The change in Australia’s industrial system from Work Choices – in which the individual Australian Workplace Agreement (AWA), was seen as the preferred mode of employment¹ to the Fair Work Act 2009 (Cth) – in which AWAs are phased out and replaced with collective bargaining² is a marked shift in the basic premise of employment law in this country. But it is not a return to the past. The Honourable Minister for Employment and Industrial Relations, Julia Gillard MP, has made her views clear: the traditional arbitration system – in which unions and employers brought cases against each other and before the impartial arbiter, the Industrial Commission – is “obsolete”.³ Instead, the new system is one of the “third way” character – that is, of cooperative workplace relations.⁴ There is to be fairness to the worker and flexibility to business.⁵

In such a system, the laws governing bargaining and the place of unions are of particular interest. Marked out in a broad suite of legislative provisions – from freedom of association (the right to join a union) to the right of entry and the “responsible unionism”⁶ of the Fair Work Act 2009 (Cth), s 3(a). The notions of good faith bargaining, union right of entry, responsible unionism and freedom of association and collective bargaining.

The Fair Work Act 2009 (Cth) predominantly commenced operation on 1 July 2009, with its final provisions (eg minimum entitlements) set to become operative in January 2010. From the perspective of Australian business lawyers, two of the more significant changes that the legislation introduces pertain to the relationship between employers and trade unions; namely, the provisions governing good faith bargaining and union right of entry. The article analyses the new laws on these topics. From a study of the relevant law, the article considers the circumstances in which unions, not just employers, might be found to be in breach of the new s 228 which, for example, requires parties not to bargain in such a way as to undermine freedom of association and collective bargaining. Of relevance to that topic, the article also considers the British decision of Young, James and Webster and its pronouncements on the legal concept of “responsible unionism”. It is argued that “responsible unionism” is relevant to the interpretation of good faith bargaining by unions and union right of entry. The article also posits that “responsible unionism” is relevant to two further issues which are extremely significant, yet have been substantively left to future rounds of reform. The first of these issues relates to the form of the trade union registration and governance provisions. The second issue pertains to the question of what will happen to unions with State and federal branches if a true national system of industrial relations is achieved. The article concludes by arguing that the rights of State businesses, unions and workers should be given due weight. The notions of good faith bargaining, right of entry, responsible unionism and State interests are therefore all interconnected.

¹ Howard J, Address to 28th Young Liberal Movement Convention (Australian National University, Canberra, 8 January 1996); and Floyd L, “For Everything there is a Season: Workplace Fairness after the Howard Government – The No Disadvantage Test and Cooperative Federalism” (2007) 14 JICULR 25.
² Refer, eg Fair Work Act 2009 (Cth), s 3(0); Gillard J, Second Reading of the Fair Work Bill (25 November 2008); and the earlier amendments affected by the Workplace Relations (Transition to Forward with Fairness) Act 2008 (Cth).
³ Gillard J, n 2.
⁵ Refer Fair Work Act 2009 (Cth), s 3(0).

(2009) 37 ABLR 255

255
and not to join a union), through to the laws that govern the manner in which collective bargaining is carried out, through to trade union security measures – are two Fair Work Act amendments that are of particular interest to Australian business lawyers. These are good faith bargaining and the union security measure called the right of entry.

This article examines these legal changes. In particular, this article examines key issues (such as the obligation to bargain without prejudicing collective bargaining and freedom of association) and postulates as to when these laws might be breached by unions as well as employers. One of the underlying themes of the article is the international legal notion of “responsible unionism,” discussed in the British decision Young, James and Webster v United Kingdom (1982) 4 EHHR 38. It is argued that such a concept is relevant to this (third way style) Fair Work Act and therefore to the concepts of good faith bargaining and right of entry. The article also considers two crucial, related issues which will surely be the subject of future reforms; namely, the union registration and governance provisions and the question of the place of unions which have State and federal branches if a true national system evolves. It is argued that the most desirable approach (that would be in keeping with the philosophy behind the new regime) acknowledges the basic theme of responsible unionism and its links to other issues such as good faith bargaining and right of entry to produce a balanced approach that works for the interests of all participants in workplace relations.

**GOOD FAITH BARGAINING**

What is good faith bargaining and why is it a significant legal issue?

**The Asahi decision**

The Asahi case of 1995 sharply focused this nation’s attention on good faith bargaining. The decision seemed simple enough. At first instance, Commissioner Hodder made an order pursuant to s 170QK of the former Industrial Relations Act 1988 (Cth) that the employer Asahi “shall negotiate in good faith” with the Automotive, Food, Metals and Engineering Union (AFMEU). Section 170QK was a provision which elaborated the types of order that could be made under s 111(1)(c), such latter provisions themselves affording the Australian Industrial Relations Commission (AIRC) a power to make orders necessary for the expedient determination of an industrial dispute. In particular, s 170QK(2)(a) stated that such s 111 orders can be made “for the purpose of ensuring that the parties negotiating an agreement ... do so in good faith”.

