
Could Canadian-style interest arbitration work in Australia?

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The collective bargaining framework in Australia's Fair Work Act 2009 provides only limited options for mandatory arbitration of collective bargaining disputes (also known as interest disputes). Experience in the first six years of the legislation's operation shows that these avenues for arbitration are rarely utilised, because the statutory tests to activate them are so difficult to meet. Eight federal and provincial Canadian labour law statutes contain provisions for first contract arbitration (FCA), enabling the relevant labour relations board to determine a first collective agreement. This article concludes that FCA in Canada works as a vehicle to promote collective bargaining; and therefore has considerable potential to address the failure of the Fair Work Act effectively to address employer "surface bargaining" tactics and long-running agreement disputes. A variation of British Columbia's extended mediation model of FCA is recommended as the most suitable for adaptation, with Australia's Fair Work Commission given discretion to assess whether bargaining disputes should move from conciliation to interest arbitration. This reform would assist in the attainment of the FW Act's stated objective to encourage collective bargaining, and give more workers access to above-award wages and employment conditions through collective agreements.

INTRODUCTION

Could Canadian-style interest arbitration work in Australia? Given the long history of compulsory arbitration as a means of determining employment conditions,¹ it is tempting simply to say: of course it could.² However, interest arbitration as it applies in the North American context is a different concept. It is "the process in which an outside agent (the arbitrator) renders a binding award on issues that the parties have been unable to settle in collective bargaining negotiations".³ Australia shifted to a statutory collective bargaining model (known as "enterprise bargaining") in the early 1990s.⁴ So the question is really whether – having made that shift – there is a place for arbitration to resolve intractable collective bargaining disputes, or disputes where there is some public interest in intervention by a third party.

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¹ Kirby M, "Industrial Conciliation and Arbitration in Australia – a Centenary Reflection" (2004) 17 *Australian Journal of Labour Law* 229.

² The traditional Australian system of setting minimum wages and employment standards through arbitrated awards was described by an American observer as "interest arbitration" with the goal of ensuring "appropriate income distribution": Loewenberg JJ, "Interest Arbitration: Past, Present, and Future" in Stern J and Najita J (eds), *Labour Arbitration under Fire* (ILR Press/Cornell University Press, Ithica, 1997) p 111; see also pp 131-132.

³ Loewenberg, n 2; see also Fisk C and Pulver A, "First Contract Arbitration and the Employee Free Choice Act" (2009-2010) 70 *Louisiana Law Review* 47.

⁴ See the special issue of the journal *Labour and Industry* (2012, Vol 22, No 3) examining the evolution of the enterprise bargaining system in Australia after 20 years in operation. See also Townsend K, Wilkinson A and Burgess J, "Is Enterprise Bargaining Still a Better Way of Working?" (2013) 55(1) *Journal of Industrial Relations* 100.



This question of the appropriate role for arbitration has been a constant one since the transition to enterprise bargaining commenced⁵ (in fact, it pre-dates the bargaining era⁶). However, a consistent thread through the various iterations of enterprise bargaining legislation since 1992 has been the *limitation* of the federal industrial tribunal's powers to arbitrate.⁷ This reflects a long-standing view that, in a system of true collective bargaining between employers, trade unions and employees, there should be minimal scope for third party determination of wages and employment conditions.⁸ This argument has added force in Australia, given that enterprise bargaining was introduced to address the perceived rigidities of the traditional conciliation and arbitration system.⁹

That said, there has also been a recognition throughout this 23-year period that arbitration is necessary to resolve bargaining disputes in certain instances. In the next section of this article, the four circumstances in which arbitration is permitted under the *Fair Work Act 2009* (Cth) (FW Act) will be examined – along with a proposal for resolution of “Greenfield” agreement negotiations which forms part of amending legislation currently before the Federal Parliament. The limitations of the current legislative framework in achieving bargaining outcomes in certain situations will also be explored. The article will then examine the Canadian concept of interest arbitration, the various models of first contract arbitration (FCA) which apply under federal and provincial labour legislation, and evidence as to their operation in practice. In the following section, the author examines whether and how any of the Canadian models of interest arbitration could be adapted to the Australian setting. Some brief concluding observations are then made.

ARBITRATION IN BARGAINING UNDER THE FAIR WORK ACT

Overview of the collective bargaining scheme

The statutory bargaining system in operation since 1 July 2009¹⁰ provides a framework for negotiations over new enterprise agreements, between bargaining representatives of employers and employees (including trade unions). Once bargaining commences consensually – or an employer is compelled to bargain through a majority support determination – good faith bargaining obligations apply to the bargaining representatives. Employees, unions and employers may take protected industrial action in support of their bargaining claims.¹¹ While most bargaining is focused on the level of a single enterprise (or part thereof),¹² a special bargaining stream is available to encourage

⁵ Isaac J, “Labour Market Regulation, Arbitration and Enterprise Bargaining – are They Compatible? An Introduction” in Australian Centre for Industrial Relations Research and Training, *Arbitration under Enterprise Bargaining: The Future Role of the Commission* (Working Paper No 30, University of Sydney, November 1993) p 1.

⁶ This is because “over-award bargaining” was a common practice under the conciliation and arbitration system: Forsyth A, “Enterprise Agreements” in Creighton B and Stewart A (eds), *Labour Law* (5th ed, The Federation Press, Sydney, 2010) pp 292-293. For older contributions to the arbitration/bargaining debate see Sir Richard Kirby, *Compulsory Arbitration and Collective Bargaining – Can They Go Hand in Hand?* (August 1964); Niland J, *Collective Bargaining and Compulsory Arbitration in Australia* (NSW University Press, Kensington, 1978); Mulvey C, “Alternatives to Arbitration: Overview of the Debate” in Blandy R and Niland J (eds), *Alternatives to Arbitration* (Allen and Unwin, Sydney, 1986) p 11.

⁷ Dabscheck B, “The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration” (2001) 43 *Journal of Industrial Relations* 277.

⁸ See eg, Frey A, “The Logic of Collective Bargaining and Arbitration” (1947) 12 *Law and Contemporary Problems* 264; Morris C, “The Role of Interest Arbitration in a Collective Bargaining System” (1976) 1 *Industrial Relations Law Journal* 427; Subbarao AV, “The Impact of Binding Interest Arbitration on Negotiation and Process Outcome: An Experimental Study” (1978) 22 *Journal of Conflict Resolution* 79; Kochan T, Lipsky D, Newhart M and Benson A, “The Long Haul Effects of Interest Arbitration: The Case of New York State’s Taylor Law” (2010) 63 *Industrial and Labor Relations Review* 565 at 566-568.

⁹ Stewart A, “Procedural Flexibility, Enterprise Bargaining and the Future of Arbitral Regulation” (1992) 5 *Australian Journal of Labour Law* 101.

¹⁰ *Fair Work Act 2009*, Pt 2-4.

¹¹ Subject to detailed restrictions and requirements (including employee secret ballots) in Pt 3-3 of the *Fair Work Act 2009*.

¹² *Fair Work Act 2009*, ss 172(2)(a) and 12 (definition of “enterprise”).



multi-employer agreement negotiations for low-paid employees.¹³ The Fair Work Commission (FWC)¹⁴ has a supervisory role in the bargaining process, including powers to make majority support determinations; bargaining orders (enforcing the good faith requirements); and scope orders (to resolve disputes over agreement coverage).¹⁵ Parties involved in agreement negotiations may also request the FWC to exercise its dispute resolution powers under s 240 of the FW Act (generally this is restricted to conciliation, unless all bargaining representatives agree to arbitration; see below).

