general observations about the impact of the provisions and the role of the tribunal in interpreting and applying them. One overriding observation we would make is that the analysis in preceding chapters – and in particular Chapter 8 – demonstrates that while the provisions in Part 2-4 of the FW Act are capable of effectively addressing a range of types of conduct and a number of circumstances in which bargaining disputes arise, they have proven incapable of addressing situations in which an employer simply does not wish to enter into an agreement on any terms. This is illustrated by the fact that in a number of protracted bargaining disputes, parties have lodged applications under several of the available mechanisms under Part 2-4 (and indeed of other parts of the legislation as well); and, notwithstanding that some or all of these applications have been successful, 'bargaining' continues to be frustrated.

### **11.2.1 Majority support determinations**

The number of applications made for MSDs has fallen steadily over the first three years since the FW Act came into operation: from 111 applications in the first year, to 96 applications in the second year, and down again to 67 applications in the third year. These data suggest – and our interview responses confirm – that the MSD provisions, and the way in which they have been interpreted and applied by FWA, have encouraged (or compelled) reluctant employers to engage in bargaining where a majority of employees have a declared preference for union involvement in collective bargaining (see Chapter 6). Nonetheless, there appears to be greater resistance to collective bargaining from employers in some sectors. Manufacturing (85 MSD applications), transport, postal and warehouse services (33 applications) and construction (26 applications) accounted for just over half (52.6%) of all MSD applications made in the first three years of operation of the FW Act.

Overall, our analysis demonstrates that the role of FWA in interpreting and applying the MSD provisions has been very important in ensuring that these provisions meet the objectives for which they were drafted. In particular, the tribunal has generally adopted a pragmatic and flexible approach to MSD applications, which has facilitated the commencement of bargaining where there is credible evidence of majority support (usually in the form of a petition signed by a majority of employees). Further, FWA's refusal to mandate secret ballots as a matter of course, appears to have been important in limiting the scope for 'union busting' tactics (of the kind found in North American labour law systems) to develop in Australia.

Whether this intervention by the tribunal ultimately leads to the successful negotiation of agreements between employers and employees/unions is less clear. Nonetheless, the data

reported in Chapter 6 suggest that, in many instances, an application for an MSD may be used by a union to bring an employer to the bargaining table, before the application is heard by FWA. Around half of all MSD applications were withdrawn or did not proceed to a hearing. The incentive to reach a settlement is perhaps also reinforced by the fact that of those MSD applications which did proceed to a final determination, the overwhelming majority were successful. This conclusion was in part borne out by our interview evidence. Most employers reported difficulty in defending MSD applications, and were aware of the limited scope for doing so. Union representatives indicated that, overall, the availability and (where necessary) the use of the MSD mechanism have proved very useful in compelling reluctant employers to bargain.

### 11.2.2 Scope orders

In the vast majority of bargaining situations, the parties to the negotiations determine the scope or coverage of the proposed agreement themselves. However, in some cases, FWA has been asked to resolve a dispute over which employees should be covered by a proposed agreement, following an application by one or more bargaining representatives for a bargaining order. The data indicate that the overwhelming majority (88.9%) of scope order applications have been made by unions. As was evident in the case of MSD applications, certain industries were over-represented in the data on scope order applications, notably manufacturing (16.7%), transport, postal and warehousing services (15.7%), education and training (13.4%), and public administration (13.4%).

Like MSDs, the number of scope order applications lodged has also decreased over the three-year period of this study. Of the 108 scope order applications lodged in this period, almost half (42.6%) were made in the first year following the commencement of the FW Act. However, the reasons for this decline in usage are likely to differ from MSDs. As we note in Chapter 5, only one in four scope order applications were successful. The reasons for this were more evident in our analysis in Chapter 7 of FWA's decisions on applications for scope orders. The evidence suggests that the statutory requirements for making a scope order inhibited their use, especially by unions. It would appear, from the decided cases, that FWA members have shown a reluctance to interfere in the bargaining process on issues of scope. Our interview evidence suggested that the parties did not hold strong views on the operation of the scope order provisions. Some union interviewees indicated that the requirements for obtaining scope orders were too difficult to meet.