The Full Bench of the AIRC found that Asahi, the employer, could not be ordered to negotiate in good faith with the relevant union, the AFMEU. Instead, the employer could only be ordered to “meet and confer” with the union. To order negotiation, the Full Bench found, would be to order parties to make concessions and reach a result. According to the Full Bench, while this country had known a decision test, it was not a test for good faith. Instead, the employer could only be ordered to bargain in good faith.

No doubt telling in the Asahi decision were the facts of that case. Asahi was bound by the Metal Industry Award 1984, to which the AFMEU was respondent along with a number of other trade unions. The AFMEU had no members at Asahi, despite having visited the Asahi workplace four times and attempting to recruit employees. Such visits had been facilitated by Asahi and there was no evidence that Asahi had coerced its employees not to join the union. There was no evidence of disharmony at the Asahi workplace and no employees had ever called upon the union for assistance.

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6 The author wishes to thank Mr John Kidd who originally drew her attention to the case many years ago.

(2009) 37 ABLR 255

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The employer and not the employee union which was recalcitrant. Indeed, as common throughout an entire industry. In adopting the more Americanized notion of enterprise-section of a discretion to order parties to negotiate, such would have involved a consideration of the objects of could still have been denied, but the power would have been open for interpretation at a later date.

The fears of commentators such as Naughton were given renewed urgency after the decision of Professor Richard Naughton was to state in his article “Bargaining in Good Faith – The Asahi Decision”. The Full Bench could have reached the same result by different reasoning. The AIRC could have found that there was a power to order parties to negotiate but decline to order the exercise of that discretion in this case. Basically, Naughton argued that the definition of “negotiate” adopted by the Full Court “is not borne out in most dictionary definitions of the (word) negotiate.” Had the Full Bench of the AIRC retained a discretion to order parties to negotiate, such would have involved a consideration of the objects of the Act and whether or not the order was likely to facilitate an agreement. By taking into account factors such as presence or absence of union members at the workplace, the AFMEU’s application could still have been denied, but the power would have been open for interpretation at a later date.

The second concern went to a structural problem in the evolving and decentralising Australian industrial system. As noted above, for generations, up until the late 1980s, the Australian system had been one of compulsory arbitration. Australian unions were parties principal to awards which would then bind employers and employees. Of the utmost significance, these workplace standards were often common throughout an entire industry. In adopting the more Americanised notion of enterprise-based bargaining, the Australian unions were negotiating for particular groups of employees but their internal structures, resources and history were still rooted in their industry-based past. As Professor McCallum was to observe:

In my view, the Keating Government and the trade union movement did not squarely face the issue of anti-union employers refusing to bargain with trade unions. More importantly, they did not appreciate that trade union bargaining at the level of the employing undertaking was of a different juridical nature from obtaining award coverage through an industry-wide arbitrated settlement by the federal Commission. In the United States and Canada, for example, collective bargaining almost always occurs between the employing undertaking and the local union whose members are employed at the undertaking. In Australia, on the other hand, the local union does not exist and the trade unions, which are registered on an industry and/or occupational basis, are jurisdictorially ill-equipped to engage in collective bargaining at the level of the enterprise.

The BHP Iron-Ore decision

The fears of commentators such as Naughton were given renewed urgency after the decision of Kenny J in Australian Workers Union v BHP Iron-Ore Pty Ltd (2001) 106 FCR 482; 102 IR 410. That case was decided under the general freedom of association provisions (on the rights to join and

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10 Naughton, n 9 at 167.
11 The structure and traditional role of Australian unions in the compulsory arbitration system was discussed by the Full Bench of the Australian Industrial Relations Commission in the Asahi judgment in the consideration of the cases: Burswood Cinema Ltd v Australian Theatrical and Amusement Employees’ Assn (1925) 35 CLR 528; and Metal Trades Employers Assn v Analytical Engineering Union (1935) 54 CLR 387.
13 For a comprehensive discussion of the BHP Iron-Ore decision, refer to Floyd, n 7, pp 267ff. The discussion of the case in this section of the article draws from that lengthier work.
not join unions) rather than the bargaining provisions (as was the case with Asahi). However, the potential the decision left for employers to simply ignore unions was patently clear (and is relevant to today’s good faith bargaining regime).

