THE ROLE OF THE 'GENUINELY TRY TO REACH AGREEMENT' REQUIREMENT IN THE PROTECTED INDUSTRIAL ACTION REGIME UNDER THE FAIR WORK ACT 2009

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The requirement genuinely to try to reach an agreement (GTRA) is one of a number of criteria that employees must satisfy before they can take protected industrial action in the course of enterprise negotiations under the Fair Work Act 2009 (Cth). *It is tested before the FWC in the process of making a Protected Industrial Action Ballot Order (PABO), and such an order cannot be made unless the FWC is satisfied that the requirement has been complied with. While there is a well-developed jurisprudence on the meaning of GTRA, there have been no attempts to study how the requirement operates in practice. To address this gap in the literature, this article draws on qualitative and quantitative analysis of PABO applications, and interviews with stakeholders including unions, employers and members of the Fair Work Commission. The analysis of this data demonstrates that the success rate of PABO applications is very high, with few PABO applications being contested by employers and even fewer being rejected by the FWC on the basis that the application has failed to meet the GTRA requirement. However, while few PABO applications are denied on this ground, the empirical findings also suggest that the GTRA requirement plays a signalling role in the enterprise bargaining regime, helping to establish accepted norms of conduct by trade union bargaining representatives seeking to take protected industrial action.*

Introduction

The *Fair Work Act 2009* (Cth) (FW Act) sets out a number of criteria that must be satisfied before employees can take protected industrial action to promote their interests in the context of negotiations for an enterprise agreement.[1] These include that the bargaining representatives of the employees concerned apply for and obtain a 'protected industrial action ballot order' (PABO) from the Fair Work Commission (FWC). Before making such an order, the FWC must be satisfied as to a range of matters, including that the parties have been, and are, genuinely trying to reach an agreement at the enterprise concerned (GTRA).[2]

[1] These pre-requisites are set out in FW Act ss 409, 413-414, see further Breen Creighton, Catrina Denvir and Shae McCrystal, 'Strike ballots and the law in Australia' (2016) 29 *AJLL* 154.
[2] FW Act s 443(1)(b).

This requirement has been in place in one form or another since the introduction of the concept of protected industrial action in 1993.[3] There is, in consequence, a well-developed jurisprudence on the *meaning* of GTRA, although there have been very few cases on the matter in recent years. In terms of the *operation* of the GTRA requirement, there is a lack of evidence as to how it operates in practice – especially given that the great majority of PABO applications are now dealt with on the papers instead of by hearing,[4] and that few applications are denied.[5] Further, there have been no empirical studies of its practical operation.

This article fills this gap in the literature by addressing two key questions: first, how significant a role does the GTRA requirement play in the process for obtaining a PABO from the FWC? Second, what impact does the GTRA requirement have on day to day union bargaining behaviour and decision-making practices? To answer these questions empirically, this article draws on analysis of a database of 1302 PABO applications made to the FWC from July 2015 – June 2016, 85 semi-structured interviews with PABO applicants, employer respondents and other stakeholders, and qualitative content analysis of 30 sample PABO applications. The analysis will provide insights into the extent to which the GTRA requirement serves the stated objectives of the PABO provisions, which are to 'establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected action for a proposed enterprise agreement'.[6]

The article commences with an historical overview of GTRA and good faith bargaining (GFB) requirements, demonstrating the role that GTRA has played in the enterprise bargaining system to date. It then describes the research methodology and the empirical findings. It concludes with an evaluation of the operation of the GTRA requirement in light of the empirical findings.

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[3] *Industrial Relations Act 1988* (Cth) (IR Act) (as amended 1993) ss 170PI, 170PO(1); *Workplace Relations Act 1996* (Cth) (WR Act), as amended 1996: ss 170MP, 170MW(2)(a-b), as amended 2006: ss 430(2), 461(1)(a-b); *Fair Work Act 2009* (Cth) (FW Act) s 443(1).

[4] Until January 2017, it was for the rekevant FWC member to determine whether to hold a hearing or determine a PABO application on the papers, and practice amongst members differed. As appears below, from 1 January 2017 all PABO applications are determined on the papers, unless a hearing is required (principally in cases where the PABO application is contested).

[5] Breen Creighton, Catrina Denvir, Richard Johnstone and Shae McCrystal, 'Protected Industrial Action Ballots: An Empirical View' (2018) 60(1) *Journal of Industrial Relations* 53.

[6] FW Act s 436.

Legislative Context

The statutory provisions – historical overview

A requirement that employee representatives try to reach agreement before taking protected industrial action was first included in the *Industrial Relations Act 1988* (Cth) (IR Act) in 1993 as part of the package of reforms which introduced the modern enterprise agreement system, including, for the first time, the capacity lawfully to take industrial action in the course of enterprise bargaining negotiations.[7] The requirement was intended to ensure that employees and their representatives engaged in negotiation prior to taking protected industrial action.[8] Industrial action would not be protected unless the negotiating party had first 'tried to reach agreement' with the other party or parties to negotiations.[9] Further, where protected industrial action was proposed or taken, and the relevant bargaining party was not GTRA with the other negotiating party, the federal tribunal (the then Australian Industrial Relations Commission (AIRC)) could, on application by another party to the bargaining, make an order suspending or terminating the relevant bargaining period, thereby ending the capacity of the party to take protected industrial action.[10]

The 1993 Act also enabled the AIRC to make orders for the purpose of ensuring that 'the parties negotiating an agreement do so in good faith'.[11] However, restrictive interpretation of this provision meant that it was largely redundant in practice.[12]

The IR Act was extensively amended in 1996. The changes included changing its name to the *Workplace Relations Act 1996* (Cth) (WR Act).[13] They also included amending the requirement that a negotiating party try to reach an agreement before taking protected industrial action to

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[7] The *Industrial Relations Reform Act 1993* (Cth) introduced new Part VIB, Division 4 to the IR Act. For discussion see Greg McCarry, 'Sanctions and Industrial Action: The Impact of the Industrial Relations Reform Act' (1994) 7 *AJLL* 198.
[8] EM, Industrial Relations Reform Bill 1993, Parliament of the Commonwealth of Australia, House of Representatives, 63.
[9] IR Act (amended 1993) s 170PI.
[10] Ibid s 170PO(1)(a) and (2).
[11] Ibid s 170QK.
[12] *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union* (1995) 59 IR 385; see Richard Naughton, 'Bargaining in Good Faith', in Paul Ronfeldt and Ron McCallum, *Enterprise Bargaining: Trade Unions and the Law*, Federation Press, 1995, 84; Aaron Rathmell, 'Collective Bargaining After Work Choices: Will "Good Faith" Take Us Forward with Fairness?' (2008) 21 *AJLL* 164 at 177-181.
[13] *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

provide that the negotiating party must have 'genuinely' tried to reach agreement before taking the action,[14] whilst GTRA was retained as a ground on which the AIRC could suspend or terminate a bargaining period.[15] The good faith bargaining requirement was repealed.

In applying the GTRA requirement, the AIRC emphasised that this involved questions of 'fact and degree' and an 'even handed assessment of the industrial context, of demands, conduct and character of the negotiators and negotiations' to evidence a genuine effort to reach agreement with the party against whom the industrial action was targeted.[16] It was also observed that the more negotiating occurred on an all or nothing basis, 'the greater the likelihood that it should be found to fail' the GTRA requirement.[17] In *MEAA v North Coast News Pty Ltd*, a Full Bench of the AIRC noted that the substance of the GTRA requirement had a similar emphasis on assessment of circumstances, context and reasonableness as the concept of bargaining in good faith in the United States context.[18]

This iteration of the GTRA requirement applied until the passage of amendments to the WR Act in 2006 which included a new mandatory pre-strike ballot pre-requisite for employees and their representatives to take protected industrial action.[19] To obtain an order for a pre-strike ballot from the AIRC the applicant had to be, and have been, 'genuinely trying to reach agreement' at the enterprise concerned.[20] GTRA also remained an independent pre-requisite for all action to be protected,[21] and a ground for suspension or termination of a bargaining period.[22]

The inclusion of GTRA as a pre-requisite for a ballot order prompted a number of decisions on its meaning, as employers began routinely to oppose ballot applications.[23] The cases clustered around two main issues. First were cases similar to those that arose under the pre-existing