Overall, FWA's apparent 'hands off' approach to dealing with issues relating to the scope or coverage of agreements may have made it more difficult for some groups of employees to engage in enterprise bargaining as effectively as they might have if their preferences had been given more weight. For example, in some of the cases FWA has dealt with, smaller groups of employees within an enterprise have wanted to join larger groups engaged in bargaining to enhance the prospects of reaching an acceptable agreement, while in others, smaller groups were being held back by intractable issues facing the larger group. However, to be fair, FWA's application of the scope order provisions is to a large degree driven by their precise formulation, in particular, the need to satisfy the tribunal that making a scope order is necessary to ensure the fair and efficient conduct of bargaining.

### 11.2.3 Bargaining orders

The numbers of applications for bargaining orders have remained fairly consistent over the first three years of operation of Part 2-4 of the FWA Act: 123 applications were made in the first year, 100 were made in the second year, and 101 in the third year. Just under 80% of the bargaining order applications over this three-year period were made by unions. These applications came mainly from the following industries: manufacturing (24.4%), health care and social assistance (13%), and transport, postal and water services (12.0%).

Our analysis in Chapter 8 showed that FWA has, in decided cases involving applications for bargaining orders, adopted an approach to the GFB obligations that facilitates an orderly bargaining process (including a willingness to ‘step in’ and order parties to attend regular meetings, exchange information and provide details of their claims). Further, the GFB provisions have been interpreted to prohibit certain bargaining tactics that have been found to undermine collective bargaining (e.g. employers making direct offers to employees or unilaterally changing employment conditions while negotiations are taking place). However, other forms of behaviour which arguably run counter to the statutory purpose of promoting collective bargaining have been permitted by the tribunal (e.g. direct communication by an employer with its employees during bargaining). Important limitations have also been identified by FWA in the reach of the GFB requirements – particularly, the difficulty of framing orders to counter the practice of ‘surface bargaining’. Tensions have also arisen between the GFB requirements, and the agreement-making provisions in Part 2-4 of the FW Act, with FWA generally giving priority to the latter over the former (especially in cases dealing with when an employer may submit a proposed agreement to a ballot of employees).

The data from our interviews revealed a mix of views among employers and union representatives about the impact and effectiveness of the GFB provisions. For example, some employers appeared to view the good faith framework for agreement negotiations as useful, while others felt the GFB rules were of marginal relevance. For some union participants in bargaining, the GFB obligations had assisted in achieving a collective agreement; others felt they had had a limited influence on bargaining conduct. Several differences in the perspectives of new as opposed to mature bargainers (both union and employer) were also identified. Overall, the existence of the GFB requirements and the availability of bargaining orders appear to have had not only a direct effect (through their operation and interpretation by FWA), but also an important ‘shadow effect’ in shaping bargaining conduct without actual recourse to the provisions.

### 11.2.4 FWA’s role in resolving bargaining disputes

As we have noted several times in this Report, applications made under s.240 of the FW Act are the most widely used of all the mechanisms to promote bargaining examined in this study. The evidence drawn from our different data sources indicate that this provision is widely viewed as an important means by which bargaining can be facilitated.

As with the other types of applications available under Part 2-4, unions were the dominant users of s.240 applications, although a significantly larger proportion of applications made under s.240 were made by employers (28.5%) and individual applicants (5.7%) than for other types of applications. Again, a small number of industries account for the majority of the s.240 applications made in the three-year period of this study: healthcare and social assistance



(37.3%), manufacturing (21.1%), and transport, postal and warehouse services (10.9%) account for more than two-thirds of all s.240 applications during this period.

As we indicated in Chapter 9, the interview data revealed a variety of reasons for which parties might make a s.240 application, including the need for assistance in resolving a stalemate in negotiations; to 'hose down' volatile negotiations; to demonstrate to a party's constituency that all efforts are being made to resolve the dispute; and as an 'exit strategy' in difficult disputes. Moreover, the evidence indicated that 'repeat players' account for the majority of s.240 applications made, whilst more inexperienced practitioners and first-time bargainers have not availed themselves of this avenue to the same extent. Our interview evidence also highlighted a general preference among parties involved in s.240 proceedings for members of FWA to take a more proactive role in the dispute settlement process. This suggests that there is considerable scope for FWA to adopt a higher-profile approach in promoting awareness of its availability as a source of assistance to parties, under s.240 of the FW Act, in the negotiation of enterprise agreements.

