SIZING UP LABOR RELATIONS DOWN UNDER: WHAT AUSTRALIA'S FAIR WORK COMMISSION CAN TEACH THE NATIONAL LABOR RELATIONS BOARD

JONATHAN COOK*

ABSTRACT

This paper argues that the United States has clear issues with its labor relations framework as it relates to its collective bargaining policy, and that several effective changes can be adopted by the United States from the Australian labor relations statutory scheme under the Fair Work Act 2009 to better effectuate its policy.

INTRODUCTION

The National Labor Relations Act (NLRA) was ratified in order to address the inequality of bargaining power between employees and employers.[1] The explicit policy of the act is to encourage and protect collective bargaining in the workplace.[2] Collective bargaining is like

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* Jonathan P. Cook is a third-year law student at the University of Wisconsin Law School. Before attending law school, he earned a B.A. in English with an emphasis in rhetoric and writing from the University of Wisconsin—La Crosse. Jonathan would like to thank his mother, Cynthia Cotter, for her unwavering encouragement and support, and the members of the Wisconsin International Law Journal for their assistance throughout the writing process.

1 National Labor Relations Act, 29 U.S.C. § 151 (2018).

2 *Id.*

democracy in the workplace.[3] To effectuate this purpose, the NLRA established the National Labor Relations Board (NLRB or "the Board") to hear complaints related to collective bargaining disputes and enforce the policy of industrial democracy in the workplace.[4] However, pro-industry interests have attacked the collective bargaining policies of the NLRA, and the effectiveness of the Board has suffered as a result. This occurred by appointing pro-industry lawyers and leaders to the Board who aggressively sided with industry interests and chipped away at the democratic ideals initially envisioned for the NLRA.[5] The result is weak enforcement of collective bargaining, which is problematic for several reasons.

Weak enforcement of the collective bargaining policy has allowed employers to reject collective bargaining because the penalties for unfair labor practices are so low, and the remedies available for aggrieved employees can only be sought through a highly legalistic and adverse system.[6] On balance, this has led to weak institutional support for collective bargaining under the NLRA. Unionization is currently the only available way through which employees can assemble together to collectively bargain.[7] Employers who want to quash unionization will, among other things, fire union organizers, distribute anti-union information without allowing union organizers to do the same, and simply refuse to recognize majority support for a union as the bargaining representative of the employees in an appropriate bargaining unit.[8] These pressures, on top of the disparate bargaining power of the two sides, have led to a decrease in unionization across the country.[9] Because

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[3] Senator Wagner, one of the original proponents of the Act, called it "industrial democracy." Charles J. Morris, *How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 44–45 (2012).

[4] 29 U.S.C. §§ 153, 160(b).

[5] *See* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1363–65 (2000).

[6] *See, e.g.*, Power Inc. v. NLRB, 40 F.3d 409, 421–22 (D.C. Cir. 1994) (demonstrating that unfair labor practice claims focus on intent, can take many years to resolve, and usually don't relieve the union of winning a representation election after litigation has concluded).

[7] 29 U.S.C. § 159 ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ")

[8] *See* HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 25–28, 31 (2000).

[9] Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983). *See generally* MAYER, UNION MEMBERSHIP TRENDS IN

unionization is the exercise of the freedom of association in the workplace, adverse policies to unionization are antithetical to that freedom. The United States policy is thus contrary to several international agreements, which the United States is a party to, that mandate the freedom of association and the right to trade unions. For example, Article 22, Section 2 of the International Covenant on Civil and Political Rights states that "[n]o restrictions may be placed on the exercise of this right [to form and join trade unions] other than those which are prescribed by law and which are necessary in a democratic society . . . ."[10] Beyond international agreements, it is possible that the low rate of unionization in the United States has a negative influence on the economy. Several academics who have studied the relationship between unionization and the economy have concluded that unions increase productivity. Their findings suggest that unions increase productivity because union membership provides workers with an effective means of communicating their discontent and concerns with their employer in a way that allows the parties to resolve the dispute through collective bargaining without pushing employees to leave their jobs.[11] In addition, unionization combats wage inequality by raising the real income of union members.[12] Thus, there may be real international and economic reasons to support a stronger enforcement of United States collective bargaining policy.

The Australian labor relations regime, under the Fair Work Act 2009, may serve as good guidance for the United States to better regulate and enforce collective bargaining. Both regimes place good-faith bargaining at the center of their overall policy. Good faith, in both contexts, generally imposes an obligation on the parties to confer with each other and genuinely negotiate and attempt to reach an ultimate

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THE UNITED STATES 22–23 (2004) (for data between 1930 and 2003); Barry Hirsch & David Macpherson, *Union Membership and Coverage Database from the CPS*, UNIONSTATS.COM, http://www.unionstats.com/ (follow "html" hyperlink under "All Wage & Salary Workers" heading) (for data between 1973 and 2017) (showing that overall union membership was near 35% in 1954, but has dropped to 10.7% in 2017).