Essentially, BHP Iron-Ore (BHPIO) offered the equivalent of individual AWAs to their employees at the expiration of their third enterprise bargaining agreement. Consequently, they did not pursue negotiations with the union for a fourth enterprise agreement. The workplace agreements offered higher wages and incentives, eg the paying out of accrued sick leave. The company supplied materials with the offer, which stated:

- “It is your choice as to whether you are a union member – this is not affected by your accepting the staff offer”; and
- “Your acceptance of the offer is completely up to you.”

The offer of workplace agreements came against a background of upheaval for the company. In 1999 there had been a 10% decrease in the iron ore price and accompanying iron ore tonnage cuts. BHPIO had spent much of the first half of the year in merger talks with Hammersley Iron. During that process (of due diligence and the like), BHPIO management came to the decision that the company had not been performing as well as first thought. Comments had been made by Hammersley Iron that BHPIO would take ages to change things if change was necessary and that Hammersley considered itself more flexible and productive. Although the merger plans were scrapped, BHPIO executives held talks thereafter to determine what changes the company would have to make in order for it to become as profitable. In addition to those economic considerations, there was also a severe demarcation dispute going on between the unions at BHPIO. The Australian Council of Trade Unions (ACTU) had been called in to deal with the union wrangling and some members were questioning the effectiveness of their union’s representation.

Approximately half the workforce accepted the agreements, at which time the union applied for an injunction, alleging that the offers were contrary to the freedom of association provisions of the law at that time, the Workplace Relations Act 1996 (Cth).

Basically, the crux of the union argument hinged on the fact that the employer was simply not bargaining with the union and only offering pay rises to individual employees on AWAs. The traditional role of the union was to gain pay increases for its worker members. Why, the union asked, would a worker remain in a union which was simply able to be ignored by its employer? The company, therefore, it was argued, was inducing employees to leave the union. Further, the company was injuring the bargaining strength of those remaining on agreements. The fewer people in that bargaining stream, the less their bargaining strength. In essence, then, the case raised a question of principle about the role and strength of unions in the workplace.

Kenny J rejected the union’s arguments. One of the basic starting points for Kenny J was that the offers from BHPIO did not lessen the conditions of the workers who chose to remain on the collective agreement. Her Honour said that bargaining strength is relevant to creating new rights under an industrial instrument whereas her task was to assess damage that had actually happened. Substantively, her Honour did not accept that the refusal of the company to bargain with the union was anything wrong or anything which transgressed the law. This was in part because of the view her Honour took of the role of unions in the workplace. While the traditional role of the union may have been bargaining for conditions of employment, there were other roles it could fulfil.

Kenny J specifically rejected the argument that BHPIO was injuring the bargaining strength of those remaining on agreements. The fewer people in that bargaining stream, the less their bargaining strength. In essence, then, the case raised a question of principle about the role and strength of unions in the workplace.

20 Australian Workers’ Union v BHP Iron-Ore Pty Ltd (2001) 106 FCR 482; 102 IR 410 at 411-413. The provisions at the time in force were: Workplace Relations Act 1996 (Cth), ss 298K(1)(b) and 298L(1)(c), 298L(1)(a) and 298L(1)(b).
Fair work laws: Good faith bargaining, union right of entry and the legal notion of "responsible unionism"

the company envisaged a role for unions in, eg, the internal dispute settlement process (in which employees could be represented by unions). Finally, as to the bargaining strength of those on the enterprise bargain, her Honour was of the view that any diminution of collective bargaining strength did not flow directly from BHPIO's actions but from acceptance of offers by employees.19

Most commentators were roundly critical of this decision.20 In the leading critique of Noakes and Cardell-Ree the underlying problem with the judgment was said to be its narrow interpretation of the freedom of association provisions of the day and the position in which that left unions when bargaining. Essentially, Kenny J had expected there to be a "direct causative link" between the conduct of the employer and the decision of an individual employee to resign (from a union) before the prohibition on inducing an employee to resign from a union will be breached.21 In other words, her Honour seemed to require an intention by an employer to rid a workplace of unions, instead of placing key importance on the employer's conduct. That was too narrow an interpretation of the law, the writers insisted.22

It was the BHP Iron-Ore decision (although decided directly under freedom of association provisions) which spawned most of the writings on good faith bargaining - the very concept that the Fair Work Act embraces and brings into force. It is considered below.

Good faith bargaining under the new Fair Work laws

In introducing the Fair Work Bill to Parliament on 25 November 2008, the Honourable Minister for Employment and Industrial Relations, Julia Gillard MP, insisted her Bill was:

based on the enduring principle of fairness while meeting the needs of the modern age. It balances the interests of employers and employees and balances the granting of rights with the imposition of responsibilities. The Bill delivers ... a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity ... 23

The crux of the good faith bargaining regime is found in s 228:

(1) 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 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.

