

Failure to bargain may jeopardise your interests

Federal Court finds Monty Python haggle scene more than a laughing matter

By STEVE LANCKEN



Steve Lancken is a Sydney based commercial mediator, steve@thetrillilugroup.com.au. Ashna Taneja, a clerk with the Trillium Group, contributed to this article.

Attending negotiation meetings and diligently responding to submissions may seem to fulfil the requirements of the Fair Work Act, but the essence of bargaining requires more than lip service.

A scene from the Monty Python movie *Life of Brian*, once voted the funniest movie of all time, has been formally cited in the Federal Court of Australia, where Justice Flick said it was “illustrative of the process of bargaining or haggling”.¹ In a judgment that turned on the bargaining provisions of s.228 of the *Fair Work Act*, his Honour drew attention to the 1979 movie’s haggle scene,² in which Brian purchases a disguise from Harry the Haggler but pays the 20 shekels first asked without any attempt to bargain. It is left to the merchant to coach the mistaken Messiah how to “haggle properly” by making counter offers.

The Australian movie *The Castle* is famous for the “It’s just the vibe of the thing” argument solicitor Dennis Denuto

delivers when asked to indicate how the Constitution can be used to support his motion over the forced purchase of a family’s home. Denuto’s argument has made its way into a few transcripts, (for instance French CJ, “Do not try and guess the vibe. It is terribly misleading”),³ but he is yet to be judicially cited in support of a judgment,⁴ as have Brian and Harry.

Of course s.228 of the *Fair Work Act 2009* does not require “haggling”. It does, however, require “good faith bargaining”, and Flick J looks to a *New Shorter Oxford Dictionary* definition which equates “bargaining” to “haggling” in order to give efficacy to the extraordinary behaviour of Harry the Haggler. In the film, Harry says to Brian when he offers the asked for 20 shekels, “Wait a minute we’re supposed to haggle”. So, too, Flick J suggests an



FAIR WORK ACT 2009 SECTION 3

Object of this Act

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 by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum

wage orders; and

- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the

- right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses. □

employer is “supposed to bargain” when s.228 applies.

What made the case somewhat pythonesque was that Endeavour had openly expressed that it did not want an enterprise agreement with its workforce at the Appin Mine.⁵ As a consequence, while it attended many meetings and respectfully responded to every idea raised by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA), who were the respondents to the appeal, Endeavour neither made any proposals nor said what it might accept in an enterprise agreement.

Orders made by Fair Work Australia (FWA) required Endeavour to meet and provide information to APESMA, in particular, information about what they would accept in an enterprise agreement. Flick J examined the decision of FWA and offered guidance on what orders can and cannot be made in support of the good

faith requirement. His Honour said that “the meaning of the requirements imposed by that subsection are relatively easy to resolve. The difficulty is in the formulation of orders to give effect to those requirements without trespassing into prohibited territory created by s.228 (2)”. In the end, he made orders restraining Endeavour from unilaterally changing conditions but set aside orders requiring it to take any positive steps to negotiate an agreement. He even set aside the order that “the parties meet to progress their bargaining ...”

What most concerned Justice Flick was the “prohibited territory” created by s.228(2), which states that a party to such a bargaining process is not required “(a) ... to make concessions during bargaining for the agreement” or “(b) ... to reach agreement on the terms that are to be included in the agreement”.

The mystery of who won or lost the case is as deep as that of the meaning of life. APESMA was obviously looking for some direction from FWA that Endeavour should agree to something (anything) or at least state its minimum requirements for an enterprise agreement. It was spectacularly unsuccessful in that respect. Endeavour was seeking to use s.228 to delay or even deny the right of APSEMA to collectively bargain on behalf of the workforce. It did not achieve that goal and, as a result of orders that the court made, was restrained from taking action to determine the terms of a standard agreement or alter those terms “outside the enterprise bargaining process”.

The end result of three hearings is at best a stalemate. The utility of a provision that leaves the parties with such an unsatisfactory outcome should be questioned.