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[14] *Workplace Relations Act 1996* (Cth) (as amended 1996) s 170MP.
[15] Ibid s 170MW(2).
[16] *MEAA v North Coast News Pty Ltd* (2003) 123 IR 326, 338. See also *Australian Airline Flight Engineers Association v Ansett Australia Ltd* (2000) 102 IR 162; *Australasian Meat Industry Employee's Union v O'Connor* (1999) 91 IR 356.
[17] *AIG v AFMEP&KIU* (Unreported, AIRC, Munro J, 16 October 2000, PT1982).
[18] (2003) 123 IR 326, 340 (Munro J, Leary DP and O'Connor C).
[19] WR Act (as amended 2006), Part 9, Division 4, 'Secret ballots on proposed protected industrial action'. See Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *AJLL* 198.
[20] WR Act (as amended 2006) s 461.
[21] WR Act (as amended 2006) s 444.
[22] WR Act (as amended 2006) s 430(2).
[23] Under WR Act s 450 (as amended 2005), employers were automatically treated as a party to all applications to for ballot orders.

provisions focused on the bargaining conduct of the ballot applicant. What tactics were adopted, how long had bargaining been underway, and where was the line between 'hard' bargaining, and bargaining which demonstrated a lack of intention to reach an agreement?[24] Consideration was also given to the claims themselves, including how precisely they were articulated,[25] and their nature – were the claims something any employer could agree to, or were they so unreasonable as to suggest a lack of genuineness?[26]

The second group of cases focused on whether the ballot applicant was seeking to take protected industrial action to support claims that could not lawfully be included in an agreement under the WR Act. The significance of this issue was highlighted in *Electrolux Home Products Pty Ltd v AWU*.[27] In that case it was determined that industrial action could not be protected if it was taken in support of claims that were not capable of inclusion in an agreement – for example, because they dealt with 'non-permitted matters'. The 2006 Work Choices amendments (and associated regulations) significantly expanded the range of matters that could no longer be dealt with in agreements,[28] with the consequence that pursuing claims for prohibited content, either in the agreement itself or in a separate side agreement, evidenced the fact that the applicant was not GTRA.[29]

The case law suggests that the GTRA requirement played a dual role under the WR Act. First, it operated as a de facto good faith bargaining requirement for unions, ensuring that where they took protected industrial action their conduct was focused on the relevant agreement and not motivated by other concerns.[30] Second, it was a means of regulating the content of enterprise agreements by denying access to protected industrial action to unions seeking agreement on matters beyond what constituted permitted content.

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[24] See eg *LHMU v CSBP Ltd* [2007] AIRC 469.
[25] See eg *MUA v Total Marine Services Pty Ltd* (2009) 190 IR 257.
[26] See eg *MEAA (WA) v Western Australian Ballet* [2007] AIRC 139.
[27] (2004) 221 CLR 309.
[28] WR Act (as amended 2005) s 356.
[29] See eg *NUW v Blue Circle Transport Pty Ltd* [2006] AIRC 495; *United Firefighters' Union of Australia v Country Fire Authority* (2006) 158 IR 120.
[30] See Anthony Forsyth, ''Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work' in Anthony Forsyth and Andrew Stewart, *Fair Work: The New Workplace Laws and the Work Choices Legacy*, Federation Press, 2009, 120 at 137-9.

The FW Act and the GTRA requirement

In 2009, the WR Act was replaced by the FW Act, and the AIRC was replaced by Fair Work Australia (later re-badged as the Fair Work Commission (FWC)).

Enterprise agreement-making is governed by FW Act Part 2-4, which has the stated object of providing a 'simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits'.[31]

Under the WR Act, there was no mechanism other than protected industrial action that employees could use to compel an employer to enter into negotiations. Further, where bargaining did occur, the absence of a good faith bargaining requirement meant that there were no mechanisms to challenge poor bargaining conduct other than GTRA where industrial action was involved.

The FW Act introduced a recognition procedure in the form of majority support determinations (MSD), whereby employers can be required to bargain in good faith for an agreement where a majority of employees want to bargain.[32] The FW Act also re-introduced GFB requirements applying to all bargaining representatives during bargaining, irrespective of whether protected industrial action is in contemplation.[33] Once bargaining has commenced, or certain triggering events have occurred,[34] bargaining representatives must meet the GFB requirements in s 228 which require bargaining representatives to attend and participate in meetings; disclose relevant information in a timely manner; respond to proposals in a timely manner; give genuine consideration to proposals and give reasons for responses; refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining; and recognise and bargain with the other bargaining representatives for the agreement. However, bargaining representatives do not have to make concessions or reach an agreement.[35]

[31] FW Act s 171(a).
[32] FW Act ss 236-237.
[33] FW Act s 228(1). For discussion see Breen Creighton and Pam Nuttall, 'Good Faith Bargaining Down Under' (2012) 33 *Comparative Labor Law and Policy Journal* 1.
[34] These include the making of a MSD, a scope order, a low-paid bargaining authorisation or the issue by an employer of notices of the right to be represented – FW Act s 173(2).
[35] FW Act s 228(2).

Bargaining representatives engaged in agreement negotiations may apply under FW Act s 229 for a 'bargaining order' under s 230 against conduct alleged to breach the GFB requirements. Since their introduction, orders in respect of GFB have been sought relatively frequently by bargaining parties, with an average of 95 applications made each year since the FW Act commenced.[36] Breach of a bargaining order is a civil penalty offence under the FW Act, although there have been few, if any, applications to the Federal Court seeking the imposition of penalties, or other relief, in respect of breaches of such orders.[37]

Serious and sustained breaches of bargaining orders can potentially result in the making of a 'serious breach declaration' by the FWC under s 235. This in turn can lead to the imposition of an arbitrated outcome in the form of a 'bargaining related workplace determination' (BRWD). At the time of writing, no application had yet been made to the FWC for a serious breach declaration, let alone for a bargaining related workplace determination.

The industrial action provisions of the FW Act are separate from those relating to agreement making, and are set out in Part 3-3 of the Act. The stated object of Division 8 is to 'establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected action for a proposed enterprise agreement'.[38]

Section 443(1) retains the GTRA requirement as a pre-requisite for making a PABO. It is also retained as an independent pre-requisite for protected industrial action,[39] but it is no longer a ground for the suspension or termination of protected industrial action.[40]

Following the enactment of the FW Act, there was a flurry of employer challenges to PABO applications on the ground that the PABO applicant was allegedly not GTRA. The decisions in

[36] This average is taken from data contained in the Annual Reports of Fair Work Australia and the Fair Work Commission from 2009 – 2017.
[37] Compliance with bargaining orders was unsuccessfully challenged in *Australian Mines and Metals Association Inc v The Maritime Union of Australia* [2015] FCA 677 (3 July 2015). For discussion see Breen Creighton, 'Getting to the Bargaining Table: Coercive, Facilitated and Pre-Commitment Bargaining' in Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining Under the Fair Work Act*, Federation Press, Sydney, 2018, 25 at 37-38.
[38] FW Act s 436.
[39] FW Act s 413(3).
[40] This change is more apparent than real because any industrial action taken where a bargaining representative has failed to meet the GTRA requirement would by definition be unprotected industrial action.

these cases helped establish the parameters of the GTRA requirement within the framework of the new bargaining regime.

