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▶▶ Good faith laws will end the Rio revolution

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Good faith bargaining will extinguish the direct engagement approach to IR pioneered and spread across Australia by the "Rio Tinto diaspora" of IR practitioners, according to a leading employer-clientele industrial barrister.

Melbourne barrister Stuart Wood [told](#) an IR Society of Victoria seminar on Friday that the Fair Work Act's good faith provisions herald a fundamental change to the way IR has been practised over the last 20 years.

Wood said the key provision – both in terms of its impact, and the volume of litigation it is likely to trigger - is [s228\(1\)\(e\)](#), which requires parties to refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

He identified four major changes the provision will bring:

1. International and US law will be relevant

While much of the debate on [s228\(1\)\(e\)](#) has focused on the words "capricious" and "unfair", Wood argued the phrase "conduct that undermines freedom of association or collective bargaining" is the most significant because it opens the door for a large body of US and international law on that notion to apply in the Australian context.

The US [National Labor Relations Act](#) requires good faith obligations and deems it (see [s8](#)) an unfair labour practice for parties to "refuse to bargaining collectively".

The US prohibition on refusing to bargain is similar, if narrower, than the concept of undermining bargaining, and it would be odd to argue - as AiG IR director Stephen Smith did in his speech at the inauguration of Fair Work Australia – that it is not relevant to the Australian context, he said.

Further, he said, it is relevant that the US legislation on collective bargaining had preceded and provided the inspiration for international law such as the ILO's [Right to Organise and Collective Bargaining Convention](#).

That fact, combined with the Act's [objective](#) to "take into account Australia's international labour obligations", means an appeal court would clearly regard international law "as a relevant consideration to be taken into account", he said.

"The simple point to make is that this: international law will be become part of the meat and drink of Australia labour laws, it has to," he said.

2. Goodbye to direct engagement

Wood continued that, over the past 20 years, IR in Australia has been characterised by a shift towards a direct engagement IR model - "bypass unions, bypass the Commission, deal directly with your employees" – pioneered in the mining industry de-unionisation campaigns of the 1980s and '90s.

The approach, which had spread from the hard rock mining sector to employers such as Telstra and the Commonwealth Bank as a diaspora of former Rio Tinto IR practitioners took up senior roles across the economy, was likely to be extinguished by good faith bargaining, he said.

He said a key principle of good faith bargaining law in the US which is likely to be adopted here is a prohibition on "bypassing the representative" during bargaining – in other words, on an employer talking to its employees instead of their union.

There are already signs of the principle emerging in Australia, he said, pointing to Senior Deputy President Lea Drake's good faith [recommendation](#) last week that an employer "not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages".

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It is highly probable that a similar principle would become an accepted part of good faith bargaining, which would mean that employers would only be able to pursue direct engagement if they are prepared to devote more resources, suffer increased disputation and litigation and accept an increased risk that the strategy will fail, he said.

"Direct engagement – this legislation is directly opposed to it," he said

3. Employers *will* have to make concessions

Wood also argued that, despite, the limitation in s228 of the Act that the good faith principles do not require parties to make concessions during bargaining, it is strongly arguable that in some cases they will have to do precisely that.

He said that, despite a similar statement in the NLRB Act's s8 that good faith bargaining does not require concessions, courts in the US had found that an employers is "obliged to make some reasonable effort in some direction to compose [its] differences with the union".

Failure to make a concession could result in a party being found to have engaged in prohibited "surface bargaining" - going through the motions with no real desire to reach an agreement.

While it remains to be seen how FWA will draw the line between acceptable hard bargaining and impermissible surface bargaining, there is no doubt the concept of surface bargaining will take root in Australia, he said.

4. Strikes will be more effective

Finally, Wood drew attention to comments by DEEWR chief counsel Natalie James last year that it is "uncharted territory" as to whether the ban on unfair or capricious conduct will in some circumstances prevent employers hiring replacement labour during strikes.

He argued there is a "real question" about how FWA will deal with the use of replacement labour in the good faith context, which could restrict employers' ability to limit the effect of strike action.

The potency of strikes could be further enhanced by any prohibition on communicating directly with employees in an attempt to persuade them to return to work, he said.

However, there could be a silver lining for employers on this point, he said, with the possibility that good faith bargaining orders can be used to ensure unions are only able to strike as a last resort.

While the recent [NTEU v University of Queensland](#) decision acknowledged that a role remains for "strategic" strike action, Wood argued courts and tribunals here are likely to follow their counterparts in the US in requiring that parties reach an impasse in bargaining before the action is available.

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