(2) 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. [emphasis added].

In exceptional cases, Fair Work Australia (the new "umpire", if you will) will have a residual power to arbitrate on protracted disputes. Essentially, under ss 234-235, a serious breach declaration

21 Noakes and Cardell-Ree, n 20 at 94-95.
23 Gillard J, in 2.
may be made when a serious and sustained breach of bargaining orders has occurred in relation to a
proposed enterprise agreement. The consequence of a serious breach declaration is that Fair Work
Australia may make a Workplace Determination under s 269 (eg where non-intervention threatens the
economy). However, Minister Gillard insists the threshold for meeting s 269 is high and
determinations will be “very unusual”. 25

The Fair Work Act’s good faith bargaining provisions are significant. According to Punch, they
give the new supervisory body, Fair Work Australia, a significant capacity to intervene in bargaining
and, to some extent, require some level of bargaining to take place.26 (To use Punch’s phrase: the
provisions have a “significant impact on the ability of employers to refuse to enter into collective
agreements in practice”.27) Further concerns include that unions may try to frustrate bargaining by
seeking good faith bargaining orders or that the capacity of Fair Work Australia to arbitrate disputes
may cause some unions to “flout” the good faith bargaining laws in order to gain an arbitrated
settlement.28 The question to arise, therefore, is the extent to which an employer can be drawn into a
collective bargain and the issue of how the good faith bargaining regime will operate.

In terms of the potential effect of the new laws, a few things can be said with a degree of
certainty. First, the laws will most aptly apply to bargaining that is already underway between parties
who have started negotiations and where the process breaks down or causes protracted disputes.29

Secondly, in an attempt to circumvent any attempt to “flout” the laws for strategic advantage, the
capacity for Fair Work Australia to make good faith bargaining orders (and thereby order parties to
bargain genuinely rather than for calculated strategic advantage) applies equally to employers and
unions.30

The real “sticking point”, then, is the one noted by Punch; namely, the extent to which an
employer can decline to bargain with a union. Section 228(2) states no employer or party will be
compelled to make concessions or sign agreements in which they are in disagreement. This point is
also emphasised by the Senate Standing Committee report and by the Minister’s Second Reading
Speech for the Bill.31 Yet, by the same token, the illusion to, eg “refraining from capricious or unfair
conduct that undermines freedom of association or collective bargaining” in s 288(1)(e), and the need
to give genuine consideration to proposals in s 288(1)(d), underscores the fact that it is unlikely
employers can simply ignore union demands – at least when those unions have a presence in the
workplace. In this connection, the manner in which the provisions may operate may be demonstrated
by considering how the provisions may apply should cases similar to those discussed above occur
once again.

Through s 228(2), it is submitted, the law would not seem to require an employer, such as Asahi,
to reach an agreement with a union that was simply not embraced by employees at a particular
workplace. In the Asahi case, you would recall from the discussion above, Asahi had been an
exemplary employer and had provided the AFMEU with numerous opportunities to recruit staff. Those
attempts had failed. It is hard to imagine an order compelling an employer to bargain in good faith on
those facts.

Work Bill stated that: “The new system is not about delivering access to arbitration any time parties get into a disagreement
during the bargaining process. Far from it. Parties can take a tough stance in negotiations. Workplace determinations can only be
made in clearly defined circumstances” (Australia, Parliament, Senate Standing Committee on Education, Employment and
27. Punch, n 26 at 3.
28. This concern was raised in the Australia, Parliament, Senate Standing Committee report, n 24, at [4.41]ff.
29. Australia, Parliament, Senate Standing Committee report, n 24 at [4.32].

(2009) 37 ABLR 255
Fair work laws: Good faith bargaining, union right of entry and the legal notion of “responsible unionism”

As to how the new good faith bargaining provisions might apply to a situation such as that arising in BHP Iron-Ore, a likely outcome might be that under s 228(1)(e) an employer may be stopped from simply declining to bargain with a union when that union still has a significant presence in the workplace (as the Australian Worker’s Union did in BHPIO). However, you would recall from the discussion above that the unions in the BHP Iron-Ore case had, themselves, been the subject of complaints from their own members and the demarcation disputes between them had caused the peak body, the ACTU, to intervene. The company was also facing financial pressure due to market fluctuations which were beyond its control. In the author’s view, while the Fair Work Act’s good faith bargaining provisions will stop an employer ignoring a union with a substantial membership employed at the workplace, they would not compel continued negotiations if the conduct of the union was repeatedly obstructionist or self-defeating. If persistent demarcation disputes, etc were “derailing” bargaining processes, then that might provide an example of when an employer could walk away from proceedings without offending the law or when s 228(1)(e) may be made against a union. That approach, it would seem, is the most consistent with the third way ideology on which the Bill purports to be based.