The critical decision is that of a Full Bench of FWA in *Total Marine Services Pty Ltd v MUA*,[41] which found that the tribunal must make a finding of fact by reference to the state of the negotiations, and all other relevant circumstances. In doing this the tribunal is required to consider: the steps taken to reach agreement; the extent to which claims are communicated; the provision of considered responses to claims; and the extent to which bargaining has progressed.[42] Hard bargaining is permitted, and parties do not have to compromise on claims to demonstrate GTRA, although intransigence in bargaining may, depending on the circumstances, suggest a lack of genuineness.[43]

The GTRA requirement must be applied to each ballot applicant in the circumstances of their application. Some cases suggested that an applicant for a PABO could not satisfy GTRA if they had raised non-permitted claims during bargaining for that agreement.[44] However, this approach was rejected by a Full Bench of the FWC in *Esso Australia v AMWU*,[45] which affirmed that there is no one type of behaviour or approach to bargaining that will conclusively demonstrate that an applicant is or is not GTRA. The inclusion of non-permitted claims during bargaining may be a factor that indicates that an applicant is not GTRA but is not determinative.[46]

An issue that has created confusion in the case law is the relationship in the FW Act between GTRA and the GFB requirements. The GFB requirements in s 228(1) set out procedural and substantive measures of conduct with which bargaining representatives must comply during agreement negotiations. They govern essentially the same conduct by bargaining representatives as GTRA,[47] without being confined to instances where industrial action is proposed or taken. Bargaining in good faith does not require the parties to reach an agreement but does require bargaining parties to approach negotiations with 'an open mind as to the prospect of ultimately

[41] [2009] FWAFB 368.
[42] The Coalition Government tried to codify these elements of GTRA through proposed amendments in the Fair Work Amendment (Bargaining Processes) Bill 2014. The Bill lapsed with the 2016 dissolution of Parliament.
[43] See eg *Ford Motor Co of Australia Ltd v CEPU* (2009) 190 IR 300; *NUW (NSW) v ACCO Australia Pty Ltd* [2009] FWA 226.
[44] *Australia Postal Corporation v CEPU* (2009) 189 IR 262; *Airport Fuel Services Pty Ltd v TWU* [2010] FWCFB 210.
[45] [2015] FWCFB 210.
[46] Ibid.
[47] *Total Marine Services Pty Ltd v MUA* [2009] FWAFB 368, [33].

reaching agreement'.[48] This is similar to what is required to satisfy GTRA, although GTRA requires an actual subjective intention to agree.[49] Despite this overlap between the concepts, the FW Act does not attempt to integrate them and a Full Bench of the FWC has emphasised that the concepts are distinct.[50]

It is not clear why the GTRA requirement was retained now that the FW Act contains formal GFB requirements. The FW Act explanatory material offers no guidance on the matter. A partial explanation may, however, be found in the fact that during the 2007 election campaign the Australian Labor Party (ALP) responded to Coalition assertions that it was too close to the union movement and that industrial chaos would return under an ALP government by repeatedly emphasising that its industrial legislation would contain 'clear tough rules' on industrial action.[51] The removal of a substantive conduct requirement in respect of protected industrial action may have been perceived not to be congruent with such an approach.

Once the FW Act regime had settled in, employer challenges to PABO applications based on GTRA have become comparatively rare. The cases that do arise are focused either on bargaining conduct, as a parallel form of good faith bargaining obligation, and those which involve a challenge to the nature of the terms sought to be included in enterprise agreements by union bargaining representatives.[52]

Methodological Overview

The foregoing suggests that the *meaning* of the GTRA requirement is clear as a matter of principle. This article focusses on how the requirement operates in practice. This is particularly important in light of the adoption of the pratice of assessing PABO applications, including the

[48] *Endeavour Coal Pty Ltd v APESMA and FWA* (2012) 206 FCR 576, [34].
[49] See Shae McCrystal, 'Protected Industrial Action, Recognition and Bargaining in Good Faith under the Fair Work Act 2009' in Breen Creighton and Anthony Forsyth, *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective*, Routledge, 2012, 114 at 125-128.
[50] *Esso Australia Pty Ltd v AMWU* [2015] FWCFB 210, [18].
[51] Kevin Rudd and Julia Gillard, *Forward with Fairness, Labor's Plan for Fairer and More Productive Workplaces*, April 2007, 16. As to the Coalition campaign, Muir outlines an attack ad with a voice over that said 'Want to go back to teachers' strikes, petrol strikes, airline strikes, bus strikes, train strikes, wharf strikes? Don't go back to Labor and the unions', Kathie Muir, *Worth Fighting For: Inside the Your Rights at Work Campaign*, UNSW Press, 2008, 160.
[52] A recent example is *United Voice v Castlemaine Perkins Pty Limited T/A Lion* [2017] FWC 4951.

GTRA requirement, 'on the papers', and the introduction of GFB provisions whose field of operation substantially overlaps with that of the GTRA requirement.

In this context, the article addresses two key research questions:

1. How significant is the role of the GTRA requirement in the process of obtaining a PABO from the FWC? and

2. What impact does the GTRA requirement have on day to day union bargaining behaviour and decision-making practices?

The first research question considers the impact of the requirement placed on a PABO applicant to satisfy the FWC that they have been, and are, GTRA at the time of the application. To analyse this question, the discussion will consider how often PABO applications are opposed on the basis of GTRA, the success rate of such objections, and FWC practice in considering applications This will provide evidence of the impact of the GTRA requirement in relation to the operation of the PABO process.

The second research question considers the normative impact of the GTRA requirement on day to day union bargaining behaviour and decision-making practices. In particular, the analysis will explore the length of time spent negotiating and the number of meetings held prior to a PABO application being submitted, the perceptions that unions hold as to what amount of bargaining is necessary prior to a PABO application being submitted, and the evidence that unions provide to the FWC in order to demonstrate that they have met the GTRA requirement.

To analyse these questions, this article draws on mixed methods research, involving analysis of quantitative data drawn from a database of PABO applications, and qualitative semi-structured interviews with PABO participants and FWC members, in conjunction with qualitative content analysis of sample PABO applications. The empirical findings are then used as a basis for evaluating whether the GTRA requirement is operating as an effective means of achieving the stated objectives of the PABO regime as outlined above.

Quantitative statistical data was drawn from a database capturing information relating to all PABO applications submitted to the FWC during the period 1 July 2015 to 30 June 2016 (n =

1302).[53] The database was hierarchical in nature, with PABO applications nested within 'negotiations' for single-enterprise agreements. This database included information about how many PABO applications were successful and how many were contested and on what grounds, allowing for simple statistical analysis of PABO success rates, and in particular rates of contest based on GTRA.

30 PABO applications in the database were subjected to a qualitative content analysis in order to assess the evidence PABO applicants are required to adduce to satisfy the GTRA requirement. ,. These applications were randomly selected and contained a cross-section from different industries/sectors, bargaining representatives and FWC registries.[54] At the time of the study, question 4.1 on the PABO application form (F34) asked: 'Describe how you have been, and are, genuinely trying to reach agreement'.[55] The sample applications were qualitatively analysed with respect to the form and substance of information provided to answer question 4.1.

To contextualise the findings, further qualitative data were drawn from 74 in-depth semi-structured interviews undertaken with applicants and respondents to PABO applications submitted during the reference period.[56] Participants were asked to share their experiences of engaging with the regulatory framework.[57] Participants were not specifically asked to discuss GTRA but were asked to give a short background to the negotiations prior to the application for PABO. The focus of questions for employee bargaining representatives was the decision to apply for a PABO, and the focus of employer questions was their response to a PABO application.

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[53] Full details relating to the variables extracted from each data source and the methodological approach adopted can be found in Breen Creighton, Catrina Denvir, Shae McCrystal and Richard Johnstone, Protected Action Ballots and Protected Industrial Action Under the Fair Work Act: The Impact of Ballot Procedures on Enterprise Bargaining Processes – Methodological Approach (October 25, 2016). Available at SSRN: https://ssrn.com/abstract=2858757.

[54] SPSS software was used to obtain the sample, and it includes applications from each FWC registry except for Canberra (Adelaide, Brisbane, Hobart, Melbourne, Perth and Sydney).

[55] As of January 2017, all PABO applications had to be accompanied by a Statutory Declaration setting out the grounds on which the applicant believed that they had satisfied the statutory requirements for an order: *Fair Work Commission 2016-2017 Annual Report: Access to Justice*, Commonwealth of Australia, 2017, 67.

[56] PABO applicants were union officials who were either: (a) directly involved in the negotiations with an employer for an enterprise agreement; or (b) union legal officers who took responsibility for submission of the PABO application and the legal process governing the granting of a ballot order (including appearing at a FWC hearing where necessary). PABO application respondents were employer representatives (typically HR Managers or small business owners) involved in negotiations with union officials for a single-enterprise agreement.

[57] The interview questions explored the factors influencing decisions to apply for PABOs; perceptions of the state of negotiations at the time of the application; perceptions of why PABO applications and resultant ballots are successful or unsuccessful; and factors influencing the time between an application to the FWC, the conduct of the ballot and any subsequent industrial action.