The debate over arbitration and relevant provisions of the FW Act

The role of arbitration in the bargaining scheme established by the former Labor Government was the subject of much debate – and lobbying by both union and employer advocates¹⁶ – as the Fair Work legislation was being developed in 2008. The government had originally maintained that “compulsory arbitration” would not be a feature of the Fair Work system.¹⁷ By late 2008, the government had announced that arbitration would be available in a number of limited circumstances:

The focus of the *Fair Work Bill* will continue to reflect the move away from the automatic arbitration of disputes by the industrial umpire ... But there are of course circumstances when bargaining “goes off the rails” and when the industrial umpire will need to step in.¹⁸

This is captured in the following provisions of the FW Act, under which the FWC can arbitrate bargaining disputes in four situations:

- 1) by agreement between all of the parties involved in the negotiations: s 240(4) (this may occur following, or instead of, the exercise of conciliation powers by the FWC);
- 2) following the making of a serious breach declaration, after serious/sustained breaches of bargaining order(s) by one of the parties, a “bargaining related workplace determination” can be made under Pt 2-5, Div 4, if agreement cannot be reached during a 21-day (or up to 42-day) negotiating period;
- 3) following the termination of protected industrial action by the FWC on public interest grounds, such as disputes affecting essential services or causing damage to a significant part of the economy, an “industrial action related workplace determination” can be made under Pt 2-5, Div 3, again following a 21 (or 42)-day negotiating period;
- 4) in the low-paid bargaining stream, where parties are unable to negotiate a first agreement after extensive efforts, a “low-paid workplace determination” can be made – either on a consent basis or on the FWC’s own initiative – under Pt 2-5, Div 2.

The FW Act workplace determination provisions in operation

In the last six years, there have been only limited instances of the FWC arbitrating under these provisions. Mostly, these have been voluntary arbitrations under s 240 (category 1 above). However, even these are rare, with only a handful of published consent arbitration decisions.¹⁹ On the other

¹³ *Fair Work Act 2009*, Pt 2-4, Div 9.

¹⁴ Formerly known as Fair Work Australia and, before that, the Australian Industrial Relations Commission.

¹⁵ *Fair Work Act 2009*, Pt 2-4, Div 8. See Forsyth A, Gahan P, Howe J and Landau I, *Fair Work Australia’s Influence in the Enterprise Bargaining Process* (Final Report, Fair Work Australia Research Partnership Project, 30 September 2012).

¹⁶ See eg “ACTU Wants Labor to Do More on Collective Bargaining”, *Workplace Express* (11 November 2008); cf Norington B and Karvelas P, “Business Backlash over ‘Dangerous’ Union Era”, *The Australian* (2 December 2008).

¹⁷ Gillard MP, the Hon Julia, “Introducing Australia’s New Workplace Relations System” (Speech delivered at the National Press Club, Canberra, 17 September 2008).

¹⁸ Gillard MP, the Hon Julia, “Address to the Australian Labour Law Association Fourth Biennial Conference” (Melbourne, 14 November 2008).

¹⁹ See eg *North Goonyella Coal Mines Pty Ltd v CFMEU* [2010] FWA 1112; *Australian Licenced Aircraft Engineers Association v Cobham Aviation Services Engineering Pty Ltd* [2012] FWA 9444; *Essential Energy; CEPU; ASU; APESMA* [2014] FWC 3065; *Viva Energy Refining Pty Ltd v Australian Workers’ Union* [2014] FWC 6184; and note especially *Chassis Brakes International Castings Pty Ltd v Australian Workers’ Union and Australian Manufacturing Workers’ Union* [2013] FWC 5615, where the FWC outlined the factors guiding its approach to conducting consent arbitration of bargaining disputes under s 240.



hand, parties negotiating enterprise agreements have made considerable use of the ability to involve the FWC in conciliation and other non-arbitral forms of assistance under s 240(1) – s 240(3).²⁰

In relation to categories 2 and 4 above, there have been no applications to date for the making of a bargaining related workplace determination or a low-paid workplace determination. This is because the tests for accessing these provisions are very difficult to satisfy. For example, to have the tribunal make a serious breach declaration that could then lead to the making of a bargaining-related workplace determination, the applicant must show that (s 235):

- another bargaining representative has contravened one or more bargaining orders previously made by the FWC;
- the contraventions are serious and sustained and have significantly undermined bargaining;
- all reasonable alternatives to reach agreement have been exhausted (eg seeking assistance from the tribunal under s 240); *and*
- agreement will not be reached in the foreseeable future.

The tests that must be satisfied before the tribunal can make a special (ie compulsory) low-paid workplace determination are similarly onerous (see ss 260(4) – 260(5), 262 – 263).

As for category 3 above, this has been activated in a small number of cases. There is in fact a “double hurdle” for having the FWC make an industrial action related workplace determination. First, there must be grounds for the termination of protected industrial action, either on the basis of:

- the action causing significant economic harm to the bargaining parties (s 423); or
- the action threatening community health, safety or welfare, or to cause significant damage to the Australian economy (or an important part of it) (s 424).²¹

The case law dealing with these provisions shows that they are not easily activated.²² This is consistent with the former government’s intention that the provisions should only operate in rare cases:

It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.²³

The second step before the FWC can make an industrial action related workplace determination is that the tribunal must be satisfied that the requirements of s 266 are met – ie there has been no agreement reached between the parties, during the mandatory 21 (or up to 42)-day negotiating period following the termination of industrial action on any of the above-mentioned grounds.

Arbitration in action: The Qantas dispute and subsequent cases

The most spectacular example of the operation of these provisions is the 2011-2012 Qantas industrial dispute.²⁴ Coordinated protected industrial action by three unions seeking new enterprise agreements caused such extensive disruption to flights that, by the end of October 2011, the airline took the drastic step of grounding its worldwide fleet ahead of a proposed lockout of employees. The then government subsequently applied under s 424 of the FW Act for termination of all parties’ protected action, with the objective of steering the dispute into FWC arbitration. A Full Bench of the FWC granted the

²⁰ See eg Forsyth et al, n 15, pp 49-53 and Ch 9. On the role of individuals/bodies other than the FWC in assisting negotiating parties, see Macneil J and Bray M, “Third-party Facilitators in Interest-based Negotiation: An Australian Case Study” (2013) 55 *Journal of Industrial Relations* 699.

²¹ The federal Minister for Employment has power under s 431 of the *Fair Work Act 2009* to terminate protected industrial action on the same grounds as those set out in s 424; to date, this Ministerial power has never been exercised.

²² See eg *Nyrstar Port Pirie Pty Ltd v CFMEU* [2009] FWA 1144; *Prysmian Power Cables and Systems Australia Pty Ltd* [2010] FWA 9402; *Tyco Australia Pty Ltd t/a Wormald v CEPU, Queensland Divisional Branch* [2011] FWA 1598; *Transit Australia Pty Ltd v Transport Workers’ Union of Australia* [2011] FWA 3410; *United Voice v MSS Security Pty Ltd* [2013] FWC 4557.

²³ Commonwealth Parliament, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum, at [1709].

²⁴ See Forsyth A and Stewart A, “Of ‘Kamikazes’ and ‘Mad Men’: The Fallout from the Qantas Industrial Dispute” (2013) 36 *Melbourne University Law Review* 785.



government's application on the basis that the airline's proposed lockout constituted a significant threat to an important part of the Australian economy.²⁵ Soon after the initial 21-day negotiation phase concluded, Qantas reached agreement with the licenced aircraft engineers' union (ALAEA). The disputes with the ground staff and catering employees' union (TWU) and international pilots' union (AIPA) proceeded to arbitration hearings before the FWC.

In August 2012 and January 2013 respectively, Full Benches of the FWC handed down decisions outlining the terms of the industrial action related workplace determinations made in settlement of the TWU and AIPA bargaining disputes.²⁶ Essentially, these decisions supported the position taken by Qantas in rejecting the unions' key claims in the negotiations – ie to enhance job security for their members, by imposing limits on Qantas's ability to contract out parts of its operations (eg heavy maintenance of aircraft) and "offshore" jobs (eg pilot positions sourced through newly-created corporate entities in New Zealand and elsewhere).