### 11.2.5 Low-paid authorisations

In contrast, as outlined in Chapter 10, the low-paid bargaining stream operating under Part 2-4, Division 9 of the FW Act has been utilized very little. It is likely that this reflects the complexity of these statutory provisions, and the many 'hurdles' that must be cleared in order to activate them. The *Aged Care Case* provides us with the only example to date of FWA's consideration of the requirements for making a low-paid authorisation facilitating access to the low-paid bargaining stream. This case highlighted a number of difficulties in the operation of the provisions, including the question of whether or not employers with existing agreements can be covered by an authorisation. The *Aged Care Case* also illustrates, quite starkly, the extent of union resources and the investment of time required to utilise the low-paid bargaining provisions – as yet, without the successful conclusion of a multi-enterprise agreement covering employees working in the aged care sector.

## 11.3 Further observations and discussion

### 11.3.1 'Shadow effects' of Part 2-4 of the FW Act

The level of direct FWA involvement in collective bargaining through the mechanisms available under Part 2-4 of the FW Act is quite low compared with the overall number of agreements being negotiated and approved by FWA. On one measure, this amounts to FWA intervention in no more than 8% of all agreements negotiated under the FW Act over its first three years of operation.<sup>706</sup> Yet this data understates the influence that FWA appears to be having on collective bargaining and agreement-making processes under the FW Act. As we observed in Chapter 8, there is evidence that the GFB provisions of the FW Act, as well as the supervisory role of FWA, have had a significant 'shadow effect' on the bargaining practices of both unions and

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<sup>706</sup> Compared with the 1785 applications made under Part 2-4 between 1 July 2009 and 30 June 2012, there were 21,983 agreements approved under the FW Act. See *Trends in Enterprise Bargaining Report*, June 2012, available at: <<http://www.deewr.gov.au/WorkplaceRelations/Pages/Reports.aspx>> (last accessed 27 September 2012).

employers.<sup>707</sup> The evidence drawn from FWA's case management database showed that for all types of Part 2-4 applications, a significant proportion are lodged only and do not result in any hearing before a FWA member. Our interview data also indicate that the parties commonly use the threat of taking a matter in dispute to FWA – whether expressly or implicitly – as leverage in bargaining. Moreover, in many cases this action is enough to enable the applicant to achieve the desired outcomes or to generate momentum in the bargaining process. Consequently, there is ultimately no need either to make a formal application to FWA under Part 2-4, or to pursue an application once lodged. This 'shadow effect' would appear to be particularly pronounced in relation to the MSD provisions, but is also discernible in the case of the scope and bargaining order provisions. Moreover, this 'shadow effect' on the behaviour of negotiating parties would appear to be consistent with the federal Government's intention that the FWA processes should operate in the background, with most enterprise agreement-making between Australian employers, employees and unions occurring without the direct involvement of the tribunal.

### 11.3.2 Agreement-making and collective bargaining in the non-union sector

While this study has found that FWA continues to exert a significant influence – both directly and indirectly – on the process of collective bargaining, it is important to emphasize that this conclusion relates largely to workplaces where a union is actively involved in the bargaining process. This is evident in the predominance of union applications in all Part 2-4 matters that come before FWA. Yet as we noted in Chapter 4, the number of collective agreements concluded without union involvement is now greater than those which do. Unfortunately, none of the available data provide us with any direct comparison as to whether the potential role of FWA – or the provisions in the FW Act regulating bargaining – influence agreement-making where no union is involved.

Nonetheless, the WAD data reported in Chapter 4 show that non-union agreements are *quantitatively* different from union collective agreements in that (on average) they cover far fewer workers. There is also at least some, albeit inconclusive, evidence to suggest there are significant *qualitative* differences, in that little negotiation appears to take place between an employer and employee representatives prior to the conclusion of non-union agreements.