The 74 interviews included 16 sets of interviews (32 in total) with the employer and a union from the same negotiations, one set of interviews (three in total) in which two unions and one employer were interviewed from the same negotiations, nine single employer interviews and 30 single union interviews. The 74 interviews related to approximately 713 PABO applications, covering 54.76% of the sample.[58] Interviewees typically spoke 'globally' about negotiations rather than confining their comments to a specific PABO application. In total, the interviews covered 55 sets of agreement negotiations, or 13.78% of the total number of negotiations for which one or more PABO applications were submitted during the July 2015–June 2016 period.

Qualitative data was also drawn from seven interviews with members of the FWC. The interview questions for these respondents explored FWC processes and practices in respect of PABO applications, drawing on respondents' specific expertise. This provided context specific information in respect of FWC practices.

Bargaining representatives were contacted via email in the first instance. Where an interview with a PABO applicant or respondent had been arranged, additional effort was made to engage the other side. Where permission was granted (in all but three cases), interviews were recorded via digital voice recorder. All audio recordings were later transcribed in full for analysis. Interviews were generally of approximately 40 minutes in duration. The interviews were coded thematically and analysed with the assistance of NVivo software.

PABO Applications and the GTRA Requirement

To ascertain how significant a role the GTRA requirement plays in the process for obtaining a PABO, it is important to ascertain how often applications are opposed on the ground that the applicant has not satisfied this requirement, and how often such objections are successful. The project data show that such objections are comparatively few and far between, and very rarely

[58] The reason for the disparity between the number of interviews and the number of PABO applications to which those interviews pertained is that some negotiations gave rise to more than one ballot application. The large disparity in the data set related to multiple PABO applications submitted in the context of employers bargaining under a single interest authorisation (see FW Act Pt 2-4, div 10). A single interest authorisation allows related employers to negotiate together as a single interest employer for a single-enterprise agreement. However, this does not bind the employees of those enterprises who may choose to pursue negotiations and industrial action at each separate enterprise. In the study reference period, 740 PABO applications were received in respect of five single-enterprise agreement negotiations involving single interest employers.

succeed where they are raised. Indeed, the data show that PABO applications are rarely rejected on *any* ground.

During the twelve-month study period, 1302 PABO applications were made to the FWC pertaining to negotiations in respect of 399 enterprises or ventures.[59] Of these applications:

- 1254 (96.4%) were approved;
- 6 (0.5%) were not approved;
- 42 (3.2%) were withdrawn by the applicant before an order was made.[60]

Of the 1254 applications that were approved by the FWC, 1203 proceeded to ballot. 51 applications were withdrawn after an order was made, but before a ballot was conducted, and a further three were withdrawn after the ballot had been conducted.[61]

Only six PABO applications out of the 1302 made during data collection were refused by the FWC.[62] Employers did, however, contest a total of 280 applications over this period. Of these applications, 228 related to applications lodged in relation to the Queensland Schools single enterprise agreement authorisation, and were directed at the legality of the bargaining representative submitting separate applications for each school involved in the negotiations. All of the Queensland applications were approved. A further 51 PABOs were contested based on one or more of the following grounds:

- Failing to notify the employer of the application (n = 2)
- Requests for longer notice periods for proposed industrial action (n = 18)
- Objection to industrial action question formulation (n = 13)
- Good faith bargaining concerns (n = 2)[63]
- Failure to meet the GTRA requirement (n = 22)

[59] See above n 58 for an explanation of the difference between the number of PABO applications made and the number of enterprise negotiations to which they related.
[60] This figure was reached based on inference of withdrawal where no PABO order could be found by the investigators and/or a withdrawal order was located. It is possible that in some cases an order was made which was locatable through public searches before the PABO application was withdrawn.
[61] For further analysis see Creighton et al, above n 5.
[62] The authors previously reported (ibid) that five PABO applications in the study had been rejected by the FWC. This information was correct at the time of publication, however subsequent developments have resulted in the inclusion in the data of an additional FWC rejection.
[63] *AMEIU v Hirino Pty Ltd t/a Gundagai Meat Processors* [2016] FWC 2125 (B2016/48) – the objection was later withdrawn; *TWU v Transdev NSW Pty Ltd and Or* [2016] FWC 1928 (B2016/394).

- Other (n = 10).

From this group of 51 PABO applications, two were withdrawn,[64] six were refused, and the remaining 43 were approved.

Looking specifically at the 22 PABO applications opposed by the employer based on GTRA, only four ultimately were refused by the FWC. Two of these were because the applicant had not met the GTRA requirement at the enterprise concerned,[65] one was refused because the notification time under which agreement-making commences under the FW Act had not passed,[66] and it was not possible to ascertain the reason for refusal of the fourth application.[67]

Both of the applications rejected by the FWC wholly or partly on GTRA grounds were re-applications made in the context of protracted disputes.

Australian Institute of Marine Engineers involved a re-application for a PABO in circumstances where an earlier PABO (which fell outside the study reference period) had been rejected on GTRA grounds.[68] The re-application was rejected by the FWC because while there was evidence that the union concerned had been meeting the GTRA requirement, at the time of the application there had been no bargaining meetings for over six months, and the union could not show that it was still meeting the GTRA requirement at the time of the application.[69]

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[64] A PABO application cannot be made to the FWC until after the 'notification time' for the agreement has passed (FW Act s 434(2A). In *MUA v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894 (B2015/1574) the PABO application was challenged because there had been no 'notification time' for the agreement. The application was withdrawn and does not appear to have been the subject of a new PABO application (or 'reapplication'). In *ANMF v Nillumbik Shire Council* [2016] FWC 3664 (B2016/557) the PABO application was challenged because the action to be included in the ballot was not 'industrial action' within the definition of that term in FW Act s 19. Although the PABO order was made, the application was subsequently withdrawn.

[65] *Australian Institute of Marine and Power Engineers* [2016] FWC 3495 (B2016/561); *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWC 4364 (B2016/581).

[66] *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWCFB 2878 (B2016/58). The CFMEU lodged another PABO in *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWC 4364 (B2016/581) with this later application being one of the two applications in the study that were refused based on GTRA grounds.

[67] The FWC order in this matter points to reasons for refusing the PABO outlined in the transcript which could not be found – *MUA v MMA Vessel Operations Pty Ltd*, PR575512, 24 December 2015 (B2015/1581). The applicant reapplied for a PABO, which the employer unsuccessfully opposed on the basis of GTRA at first instance, and on appeal (*MUA v MMA Offshore Vessel Operations Pty Ltd* [2016] FWC 2481 (B2015/1766; *MMA Offshore Vessel Operations Pty Ltd v MUA* [2016] FWCFB 3957 (C2016/4034)).

[68] *Australian Institute of Marine and Power Engineers v Mermaid Marine Vessel Operations Pty Ltd & Ors* [2014] FWC 3786 (B2014/606).

[69] *Australian Institute of Marine and Power Engineers* [2016] FWC 3495 (B2016/561).

CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang,[70] meanwhile, was a re-application in respect of two earlier PABO applications both of which had been rejected as the notification time had not passed.[71] The second application was brought after the notification time had passed, and was rejected by the FWC on the basis that the union was insufficiently genuine in its attempts to reach agreement, for reasons including, inter alia, the pursuit of matters that could not be included in an enterprise agreement.[72] A subsequent union appeal against this decision was unsuccessful.[73]

Both of these applications involved protracted disputes with employers who were motivated to oppose the PABO applications, and to appeal decisions of the FWC or contest appeals by bargaining representatives. Consequently, it is likely that these employers would have contested the lawfulness of any proposed industrial action by the bargaining representatives and employees concerned, irrespective of whether or not formal approval to ballot the workers concerned had first been obtained from the FWC . It seems unlikely that the existence of the PABO process itself made any practical difference to the outcome in these cases.

Overall, of the 22 PABOs where GTRA formed all or part of the basis for challenge by the employer, four were not approved, but only two were because of a failure to meet the GTRA requirement (and a further one may have been rejected due to GTRA concerns). This supports the proposition that although GTRA issues were raised by employers in 43% (22 of 51) of contested PABO applications, such objections very rarely led to rejection of the application.