The workplace determination settling the dispute between Qantas and the ALAEA, based on an agreement reached between the parties, was the first such determination made under the FW Act.²⁷ As indicated above, this was followed by two other workplace determinations settling the TWU and AIPA disputes. Other than these examples, the FWC has made industrial action related workplace determinations in only a small number of cases.²⁸ This reflects the fact that, as with the other circumstances in which the tribunal may arbitrate bargaining disputes (apart from section 240), the tests for triggering industrial action related workplace determinations are very difficult to meet.

Arbitration back in focus

Qantas's actions in the 2011-2012 dispute led to renewed debate over the role of arbitration in the Fair Work bargaining system. In the immediate aftermath of the airline's grounding, trade union leaders argued that the Qantas case illustrated a "loophole" in the legislation which allowed a multinational employer to obtain arbitration by locking out its workforce – while the tests for employees or unions to access arbitration were too difficult to meet.²⁹ An Australian Council of Trade Unions (ACTU) representative has since made the point that:

[Qantas's] "might is right" strategy is simply not available to small and medium enterprises, those that are not big enough to deliver Mutually Assured Destruction. If arbitration is to be a way out of bargaining for the mammoths it ought also be available to the mice.³⁰

The Australian Labor Party subsequently varied its policy platform, to call for the FWC to be given greater power to arbitrate "protracted and/or intractable bargaining disputes".³¹ Many unions and other interested parties argued for easier access to arbitration of bargaining disputes in their submissions to the 2012 Fair Work Act Review.³² For example, Forsyth and Stewart contended that:

There is a strong argument for adjusting the tests for accessing arbitration under the FW Act, so that the emphasis is not so much on establishing extreme bad faith (or "fault") by one party, or that industrial

²⁵ *Re Minister for Tertiary Education, Skills, Jobs and Workplace Relations* (2011) 214 IR 367.

²⁶ *Transport Workers Union of Australia v Qantas Airways Ltd* [2012] FWAFFB 6612; *Australian and International Pilots Association v Qantas Airways Ltd* [2013] FWCFFB 317.

²⁷ *ALAEA v Qantas Airways Ltd* [2012] FWAFFB 236; industrial action related workplace determinations based on agreement between the relevant parties were made in *Victoria v Community and Public Sector Union* [2012] FWAFFB 6139; *CPSU, the Community and Public Sector Union v G4S Custodial Services Pty Ltd* [2014] FWCFFB 9044.

²⁸ *Schweppes Australia Pty Ltd v United Voice – Victoria Branch* [2012] FWAFFB 7858; *Schweppes Australia Pty Ltd v United Voice – Victoria Branch* [2012] FWAFFB 8599; *Parks Victoria v Australian Workers' Union* [2013] FWCFFB 950.

²⁹ See eg, Hepworth A and Karvelas P, "Business to Fight Union Fair Work 'Wishlist'", *The Australian* (2 November 2011), quoting then ACTU Secretary, Jeff Lawrence; Skulley M, "Unions Want Stronger Hand", *Australian Financial Review* (14 November 2011).

³⁰ Belchamber G, "The Future of Enterprise Bargaining" (2012) 22 *Labour and Industry* 307 at 313; see also "Give Tribunal Power to Address Surface Bargaining: Noonan", *Workplace Express* (19 November 2012).

³¹ See "ALP Considering Easier Access to Arbitration", *Workplace Express* (3 December 2011).

³² See eg, Health Services Union, *HSU Submission to the Review of the Fair Work Act 2009* (2012); Community and Public Sector Union/State Public Services Federation Group, *Submission to Fair Work Act Review Panel* (2012).



action by one side is causing so much damage to the other that it should be ended. Rather, one of the tests for access to arbitration should be focused on whether parties – having negotiated with each other in good faith – have reached the point where further negotiation is unlikely to be productive.³³

On the other hand, employer advocates seemed somewhat divided on the issue. Some felt the Qantas dispute showed that an employer had to take quite extreme steps in order to gain access to arbitration – and therefore the tests should be relaxed.³⁴ Others argued that there should be no return to compulsory arbitration, as it is incompatible with the notion of enterprise bargaining and the goal of workplace productivity.³⁵

The case for change: Other bargaining disputes

The bargaining dispute at the Sydney plant of bionic ear implant manufacturer, Cochlear, is considered a prime example of the FW Act's limited capacity to address systemic failures of bargaining. The Australian Manufacturing Workers Union (AMWU) has been seeking an enterprise agreement for Cochlear employees for over seven years. The union obtained a majority support determination compelling the employer to bargain in August 2009.³⁶ At the time of writing, no agreement has been reached. There have been skirmishes in the FWC, with both the employer and union seeking bargaining orders in 2011-2012. Although finding that Cochlear had, through some of its tactics, dragged out the bargaining process, the tribunal determined that the company had not (for the most part) breached the good faith bargaining rules.³⁷ Some procedural orders were made requiring further meetings to be held between the parties, and facilitating union access to the lunchroom for site meetings with employees.³⁸ But with no arbitration mechanism available, and industrial action an unrealistic option for the largely migrant female workforce, the AMWU is unable to address Cochlear's determination to resist entering into an agreement.

Other examples of protracted bargaining disputes under the FW Act, which have exposed not only the inadequacies of current tests for accessing arbitration but also the limits of the good faith bargaining obligations, include:

- The Tahmoor coalmine dispute, in which (after many months of negotiations) the employer bypassed the Construction, Forestry, Mining and Energy Union (CFMEU) by communicating directly with employees, through meetings held in the union's absence and sending information packages regarding the employer's final offer in negotiations to the employees' homes. These actions, and the employer's submission of the proposed agreement to a ballot (despite the union wishing to continue bargaining), were found to be consistent with good faith bargaining.³⁹
- The Endeavour Coal dispute, where (in an attempt to resolve a bargaining impasse) the union applied for bargaining orders. This ultimately led to the Federal Court finding that the employer's conduct in negotiating without any real intention to reach agreement breached the good faith bargaining requirements.⁴⁰ In the court's view, a party cannot sit "mute" or act as a "disinterested

³³ Forsyth A and Stewart A, *Submission to the Fair Work Act Review* (February 2012) p 26.

³⁴ See eg, Belling B, "Bring Back the Arbitration Factor", *Australian Financial Review* (3 November 2011).

³⁵ See eg, Ridout H, "The Straitjacket of Arbitration", *Australian Financial Review* (6 December 2011).

³⁶ *AMWU v Cochlear Ltd* [2009] FWA 67; *AMWU v Cochlear Ltd* [2009] FWA 125. The early stages of the Cochlear dispute are discussed in Forsyth A, "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 at 42-43.

³⁷ *AMWU v Cochlear; Hargraves v AMWU* [2012] FWA 5374.

³⁸ *AMWU v Cochlear; Hargraves v AMWU* [2012] FWA 5374.

³⁹ *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWA 3510. For an account of the bitter Tahmoor dispute (which at one stage involved allegations that a bomb had been placed in a manager's car) see Bukarica A and Dallas A, *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) pp 22-25.

