



Regulating for success: the impact of Good Faith Bargaining provisions in promoting collaborative employment relations in Australian business.

Research Workshop: International Regulation of Work and Employment, ESRC Seminar Series, Monash University Prato Centre, Tuscany, Italy

Dr Troy Sarina

Department of Marketing and Management, Macquarie University, Sydney Australia



Why the project?

- Evaluate the impact of reforms to collective bargaining laws from the perspective of enhancing strategic employment relations
- Introduction of Good Faith Bargaining (GFB) provisions (section 228) in *Fair Work Act* (Cth) 2009 (The Act)
- Intention of legislation?
 - Enhance and balance productivity with fairness (see section 3 of The Act)
 - To encourage *integrative*, win-win outcomes between actors
 - Ensure the industrial pendulum swings ‘back to the middle’ by curbing managerial authority



Playing the sceptic..

- Does the law REALLY matter or influence managerial choice?
- Based on?
 - Gunther Teubner (1987)
 - Law often fails to be an effective instrument. Why?
 - Non-responsive
 - Irrelevant
 - Incoherent



Method

- Interviewing large “accommodating” businesses from key sectors in Australian economy:
 - Airlines
 - Oil Refining
 - Banking
- Qualitative study
 - 20 interviews with key stakeholders to gauge their response to GFB
- How did we measure their response?
 - *Strategic Negotiations* Framework developed by *Walton & Cutcher-Gershenfeld (1994)*



Union Relations			
Employment relations	Avoidance	Accommodation	Cooperation
Compliance	Power and responsibility for managing business concentrated in management while diminishing the union's role	The parties acknowledge the conflicting interests of employees and employers; emphasis is on achieving equitable outcomes	The parties place joint emphasis on mutual goals and integrative potential, as well as on increasing the 'size of the (resource) pie'
Commitment	New plant set-ups at Greenfield sites	Evidence of parties experimenting with quality circles and other forms of employee participation programs	Emphasis is on cooperative partnerships, manifested in joint structures and processes for sharing power and responsibility

Figure 1: Strategic Negotiations Framework

Source: Walton R.E., J Cutcher-Gershenfeld and R.B. McKersie (1994) *Strategic Negotiations: A Theory of Change in Labor-Management Relations*, 11-17. Harvard Business School Press, Boston Massachusetts



The provision under the spotlight: Section 228 of the *Fair Work Act* 2009 (Cth)

- Elements of s.228 include:
 - (a) Attending and participating in meetings;
 - (b) Disclose relevant information in a timely manner;
 - (c) Respond to proposals made by other bargaining representatives
 - (d) Give genuine consideration to the proposals of bargaining representatives
 - (e) Refrain from 'capricious' or 'unfair' conduct that undermines freedom of association or collective bargaining
 - (f) Recognising elected bargaining representatives



What have we found so far?

- Has there been a move to ‘commitment’ ER strategies?
- Disappointing results
 - Minimal positive impact on the way the parties engage in collective bargaining
 - Instead there has been the emergence of ‘unintentional’ consequences to GFB
 - Regulating for collaboration seems to have had limited effect (at least in large corporate players)
 - Confirmation of findings?

‘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’



What have been the unintended consequences?

1. The challenge of multiple bargaining agents (undermining established rapport of actors)

Qantas Airways Limited [2011] FWA 3632 - spectre of adverse action claims

2. Enhancing the debate around confidential and commercially sensitive data used during bargaining

CPSU v Red Bee Media Australia Pty Ltd [2011] FWA 9253



3. Enhanced legalism (Application of bargaining orders to Fair work Commission)

Tracey v Technip Oceania Pty Ltd [2011] FWA 3509; [2011] FWAFB 6551 – re-emergence of demarcation disputes

4. Absence of productivity gains

Current results from Qantas (Annual loss of \$2.8 billion) , respondents reporting “no more low hanging fruits”

5. Development of alternative streams of innovation

Win-win processes at Exxon Mobil



Conclusions

- Positive impact of GFB seems to be minimal in circumstances where there has been a long history of collective bargaining between parties
- Indication of 'incoherent' or 'irrelevant' rules for larger well established enterprises that have had a long established relationship with trade unions
- Solutions?
 - More tailored GFB codes for industries?
 - Emergence of alternative forums to achieve productivity gains?
 - Further education about the intention of the provisions to seek greater alignment between the parties



**THANK YOU
QUESTIONS?**