A possible qualifying factor in this context is that a further 42 PABO applications were withdrawn by the applicant *before* any order was made. It is possible that some of these withdrawals were connected to a problem with GTRA. While it was not possible positively to establish the reasons for these 42 withdrawals, the qualitative data suggest that PABO applications may be withdrawn for a number of reasons, including problems with the application itself or the state of enterprise agreement negotiations to which the PABO application relates (for example where bargaining produces agreement before the PABO application is heard). It is also possible that withdrawal of a PABO application may be a tactical manoeuvre by a bargaining

[70] [2016] FWC 4364 (B2016/581).
[71] *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWCFB 2878 (B2016/58).
[72] *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWC 4364 (B2016/581).
[73] *CFMEU v AGL Loy Yang Pty Ltd t/a AGL Loy Yang* [2016] FWCFB 6332 (C2016/4415).

representative to influence progress in bargaining, for example where a bargaining representative withdraws an application in return for concessions from the employer. In addition, interviews with FWC members suggested that in at least some (rare) instances withdrawal resulted from a tribunal member raising concerns with the bargaining representative in relation to the GTRA requirement. The process may have also led to premature PABO applications being withdrawn because of likely failure to meet the GTRA requirement, but the evidence collected suggests that any such effect was marginal.

Fair Work Commission Processes and Practices

The decision as to whether a PABO applicant has met the GTRA requirement is made by individual FWC members. The member with responsibility for the decision must make the order sought if the statutory pre-requisites are met. This means that an order must be made if the member is satisfied that the application has been made in the approved form (FW Act s 437), that the notification time has passed, and that the applicant is GTRA (FW Act s 443).

Interviews with FWC members revealed differences in practice with respect to PABO applications. Several Commissioners indicated that their practice was to deal with PABO applications 'on the papers', unless the matter was contested by the employer. For example, one Commissioner stated that they dealt with 'the bulk of them on the papers' but if the application is contested by the employer, it would always be dealt with by way of a hearing so that the parties 'can be heard'.[74]

There were key differences between Commissioners in the level of engagement that they had with the parties. For instance, one member indicated that they had a policy of contacting employers to ask whether they objected to the making of a PABO order, and where employers did object, drilling down into the substance of the objection to determine if it had merit, noting:

> I'll usually call the matter on for objections hearing either by telephone or in person and enquire as to the nature of the objection. If it's not about either the notification time point or genuinely trying to reach an agreement then usually you can point out to the employer that these arguments have been run before and refer them to an appropriate case and

[74] FWC Interview 2.

indicate to them that it will take a lot of persuading for example, that that's a basis and usually they reconsider.[75]

The same Commissioner observed that they dealt with uncontested matters on the papers.[76]

Another FWC member indicated that their approach to PABO applications was immediately to prepare a draft order to give effect to the application and then to send that draft to the applicant and employer for comment. This Commissioner observed that objections or communication from the employer were usually resolved between the parties in a short period of time, and that this process occurred in 'probably 95% of all of the PABOs that I've had … it's normally readily apparent that they're genuinely trying to reach agreement and the like because they've [been] meeting for some time'.[77]

In contrast, another Commissioner indicated that they only dealt with a 'minority' of applications 'on the papers', and would instead use a telephone or Skype call to conduct a virtual hearing in most cases.[78] The Commissioner described this as a 'staged approach' that was responsive to the needs of the parties involved, noting that reasonably sophisticated employers were unlikely to object to PABO applications (provided they were properly made), but that more attention had to be paid to less sophisticated employers who either did not understand the process, or misunderstood the PABO requirements.[79] This 'educative' role with respect to employers who did not understand the process or who thought that a PABO could not be ordered if the parties were still in negotiation or not at 'impasse' was a common theme arising in the FWC interviews, indicating a lack of clarity on the part of some employer respondents to PABO applications with respect to the substance of the GTRA requirement.

On I January 2017, after data collection was complete, the FWC changed its procedures for dealing with PABO applications. The information that was previously dealt with in question 4.1 of Form 34 was moved to Form 34B. That Form consists of a statutory declaration as to the matters contained therein, facilitating the review of all PABO applications on the papers. This change aligns with the previous practice of many commissioners, and may in practice provide

[75] FWC Interview 3.
[76] FWC Interview 3.
[77] FWC Interview 4.
[78] FWC Interview 5.
[79] FWC Interview 5.

fewer obvious opportunities for employers to challenge PABO applications. It may also reduce the educative role played by some FWC members in respect of any lack of clarity from an employer respondent with respect to the content of the GTRA requirement and the legitimate grounds on which a PABO application may be contested.

How do PABO Applicants Satisfy the GTRA Requirement in Practice?

As noted above, the cases establish that to be GTRA, the bargaining representative must have a subjective intention to reach an agreement, and that all circumstances are relevant in determining this question, including progress in negotiations to date, the claims made by the parties, and behaviour at the bargaining table.[80]

The qualitative interviews and qualitative content analysis of 30 sample PABO applications indicate how the GTRA requirement is addressed in practice, demonstrating what bargaining representatives believe they need to do in enterprise agreement negotiations before making a PABO application to satisfy the GTRA requirement. Ballot applicants perceive that participation in a minimum number of meetings, taking steps to consider and respond to employer proposals, and advancing genuine claims, are centrally important to satisfy GTRA. The quantitative data reveal the length of time spent negotiating and the number of meetings held prior to an application being submitted. Close attention to these elements provides an indication of how GTRA influences bargaining processes in practice.

Participation in a minimum number of meetings

The FW Act does not require a prescribed number of meetings before a bargaining representative can apply for a PABO, but there was a general consensus among the union interviewees that in order to satisfy the GTRA requirement, it was necessary to participate in a series of bargaining meetings. There was no agreement as to the threshold number of meetings required; respondents emphasised that this would depend on the circumstances. For example one union interviewee stated that there was no 'cut off number', but 'ordinarily I would expect at least a couple of meetings'.[81] Another observed that 'normally, normally – and I'm not saying this is in every

[80] See text above accompanying nn 41-46.
[81] Interview 61, Union.

negotiation – but we ensure that we make sure that we have a minimum of about two to five meetings, you know, with the company to make sure that we're, we're bargaining, you know?'[82]

Content analysis of 30 sample PABO applications further indicates applicants' perceptions regarding the necessity of participating in bargaining meetings. The great majority of applications in the sample stated that the parties had met at least five times, suggesting (amongst other things) that many union representatives consider at least five meetings to be indicative of GTRA. However, two applications in the sample indicated that the parties had met only twice, which suggests that the bargaining representatives concerned considered that two meetings were sufficient to demonstrate GTRA in the circumstances of those particular cases. One of these two applications gave no explanation as to why the parties had not been continuing to meet and continue to negotiate, even though the most recent meeting date was more than two months prior to the form being submitted;[83] the other was submitted a month after the last meeting, and the meetings were spaced a month apart.[84]

Three applications that were submitted by the same union, to the same registry stated that the parties 'have formally met on no less than five occasions'.[85] Conceivably, the negotiations in all three instances had reached the point where it was necessary and appropriate to contemplate escalation to protected industrial action, and that by coincidence this point was reached after five meetings. It seems more likely, however, that the bargaining representatives concerned considered that this was the minimum number of meetings necessary to satisfy the GTRA requirement. This suggests that bargaining representatives establish their own internal negotiation time-limits/thresholds in respect of the potential timing of PABO applications.[86]

Quantitative analysis of PABO applications confirmed that the FWC does not proceed on the basis that there must be a specific number of meetings before an application will be approved.

Where it was clear from a PABO application how many meetings had taken place between the applicant and the employer, this information was recorded and analysed statistically. Of

[82] Interview 16, Union.
[83] PABO Application 16 (Brisbane registry).
[84] PABO Application 6 (Melbourne registry).
[85] PABO Applications 5, 9 & 12 (Melbourne registry).
[86] See eg J Z Rubin and B R Brown, *The Social Psychology of Bargaining and Negotiation*, Academic Press, 1975, 120.

approved PABO applications (n = 473), the mean number of meetings prior to a successful PABO application was eight (SD = 6), with a maximum of 33 and a minimum of 0.[87] Commonly ballots were submitted after between 4 and 7 meetings had taken place. This accounts for 42.5% of all approved ballots. A further 30.9% were approved after there had been between 8 and 14 meetings. However, the FWC also approved PABO applications both where very few (1–2) and a large number (15+) of bargaining meetings had taken place. 2.7% of PABO's were approved having recorded only one meeting, 5.7% were approved having recorded two meetings. At the other end of the spectrum, 12% of PABOs were approved having involved 15 or more meetings.