⁴⁰ *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576.



suitor” by merely rejecting proposals advanced by other bargaining representatives.⁴¹ However, the court struck down orders made by a Full Bench of the FWC, which would have required the employer to provide a list of the subject matter it would be prepared to include in an agreement⁴² (leaving the FWC powerless to address employer “surface bargaining” tactics through the imposition of effective orders). Eventually, after two more years of bargaining and with the assistance of FWC conciliation, an agreement was reached.⁴³

- Yet another coalmine dispute, in which it was found that BHP Coal had not breached the good faith bargaining obligations despite failing to put forward any draft clauses or proposals in 11 negotiating meetings over 18 months. The company successfully argued that it had participated in the bargaining process, but it was not required under the FW Act to make concessions or reach agreement.⁴⁴ The union ultimately abandoned its efforts to obtain a collective agreement for the relevant employees.⁴⁵
- Several other long-running bargaining disputes have seen the use of another common employer tactic, ie making application to the FWC to terminate existing enterprise agreements, mainly on the grounds that the terms and conditions provided for are no longer relevant. If successful, the effect of such a termination is to force employees back onto minimum award conditions until a new agreement is reached.⁴⁶

In their study of another case of prolonged agreement negotiations, in this instance at a casino, Williamson et al argued that:

The absence of a legislatively imposed finish line for bargaining (eg. last resort arbitration) creates in the FW Act a potentially valuable institutional resource for employers and one that was enjoyed by CasinoCo. Employers that can endure prolonged bargaining enjoy an effective pay freeze. In limited instances, the FW Act provides for the FWC to bring intractable disputes to an end by making workplace determinations. However in this case, the parties’ actions both within and outside institutional boundaries were insufficiently serious to trigger the Minister’s involvement. Without both parties agreeing to arbitration, the existing agreements could continue indefinitely.⁴⁷

The examples discussed above point to a design flaw in the FW Act bargaining provisions – the absence of a mechanism to resolve deadlocked negotiations – which hampers the legislation’s capacity to achieve its stated objective of encouraging collective bargaining.

Regulatory responses to the “arbitration in bargaining” dilemma

Despite its attention being drawn to the Cochlear dispute and numerous similar cases of “surface bargaining”, the Fair Work Act Review Panel was reluctant to expand the FWC’s compulsory arbitration powers. The Panel rejected the case for making such a change, including the adoption of Canadian-style FCA, because the ability of good faith bargaining orders and the low-paid bargaining

⁴¹ *Endeavour Coal Pty Ltd v Association of Professional Engineers, Scientists and Managers, Australia* (2012) 206 FCR 576 at [35] and [43].

⁴² *Endeavour Coal Pty Ltd v APESMA (Collieries’ Staff Division* [2012] FWA 1891.

⁴³ “BHP Appin Agreement Surfaces after Good Faith Bargaining Rulings”, *Workplace Express* (30 September 2013).

⁴⁴ *APESMA v BHP Coal Pty Ltd* [2012] FWA 4435.

⁴⁵ “APESMA Claims Win but Ends Bid for BHP Collective Staff Deal”, *Workplace Express* (24 August 2012).

⁴⁶ See eg. “FWA Makes Crucial Ruling on Termination of Agreements”, *Workplace Express* (24 August 2010) (relating to the Tahmoor dispute, discussed above, where the FWC refused the employer’s agreement termination application on the basis that it would not be conducive to the objective of the parties concluding a new agreement: *Tahmoor Coal Pty Ltd* [2010] FWA 6468); “RTBU to Fight Aurizon bid to End Bargaining Deadlock”, *Workplace Express* (14 May 2014) (relating to negotiations at a Queensland rail freight company); “Agreement Termination Bid Shaping as Titanic Case”, *Workplace Express* (4 July 2014) (relating to bargaining at the Melbourne Metropolitan Fire Brigade – the FWC also refused the employer’s application in this case: *Metropolitan Fire and Emergency Services Board v United Firefighters’ Union of Australia* [2014] FWC 7776).

⁴⁷ Williamson S, Clibborn S and Kaine S, “A Case Study of Enterprise Bargaining under the Fair Work Act 2009: Beyond the Legislative Limits?” (Unpublished paper, 2014) p 20; see also “Absence of Final Arbitration in Act Favours Employers: Study”, *Workplace Express* (3 March 2014).



stream to deal with insoluble disputes remained unexplored.⁴⁸ The Panel stated its position as follows:

In the fullness of time, Australia may consider adopting one or more variants from the first contract arbitration models in Canada, but at present we should not take this step unless the low-paid bargaining stream is found wanting. ... [T]he time is not opportune to recommend arbitration to secure agreements in all first contract situations above and beyond low-paid workers. In our opinion, the [good faith] rules should be given more time to evolve to determine whether first contract situations in Australia are failing to result in collective agreements.⁴⁹

The Review Panel instead recommended a more proactive role for the FWC through the expansion of its compulsory conciliation powers, including empowering the tribunal to act on its own motion.⁵⁰ However, strengthening the tribunal's powers to compel negotiating parties to participate in discussions does not go far beyond the existing good faith bargaining requirements in s 228. The Review Panel was right to observe that a form of FCA already exists in the low-paid bargaining stream (category 4 above) – but the fact that it has not been utilised once in the last six years speaks volumes about its (in)effectiveness.⁵¹

In any event, these recommendations of the Review Panel were not implemented by the Labor Government before it lost office in September 2013. Earlier that year, the government had foreshadowed the introduction of proposals that would in fact have gone further than those outlined by the Review Panel – by relaxing the tests for accessing arbitration in long-running bargaining impasses.⁵² In particular, the government was considering options to address union demands for arbitration to be available in stalled negotiations for a first agreement, and instances where employers engaged in “surface bargaining” tactics.⁵³ However, these proposals did not ultimately form part of the government's amending legislation in 2013.⁵⁴ This was largely attributable to key independent MPs failing to support the changes,⁵⁵ and a strong backlash from the employer lobby. For example, key business groups argued that the government's plans were:

a significant backward step [and] a major reversal in workplace relations policy under [previous] governments ...

Successive legislative reforms have been designed to limit third party interventions in workplace relations. Third party arbitration compromises the bargaining autonomy of employers and employees to agree an outcome and adds greater uncertainty to the end result.⁵⁶

The Coalition Government elected to office in September 2013 will not take these proposals forward. Its focus, instead, is on implementing a number of other recommendations made by the Review Panel relating to the processes for negotiating greenfields agreements under the FW Act. These are enterprise agreements which can be made for a genuine new business, undertaking or project.⁵⁷ Presently, employers must negotiate greenfields agreements with a union (or unions) having

⁴⁸ Edwards J, McCallum R and Moore M, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Australian Government, Canberra, 2012) p 148.

⁴⁹ Edwards et al, n 48, p 148.

⁵⁰ Edwards et al, n 48, p 149.

⁵¹ Forsyth et al, n 15, Ch 10; Naughton R, “The Low Paid Bargaining Scheme – An Interesting Idea, But Can It Work?” (2011) 24 *Australian Journal of Labour Law* 214.

⁵² Skulley M, “Law Changes to Give Fair Work More Power”, *Australian Financial Review* (8 March 2013); Shorten MP, the Hon Bill, “Gillard Government to Further Enhance Fair Work Act”, *Media Release* (8 March 2013).

⁵³ “ACTU Fleshes Out Arbitration Model in Senate Inquiry”, *Workplace Express* (22 April 2013).

⁵⁴ *Fair Work Amendment Act 2013* (Cth); see McCrystal S, “Industrial Legislation in 2013” (2014) 56 *Journal of Industrial Relations* 331 at 332-334.

⁵⁵ Massola J, “Independents Kill Off Labor's IR Changes”, *Australian Financial Review* (5 June 2013); “Abetz Tables Gillard Arbitration Letter, as Key Independents Reveal Position on Bill”, *Workplace Express* (4 June 2013).

⁵⁶ “Employers Fight Expanded Arbitration, Right of Entry”, *Workplace Express* (20 March 2013). See also Hannan E, “Business Angered by Union Revival”, *The Australian* (30 May 2013); Massola J and Skulley M, “Showdown Ahead on FWC Interventions”, *Australian Financial Review* (31 May 2013).