### 11.3.3 New versus mature bargainers

A further observation that can be drawn from the analysis in this report is that the provisions of FW Act, Part 2-4 appear to be having differing impacts for new and mature bargainers. For new bargainers – especially employers who have not previously had enterprise agreements – it is the MSD provisions that are of most relevance. Their impact may be direct (for example, through an employer being subject to an MSD application), or indirect (for example, through the awareness that this mechanism is now available and that the employer is operating within a statutory environment that promotes bargaining and agreement making). The GFB requirements also appear to be operating to provide some guidance to new bargainers as to what is expected of them during bargaining, and appropriate processes to be followed. In a number of cases, it

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<sup>707</sup> The 'shadow' effect of relevant provisions of FW Act, Part 2-4 was also discussed by the Fair Work Act Review Panel; see J Edwards, R McCallum, and M Moore, 'Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation,' Australian Government, Canberra, June 2012 at 129, 131, 139, 153 (see also the discussion of their findings in Chapter 2 of this Report).



would appear that the GFB requirements are indeed leading to agreements being made. In general, we found little evidence that new bargainers are not aware of, or are not inclined to use, FWA assistance through s.240.

For mature bargainers – that is, employers who have had several generations of collective agreements in place – the provisions would appear to operate quite differently. The MSD provisions are, of course, of little relevance here as these parties have already been involved in previous rounds of bargaining. Whilst the GFB requirements apply to new and mature bargainers alike, they appear to be operating differently for these two groups. Mature bargainers indicated that generally they do not use the GFB provisions to influence their own behaviour or as any type of guide in bargaining – they generally already have well-established bargaining styles and patterns. Rather, mature bargainers appear (often) to use the GFB requirements in a more tactical manner so as to pursue specific bargaining agendas and objectives. These types of bargainers, however, are much more likely to avail themselves of FWA assistance through s.240. In doing so, mature bargainers are perhaps displaying the type of predisposition towards, or ‘dependency’ on, the use of an independent third party to assist in resolving bargaining disputes that has long been a feature of Australian industrial relations.

#### **11.3.4 The role of FWA in the process of bargaining**

Overall, the analysis in our report suggests that the role played by FWA in bargaining under the provisions in Part 2-4 of the FW Act is overwhelmingly a facilitative rather than a determinative one. This is demonstrated by the high proportion of s.240 applications (many of which result in FWA conciliating or mediating in bargaining disputes); and the low proportion of other Part 2-4 matters that result in FWA issuing a decision or order. Further, our interview data confirm that some members of FWA will often initially deal with Part 2-4 matters by ‘going into conference’, rather than dealing immediately with the formal application before them; and that this conciliation is often successful in resolving the dispute.

A striking theme to emerge from a number of interviews conducted for this study concerns the role of FWA in facilitating communication and negotiation in the course of bargaining. While many interviewees recognized that there are clearly circumstances in which a matter requires a determination, or FWA utilizing a specific remedy (e.g. an MSD), in many cases interviewees reported that the presence of an opportunity to access FWA and its personnel to assist in resolving a dispute was an important feature of the system. This was particularly true of matters brought before FWA under s.240. In these instances, FWA was viewed as an important avenue through which parties to a bargaining dispute may meet and communicate, and in which FWA members might assist in the resolution of disputes. In many cases, the perceived effectiveness of this role appears to lie in its presence as an avenue for parties to meet in a neutral forum.<sup>708</sup>

This finding is perhaps moderated by two further observations on the role of FWA in the bargaining process. First, a theme that emerges strongly from the interviews concerned the importance placed by parties on the conciliation skills held by FWA members. This is perhaps

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<sup>708</sup> This is well illustrated by the fact that, in at least two bargaining disputes that were discussed during our interviews, the parties resolved the matter between themselves while waiting for the FWA member to arrive for the conciliation.

unsurprising given that conciliation takes up such a large proportion of the tribunal's workload.<sup>709</sup> Two related concerns appeared to feature prominently in responses to the questions that we put to interviewees. To begin with, a significant number of interviewees observed that the quality of FWA involvement in a particular matter was dependent on the extent to which the FWA member was able to deploy effective communication skills, and their expertise in negotiation and alternative dispute resolution. In addition, many interviewees reflected on the importance of the particular approach taken by a member in conciliating a matter. In Chapter 9, it was noted that there was significant support from both employer and union interviewees for FWA taking a 'proactive' approach in the conciliation of bargaining disputes. Yet, as a number of interviewees indicated, not all members took such an approach. This, it was suggested, often depended on the individual style of a particular member.