That approach (of linking the obstructionist conduct of unions to an absence of good faith or a breach of s 228(1)(e)) may, some would argue, pertain more to trade union governance than to the actual process of bargaining. Such people would say the BHPIO demarcation dispute between unions was a separate union matter, not a bargaining concern potentially relevant to s 228. However, it is important to note the Principal Objects of the Fair Work Act in s 3(1):

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians:

... (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining undimmed by simple good faith bargaining obligations and clear rules concerning industrial action.

The objects of the Fair Work Act clearly link good faith bargaining to the conduct of unions (hence the allusion to “rules governing industrial action”). They also emphasise the need to pursue “cooperative workplace relations” and “national economic prosperity”. In the author’s view, the emphasis of the system is on responsible unionism that pursues the bargaining interests of union members. Where unions forsake their members and become mired down in their own internal power struggles, then that must surely undermine the very purpose of bargaining and union membership, and represent conduct that promotes the bargaining unions themselves, rather than the members they purportedly bargain for.

From the above analysis one would have to assume that the nature (and size) of a union presence in a workplace is relevant to the operation of the good faith bargaining laws. In his commentary on the

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32 It would then remain to be seen what law would apply next — Fair Work Act 2009 (Cth), s 269; or laws pertaining to trade union conduct, governance or industrial action.

33 The substantive criticisms of Rob Baragry of the new legislation are noted subsequently in this article. For the time being, it is interesting that Baragry alludes, albeit in passing, to the apparent vagueness of the wording of s 228(1)(e) of the Fair Work Act 2009 (Cth). It should, in fact, be noted that the idea of a section or rule being held invalid for lack of meaning is actually not unknown in industrial law. Refer, eg Hardiman v Transport Workers Union of Australia (1954) 80 CAR 232 at 235-236. However, the better view on s 228, both legally and in terms of policy, is not to question the validity of s 228(1)(e) but rather to define the section in terms of responsible unionism. The reasons for that view are obvious at the heart of this article and discussed throughout. On the general notions of freedom of association and collective bargaining refer also to Floyd L., Cicides in the Sand: A Study of Australian Strike Law and its Effects on Trade Union Power (LLM (Research) Thesis, University of Queensland, 1998), Ch 1. See also Valticos N., International Labour Standards (Deventer: Kluwer, 1979).
new legislation, Ron Baragry of the Australian Industry Group\textsuperscript{34} raises a further issue which will likely only be resolved with time; namely, how new concepts like majority support determinations will work.\textsuperscript{35}

The Australian good faith bargaining regime seems to stop short of a full-blown trade union recognition scheme. These types of schemes can contain an elaborate voting system through which workers vote for a union as their exclusive bargaining agent. Authors such as Professor Michael Gold,\textsuperscript{36} Tonia Novitz and Paul Skidmore,\textsuperscript{37} Alan Bogg\textsuperscript{38} and Lord Wedderburn\textsuperscript{39} all note the complexity of the voting systems and other structures on which trade union recognition laws depend. For almost all of these authors, trade union recognition is no panacea. Gold even infers that voting can be manipulated by employers to suit their interests.

In contrast, as Rathmell notes in his article "Collective Bargaining after Work Choices: Will Good Faith Take Us Forward with Fairness?",\textsuperscript{40} good faith bargaining provisions "go some way towards tempering disparities in parties' bargaining power in the interests of fairness and promoting rational dialogue and timely consensus-building in the interests of productivity". These laws have a pedigree in the bargaining laws of North America, and to an extent New Zealand, so there is a body of case law on which Australians can draw to illuminate what their good faith bargaining obligations amount to in practice.\textsuperscript{41}

The laws are further supported by Professor Andrew Stewart who notes:

Employer fears that unions may try to force arbitration to get an employer to pay a wage claim that it would never have settled in normal negotiations are overblown. The reality in relation to bargaining is that unions are not going to be able to take over a workplace by simply having one member in it. It is true they will have more rights under this system than present. Their practical ability to negotiate will be (dependent on) the level of support in a workplace [emphasis added].\textsuperscript{42}

That may well be so, but the important point to remember is that the composition of a workplace and whether it contains members of a particular union are likely to be relevant in terms of the operation of s 228 and its associated provisions. The unionised (or "unionisable") composition of its workforce is therefore something of which employers should be acutely aware as the laws come into force. Contrariwise, unions should be aware of their internal behaviour and be alive to the possibility that their own demarcation disputes might be the very thing that "undermines ... collective bargaining (under subsection (1)(c))". As noted above, it is in relation to that latter point that the legal notion of "responsible unionism" becomes relevant. "Responsible unionism" is considered in the penultimate section of this article. Before embarking on that discussion, the next section analyses union right of entry laws. It will be seen that the idea of "responsible unionism" is relevant to good faith bargaining and right of entry and the shape of the \textit{Fair Work Act} as a whole.