⁵⁷ *Fair Work Act 2009*, s 172(2)(b), s 172(3)(b) and s 172(4).



rights of industrial coverage over the employees to be engaged in the greenfields enterprise. In practice, unions have commonly held out for optimal wages and conditions for their members under greenfields agreements, leading employers (particularly in the resources and construction sectors) to sign up to these deals in order to avoid delays on the commencement of projects.⁵⁸ To address this problem, the Fair Work Act Review Panel recommended that good faith bargaining and s 240 dispute resolution be available in the negotiation of greenfields agreements. Further, it was proposed that the FWC be given power to arbitrate a greenfields bargaining impasse where attempts to resolve the dispute within a defined time-frame have failed.⁵⁹

A variation of these proposals forms part of the *Fair Work Amendment Bill 2014*, currently before Federal Parliament. Under the proposed amendments, an employer could apply to the FWC for approval of a proposed agreement within a reasonable period after three months of negotiations have concluded.⁶⁰ Good faith bargaining obligations would apply during that three-month period only. When the tribunal is considering whether to approve the proposed agreement, it would be required to ensure that the agreement is consistent with industry standards (which could include agreement outcomes in the relevant geographic area).⁶¹ Although not strictly an arbitration mechanism, this proposal would provide an option for the resolution of deadlocked greenfield negotiations – one which appears fairly heavily weighted in favour of employers.⁶² At the time of writing, it is unclear whether or when the Coalition will obtain the necessary support among non-Government Senators to ensure passage of these proposals through Parliament.

INTEREST ARBITRATION/FIRST CONTRACT ARBITRATION IN CANADA

Overview

Providing the FWC with increased arbitral powers would enable it to address the problem of surface bargaining, and the difficulties faced by some employees/unions in obtaining a first agreement with an employer under the FW Act. This invites consideration of the various forms of interest arbitration operating in Canada. Before doing so, it should be noted that interest arbitration has been used in the United States since the early 20th century, with employers in certain sectors preferring to give up a final say over the terms of a new collective agreement if it meant workers could not resort to strike action.⁶³ In private sector collective bargaining in the United States, interest arbitration is available only on a voluntary basis.⁶⁴ Mandatory interest arbitration is a feature of most public sector employment in the United States, at both the federal level (overseen by the Federal Service Impasses Panel); and in many States where it is used to resolve police, firefighters and teachers' contract disputes (among others).⁶⁵

⁵⁸ Edwards et al, n 48, pp 168-173.

⁵⁹ Edwards et al, n 48, pp 168-173.

⁶⁰ Proposed ss 178B and 182(4) of the *Fair Work Act 2009* (Cth).

⁶¹ Proposed s 187(6) of the *Fair Work Act 2009*.

⁶² Because an employer will simply need to hold out on its greenfield agreement proposal for three months, then submit it to the FWC for approval: see eg, the union submissions summarised in The Senate, Education and Employment Legislation Committee, *Fair Work Amendment Bill 2014 [Provisions]* (June 2014) pp 19-20. However, the leading resource sector employer organisation (Australian Mines and Metals Association) opposes the current formulation of the proposal due to concerns that it "risks entrenching 'artificially inflated greenfields agreements' as benchmarks for future settlements": "Ditch Proposed Greenfields Benchmark, Employers Tell Abbott", *Workplace Express* (30 April 2014).

⁶³ Winograd B, "An Introduction to the History of Interest Arbitration in the United States" (2010) 61 *Labor Law Journal* 164 at 166. See also Loewenberg, n 2, pp 112-117; Malin M, "Two Models of Interest Arbitration" (2013) 28 *Ohio State Journal on Dispute Resolution* 145.

⁶⁴ An attempt by the first Obama administration to provide for mandatory interest arbitration in negotiations for a first collective agreement through the "Employee Free Choice Act" was unsuccessful: see eg, Fisk and Pulver, n 3.

⁶⁵ Winograd, n 63 at 167; Kochan et al, n 8.



In Canada, interest arbitration is an entrenched feature of the bargaining landscape in both the public and private sectors.⁶⁶ It applies in “first agreement” or “first contract” situations, when it is considered that a union (having obtained the right to bargain through a statutory recognition process) is most vulnerable to delay tactics by an employer which might frustrate the making of a collective agreement.⁶⁷ Eight of Canada’s 11 labour law systems make provision for FCA. These provisions enable a union or employer involved in unsuccessful negotiations for a first agreement to apply to a federal or provincial labour relations board, to have an agreement imposed through interest arbitration.⁶⁸

Objectives/purposes of FCA

As originally conceived, the objectives of FCA were twofold: to put an end to a current collective bargaining dispute, and to lay the foundations for more mature and enduring relationships between negotiating parties.⁶⁹ Referring to the British Columbia extended mediation model (see below), the Chair of the BC Labour Relations Board in *Yarrow Lodge Ltd et al v Hospital Employees’ Union et al* (unreported, BCLRB No B444/93, 30 December 1993)⁷⁰ stated a number of principles as to the purpose of FCA including:

1. First collective agreement imposition is a remedy which is designed to address the breakdown in negotiations resulting from the conduct of one of the parties. ...
2. The process of collective bargaining itself, to whatever extent possible, is to be encouraged as the vehicle to achieve a first collective agreement.

Similarly, Sexton viewed FCA not as an interference with the concept of free collective bargaining, but as a remedy (for the contravention of the relevant labour relations statute) to be “used where the conditions for viable collective bargaining are not present. Arbitration here is not a right nor is it intended to replace automatically collective bargaining”.⁷¹ More recently, Riddell has contended that:

The main purpose in having FCA ... is to acknowledge that a bargaining unit that has successfully certified has a reasonable expectation that such support for a union should be matched by a bargaining relationship with the employer.⁷²

Canadian Models of FCA

There are four different models of FCA operating in Canada:⁷³

⁶⁶ The discussion that follows will focus primarily on the private sector. On public sector interest arbitration in Canada, see Rootham C, *Labour and Employment Law in the Federal Public Service* (Irwin Law, Toronto, 2007) pp 219-229.

⁶⁷ Sexton J, “First Contract Arbitration: A Canadian Invention” in Kaplan W, Sack J and Gunderson M (eds), *Labour Arbitration Yearbook 1991*, Vol 1, pp 231, 232.

⁶⁸ Sexton, n 67.

⁶⁹ Weiler P, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell, Toronto, 1980) p 53.

⁷⁰ Extracted in The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary* (8th ed, Irwin Law, Toronto, 2011) pp 385-387.

⁷¹ Sexton, n 67, pp 233.

⁷² Riddell C, “Labor Law and Reaching a First Collective Agreement: Evidence from a Quasi-Experimental Set of Reforms in Ontario” (2013) 52 *Industrial Relations* 702 at 703.

⁷³ The discussion that follows draws upon Slinn S and Hurd R, “First Contract Arbitration and the Employee Free Choice Act: Multi-Jurisdictional Evidence from Canada”, in *Advances in Industrial and Labor Relations* (Emerald Group Publishing, 2011) Vol 18, pp 41, 44-54.



- a “fault” or “exceptional remedy” model (Federal, Quebec and Newfoundland⁷⁴) – referrals may be made by the relevant Minister of Labour to the labour board or an arbitrator, based on a demonstrated breach of good faith bargaining obligations by one of the parties; in some jurisdictions, the labour board has discretion as to whether it will arbitrate;⁷⁵
- a “no fault” model (Saskatchewan and Ontario) – a party seeking FCA may apply directly to the labour board, by showing simply that bargaining has been unsuccessful or dysfunctional (eg because of the respondent party having taken an uncompromising bargaining position without reasonable justification, or having failed to make reasonable efforts to conclude an agreement);
- an “extended mediation” model (British Columbia) – the parties must participate in comprehensive mediation of a bargaining dispute before it will be submitted for arbitration (application can be made to the labour board to appoint a mediator where certification has been granted, the parties have failed to reach agreement and a successful strike vote has been held – a mediator must be appointed within five days, and if no agreement is reached within a further 20 days then the mediator must report to the board recommending the terms of an agreement and a process for concluding it, eg through mediation, arbitration or allowing the parties to strike/lockout);
- an “automatic access” model (Manitoba) – if no collective agreement is reached after 90 days of negotiations, an arbitrator must determine the terms of the agreement within 60 days; the labour board can refer negotiations back to a mediator if there is some prospect of an agreement being reached within 30 days, but if this last attempt at negotiation fails then the labour board must issue a first contract within 120 days of receiving the case (interest arbitration can also be utilised to settle subsequent collective agreements between the parties, eg based on a failure to bargain in good faith and where there is no prospect of an agreement).