Second, a significant number of interviewees commented on the importance of the pace at which various applications were dealt with under Part 2-4. In a number of bargaining-related disputes, it was reported that the promptness with which the application was dealt with by FWA was one important factor in influencing whether or not the matter was successfully resolved. Some interviewees also suggested that, in seeking to get a matter before FWA and to ensure that the matter would be dealt with more promptly, this consideration was a factor taken into account when deciding which provision would be used to lodge an application. Several interviewees emphasized that the nature and dynamics of bargaining are such that prompt consideration of applications and resolution of disputes is very important.

A further way in which parties involved in bargaining have found FWA to play a useful role is by giving legitimacy to a compromise or outcome reached between the parties. For example, in some instances, unions and employers did not want to be seen by their constituents to have compromised on disputed issues in negotiations – but were more content to reach a settlement in circumstances where the tribunal was involved.

### 11.3.5 The panel system

In reflecting on their experiences with FWA in relation to bargaining, a number of interviewees stressed the significant impact of the tribunal's industry panel system.<sup>710</sup> Most of those who expressed a view on this issue recognised the merit in having a system in which FWA members were familiar with particular industries, and even in some cases with the bargaining histories of particular unions, employers and workplaces. One employer practitioner suggested that:

*'...there's a lot of benefit to be had by having continuity in the sense that [the FWA] panel member or members get to understand the business and get to understand the players in the business and that has an awful lot of merit in it.'*<sup>711</sup>

A union representative expressed his view that the familiarity with particular issues and parties that was enabled by the panel system often meant that an FWA member could 'find a way through' a dispute more quickly and efficiently than would otherwise be the case.<sup>712</sup>

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<sup>709</sup> Senior Deputy President J Acton, 'From Interests to Rights: The Work of Fair Work Australia', Paper presented at the 9<sup>th</sup> Annual Workforce Conference, Melbourne, 22 November 2010.

<sup>710</sup> See <http://www.fwa.gov.au/index.cfm?pagename=aboutpanels>.

<sup>711</sup> Interviewee 40b. See also Interviewee 33b.

In discussing a number of specific disputes, interviewees identified the knowledge and experience of the FWA member as an important factor in facilitating resolution. However, a number of interviewees proceeded to express concern over the way in which the panel system operated in practice. For two parties interviewed, the system was a source of dissatisfaction to the degree that it operated as a strong disincentive to seeking FWA's assistance under Part 2-4.<sup>713</sup> This was particularly the case where, due to the combination of a more remote geographical location and the industry panel system, the likelihood that any application would be heard by a particular member of FWA was very high.<sup>714</sup> Another interviewee expressed his view that there would be considerable merit in rotating panel members more frequently so as to avoid overfamiliarity with the actors and issues, and relieve pressure on FWA members.<sup>715</sup>

### 11.3.6 The role of FWA in providing information and education

A final theme to emerge in relation to the way in which the tribunal has conducted its work under Part 2-4 of the FW Act is the scope for further activity around the provision of information and education to the parties about FWA's role. This related both to promoting public awareness of the various mechanisms available to the parties under Part 2-4 of the FW Act, as well as broader issues around accessing and utilizing the tribunal. For example, the extent to which parties were aware of the availability of the s.240 mechanism has already been discussed in Chapter 9. In addition, two groups of applicants appear to experience particular difficulty in accessing information about FWA and its processes. The first of these, as we have noted above, is 'new bargainers'; that is, organizations (or individuals) that are unfamiliar with the statutory framework for bargaining and the role of FWA. For example, a small, regional, family-owned and operated business explained that:

*'... we didn't know it was going to be that bad. We tried ringing Fair Work Trade [sic]; they just said "Read the website" and things like that and then I asked "Is there someone there that could help us?" and they said "No" there wasn't really anyone to help us and then, like I say, we just, sort of, kept going on, because we thought we were within our rights doing everything. We didn't think we really needed solicitors involved, or anything like that.'*<sup>716</sup>

In a number of cases, FWA members have shown a willingness to assist parties who have limited experience with the tribunal, explaining the relevant statutory provisions or process requirements under the FW Act, or in some cases conducting site visits.<sup>717</sup> In the case referred to above, the interviewee was eventually assisted during the process by an FWA member, and this assistance was seen by the company as critical to the resolution of the dispute and, indeed, to the capacity of the business to continue operating.<sup>718</sup>

The second group of parties involved in bargaining, where there appears to be considerable scope for the provision of targeted information and education, is non-union employee bargaining representatives. The concept and role of an employee bargaining representative is a

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<sup>712</sup> Interviewee 42a.