\textsuperscript{34} Baragry R "Forward with Fairness: An Employer Reaction" (2009) \textit{1 \textit{Australian Industrial Law News}} (CCH Australia, 27 February 2009) p 3.

\textsuperscript{35} Refer to \textit{Fair Work Act 2009} (Cth), s 226 - a bargaining representative of an employee may apply to \textit{Fair Work Australia} for a majority support determination that a majority of employees wish to be covered.


\textsuperscript{41} Rathmell, n 40 at conclusion. Rathmell considers cases such as \textit{Sensis Pty Ltd v Community and Public Sector Union} (2003) 128 IR 92.

\textsuperscript{42} Professor Andrew Stewart as cited in Australia, Parliament, Senate Standing Committee report, n 24 at [4.45].
Fair work laws: Good faith bargaining, union right of entry and the legal notion of "responsible unionism"

TRADE UNION SECURITY MEASURES: RIGHT OF ENTRY

Part 3.4 of the *Fair Work Act* governs right of entry. Significantly, the objects of this Part (contained in s 480) are based on an underlying premise; namely, that unions are an essential part of the framework of enforcing the law — they are to be given a reasonable opportunity to access members and potential members, facilitate the provision of information to employees and investigate suspected breaches — and those rights are to be balanced against the rights of employers to "go about their business without undue inconvenience".

A number of changes were made to the provisions of the original Bill on right of entry when it was passed by the Senate, especially as regards privacy and non-union members.43 However, as Catanzaritti notes, "the key reform in relation to right of entry remains in the act".44 For example, under s 481, a unionist (with a permit) may enter a workplace if a matter "relates to, or affects, a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises". In other words, the right does not hinge on "whether the union is bound by an award or agreement applying to the workplace".45 The new provision is therefore substantially broader than its predecessor.46

The concern raised in the Senate Standing Committee report was that the opening of the workplace to unions who are simply entitled to represent employees may lead to demarcation disputes.

The Senate Standing Committee rejected that criticism as having no basis in fact.17 As to the phrasing of the new provisions, the Committee stated that through award modernisation (one of the measures occurring under the Fair Work legislative reforms), many awards are being brought together "in a single modern instrument".48 No longer is there a union which is a party to an award, no longer is the award in strict settlement of a dispute. Rather, modern awards are standards of general relevance to industries.49 The change in wording of the right of entry provisions is said to simply reflect this.50 Further, the Committee noted that abuses of authority by unionists can result in the loss of the permit regarding right of entry.51

That may well be so, but in the author's view there is one paragraph of the Committee's report which is worth further consideration:

The Committee heard evidence that union demarcation disputes will be dealt with through the making of representation orders which will continue to be available under provisions regulating registered organisations. DEEWR advised that these provisions will be located in a separate Act dealing with organisations provided for in the forthcoming Transition Bill. It indicated that representation orders will be available in a wider range of circumstances than at present.52

In other words, as Punch notes, the *Fair Work Act*, although substantial, is not the end of the reform process. In particular, it does not cover trade union registration and the regulation of registered organisations.53 These issues are, instead, contained in separate legislation: the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (Cth), which was introduced into

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44 Catanzaritti, n 43.
45 Australia, Parliament, Senate Standing Committee report, Ch 7, [7.8] and [7.9].
46 See also *Fair Work Act 2009* (Cth), s 484 — entry to hold discussions.
47 Australia, Parliament, Senate Standing Committee report, n 24 at [7.23].
48 Australia, Parliament, Senate Standing Committee report, n 24 at [7.18].
49 Australia, Parliament, Senate Standing Committee report, n 24 at [7.19].
50 Australia, Parliament, Senate Standing Committee report, n 24 at [7.20].
51 See eg *Fair Work Bill at ss 500 ff and 507 ff*.
52 Australia, Parliament, Senate Standing Committee report, n 24 at [7.23].
53 Punch, n 26 at 7.
the House of Representatives on 19 March 2009. That legislation does not substantially change the law on trade union registration and operation a great deal at this stage.

However, in the author's view, matters pertaining to the internal and external regulation of individual trade unions (and their conduct), and pertaining to the trade union movement generally, are the very legal issue on which business lawyers and unions should be dwelling at present. This view is held for two reasons.