Nova Scotia’s recent adoption of FCA is an important reaffirmation of the concept, almost 40 years after it was first introduced in British Columbia. The original Nova Scotia formulation of FCA, which commenced in 2012, was based on the automatic access model.⁷⁶ However, following legislative amendments in 2013, it now combines elements of the fault (good faith breaches) and no fault (breakdown of bargaining) models.⁷⁷

Operation of FCA in practice

Overall, the evidence from Canada⁷⁸ is that the application rate for first contract arbitration is fairly low across the seven jurisdictions which have been studied, with the exception of Manitoba where FCA is more easily accessed. The actual rate of imposition of first agreements through FCA is even lower, as the parties often resolve agreement terms themselves after an application for arbitration is made – or the arbitrator only determines some contract provisions for them. Research has suggested, however, that the existence of FCA has a “shadow effect”, in that the *possibility* of arbitration leads employers and unions to negotiate their own outcomes.⁷⁹

Sexton’s study of the operation of FCA mechanisms found that while those in BC and the federal jurisdiction had been rarely utilised, in Quebec FCA had been regularly applied since it first came into

⁷⁴ Legislative proposals currently under consideration in Newfoundland would shift its FCA system more towards the automatic access model described below: see Doorey D, “Newfoundland and Labrador Introduces Unionized Card-check Model”, *Law of Work* (4 January 2015), <http://lawofwork.ca/?p=5395>.

⁷⁵ Riddell, n 72 at 705, notes that the fault-based approach to FCA is similar to the Australian provision for bargaining related workplace determinations; see above.

⁷⁶ Slinn S, “First Contract Arbitration comes to Nova Scotia”, *Conversations on Work* (5 January 2012) <http://conversationsonwork.wordpress.com/2012/01/05/first-contract-arbitration-nova-scotia>.

⁷⁷ Government of Nova Scotia, “Changes Restore Balance, Responsibility to First Contract Arbitration”, *News Release* (6 December 2013) <http://novascotia.ca/news/release/?id=20131206001>.

⁷⁸ See generally Slinn and Hurd, n 73; Johnson S, “First Contract Arbitration: Effects on Bargaining and Work Stoppages” (2010) 63 *Industrial and Labor Relations Review* 585; Riddell, n 72.

⁷⁹ Johnson, n 78.



force in 1978.⁸⁰ Over the following 20 years, 532 requests were made for FCA with 257 (48.3%) granted. In the 1978-1984 period, 376 FCA requests were made with 205 (54.5%) granted. 85.6% of these requests came from unions; 13.5% from employers; and 1.3% jointly. Of the 205 cases referred to FCA, 88 resulted in arbitration awards; of these, the parties reached agreement before the board completed its work in 63 cases. In most cases, the arbitration board did not impose the entire collective agreement but only certain provisions (eg wages, hours of work).⁸¹ 23 agreements were renewed at least once, with “renewal bargaining” conducted expeditiously⁸² (demonstrating the contribution of FCA to developing sustainable bargaining relationships). Sexton concluded that: “The Quebec ... [experience suggests] that the more time passes and the greater number of cases referred, the more successful [the FCA] remedy will be not only in terms of putting an end to a current dispute but also in terms of getting the parties used to each other and into a more mature and enduring relationship.”⁸³

Although Sexton’s data and findings are now quite dated, they are to some extent reinforced by Slinn and Hurd’s more recent examination of FCA in four Canadian provinces (BC, Ontario, Manitoba and Quebec, representing each of the four models of FCA). Their findings, for the 2001-2009 period, included the following:

- On average, less than half of FCA applications led to imposition of a first contract, although experience varied widely: in BC, 6.9% of applications resulted in arbitration, compared with 11.4% in Ontario, 34.6% in Quebec and 42.6% in Manitoba.⁸⁴ This evidence counters the argument that the availability of arbitration discourages parties from negotiating their own agreements.⁸⁵
- Under BC’s mediation-intensive model, the application rate for FCA is high but arbitration of first contract disputes is rare: “Indeed, those that enter the process appear to benefit from intensified mediation and frequently reach some type of voluntary accommodation.”⁸⁶
- Generally, FCA lengthens the bargaining process significantly: the median time from union certification to arbitration award is 482 days in Ontario and 481.5 days in BC; however in Manitoba, where the 60-day time limit applies (from FCA application to arbitration), most first contract awards are issued within around six months of certification.⁸⁷
- Most FCA applications came from unions in Ontario (97%) and Manitoba (95%), while considerably more applications were made by employers in BC (around 33%) and Quebec (approximately 17%). In the latter two provinces: “Clearly, ... management often sees value in entering the FCA process, perhaps because both jurisdictions place some emphasis on mediation and voluntary resolution of disputes.”⁸⁸
- Evidence from Manitoba and BC supported the view that FCA promotes long-term bargaining relationships, in that around two-thirds of bargaining units still had a collective bargaining relationship at the conclusion of the study period. 50% of bargaining units involved in FCA in

⁸⁰ Sexton, n 67, p 237.

⁸¹ Sexton, n 67, pp 237-238.

⁸² Sexton, n 67, p 238.

⁸³ Sexton, n 67, pp 239-240.

⁸⁴ Slinn and Hurd, n 73, p 74. Older data (1982-1991) indicated a similar rate of arbitrations (as a proportion of FCA applications) in Manitoba: Black E and Hosea C, “First Contract Legislation in Manitoba: A Model for the United States?” (1994) *Labor Law Journal* 33 at 39.

⁸⁵ See further Slinn and Hurd, n 73, pp 77-78.

⁸⁶ Slinn and Hurd, n 73, p 76.

⁸⁷ Slinn and Hurd, n 73, p 78.

⁸⁸ Slinn and Hurd, n 73, p 79.



Quebec had negotiated subsequent agreements, while in Ontario it was “evident that the FCA process often has been able to establish a foundation for durable labor-management relationships”.⁸⁹

Across the seven jurisdictions with FCA at the time of their study, Slinn and Hurd found that applications for FCA were made in only 4% of cases where a union was certified for bargaining over the 1986-2008 period; and applications for FCA were approved in only 1.4% of certifications: “Thus, on average ... 98.6% of first contracts are resolved in some way without arbitration.”⁹⁰

Johnson’s study utilised cross-sectional time-series analysis across all Canadian jurisdictions with FCA (over the 1975-2005 period), finding that arbitration “reduces the incidence of first agreement work stoppages by a substantial amount”.⁹¹ In the course of reaching that conclusion, Johnson also found that: “access to FCA, as measured by the application rate, is associated with the form the FCA legislation takes. ... [A]pplication rates for jurisdictions and time periods with fault and no-fault FCA are low relative to jurisdictions with mediation-supported or automatic FCA”.⁹² Further, the rate of imposition of first agreements is “much lower than application rates for all jurisdictions and years”.⁹³ Johnson ultimately concluded that:

Based on Canadian experience, evidence suggests that the availability of FCA creates the incentive for parties to freely negotiate collective agreements without resorting to disruptive and costly work stoppages or using a third party to impose the terms and conditions of employment. Concern that FCA undermines the collective bargaining process seems to be unwarranted; on the contrary, FCA appears to support and encourage collective bargaining.⁹⁴