<sup>713</sup> Interviewee 39a and Interviewee 2a.

<sup>714</sup> For example, Interviewee 39a.

<sup>715</sup> Interviewee 34b.

<sup>716</sup> Interviewee 30b.

<sup>717</sup> Interviewee 30b.

<sup>718</sup> Interviewee 30b.

novel feature of the FW Act. However, while bargaining representatives are given significant rights under Part 2-4 of the FW Act, including the capacity to lodge applications for MSDs, scope orders, bargaining orders, low-paid authorisations and FWA assistance under s.240, there appears to be limited (if any) support or advice available to them about these rights. While it is not possible for us to draw any conclusions on the experiences of (non-union) employee bargaining representatives, in light of the fact that we interviewed only two such individuals, the experiences of these two individuals – despite working in very different industries and occupations – was remarkably similar. They each emphasised the lack of assistance available to them during the bargaining process. Moreover, in both cases, the individuals reported having contacted FWA for assistance and advice but without success. One explained:

*‘... even in my position as a person who has a reasonably good grasp of legislation, it seemed... the process seemed to be weighted in favour of people who had [a better] understanding of it. I would think that a person who’s tried to represent a group, who doesn’t have that sort of grasp, doesn’t have that sort of background, would be really floundering at [FWA].’<sup>719</sup>*

In the other case, the individual bargaining representative (who lodged an application for a bargaining order against his employer) explained that he was very much ‘at sea’ until he appeared at the hearing and was assisted by an FWA member, who emphasised the need for the parties to assist him to ensure he was not at a significant disadvantage during the process.<sup>720</sup>

One consequence of the existing lack of support for non-union employee bargaining representatives would appear to be that some employers have taken the responsibility to provide information to such employees.<sup>721</sup> In some instances, employers reported that they had conducted information and training sessions for individual bargaining representatives themselves or through a consultant or industry association.<sup>722</sup> While not evident in any of the interviews we conducted, this practice does at least raise concerns about whether the independence of individual employee bargaining representatives is compromised, in a manner inconsistent with reg. 2.06 of the *Fair Work Regulations 2009* (Cth).

## 11.4 Areas for further research

While this research has provided a comprehensive analysis of FWA’s role in supervising bargaining under Part 2-4 of the FW Act, it has revealed a number of areas in which further research would be useful. One of these is around how FWA members themselves understand their role in assisting parties to resolve disputes under Part 2-4 (e.g. whether they see their role only as resolving the immediate dispute before them, or to assist the parties to develop more constructive relationships which might prevent them from needing the tribunal’s assistance in future).

Another area where further research would provide greater depth in understanding the operation and impact of Part 2-4 of the FW Act, and FWA’s role in supervising bargaining, relates to the experience of different types of employers under the new provisions. For example,

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<sup>719</sup> Interviewee 43c.

<sup>720</sup> Interviewee 14c.

<sup>721</sup> Interviewee 1b.

<sup>722</sup> Interviewee 15b; Interviewee 1b; Interviewee 42a.

our research has indicated that the experience of new and mature bargainers has been (in certain respects) quite different. It might also be expected that the legislation has had differential impacts upon employers with varying attitudes to the idea of collective bargaining (e.g. 'hostile' or 'resistant' employers, as opposed to those that are 'compliant' or 'amenable'). Further insights could potentially be revealed by the carrying out of in-depth case studies of a representative sample of these various categories of employers.

Finally, we mentioned in Chapter 1 of this report that we did not seek, in this study, to examine the content of enterprise agreements made under the FW Act, or to measure the quality or effects of agreements. Some qualitative analysis of the *outcomes* of the collective bargaining and agreement-making processes would add significantly to the findings that we have made about the nature and extent of FWA's role in overseeing bargaining under Part 2-4 of the FW Act.

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