First, the recurrent theme of the discussion (above) of both trade union right of entry and the question of whether and when employers can be compelled to bargain with unions under good faith laws is whether unions conduct (especially demarcation disputes and competition between unions) can "derail" bargaining processes and the efficiency of workplaces. The switch in the underlying premise of the Australian industrial system from individualism under Work Choices to collectivism under the Fair Work Act sees a greater opportunity for unions to recruit new members and also compete to recruit new members as AWAs are phased out of operation and collective agreements take their place.

Secondly, the Fair Work Act retains Work Choices' vision of a national system of industrial relations for Australia. In fact, the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 (Cth) was introduced into Parliament on 27 May 2009 to deal with any referrals of State power that may occur. Some notable unions in this country have both State and federal bases of operation. Moreover, the State union in some cases is more financially secure than the federal branch of the union. Unsurprisingly, some State unionists are reticent to relinquish the funds and organisational structure of their State union to a federal undertaking in which they may have little control. In many cases, the motivation for such reticence goes far beyond self-serving reasons. In some cases, eg in Queensland, State unionists are genuinely concerned as to whether federal management would acknowledge local and State issues to the extent that State management does at present. Further, there is a question of financial accountability.

All of these trends, in the author's view, do justify a need to be vigilant about the possibility of demarcation disputes. It is for those reasons, also, that the laws governing unions are and should be something about which lawyers, unions and the government debate.

It is against that background that the legal notion of "responsible unionism" should, in the author's view, be considered. It is discussed immediately below. It will be seen the concept is relevant both to the ongoing issues of union regulation and nationalisation, and also to the interpretation that may be placed on the Fair Work Act's bargaining and right of entry laws.

**RESPONSIBLE UNIONISM**

This section of the article should start by openly stating the three basic planks on which it is written. First, there is a legitimate and important role for unions in representing the industrial interests of workers. Secondly, some unions have shown strongly responsible behaviour in their industrial conduct. Thirdly, there is no question that aspects of Work Choices were anti-union measures in breach of Australia's obligations at international law.

This portion of the article, then, is not arguing against the existence or industrial role of unions. Rather, it makes the point that the union movement is not monolithic, nor is it infallible. And that point, as will be seen in the conclusion to the article, is relevant to the interpretation of the Fair Work Act and the ongoing federal industrial reform process. An appreciation of the point starts with a consideration of the decision in Young, James and Webster v United Kingdom (1982) 4 BHHR 38.56

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56 Gillard, n 2.  
55 While this Bill as first introduced to Parliament deals with mainly the Victorian referral of powers, other States such as Queensland have subsequently announced their intention to hand over State powers. (Press Release from the Office of Minister Cameron Dick, Queensland Attorney-General, 11 June 2009, copy on file with author).  
54 It almost goes without saying that such international decisions are relevant to an interpretation of the new Australian laws. Some Australian laws in this area, as seen earlier in this article, derive from international laws and notions about unions. Further, many of the activities of unions are similar across jurisdictions.
Fair work laws: Good faith bargaining, union right of entry and the legal notion of "responsible unionism"

The Young, James and Webster decision

The British litigation of Young, James Webster involved a claim brought by three British railway employees who had been dismissed in a "closed shop" for not joining a trade union. The associated dismissal laws had allowed for dismissal in such circumstances, but also referred to some forms of conscientious objection.

The specific grounds of objection of the individual applicants were set out in the judgment: Mr Young did not want to join the particular union because he did not subscribe to the political views of the union concerned - money being used by the union to publish a newspaper biased in favour of the Labor Party. He also believed unionism should be a matter of choice. The second complainant, Mr James, had been a union member and was willing to join, but deferred his choice until he established how the particular union concerned dealt with members' problems. He formed the view that they did not handle his problem well and, consequently, he did not join. Finally, Mr Webster had similar concerns. He did not think unions acted in the best interest of workers or the country generally and "found it utterly repugnant to be obliged to participate in any strike which caused loss to the general public or workers elsewhere". He believed that the individual should enjoy freedom of choice as regards union membership, and should be able to express and abide by opinions and convictions, without being threatened with the loss of his livelihood as a result of a closed shop practice, which would not remedy the disabilities in the trade union system.

The applicants had argued that the "freedom of association" (under the relevant human rights convention) guaranteed not only the right to join a union, but by implication implied a negative right not to be compelled to join an association. The court did not consider it necessary to answer this question. However, it is interesting to observe the judges remarks that:

To construe [the article] as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee. In fact, according to Novitz and Skidmore in their book Fairness at Work, the Young, James and Webster decision makes it "(legally) hard to make the case for restoring the closed shop" and demonstrates that it is not (legally) unreasonable to ensure the democratic accountability of trade unions.