[10] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 22, ¶ 2 (Dec. 19, 1966).

[11] Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 650 (2003).

[12] *See* W.E. Diewert, *The Effects of Unionization on Wages and Employment: A General Equilibrium Analysis*, 12 ECON. INQUIRY 319, 335 (1974).

agreement.[13] However, the Australian regime is more detailed and provides clearer and more substantial institutional remedies to employees who are subject to unfair bargaining practices. Because the Australian remedies are clearer and more substantial, they are more effective at deterring unfair labor practices.

I. BACKGROUND

The National Labor Relations Act (NLRA) conveys a strong policy of collective bargaining. Section 1 of the NLRA reads, in part, that

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[14]

The NLRA, first introduced as the Wagner Act in 1935, was instituted to encourage and protect collective bargaining in the workplace;[15] this was considered a crucial component to freedom and democracy. As Senator Robert F. Wagner stated: "Democracy cannot work unless it is honored in the factory as well as the polling booth; men cannot be truly free in body and in spirit unless their freedom extends into the places where they earn their daily bread."[16]

Senator Wagner, a major proponent of the National Labor Relations Act, sought to introduce industrial democracy into the workplace. Senator Wagner understood industrial democracy to be the joint control of working conditions by employers and unionized employees acting within the context of collective bargaining, and found

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[13] *See, e.g.*, MICHAEL G. PEDHIRNEY & KAREN A. SUNDERMIER, LITTLER ON UNION ORGANIZING & COLLECTIVE BARGAINING § 4.2 (Littler Mendelson eds., 2d ed. 2016); *Fair Work Act 2009* (Cth) s 228 (Austl.).

[14] National Labor Relations Act, 29 U.S.C. § 151 (2018).

[15] *See id.* ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

[16] Morris, *supra* note 3, at 44–45.

it to be essential to the proper functioning of political democracy, that is, "the polling booth."[17] This method of governance asks industry and labor to resolve their disputes through concerted self-governance.[18] The NLRA established the National Labor Relations Board to institute these policies.[19] This strong policy in favor of organizing labor and collective representation at the bargaining table did not last long without challenge from industry. Starting with the Eisenhower administration and becoming more pronounced during the Reagan administration, industry interests have lobbied to pack the Board with industry representatives who have effectively chipped away at the NLRA's effectiveness at encouraging collective bargaining.[20]

Initially, the NLRB was created to be a non-partisan board that resolves disputes between labor and industry.[21] In the beginning, academics and government officials were chosen to staff the Board.[22] Beginning with the Eisenhower administration, the Republican Party moved to staff the Board with industry professionals rather than "neutral" parties.[23] During this same time period, Democratic administrations continued to staff the board with neutral parties instead of staffing the Board with professionals from the labor side.[24] This practice changed following a shift by the Nixon and Reagan administrations when the Republican Party began to staff the Board with industry side lawyers who aggressively sided with industry interests.[25] Now, each political party routinely staffs the Board with industry insiders who favor their view, instead of moderate or more-neutral professionals.[26] The Senate currently takes a greater role over appointments to the Board, resulting in even more partisan appointments.[27] These appointments have, over time, swayed the Board in a pro-industry direction. At the very least, the Board has become a battleground for partisanship. For example, the Reagan-appointed NLRB chairman Donald Dotson voted in favor of industry interests 97.2% of

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[17] *Id.*
[18] *Id.* at 45.
[19] 29 U.S.C. § 153.
[20] Flynn, *supra* note 5, at 1368–77, 1383–91.
[21] *Id.* at 1363.
[22] *Id.* at 1363–65.
[23] *Id.* at 1365, 1368–69.
[24] *Id.* at 1377–78.
[25] *Id.* at 1378–79, 1383–91.
[26] *Id.* at 1392–98.
[27] *Id.* at 1427–32.

the time, according to Employment Law Alert.[28] The result of this gradual change is that the collective bargaining centered policy of the NLRA has not been protected and has been set aside for industry-favored interpretations of the NLRA.[29] The decreasing rate of unionization and collective bargaining is correlated with this change in policy.[30]

There are several ways that the United States policy as currently instituted does not adequately enforce collective bargaining. For purposes of this article, some of these problems can be generalized into two categories. First, American unions have difficulty achieving recognition in the workplace. To make it more difficult for unions to achieve recognition in the workplace, employers fire union organizers, distribute anti-union information without allowing union organizers to do the same, and simply refuse to recognize a union as the representative of the bargaining unit.[31] Refusing to recognize a union is a common strategy for employers who seek to stop collective bargaining because it is easy for larger employers to incorporate the costs of fighting these battles in their costs of doing business.[32] Penalties for failure to recognize majority support for unionization in the workplace are low, and litigation over these disputes can take a lot of time, especially if the employer has money to pay counsel to appeal its case.[33] Second, once at the bargaining table, American unions do not have access to early and effective remedies for bad faith bargaining.[34] The root of both problems boils down to the lack of a responsive labor relations system and a lack of effective remedies for harms done. These problems, in addition to

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[28] *Id.* at 1411 n.191.