Riddell compared automatic and non-automatic access to FCA under changing labour legislation in Ontario over the 1991-1998 period, finding that automatic FCA produced an increase of between 8%-14% in the likelihood of reaching a first agreement (although other statutory changes also contributed to that outcome).⁹⁵ Weinberg’s study focused on the role of FCA in developing bargaining relationships by examining its effect on union decertifications (ie the process for derecognition of a union that has been certified for bargaining). He found that the presence of FCA correlated with approximately 36%-37% fewer decertifications (than occurred in Canadian jurisdictions without FCA). Mediation-based FCA correlates with a greater decrease in decertifications – and therefore more bargaining relationships – than the automatic and fault FCA models.⁹⁶

As against the above studies,⁹⁷ Ponak and Falkenberg argued in 1989 that: “Almost all available evidence suggests that compulsory arbitration systems reduce the likelihood that the parties will in fact be able to reach an agreement at the bargaining table”.⁹⁸ They based this view on three reasons: (1) the threat of a strike (in non-arbitral systems) is a more powerful inducement to settle than the threat of arbitration; (2) negotiators are reluctant to make concessions in the knowledge that an arbitrator will eventually “split the difference” between the parties (the so-called “chilling” effect of arbitration); and (3) parties become less able to negotiate and overcome difficulties for themselves as they become

⁸⁹ Slinn and Hurd, n 73, p 80.

⁹⁰ Slinn and Hurd, n 73, pp 73-74.

⁹¹ Johnson, n 78 at 593; see also 600-601.

⁹² Johnson, n 78 at 597.

⁹³ Johnson, n 78 at 598-599.

⁹⁴ Johnson, n 78 at 602-603.

⁹⁵ Riddell, n 72 at 732.

⁹⁶ Weinberg B, “A Quantitative Assessment of the Effect of First Contract Arbitration on Bargaining Relationships”, forthcoming in *Industrial Relations*.

⁹⁷ It should be noted that the following discussion includes studies of the operation of interest arbitration more broadly, rather than the more limited concept of FCA in Canada.

⁹⁸ Ponak A and Falkenberg L, “Resolution of Interest Disputes” in Sethi A (ed), *Collective Bargaining in Canada* (Nelson, Scarborough, 1989) p 260, extracted in *The Labour Law Casebook Group*, n 70, pp 488-491.



more dependent on arbitration (the so-called “narcotic” effect).⁹⁹ Ponak and Falkenberg then drew upon data from 600 public sector negotiations conducted in Ontario over the period 1979-1982, to show a lower settlement rate for arbitration systems than strike-based collective bargaining systems.¹⁰⁰

Hebdon and Mazerolle affirmed the operation of the chilling effect (ie higher failure to arrive at a negotiated settlement) in their study of bargaining disputes in Ontario over a 10-year period.¹⁰¹ They concluded that interest arbitration in Ontario: “failed to produce a satisfactory rate of freely agreed agreements. We found evidence that arbitration exerted a powerful influence over union bargaining behaviour by increasing rates of impasse. ... This finding is supportive of a dependency effect whereby a union’s high usage of arbitration fosters an inability to freely negotiate settlements”.¹⁰²

Winograd has posited an alternative view as to the chilling effect of interest arbitration:

In terms of motivating forces, interest arbitration works ... because ... each side feels compelled to make offers that are more likely to be acceptable to an arbitrator as the day of reckoning approaches. ... If the system is working properly, each side will choose a negotiated outcome as a better alternative to the uncertainty of the decision-making outcome in arbitration. Paradoxically, interest arbitration works best when a hearing never takes place.¹⁰³

This more positive assessment of interest arbitration is supported by the weight of evidence on the operation of the various Canadian FCA models (considered above), perhaps best encapsulated in Slinn and Hurd’s assessment that: “once brought into force FCA has proved to be amazingly durable – surviving relatively intact in all seven jurisdictions during both conservative and liberal provincial governments. ... [After more than three decades] ..., FCA has become a settled and even mundane part of the labour relations environment in this country”.¹⁰⁴

ASSESSMENT: THE ADAPTABILITY OF FCA TO THE AUSTRALIAN SETTING

Viewed from an Australian perspective, the Canadian concept of FCA has considerable potential to fill the important gap in the Fair Work scheme of agreement-making identified earlier in this article. There is clearly scope for the adoption of some form of FCA under the FW Act, to ensure that the collective bargaining rights facilitated by majority support determinations and bargaining orders actually lead to the reality of an agreement.¹⁰⁵ The question then is which of the Canadian models of FCA is most suitable to adaptation for Australian purposes.

The earlier discussion in this article highlighted the need for provisions enabling access to arbitration under the FW Act, in addition to the current tests which focus mainly on egregious bad faith or damage (to the parties, the economy or the community) arising from protected industrial action. In particular, arbitration should be available to address a failure of the bargaining process, and employer delay or frustration of reaching an agreement. This is important because such outcomes frustrate attainment of the statutory goal of encouraging collective bargaining, especially in negotiations for a first agreement. The no fault model of FCA, such as that operating in Ontario, could usefully be adapted to address these issues.

⁹⁹ Ponak and Falkenberg, n 98.

¹⁰⁰ Ponak and Falkenberg, n 98.

¹⁰¹ Hebdon R and Mazerolle M, “Regulating Conflict in Public Sector Labour Relations: The Ontario Experience (1984-1993)” (2003) 58 *Relations Industrielles* 667, extracted in The Labour Law Casebook Group, n 70, pp 491-492.

¹⁰² Hebdon and Mazerolle, n 101.

¹⁰³ Winograd, n 63 at 165. See also the discussion of studies on the chilling and narcotic effects of interest arbitration in the US context in Loewenberg, n 2, pp 117-122; Malin, n 63 at 150; Kochan et al, n 8.

¹⁰⁴ Slinn and Hurd, n 73, p 45.

¹⁰⁵ See Cooper R and Ellem B, “Getting to the Table: Fair Work and Collective Bargaining” in Creighton B and Forsyth A (eds), *Rediscovering Collective Bargaining: Australia’s Fair Work Act in International Perspective* (Routledge, New York, 2012) p 135.



Alternatively, the BC extended mediation model has attraction, given the familiarity of industrial relations parties in Australia with FWC involvement in bargaining disputes.¹⁰⁶ In practice, the BC approach incorporates elements of the no fault model of FCA. The BC Labour Relations Board, in *Yarrow Lodge Ltd et al v Hospital Employees' Union et al*,¹⁰⁷ established the following factors for determining whether a first agreement should be imposed – ie has there been:

- surface bargaining?
- employer refusal to recognise the union?
- one party adopting an uncompromising bargaining position without reasonable justification?
- failure to make reasonable or expeditious efforts to conclude an agreement?
- unrealistic demands or expectations arising from a party's intentional conduct or inexperience?
- a bitter and protracted dispute, making it unlikely that the parties will be able to reach a settlement themselves?

In 2012, Bukarica and Dallas proposed a framework of “supervised negotiation” by the FWC which included some elements of the BC *Yarrow Lodge* approach. The essence of their proposal was as follows:

[The FWC] should be empowered to initiate, perhaps as a consequence of a notified bargaining dispute under s 240 of the FW Act, a process of supervised negotiation whereby the parties are put on notice that the trajectory of their bargaining dispute is not acceptable and that a resolution of the dispute is required. ... Within this framework, compulsory arbitration of the matters dividing the parties will remain a matter of last resort The exception would be where one party is acting unconscionably, and the result of non-intervention by [the FWC] would result in serious unfairness to the other party.¹⁰⁸

The criteria for accessing arbitration put forward by Bukarica and Dallas included:¹⁰⁹

- the intractability of the bargaining dispute;
- whether the bargaining relationship is mature, or involves negotiations for a first agreement;
- the extent of the parties' compliance with good faith obligations, including whether “the claims or issues advanced are consistent with reasonable responses given the relevant industrial context”;
- whether the parties have actively and diligently taken part in the bargaining process, or whether surface bargaining or “receding horizon” bargaining has occurred;
- the damage that the bargaining dispute is causing to the parties' long-term relationship.