Time spent negotiating prior to application

The time between negotiations *commencing* and a PABO application being *submitted* spanned a minimum of eight days and a maximum of 1199 days (3.3 years). The mean number of days was 220 although this was coupled with a relatively high standard deviation (197.2 days) suggesting that the length of time varied considerably across the dataset.[88]

Figure 1 shows the average length of time spent negotiating prior to a PABO application being submitted.[89] It shows that just over a third of applications were submitted between three and six months after negotiations commenced, and a further 20 per cent between six and nine months.

[87] In two cases no meetings occurred and both applications were later withdrawn.
[88] These data represent PABO applications relating to unique 'sets' of negotiations. For this reason, the time duration for PABOs lodged in respect of the Queensland Schools Single Enterprise Agreement was counted only twice – once for the original ballots, and once for the re-ballots. Where a single enterprise agreement negotiation involved more than one union, these PABOs were counted individually. In these cases, the unions did not necessarily co-ordinate their PABO applications, leading to the timeframes between commencement of negotiation and PABO application potentially being different for each application.
[89] Months are calculated on the average of 30 days.

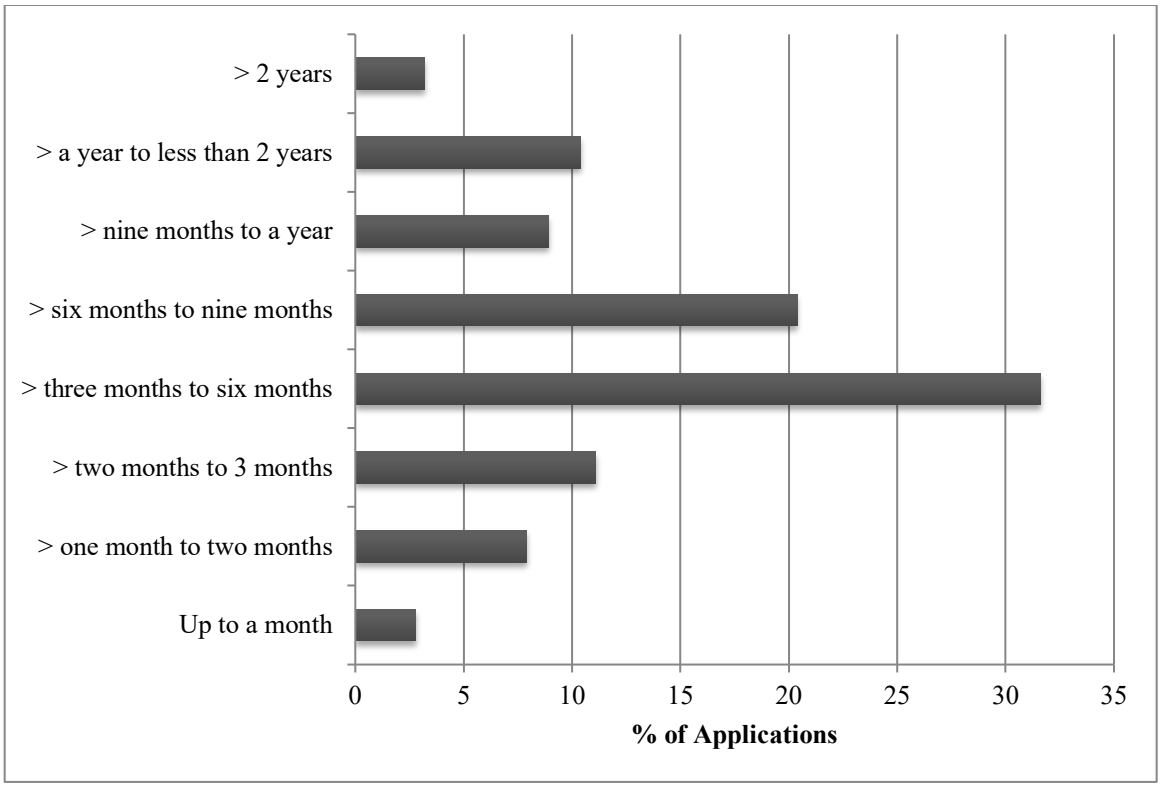

Figure 1. Length of negotiations prior to a PABO application being submitted

There did not appear to be any relationship between the length of time spent negotiating and the rate at which PABOs were approved. Indeed, the two applications for which approval was denied on the basis of a failure to demonstrate GTRA both involved more than 15 meetings, and between nine months and two years of negotiations.

It is possible that the number of meetings and time spent bargaining operate in tandem, to counterbalance the inferences that may be drawn from an examination of one metric in isolation. Bargaining that is short in duration (<3 months) might avoid an impression of not GTRA if the number of meetings held was reasonably high. A short period of bargaining coupled with a high number of meetings would suggest the actors were motivated to reach an outcome. Conversely, fewer meetings may not support adverse inferences if these meetings were conducted over a longer period of time. To explore number of meetings as a function of bargaining duration, a regression model was used to predict number of meetings on the basis of time spent negotiating (controlling for industry).[90] Notably, there was little variation in the number of meetings where

[90] A multilevel poisson regression model was used.

negotiations spanned 0─3 months prior to application and where negotiations spanned 6─9 months prior to application. Under the model, the predicted number of meetings for negotiations spanning 'less than 3 months' is seven, 'for 3 to less than 6 months' is eight, for '6 to less than 9 months' is seven and for over nine months is nine.[91] While the number of meetings increased where negotiations exceeded nine months, there was little variation in the number of times the bargaining parties met prior to making a PABO application when compared to the length of time they had been negotiating.

The analysis indicates that irrespective of whether parties take three months or nine months before making a PABO application, there is very little variation in the number of meetings that occur before a PABO application is made. This suggests that when PABO applications are lodged, negotiations tend to have reached a similar state irrespective of the length of time negotiations have been ongoing. In terms of industry differentiation, there were no statistically significant differences in meeting numbers, except in the case of Public Services and Utilities. In this sector, the mean predicted number of meetings prior to a PABO application was 11, presenting as slightly higher than other industries.[92]

Responding to employer proposals; providing genuine claims

The nature and content of the claims made in bargaining by the applicant, and the responses to employer claims were perceived by some union representatives to be important in the context of the FWC's assessment of whether they met the GTRA requirement. A failure adequately to engage with employer claims, the inclusion of grossly inflated claims or claims to which the employer could not realistically be expected to agree, or claims that cannot be included as part of an enterprise agreement under the FW Act, were seen by some interviewees as indicators that the bargaining representative had not met the GTRA requirement, and/or was seeking to use industrial action to achieve industrial objectives other than the conclusion of an enterprise agreement.

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[91] Under the model <3 months $\beta = -0.32$, $\chi^2_1=33.29$, $p <0.001$; 3 months to <6 months $\beta =-0.23$, $\chi^2_1=13.82$, $p<0.001$; 6 months to <9 months $\beta = -0.37$ $\chi^2_1=44.45$, $p<0.001$).

[92] Mean predicted number of meetings, simulating from the model, were: five for Building, Construction and Labour; seven for Health, Food Production & Manufacturing and, Metals, Mining, Oil and Gas; eight for Transport and Maritime; 10 for Education; and, 11 for Public Services/Utilities.

There was a well-developed understanding amongst union representatives of the need to consider and respond to proposals put by the employer. For example:

> [T]he important thing is that you've got to make sure you meet, you've got to make sure you, you know, you present your log of claims, you see if the company's got a log of claims and you go through that process, you know? [93]

> Well, I guess you've always got … the genuinely trying to reach agreement and not being capricious on those sort of things … And you've always got at the back of your mind, 'Well, we might eventually need to do a Protected Action Ballot application' so it's important we have, you know, we are able to say we've attended all the meetings and we've been, we've been, listened to the employer's claims and given it due consideration. [94]

In addition, some respondents stressed that as part of demonstrating 'willingness to bargain', unions must table a genuine set of claims. As one union representative explained: 'If I go in there with things that were unrealistic then this would indicate that I'm not trying to genuinely reach an agreement.' [95]

Both union and employer representatives drew a distinction between 'genuine' claims and inflated claims or an excessive number of claims that were used as a bargaining tactic. For instance, one union interviewee described their claims in the following terms:

> It's our position that our claims are genuine claims with respect to try to reach a genuine agreement. We're not asking for something like fifteen, twenty per cent over three years, we're asking for a very humble nine per cent. [96]

One employer representative referred to two different sets of enterprise agreement negotiations that they were involved in, contrasting 'genuine employee concerns' with bogus claims about which employees did not genuinely care:

[93] Interview 16, Union.
[94] Interview 49, Union.
[95] Interview 30, Union.
[96] Interview 20, Union.

