

Legal Framework of Collective Bargaining

1. **Constitutional Provisions – Does your country's constitution include the right to collective bargaining?**

There is no express constitutional provision in Australia that includes the right to collective bargaining. Section 51(xxxv) of the Australian Constitution gives the Australian federal Parliament the power to make laws with respect to, “Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”, however, as early as 1908 the High Court of Australia held that while this power would permit the establishment of a court or a tribunal to arbitrate settlements to labour disputes, it would not permit the enactment of collective bargaining legislation per se, that is separate and distinct from processes of conciliation and arbitration, *Jumbunna Coal Mine no liability v Victorian Coal Miners’ Association* (1908) 6 CLR 309. The current federal legislation on collective bargaining is supported by several provisions in the Australian Constitution, including the conciliation and arbitration power (section 51(xxxv)), the interstate and overseas trade and commerce power (section 51(I)), the corporations power (section 51(xx)) and the territories power (section 122)).

2. **Legislation: Please indicate if collective bargaining is, in your country, regulated by:**

(a) The Labour Code:

No.

(b) A law on collective bargaining:

Yes, the federal *Workplace Relations Act* 1996 (Cth) ("**WRA**") and various State statutes provide a framework for voluntary collective bargaining throughout Australia. (See WRA, Part VIB, Division 8, which relates to the negotiations for certified agreements and

If your country is a Federal State, have the state or provinces that constitute the State competence to adopt their own legislation to regulate collective bargaining?

Yes.

If they have such competence, have they actually enacted legislation on this subject, and to what extent is this legislation different from that at the Federal level?

Yes, all of the Australian States have enacted legislation on this subject, with the exception of the State of Victoria which referred most of its industrial relations powers to the Commonwealth pursuant to the reference power in the Australian Constitution (section 51(xxxvii)).

(See *Industrial Relations Act 1996 (NSW)* ("**NSWIRA**"), Part 2, Division 1, *Industrial Relations Act 1999 (Qld)* ("**QIRA**"), *Industrial Relations Act 1984 (TAS)* ("**TASIRA**"), *Industrial Relations Act 1979 (WA)* ("**WAIRA**") as

amended by the Labour Relations Reform Act 2002 (WA), and *Industrial and Employee Relations Act 1994 (SA)* ("**SAIRA**"), Part 1.)

Generally, the state enacted legislation provides a similar framework for collective bargaining as the federal legislation.

Has your country enacted ad-hoc regulations to address collective bargaining in specified industries or activities (for example, transport, communications, energy, public education)? If it has, please describe them.

Generally, no. However, most jurisdictions have enacted essential services legislation which confers powers on the relevant bodies to make orders or regulations which are designed to avoid serious or prolonged disruption to essential services such as fire fighting, public health, water, power and public transportation. The power to make regulations under the relevant acts are quite broad, and may include an order directing the cessation of industrial action. Accordingly, the right to collective bargaining may be limited in essential service industries.

- (c) If your country does not have a law on collective bargaining, is this subject dealt with by civil law (for example the Civil Code or the Code on Obligations)?

No.

- (d) To what extent is collective bargaining also self-regulated by the interested parties in your country (for example through a framework agreement on collective bargaining)?

Not applicable.

- (e) To what extent are the contents, effects and legal bearing of collective agreements also determined by judicial decisions?

Statutory schemes providing for the exercise by industrial tribunals of the power to regulate terms and conditions of employment by arbitration have been established under the laws of the Commonwealth and by all the states, with the exception of Victoria. While for constitutional reasons, the Australian Industrial Relations Commission ("**AIRC**") is not entrusted with the exercise of judicial power, it possesses many of the attributes of a court, and in dealing with disputes between parties, is bound to act judicially.

The contents of collective agreements are considered by the AIRC pursuant to its certification power under the WRA Act. The legal bearing of a collective agreement may be considered by the Federal Court pursuant to its interpretation power.