In my view, a BC-style extended mediation model – incorporating a combination of the *Yarrow Lodge* and Bukarica and Dallas tests for accessing arbitration – could work very well in Australia, building on the existing powers of the FWC to conciliate bargaining disputes under s 240 of the FW Act. However, rather than setting a time limit for conciliation/mediation, the tribunal should be given discretion to assess (at any stage of the process) whether stalled negotiations have reached the stage that the tests for arbitration need to be applied. This could occur either on the tribunal's own motion, or on application by one of the disputing parties. The FWC's active role as “gatekeeper” would also ensure that arbitration is not too easily accessed (so that parties simply go through the motions of bargaining, with a view to entering the arbitration phase). Further, under this proposal, arbitration would only be available for a first agreement.

Somewhat unexpectedly, Australia now has an opportunity to examine the operation of something like the Manitoba automatic access model of FCA. This has come about through amendments to Queensland industrial legislation, which were passed in 2013.¹¹⁰ It is highly unlikely that the former

¹⁰⁶ See n 20 and accompanying text on the widespread use of s 240 conciliation before the FWC in bargaining disputes.

¹⁰⁷ See n 70.

¹⁰⁸ Bukarica and Dallas, n 39, pp 145-146. See also Carabetta G, “Police Bargaining Disputes and Third-Party Intervention in Australia: Which Way Forward?” (2013) 18 *Deakin Law Review* 67; Boland R, *Some Matters of Current Interest* (Paper to the Annual Conference of the Industrial Relations Society of NSW, 18 May 2012).

¹⁰⁹ Bukarica and Dallas, n 39, p 147.

¹¹⁰ *Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Act 2013* (Qld), amending the *Industrial Relations Act 1999* (Qld); this legislation applies mainly to state public sector departments and agencies. See “Newman Government Overhauls Queensland's IR System”, *Workplace Express* (18 October 2013); “Newman Government IR Reforms through Parliament”, *Workplace Express* (22 November 2013). Also unexpectedly, the Labor Party formed government



Liberal National Party Government in Queensland had the Manitoba FCA model in mind when framing these amendments, and they could not be characterised as a measure intended to promote collective bargaining. Rather, they seem designed to ensure a “quick fix” in agreement negotiations for state public sector employers, as follows:¹¹¹

- once bargaining commences, a party can declare a breakdown in negotiations;
- if it is demonstrated that further negotiations are unlikely to result in an agreement within a reasonable time, there is then a 14-day period of conciliation by the Queensland Industrial Relations Commission;
- if no agreement is reached during that period, the Commission then has 90 days to arbitrate the dispute; the issues which it must consider when arbitrating include:¹¹²
 - the effects of any proposed determination on the employer and employees;
 - the likely effect of the determination on the economy and the community;
 - the employer’s efforts to improve productivity in the relevant enterprise or industry;
 - the flexibility of work practices and operational requirements of the enterprise;
 - the state of Queensland’s finances and fiscal strategy; and
 - the extent to which the parties have negotiated in good faith.

While the Manitoba approach of providing access to arbitration following the expiry of specified negotiation time frames is worth exploring, the 14-day conciliation period under the Queensland legislation seems too tight. It may allow little practical opportunity for the parties to negotiate an agreement, or even encourage a “wait it out” strategy to secure arbitration.

CONCLUSION

Returning to the fundamental question posed at the start of this article – whether there is a role for Canadian-style interest arbitration in the Australian bargaining system – it is useful at this point to consider the objectives of collective bargaining legislation. As indicated at several points in this article, the FW Act is aimed at encouraging the practice of collective bargaining, indeed, good faith bargaining.¹¹³ It has been moderately successful in achieving that objective, with the coverage of collective agreements increasing by around 440,000 employees between July 2009 and December 2011.¹¹⁴ However, an important gap has been identified in the legislation’s operation: the ability of some employers to withstand union efforts to obtain an agreement, by endlessly stringing out negotiations. Existing mechanisms –majority support determinations, good faith bargaining rules and the low-paid bargaining stream – have proven ineffective in addressing surface bargaining and intractable negotiations. Further, the present grounds for accessing arbitration are too difficult to satisfy, requiring that serious/repeated bad faith or industrial action causing extreme harm be demonstrated. The end result is to impede the statutory objective of promoting bargaining – and more importantly, to deny many workers access to the opportunity of obtaining above-award wage increases and other improvements in working conditions through collective agreements.

The Canadian evidence examined in this article indicates that an interest arbitration mechanism could play an important role in furthering the statutory purpose of facilitating collective bargaining. It is acknowledged that the Canadian labour law system (including the exclusive rights of recognised unions and the scope of good faith bargaining obligations) provides a different backdrop for FCA from

in Queensland following an election held on 31 January 2015. The ALP’s policy platform commits it to repealing the *Industrial Relations (Fair Work Act Harmonisation No 2) and Other Legislation Amendment Act 2013*: see *Queensland Labor State Policy Platform 2014*, p 29.

¹¹¹ See *Industrial Relations Act 1999* (Qld), ss 148 – 150 (especially ss 148, 149, 149A, 149D).

¹¹² Compare the following with the factors to be considered in arbitration, outlined by the BC Labour Relations Board in *Yarrow Lodge Ltd et al v Hospital Employees’ Union et al* (unreported, BCLRB No B444/93, 30 December 1993), while including consideration of the financial state of the employer and the market conditions of the relevant industry, reference was also made to ensuring “comparable terms and conditions [for] similar employees performing similar work” and “internal consistency and equity among employees”.

¹¹³ *Fair Work Act 2009* (Cth), ss 3(f) and 171.

¹¹⁴ Edwards et al, n 48, p 153.



Australia's labour relations framework.¹¹⁵ Even so, a modified form of the BC extended mediation model was suggested as the most suitable for adoption in Australia, with the FWC playing a central role in determining access to arbitration. This would be based on a new set of criteria which focus on unreasonable negotiating conduct that impedes the reaching of an agreement. However, it is highly unlikely that any form of FCA will be adopted under Australian federal law in the foreseeable future. Implementation of the Coalition Government's industrial relations policy agenda¹¹⁶ will inevitably include measures to wind back the current supports for collective bargaining under the FW Act. In summary, Canadian-style interest arbitration could well play a useful role in the Australian labour relations system – but we will not know for sure for some time.

¹¹⁵ These differences, and a number of similarities, are explored in Forsyth A and Slinn S, "Promoting Worker Voice through Good Faith Bargaining Laws: The Canadian and Australian Experience", in Bogg A and Novitz T (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, Oxford, 2014) p 163.

¹¹⁶ Liberal/National Parties, *The Coalition's Policy to Improve the Fair Work Laws* (May 2013). The government has requested the Productivity Commission to conduct a wide-ranging review of the *Fair Work Act 2009* in 2015. Interestingly, the Commission (noting the limited bases for FWC to impose an outcome in collective bargaining disputes) will examine the following question: "To what extent should there be any changes to the FWC's conciliation and arbitration powers?": Productivity Commission, *Workplace Relations Framework: The Bargaining Framework – Issues Paper 3* (January 2015) p 13. A number of union and employer submissions to the review argue for greater options for arbitration of collective bargaining disputes: see eg "Unions to Pursue New Remedies for Bargaining Deadlocks", *Workplace Express* (18 March 2015); Hannin E, "Bluescope Calls for Radical IR Overhaul", *Australian Financial Review* (18 March 2015).