> [In agreement A] you could see that the union was trying to reach agreement because they only had six items on their log of claims whereas [agreement B] had 24 … 24 items on the log of claims doesn't tell you that they're really keen to reach agreement quickly … I've had employees tell me I don't know why this is on our log of claims, we don't care about that. [97]

Analysis of a sample of PABO applications confirms the interview findings. At the time of the study, Form F34 provided the following prompt to applicants: 'Using numbered paragraphs, set out the relevant facts which support the application and provide description of the steps taken to try and reach an agreement with the Respondent. Attach additional pages if necessary'.[98]

All of the applications in the sample made some reference to having claims still in dispute, and attempts to respond to employer proposals. However, there was considerable diversity among the applications with respect to the level of detail provided, and the form in which the information was provided.

Four of the applications contained minimal detail and no specificity about the claims in dispute. One application simply included two short paragraphs, the first listed four meeting dates, and the second read: 'Negotiations have now reached a stalemate and [the applicant] seeks a Protected Action Ballot Order to further its members' claims'. Three identical applications submitted by the same union in the same jurisdiction state that the applicant 'served a log of claims', has 'formally met [with the respondent]' on 'no less than five occasions' to negotiate an agreement, and during that time, the applicant has 'changed its bargaining position, including removing or amending claims'.[99]

At the other end of the spectrum, 11 of the sample PABO applications contained extensive and highly detailed responses, ranging up to 36 paragraphs in length.[100] Typically, the more detailed applications contained a separate attachment addressing the GTRA requirement. In each

[97] Interview 23, Employer.
[98] Since January 2017, PABO applicants have been required to submit two forms – F34 and F34B. The prompt that was previously contained in Form F34 has been moved to F34B. The information is still collected, in the same form, and as such the current analysis remains relevant.
[99] PABO Applications 5, 9, 12 (Melbourne registry) (same union).
[100] PABO Applications 18 (Sydney registry), 14 (Melbourne registry), 15 (Melbourne registry), 19 (Brisbane registry), 28 (Brisbane registry), 2 (Sydney registry), 26 (Hobart registry), 29 (Adelaide registry), 3 (Melbourne registry), 20 (Sydney registry), 30 (Sydney registry).

instance, the attachment was a statement by a bargaining representative, written in the first-person, setting out the timeline of the negotiations, details of discussions, meetings and/or communications between the applicant and respondent, specific information about the claims in dispute, and specific efforts made to respond to offers.

The remaining applications in the sample contained a moderate amount of detail, noting meetings, describing in brief the claims still in contention between the parties (e.g. wages and allowances, rostering, superannuation), and indicating generally that there had been attempts to respond to employer proposals.[101]

The variation with respect to the level of detail provided may reflect the degree to which PABO applicants anticipate the potential for an employer to contest the application. It is logical to assume that in contexts where a specific employer has a history of objecting, or has indicated that they are likely to oppose the application, ballot applicants might provide greater detail to substantiate the GTRA requirement so as to pre-empt and deter a potential challenge by the employer.

Stakeholder Understanding of the GTRA requirement

Analysis of the qualitative data shows that there is overall a high level of understanding amongst bargaining representatives of the need to engage in a genuine bargaining process to satisfy the legislative requirements. However, reflecting the trend identified in the case law discussed above, the difference between the GFB requirements and the GTRA requirement was not always well understood in practice. Negotiating in good faith requires parties to comply with procedural requirements and maintain an open mind with respect to concluding agreement. The GTRA requirement requires a subjective intention to reach agreement, evidence of which may be drawn from the process of bargaining itself.

Some interview participants appeared to conflate GFB and GTRA, and used the terms interchangeably. As one union representative put it:

[101] PABO Applications 22 (Hobart registry), 4 (Sydney registry), 1 (Sydney registry), 27 (Brisbane registry), 6 (Melbourne registry), 7 (Sydney registry), 8 (Melbourne registry), 25 (Perth registry), 13 (Adelaide registry), 24 (Adelaide registry), 17 Melbourne registry), 10 (Hobart registry).

> So the legislation says the Commission must – and it's must – issue a protected action ballot order if the agreement has expired or within 30 days of expiry and you're negotiating in good faith. So we're very cognisant of the fact that you can demonstrate that you've been negotiating in good faith because it's essentially the only way the employer can stop you from going to a protected action ballot. [102]

Another union representative, when asked about whether the union was complying with the 'good faith bargaining requirements', interpreted this as a question about genuinely trying to reach agreement:

> Yes, we always are. We're very much trying to, if we can possibly reach agreement we'll always try and reach agreement without the need for industrial action. We only use it as a mechanism to try and close a gap essentially.[103]

Another union interviewee discussed the employer's ability to contest the PABO application not on the basis of whether the GTRA requirement was satisfied, but as a matter of whether the union had 'bargained properly'.[104]

Such confusion appears not to be limited to union bargaining representatives. One of the FWC members interviewed in this study explained that some employers have attempted to challenge PABO applications on the ground that the applicant had failed to meet the good faith requirements, observing that 'those two issues are conflated and it doesn't follow simply because somebody has refused to attend a meeting for example, that they are not genuinely trying to reach agreement'. [105]

A lack of conceptual clarity about the substantive content of the GTRA requirement may lead to delay for PABO applicants in two circumstances: where their application has not been sufficiently tailored to the statutory requirement; and where employers challenge PABO applications because of perceived failure to meet the good faith requirements rather than the GTRA requirement.

[102] Interview 66, Union.
[103] Interview 41, Union.
[104] Interview 22, Union.
[105] FWC Interview 3.

Employer Responses

One of the obvious questions raised by the very low rate of successful challenges to PABO applications on the basis of the GTRA requirement is why employers continue to oppose applications on that ground. One reason suggested by the discussion immediately above is that some employers misunderstand the GTRA requirement, and may be confused about the overlap between the GFB requirements and GTRA. Nevertheless it is clear that some employers had genuine concerns that the union bargaining representative applying for a PABO was not GTRA.

Analysis of the interview data suggests that employers may challenge PABO applications in order to 'run the clock down' to delay potential protected industrial action. A number of union representatives asserted that this was the case, whilst employer representatives tended to deny the practice. One employer interviewee did, however, expressly acknowledge using the tactic, noting that they intended to challenge an upcoming PABO application alleging failure to meet the GTRA requirement even though they knew the PABO would be granted. They observed that this would string proceedings out, 'and then I might get three more days, three more days is three more days when you've got [a large number of] people and they're building a plant, three more days might be three more days that I need'.[106]

In addition, the FWC members interviewed observed that a small number of employers strategically challenge ballot applications (while also noting that the majority do not). For example, one member stated:

> Yeah. [Employers game the system] Occasionally. I mean I have one at the moment. I won't identify it, but it's the same law firm that's arguing the same point in relation to this matter as it did six months ago in another matter. Which it failed. The complaint is always about, well bargaining should continue and if it continues then there's a prospect that the agreement will be made and so the union's insistence on taking industrial action is effectively then indicating that they're not genuinely trying to reach an agreement.[107]

[106] Interview 62, Employer.
[107] FWC Interview 3.

Discussion and Conclusion: The Practical Impact of the GTRA Requirement

This article has empirically examined the practical operation of the GTRA requirement. First, the article considered the significance of the role that the GTRA requirement plays in the process for obtaining a PABO from the FWC. Second, it considered the practical impact of the GTRA requirement on the day to day bargaining behaviour and decision making practices of trade unions when planning to undertake industrial action during negotiations for an enterprise agreement.

In respect of the first research question, the analysis demonstrated that the success rate for PABO applications made during the study period was remarkably high, and the rate of rejection of PABO applications on the basis that the GTRA requirement had not been met was exceptionally low. Only six applications out of the 1302 in the dataset were rejected by the FWC, and of those six, only two were rejected on GTRA grounds. In both these cases, the PABO applications were actively contested by the respondent employers. The statistical picture indicates that GTRA is not a significant ground of active contestation of PABO applications. Further, analysis of the data indicates that when considering whether an applicant has satisfied the requirements for a PABO the FWC is influenced predominantly by whether the employer lodges an objection, as opposed to the applicant's description of how they have been, and are, GTRA.