3. **How is collective bargaining legally defined in your country?**

While collective bargaining is not strictly defined in legislation or judicial decisions, the law recognises and provides a framework of voluntary collective bargaining, in which employers may choose to conclude a collective agreement with one or more trade unions. Despite this recognition, no legal mechanism exists under the federal law to enforce employers to collectively bargain.

4. **The duty to bargain:**

- (a) Does the duty to bargain in good faith exist in your country? How is it defined? What are its contents?

Between March 1994 and December 1996, the now repealed *Industrial Relations Act 1988* contained specific provisions giving the AIRC the power to issue good faith bargaining orders (see s170QK). These express provisions were abolished in Australia from 1 January 1997 following the election of the Coalition Government.

Under the current WRA, the AIRC has a residual power to suspend or terminate the bargaining period if the parties have not "*genuinely tried to reach agreement*" before taking protected industrial action (see s170MW(2)(a)(b)(c)). Several recent AIRC and Federal Court decisions provide authority for the view that the concept of "genuinely trying to reach agreement" includes the notion of "bargaining in good faith".

(See *AMIEU v G & K O'Connor* (1999) FCA 310, Marshall J of the Federal Court of Australia stated that he could see "no material distinction between the concept of bargaining in good faith and the concept of a genuine attempt to reach agreement.")

- (b) How is the duty to bargain enforced when one of the parties refuses to bargain or fails to bargain in good faith?

There is no express provision in the legislation which confers on the AIRC the power to order a party who refuses to bargain, or fails to bargain, to do so. (See the decision by the Full Bench of the AIRC in *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385 in which it was stated that the "*Commission cannot order a person to negotiate. Such an order is beyond power.*")

However, recent cases have suggested that the AIRC has the power to make orders requiring negotiating parties to bargain in good faith to assist conciliation proceedings under the broad powers of s111(1)(d)(t). These sections confer on the AIRC powers to give a direction in the course of, or for the purposes of, the hearing or determination of an industrial dispute and to give all such directions, and do all such things, as are necessary or expedient for the speedy and just determination of the industrial dispute. (See *CPSU and Telstra Corporation* (20 June 2000), in which a five member Full Bench of the

AIRC found that the AIRC has broad powers to issue orders during conciliation proceedings.)

5. **The Civil Service:**

- (a) Do the same laws and regulations apply in your country to collective bargaining in both the private sector and the civil service?

Yes.

- (b) If different rules apply, please explain what rules and procedures exist to regulate collective bargaining in the civil service at national, regional or local levels, and in decentralised administrations or public utilities.

Not applicable.

B. THE LEVEL AND STRUCTURE OF COLLECTIVE BARGAINING

6. **Please indicate if, in your country, collective bargaining takes place mainly or exclusively at the level of:**

- (a) **the establishment;**
- (b) **the enterprise;**
- (c) **the branch of industry or economic activity;**
- (d) **the national central level;**
- (e) **other levels (for example, occupational groups).**

Under the *Workplace Relations Act 1996*, strictly speaking collective bargaining takes place at the level of the “single business”, a statutory conception which embraces both (a) the establishment (in the sense of the plant or workplace) and (b) the enterprise (in the sense of the firm, partnership, joint venture, corporation etc.). Indeed that legislation goes so far as to enable a collective agreement – relevantly termed a certified agreement – to be limited in scope, and negotiated with respect to, a *part* of a single business. So, for example, in the case of a single business (“enterprise”) comprising more than one workplace (“establishment”) a certified agreement (collective agreement) or agreements may be negotiated with, and confined to, one or more of the constituent workplaces. In the federal system it is even possible for collective bargaining, and resultant collective (certified) agreements, to be limited to parts of a single business (enterprise) which, although not geographically distinct (“establishments”), are sufficiently operationally or organisationally distinct.

The federal legislation does also make provision for collective agreements covering several “single businesses” (within an industry, branch of an industry or across industries) to be negotiated and certified. These are termed “multiple-employer agreements”. As the parties negotiating these agreements, however, cannot lawfully take industrial action in furtherance of

their negotiations, some may think it a little misleading to describe this particular process as collective bargaining.