Some commentators, such as Ruth Ben-Israel, have been scathing in their criticism of the Young, James and Webster decision. According to Ben-Israel, this idea of "responsible unionism" embodied in Young, James and Webster takes most legislators on the slippery slope of eventual hostility against all union activity.

With respect to Ben-Israel, whose work is often luminous, the author does not agree on this particular point. Responsible unionism is something which is important to issues which unions are about to confront in Australia; namely, those relating to their regulatory environment and questions of nationalisation of unions. It also informs the manner in which the Fair Work Act's provisions on good faith bargaining, right of entry and the like will operate. In the author's view, it is something which is in the mutual best interests of employers, employees and their unions.

This view can be demonstrated if one has a final reflection upon and consideration of the relevant cases: Asahi and BHP Iron-Ore (discussed earlier) and also Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia (1986) VR 383. In each of these cases, which yielded results unfavourable to the union concerned, there was conduct on the part of the union which was questionable.

57 For a detailed analysis of this decision refer to Floyd, n 7, pp 262ff. The discussion of Young, James and Webster v United Kingdom (1982) 4 EHHR 38 in this section of the article draws from that lengthier work.

58 Young, James and Webster v United Kingdom (1982) 4 EHHR 38 at 39ff.

59 Young, James and Webster v United Kingdom (1982) 4 EHHR 38 at 48.

60 Novitz and Skidmore, n 37 at 6.

As noted earlier, in *Asahi*, repeated overtures by the union to the *Asahi* employees were fruitless. Despite that, the union insisted on conduct which led to a legal action that brought about a decision that most unions found unfavourable to the union movement as a whole.

In *BHP Iron-Ore*, the decision of Kenny J was undoubtedly too narrow. However, the conduct of the union was not exemplary either. The evidence included statements from union members that they were unsure if their union was actually representing their interests. Yet again, litigation damaging to the union movement occurred after evidence of union infighting.

Finally, one needs to consider the decision of *Dollar Sweets Pty Ltd* in this context. Critics of this decision routinely state that recourse to civil courts is reprehensible in an industrial context as it is adversarial and favours wealthy employers. That may be so, but those critics often forget the facts of the case. The union concerned was seeking a pay rise that was not fully supported by all members at the workplace. In pursuing its industrial agenda, the unions persistently failed to comply with orders of the Industrial Commission. Further, the physical violence of unionists in the picket line resulted in one supplier (who crossed the line) having his retina detached after having been pulled from his van by workers and set upon.

As one considers the new laws, recourse surely will be had to cases such as those discussed above. The result is that employers seeking to have good faith bargaining orders made against unions or seeking to walk away from union bargaining will look for evidence of a type similar to the cases above to show that sometimes it is the union whose activities are "capricious and prejudicial to freedom of association". (This is especially so if one accepts the discussion of freedom of association in *Young, James and Webster* and its relevance to the "third way approach" of establishing industrial systems in which fairness and flexibility are mutually supportive, not mutually exclusive goals.)

Likewise, in right of entry disputes, if these provisions are abused by unions in competition with each other for members, then that type of conduct could, it is submitted, easily lead to an employer robustly arguing that the law has been breached.

Finally, as we consider the State Referral Bill (mentioned earlier), it would pay to remember the legitimate concerns of State unions who seek to ensure legitimate and unique interests of State employees are not downplayed should a true national system (of industrial laws and unions) come to being. Those same unionists may well agree that responsible and accountable actions by unions are in the interests of all industrial players - including unions.

**CONCLUDING REMARKS**

The twists and turns of industrial law are fascinating to watch. Prior to the advent of the Howard Government, the novel Australian Chamber of Commerce and Industry complaint saw a peak Australian business group pitch the argument that the old arbitration system (with its compulsory arbitration procedures for approving agreements) was a breach of freedom of association. After the advent of the Howard Government's Work Choices scheme, unions had legitimate concerns that the law (with its employer green fields agreements, in which one employer could agree with itself to settle terms without union involvement) was hostile to their equally legitimate industrial ends.

As Professor McCallum has often said, the *Fair Work Act* gives this country an opportunity to settle a modern industrial system with which all major industrial players can live.

In order for that to take place, it is the author's view (as has been argued throughout) that all parties need to act responsibly and that the meaning of some apparently new and novel conditions can be gleaned by learning from the mistakes of the past.

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62 North AM QC (as he then was), "Industrial Action - the Need for Change in the Law?" (1991) 65 Law Inst J 608 at 610. See also McCarthy B, "Industrial Disputes and the Law" (1991) 65 Law Inst J 607.

63 Australian Chamber of Commerce and Industry, Employment and Labour Relations Forum, Number 3 (October 1995) at 112, 133.

64 McCallum R as cited in Punch, n 26.