The intent of the *Fair Work Act* is made very clear by s.3 (see box). The legislation seeks to strike a fair balance between labour and management and to support fair negotiation of employment agreements, including collective or enterprise agreements. The dominant word in s.3, the objects section, is “fair”. The word fair, or fairness, appears six times in the section.

As Justice Flick identifies in his judgment, the goals of the section are easy to define but almost impossible to enforce. No judicial officer so far had been able



“One would have thought there were some terms the company could have articulated ... that would have been better than having FWA make the decision about the terms of the enterprise agreement for them.”

to force someone to bargain or negotiate fairly or in good faith. If a person (employer) refuses to do what someone else thinks is fair, then the courts must decide what is fair. This is their legitimate role. Put another way, while courts can impose outcomes on the substantive issue (the terms of an enterprise agreement), they are not so good at moderating behaviour. Indeed, the only sanctions for behaviour that does not meet societal standards, as his Honour demonstrated, are prohibition or incarceration, and these are not available under s.228 of the *Fair Work Act*.

That does not mean that provisions like s.228 are of no benefit, nor that decisions about it do not assist us in deciding what is good faith. Clearly the court decided that a refusal to countenance any terms that might be acceptable in an enterprise agreement (as Endeavour Coal were saying when they honestly articulated that they did not want to have an enterprise agreement) is not acceptable and should not be acceptable. Everyone has a duty to try to reach agreement and not capriciously use the courts to delay or for an ulterior purpose – a discussion that is

presently being vigorously debated in the *Ashby v Slipper* litigation in the Federal Court.

FWA will some day arbitrate the substantive dispute under s.240 of the Act, which provides that a bargaining representative may apply for FWA to deal with a dispute if the dispute cannot be resolved and, in some cases, whether or not the other bargaining representatives for the agreement have agreed to the making of the application. If the bargaining representatives have agreed that FWA may arbitrate the dispute, FWA may do so.

Endeavour must have known that, if there were no negotiated terms for an enterprise agreement, the FWA would impose them. A very important issue for parties to consider in such bargaining is what will happen if there is no agreement. While this question cannot be answered without some ambiguity (or a crystal ball), the possibilities are there for all to see. One would have thought there were some terms the company could have articulated, no matter how unacceptable they may be to APSEMA and its members, that would have been better than having FWA make the decision about the terms of the enterprise agreement for them. By taking a stance that they would not articulate any terms, the company was leaving itself open to FWA to decide in a way that does not address its needs at all.

Other legislation deals with this sort of impasse by providing for offers of compromise, or costs orders for the recalcitrant bargainer. Perhaps the *Fair Work Act* should provide some other consequences that make the risk of not bargaining more onerous, supports the intention of the Act and is more likely to avoid pointless and expensive litigation. While legislation can exhort people to bargain, it does not make sense for it to, nor can it, force them to agree. Absent an agreement, a court can and should decide as quickly and cheaply as possible.

To put it another way: when faced with the Knights of Ni,⁶ there is a need for us to know what “it” is that causes pain or consequence (Fisher and Ury⁷ call it the “alternative to a negotiated agreement”). The clearer the consequence, the more likely there will be a deal. If there is no deal, then the fair way to break the impasse is for a court or an arbitrator like FWA to decide. □

ENDNOTES

1. *Endeavour Coal Pty Limited v Association of Professional Engineers, Scientists and Managers, Australia* [2012] FCA 764 (19 July 2012) at [39].
2. Visit www.youtube.com and search for ‘Monty Python Harry the Haggler’.
3. *Aytugrul v The Queen* [2011] HCA.
4. Unless the retirement speech of Justice Michael Kirby, as he then was, is considered a judgment.

5. Above n.1 at [10].

6. A band of Monty Python knights associated with the use of words endowed with mysterious powers, including the word “it”, which caused them severe pain.

7. R. Fisher, and W. Ury, *Getting to yes: Negotiating agreement without giving in*, Penguin Group, 1981. □