Depending, then, on the structure of single businesses, and on the negotiating preferences of these businesses, their employees and (where applicable) the relevant unions, collective bargaining *can* in theory take place at any of the levels specified from a. to e. In practice though, it seems not surprisingly that collective bargaining takes place mainly, but by no means exclusively, at the enterprise level. This is the case even if that bargaining ultimately results in collective agreements which apply only to parts of the enterprise ("single business") in the sense explained above.

Broadly speaking the same general pattern of collective bargaining is also true of collective agreement making in the state systems of industrial regulation.

7. **When collective bargaining takes place at different levels, does a hierarchical relationship exist, or is there coordination between those different bargaining levels?**

As might be expected to be so when bargaining takes place at the establishment (workplace or plant) level or, as explained above, at the level of a distinct operational or organisational part of an enterprise ("single business") a very high degree of coordination is almost certain to be evident on the employer side. Similarly, in the case of individual unions bargaining with such enterprises.

Where collective bargaining occurs at or above the industry or branch of industry level, coordination on the union side is commonplace. In one particular form, frequently referred to - usually pejoratively - as "pattern bargaining" (adopting the North American terminology), coordinated bargaining by **national** unions negotiating with many separate employers in one or more industries is now standard practice in certain major industries, including for instance manufacturing and mining.

Coordination in bargaining on the employer side, when it occurs, is usually achieved through the medium of industry, State or national organisations, such as for example the National Farmers Federation, the Motor Traders Association of New South Wales, the Australian Confederation of Commerce and Industry and the Australian Industry Group.

As explained below (13), in its recognition of collective bargaining the *Workplace Relations Act 1996* makes only very limited provision for bargaining above the single enterprise level. To the extent that the legislation provides for "multiple-business" agreements, they are subject to prohibitions on the use of industrial action, special arrangements for certification, and displacement by inconsistent single business agreements. The legislation governing State systems of industrial regulation tend to be less restrictive in their recognition of collective agreements between unions and *organisations* of employers (for example s 41 of the *Industrial Relations Act 1979* (WA)) than the *WRA 1996*, although seldom is industrial action in the negotiation of such agreements accorded legitimacy and statutory protection.

8. **To what extent does international collective bargaining have an actual or potential bearing in your country's collective bargaining practices?**

International collective bargaining appears to have had only a very modest bearing on Australia's collective bargaining practices. To the extent that its influence is identifiable it derives either from the international character of some of the larger corporate employers (such as Ford Motor Company, General Motors, Comalco, BHP Billiton etc.) or from international affiliations or less formal international linkages between Peak bodies (such as the ACTU, Australian Mines and Metals Association (Inc.)) or large unions (such as the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and the Australian Education Union). On occasion these linkages and affiliations are manifested in internationally coordinated industrial action such as occurred during the 1998 Australian waterfront dispute involving the Maritime Union of Australia and Patrick Stevedores Ltd. Australia, is of course, signatory to a number of relevant international (ILO) conventions, including in particular the Convention Concerning Freedom of Association and the Protection of the Right to Organise, the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively and the International Covenant on Economic, Social and Cultural Rights, all of which have considerable potential bearing and significance for practices and institutions of collective bargaining in this country.

C. THE PARTIES TO COLLECTIVE BARGAINING: WORKERS' REPRESENTATION

9. Workers' representation by a trade union

- (a) **How is the representativeness of a trade union determined for collective bargaining purposes at the different bargaining levels (ie the establishment, the enterprise the industry or branch of economy, an occupational group or at national central level)?**

Unions representative rights are governed by their registered rules of membership.

- (b) **What recourse or procedures are available to resolve disputes when trade union representativeness is challenged?**

Demarcation orders are available which can provide a particular union with the exclusive right to represent employees in a particular trade, calling or industry. It is usual for a demarcation order to be followed by an order altering the effected unions' registered rules of membership.

