The Impact of ‘Good Faith’ Obligations on Collective Bargaining Practices & Outcomes in Australia, Canada and the USA
Labor’s *Fair Work Act 2009* (Part 2-4)

- CB = centre-piece of the legislation
- Good faith bargaining (GFB) obligations → enforced by bargaining orders, & (if extreme bad faith) arbitration
- Majority support determinations (MSDs)
- Low-paid bargaining stream
- Fair Work Australia (FWA) oversees the CB system
Research Project

• (1) Is the new legislation meeting Govt’s aim of promoting CB?
  – what impact on ‘employer resistance’ strategies?
  – what mechanisms are proving effective?

• (2) How is the Australian law working in comparison with regulation of CB in Canada & USA?
Good Faith Bargaining (*FW Act*, s 228)

- Process obligations (duty to meet, respond to proposals, exchange information, etc) ...

- & duty to refrain from ‘capricious or unfair conduct that undermines CB or freedom of association’
  - ie limits on ‘unfair labour practices’?
FWA case law: a cautious (conservative?) approach to GFB

- Employers have latitude to communicate directly, eg:
  - staff-management meetings without union: *LHMU v Mingara Recreation Club*
  - emotive language & bargaining ‘spin’ OK: *LHMU v Hall & Prior Aged Care*
  - employers can send info packages on ‘last offer’ to employees’ homes: *CFMEU v Tahmoor Coal*
FWA case law: a cautious (conservative?) approach to GFB

• Employers can also:
  – submit agreements to ballot after ‘impasse’: *CFMEU v Tahmoor Coal*
  – implement restructure during bargaining: *LHMU v Coca-Cola Amatil*
  – but unilateral wage increase = bad faith (query remedies?): *FSU v Commonwealth Bank*
Use of MSDs to counter employer resistance to CB

• Do a majority of employees want CB? (FW Act, ss 236-237)

• FWA can determine on basis of:
  – employee petitions (most common method)
  – union membership lists
  – signatures on ‘pledge cards’
  – workplace ballots
Use of MSDs to counter employer resistance to CB

• Employer tactics in response to MSDs, eg:
  – disputing the employee constituency
  – challenging integrity of employee petitions
  – sending employees resignation letters (from union)
  – (misleading) employer surveys

• But these tactics have been unsuccessful
Use of MSDs to counter employer resistance to CB

• Effectiveness of MSDs
  – **IBM**: *the first time that IBM employees have been able to exercise CB rights anywhere in the world!*

• Employers **voluntarily** agreeing to CB
  – eg Telstra, major banks, Rio Tinto
Preliminary conclusion & further research

• Early signs that Part 2-4 is encouraging take-up of CB
  – need to measure whether increase in CB coverage → esp in non-union sector ...
    – [why not greater use of low-paid stream?]
  – analysis of FWA data & case files
  – comparison with Canada, US, UK & NZ
  – what are key ingredients of effective statutory support for CB?