Employers are not party to a PABO application, but they are provided with a copy of each application that pertains to their employees, and are entitled to be heard in respect of, amongst other things, whether or not the applicant has satisfied the requirements for a PABO. This gives sufficiently motivated employers an opportunity to intervene and resist potential industrial action through opposing the application. In the two cases where the PABO application was rejected on GTRA grounds, the employers were highly motivated, prepared actively to contest the applications and appeal the outcomes. This may suggest that the PABO provisions are operating effectively to identify circumstances where proposed industrial action would not be protected by giving employers the opportunity to challenge whether a union is lawfully able to take protected industrial action. However, the inference may also be drawn that such highly motivated employers would act to challenge union behaviour and the lawfulness of proposed industrial

action without the prompting of a PABO application. Under FW Act s 413(3) industrial action will not be protected if the bargaining representative is not genuinely trying to reach agreement at the enterprise concerned, and an order from the FWC that actual or threatened unprotected industrial action stop or not occur may be obtained under s 417. If this remedy is already available to employers under the FW Act where a bargaining representative is not meeting the GTRA requirement, it might be questioned whether it is necessary to test GTRA as part of the balloting process to authorise proposed industrial action – especially in light of the extremely low rate of rejections of PABO applications on this ground.

A complicating factor in this analysis is that since January 2017 uncontested applications are dealt with by the FWC on the papers. Because this change occurred outside of the study period, it is not possible to express any decided view as to the impact the change might have on levels of opposition and success rates of PABO applications. The fact that this change has been adopted does, however, tend to confirm the earlier conclusion that there is nothing to suggest that FWC decisions in respect of the GTRA requirement are influenced by anything other than employer opposition to the making of an order. The new practice of statutory declarations will very likely enable PABO applications to be processed more efficiently where the bargaining representative's assertion that they have met the GTRA requirement is unchallenged.

The second research question considered the impact of the GTRA requirement on day to day union bargaining behaviour and decision-making. The case law analysed earlier in the article shows that the GTRA requirement has played a de facto GFB role in the enterprise bargaining system since its introduction in 1993, although restricted in operation to industrial actors seeking to take industrial action. It has also operated to police broader bargaining norms, particularly those relating to agreement content and the enterprise focus of negotiations.

These conclusions were confirmed by the statistical data and the qualitative analysis in this article, which demonstrate that the GTRA requirement has had a normative effect on the bargaining behaviour of union representatives by helping to establish generally understood standards of what is necessary in bargaining before industrial action can be accessed. Looking at bargaining conduct prior to the making of PABO applications, the analysis demonstrates that there is general consistency in the number of bargaining meetings before such applications are made. This says nothing about the quality of those meetings, or how seriously they are taken by

the parties. It does, however, suggest that PABO applicants do not for the most part 'rush' to the FWC or pursue PABO applications at a very early stage in negotiations. Further, for all PABO applications made in the first nine months of bargaining, there was considerable consistency in the number of bargaining meetings prior to PABO application. Whilst negotiations all seem to reach a similar point before an application is submitted, neither a small number of meetings nor a short time spent negotiating appear significantly to prejudice the likelihood of obtaining a PABO.

Further, it also appears that the GTRA requirement promotes self-policing behaviour on the part of bargaining representatives which enables them to demonstrate compliance when making a PABO application. The union interviews indicate a generally high level of understanding amongst union bargaining representatives as to what is required to meet the GTRA requirement and successfully to obtain a PABO. There was understanding of the need for bargaining parties to meet, to exchange claims, and to respond to the claims of the other side. There was little indication that union bargaining representatives sought to rush PABO applications. The GTRA requirement very clearly factors into the decisions made by union representatives in the lead up to a ballot application. If it is the case that unions self-police so as to minimise the risk of a failed PABO application, then it appears that the requirement plays a positive role in setting a reference point for the behavioural norms constraining the actions of bargaining representatives – although the project data do not make it possible to quantify the extent of that contribution.

This analysis is further complicated by the parallel role that the GFB requirements have played in promoting self-policing behaviour on the part of bargaining representatives. The GFB requirements have provided a degree of legislative scaffolding in respect of bargaining representative conduct, clarifying expectations around acceptable bargaining behaviour. Further, it is difficult clearly to distinguish between the effect of GTRA and GFB requirements in practice because the analysis demonstrated some conceptual confusion amongst those interviewed for this study with respect to exactly what was entailed by the GTRA requirement and whether this was met in practice by evidence that the bargaining representative was bargaining in good faith. The import of this is that the introduction of the GFB requirements qualifies the conclusion that the GTRA requirement is promoting self-policing behaviour, because it is likely that the GFB requirements are producing some of this effect.

In light of the parallel role played by the GTRA provisions, could it be said that the GFB provisions have obviated the need for the GTRA requirement altogether? The analysis does not make it possible to draw a firm conclusion to that effect, but such a case could potentially be made. This would rest on the proposition that inappropriate bargaining conduct can now be challenged at any time in the negotiating process (without the need to wait for the making of a PABO application) by applying for a bargaining order to enforce the GFB requirements. The availability of such orders may be thought to provide a flexible and adaptable remedy where breaches of those requirements occur. However, the persuasiveness of this argument is somewhat compromised by the fact that there have been relatively few applications for bargaining orders under the FW Act, that few such orders have been made, and that there have been few attempts to enforce them even where they are made and breached.[108] However, the same could also be said of the GTRA requirement, given that so few PABO applications are challenged on this basis, and even fewer of those challenges are successful.

The legislative object of the PABO provisions in FW Act s 436 emphasises the implementation of a 'fair, simple and democratic process' to enable a bargaining representative to determine if the employees they represent want to take particular protected industrial action. This is part of the broader legislative object of the FW Act to achieve productivity and fairness through enterprise bargaining underpinned by 'clear rules governing industrial action'.[109] The analysis in this article suggests that the GTRA requirement plays an important role in promoting self-policing behaviour on the part of bargaining representatives and compliance with the statutory norms in respect of enterprise bargaining behaviour. It also lends support to the proposition that the PABO provisions, including the GTRA requirement, have helped inhibit 'strike first, talk later' behaviour on the part of bargaining representatives and assisted in developing a common understanding of accepted bargaining conduct.

There is, however, a disjunct in the FW Act between the legislative object of setting clear rules for industrial action and encouraging productivity and fairness through enterprise bargaining, and the stated objective of the PABO provisions to establish a 'democratic process' for employees to decide if they want to take industrial action. The GTRA requirement, which is focused on the behaviour of bargaining representatives in enterprise bargaining and the likely motivations

[108] See above n 37.
[109] FW Act s 3(f).

involved in the proposal to take industrial action, is not concerned with whether or not the employees represented by a bargaining representative want to take proposed industrial action. Irrespective of the effect of GTRA on bargaining representative behaviour in practice, legitimate questions can be raised about whether the PABO process, with its emphasis on obtaining permission to seek the agreement of employees to participate in industrial action at some future time, is the best place to question the conduct and intentions of the bargaining representatives.

If, as the analysis suggests, and as the move to an on-the-papers procedure seems to confirm, GTRA really becomes a live issue only when it is the subject of an objection by an employer, then there are grounds for reverting to the pre-2006 situation where employers could make an application for an order against threatened or actual industrial action on the basis that it was unprotected because the bargaining representative was not GTRA. Balloting would still be required, but without the need for pre-permission from the FWC. GTRA could remain as an independent pre-requisite for action to be protected under the Act (as is currently the case in FW Act s 413(3)). This would enable GTRA to continue to be used as a mechanism to ensure that industrial action is taken only by those who are complying with the broader norms of the enterprise bargaining system. It may also offer some clarity with respect to the differing roles of the GFB and GTRA requirements, given that bargaining conduct would not be automatically open to challenge every time a bargaining representative wanted to ascertain the views of their members in respect of proposed industrial action.

Arguably, this would more appropriately distribute the balance of burden between employers and unions in bargaining situations. An employer's recourse to legal challenge would continue to incentivise the self-policing behaviour the project data suggest may already exist, whilst simultaneously ensuring that the pre-conditions governing protected industrial action are not disproportionately borne by bargaining representatives.