- (c) **When a union is a member of a federation of trade unions, what are the respective collective bargaining rights of the union and the said federation? Are these respective rights determined by the law, or by the relevant federation's by-laws.**

Collective Bargaining is almost exclusively done by the union and not the federation. The Federation conducts arbitration outside the bargaining process such as for "industry wide" pay increases. The federation may get involved on behalf of its affiliates in large bargaining disputes and at a policy level in terms of setting bargaining agendas.

- (d) **When a trade union has elected union delegates at enterprise level, what are the rights and role that are afforded to those delegates in the collective bargaining process?**

Collective bargaining for a union endorsed agreement requires both the consent of a valid majority of employees and the consent of the unions wishing to be bound. The usual way that the agreement is negotiated is that a “single bargaining unit” consisting of employee and employer representatives is elected, which then negotiates the agreement, and puts it to employees for a vote. It is usual, for a delegate to be an elected representative on the single bargaining unit.

- (e) **To what extent must a collective bargaining agreement be ratified by the rank and file?**

It is a requirement of the Industrial Relations Commission certifying a collective bargaining agreement that a “valid majority” of persons employed at the time the agreement is made, who will be subject to the agreement approve the agreement

- (f) **When there is trade union multiplicity, how is the representation of workers for collective bargaining purposes organised? Consider the extent to which minority unions can enjoy bargaining rights**

It is usual for representatives of different unions to sit on the “single bargaining unit”. There is no legal requirement however for all unions with representation rights to sit on the single bargaining unit, or even to form a single bargaining unit at all.

- (g) **Can a union join an existing collective agreement to which it has not already been a signatory party? If yes, what rights does it enjoy as a result of its adhesion to that agreement?**

If the agreement is already in existence it can only be varied to include a party by going through the same process as required to make the agreement (that is having it approved by a valid majority of employees). A union however will still have a right to represent its members who are covered by the agreement, even though the union itself is not a party to the agreement.

- (h) **To what extent is a union empowered to represent non unionised workers?**

Unions may make an agreement that covers the entire workforce of an enterprise provided a valid majority of persons vote in favour of the agreement.

- (i) **To what extent can a collective agreement be applied to non-union members?**

To the full extent of the agreement.

- (j) **What rights and obligations are recognised to trade unions that have signed a collective agreement?**

The rights and obligations of trade unions stem from sources other than the collective agreement. The agreement however will usually have a disputes avoidance procedure which provides a defined role to unions in the handling and avoidance of disputes. Further, it is usual to have consultation clauses that apply to the union signatories to the agreement.

- (k) **What procedures and recourses are available in Australia for the unions to demand the enforcement of an agreement by the other party?**

A union may apply to the Industrial Relations Commission for an order enforcing compliance with the agreement. In certain circumstances penalties may also be imposed on the party breaching the agreement.

10. **Workers' representation by a non-union body**

- (a) **Are there legal or collectively agreed rules in Australia that provide for the representation of all workers at the enterprise level by an organ elected by all the workers of the enterprise whether unionised or not.**

It is legally possible to make a collective agreement with employees only. In such circumstances it may be that workers elect a single representative from amongst themselves or external to the organisation.

- (b) **What kind of relationship - legal or defacto- exist between these organs and the unions?**

No relationship exists at all.

- (c) **What specific competences do these organs have and to what extent can they negotiate collective agreements or other binding agreements?**

Non union agreements are binding provided a valid majority of employees vote in favour of them. The negotiation of such agreements are rarely done through an "organ" as such, but rather with employee representatives and employees directly.

11. **Workers' representation by ad-hoc committees**

Not applicable

12. **Protection of the Worker's representatives - Indicate the measures whereby protection is afforded to workers' representatives in the negotiation of collective agreements.**

Worker's Representatives are protected from victimisation or injury through the Freedom of Association laws. These laws provide that an employer must not, for a "prohibited reason" do, or threaten to do, the following, in respect of an employee:

- (a) dismiss the employee;

- (b) injure the employee in his or her employment;
- (c) alter the position of the employee to that employee's prejudice;
- (d) refuse to employ another person;
- (e) discriminate against another person in the terms and conditions on which the employer offers to employ the other person.

The list of prohibited reasons include:

1. The person being or proposing to be an officer, delegate, or member of a union;
2. a person's membership or non-membership of a union;
3. the right of a person to participate in lawful activities of a union;
4. a person's entitlement to the benefit of an industrial instrument or order such as an award or collective agreement;
5. the right of a person or independent contractor to participate in proceedings under the Industrial Relations legislation, including seeking compliance or observance of such laws;
6. a person's dissatisfaction with their conditions where their union is seeking better working conditions.

D. THE PARTIES TO COLLECTIVE BARGAINING: REPRESENTATION OF THE EMPLOYERS

13. Employers' representation in the private sector

- (a) **Who represents the employers when collective bargaining takes place at a level above that of the enterprise? How is this representation determined?**

Individual employers are free to choose their representatives in collective bargaining under Part VIB of the *Workplace Relations Act 1996*. Where employers choose to be represented by an employer association/organisation at industry or branch of industry level, however, that association may only represent them as an agent and cannot itself be a party principal to any resultant agreement. In this respect the position in relation to collective agreements under the Federal legislation is quite different from the position in relation to arbitrated awards (see s 149 of the *WRA 1996*).

Choice of representatives by individual employers is also the norm in the State systems, although the relevant legislation of the States not infrequently makes provision for employer associations to be parties to collective agreements rather than restricting them to acting as agents for their members (see for example s 41 of the *Industrial Relations Act 1979 (WA)*).

- (b) **If an employer is a member of an employers' association, can he or she negotiate an agreement applicable to his/her enterprise when an agreement already exists that applies to an upper level (for example the industry or the branch of economy to which the enterprise belongs)?**

Although the *Workplace Relations Act 1996* (s 170 LC) does make provision for so-called "multiple-business agreements" - agreements covering more than one single business or enterprise - these agreements are not able to be negotiated using protected industrial action and their certification is subject to special procedures and arrangements. Moreover, as indicated in a. above, to the extent that the bargaining process involves employers being represented by one or more employer organisations, those organisations can only act as agents of the relevant employers ("single businesses") and not as parties principal save in respect of their own employees. Furthermore the Act expressly provides that a multiple-business agreement has no legal effect in so far as it is inconsistent with any certified single business agreement.

- (c) **What are the legal effects of collective agreements signed by an employers' association in respect to enterprises that are not members of that association?**

If it is possible at all, save in respect of agreements covering their own employees, employer associations could only sign collective agreements under the *Workplace Relations Act 1996* as agents of single businesses and not as parties principal. Such agreements are only able to be certified as agreements between unions or employees and named employers ("single businesses"). Certified agreements, whether single business agreements or multiple-business agreements, can have no direct legal effect on employers who are not themselves parties to those agreements. Therefore, *a fortiori*, under the Federal legislation collective agreements signed by an employers' association could have no legal effect whatsoever in respect to enterprises that are not members of that association.

Under the State systems of industrial regulation provision is not infrequently made for employer associations to be named parties to collective agreements. The effect of these provisions is usually to bind employers ("enterprises") who are members of the relevant association while they are members of that association. Such collective agreements do not have any legal effect, however, in respect to enterprises (employers) which are not members of the employer association.

- (d) **Can a collective agreement be made binding on enterprises that are not members of the association that have signed it? If it can, please give details on the procedures that are to be followed for the agreement to be made generally binding.**

No.

- (e) **What rights and obligations are recognised to employers' associations that have signed a collective agreement? What procedures and recourses are available in your country for the employers' associations to demand the enforcement of an agreement by the other party?**

None under the *Workplace Relations Act 1996* (see a. and b. above).

Where State legislation provides for employer associations to be parties to collective agreements, the relevant legal position of those associations (in the individual enterprises (employers) which have signed and become parties to such agreements. In these cases an employer association that is party to a (State) collective agreement can bring an action for the enforcement of that agreement in respect of non-complying parties in accordance with the relevant statutory procedures that apply to any other named party - employer (enterprise) or union - seeking to enforce the agreement.