[29] Morris, *supra* note 3, at 15–21 (explaining that the provisions of the NLRA are general and flexible enough to be interpreted in a strong and effective manner, but instead have decidedly been interpreted in a narrow, pro-management direction).

[30] *See, e.g.*, Weiler, *supra* note 9, at 1774–86 (showing that a declining union victory rate over time is associated with an increasing rate of unfair labor practices perpetrated by employers over time).

[31] *See* HUMAN RIGHTS WATCH, *supra* note 8, at 25–28, 31.

[32] *See id.* at 25 ("Firing a worker for organizing is illegal but commonplace in the United States. Many of the cases examined by Human Rights Watch for this report reflect the frequency and devastating effect of discriminatory discharges on workers' rights. An employer determined to get rid of a union activist knows that all that awaits, after years of litigation if the employer persists in appeals, is a reinstatement order the worker is likely to decline and a modest back-pay award. For many employers, it is a small price to pay to destroy a workers' organizing effort by firing its leaders.").

[33] *See id.* at 23.

[34] *See id.* at 35–36. *See also* Weiler, *supra* note 9, at 1776–81.

hostility in state legislatures, have been taxing on unions and have resulted in a steadily decreasing rate of unionization.

There are at least two problems with the heavily decreasing rate of unionization. First, it goes against international agreements. The hostile United States policy toward collective bargaining is contrary to Articles 21 and 22 of the International Covenant on Civil and Political Rights which mandate the freedom of association and the right to trade unions.[35] Section 2 of Article 22 specifically states that

> No restrictions may be placed on the exercise of this right [to form and join trade unions] other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.[36]

Further, the United States policy contradicts two separate International Labour Conference conventions, the Freedom of Association and Protection of the Right to Organize Convention (No. 87), and the Right to Organise and Collective Bargaining Convention (No. 98).[37] While the United States has not ratified these two conventions, it is still a party to the International Labour Conference Constitution[38] and is therefore a party to those agreements.[39] Second, the declining rate of unionization and collective bargaining has accompanied stagnating wages and a rise in income inequality,[40] signaling that the decreasing rate of unionization is correlated with negative outcomes in the United States economy.

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[35] *See* G.A. Res. 2200(A) (XXI), *supra* note 10, arts. 21–22.

[36] *Id.* art. 22.

[37] International Labour Organization, Freedom of Association and Protection of the Right to Organise Convention, July 9, 1948, No. 87, art. 2; International Labour Organization, Right to Organise and Collective Bargaining Convention, July 1, 1949, No. 98, art. 1.

[38] *Ratifications by Country*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO::: (last visited Sept. 30, 2018).

[39] For a discussion on the topic as it pertains to state law in the United States, see *The Attack on US Workers' Rights*, AMNESTY INTERNATIONAL: HUMAN RIGHTS NOW BLOG (Mar. 17, 2011, 9:32 AM), https://blog.amnestyusa.org/us/the-attack-on-us-workers-rights/.

[40] Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011) ("From 1973 to 2007, union membership in the private sector declined from 34 to 8 percent for men and from 16 to 6 percent for women. During this time, wage inequality in the private sector increased by over 40 percent.").

The net effect of trade unions on a state economy has been the subject of considerable debate.[41] Opponents of unions claim that they have a negative effect on the economy because unions increase costs and decrease productivity.[42] In contrast, proponents of unions argue that unions increase productivity because union membership provides workers with an effective means of expressing discontent with the employer in a productive and facilitated way, as opposed to quitting; and that unions may be responsible for adopting more efficient personnel policies.[43] While the debate over the merit of trade unions is far from over, studies have shown that the proponent's view of trade unions is generally correct insofar as effective trade unions in the United States tend to increase wages and worker productivity.[44]

Union membership in the United States has declined gradually since 1954[45] to an all-time low in 2017 at 10.7%.[46] The decline in union membership in the United States has coincided with an increase in economic inequality, and a decrease in wages and benefit coverage.[47] There are several reasons for the decline in union membership, but it can be stated that adverse union sentiment in politics has played a substantial role in "revising" the policy objective of the National Labor Relations Act.[48] It has gone from promoting collective bargaining to protecting "freedom of choice," effectively encouraging employers to ignore majority support determinations and refrain from bargaining with union representatives in good faith.[49] What's crucial for membership, however, is that trade union rights under the NLRA have not been enforced.[50] It is

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41 *See* Diewert, *supra* note 12, at 319–21 (summarizing the disagreement over whether unionization increases the real income of its members, but states that most modern theorists posit that it does). Additionally, there is general disagreement over whether unionization increases labor's share of the national income. *Id.*

42 Doucouliagos & Laroche, *supra* note 11, at 650.

43 *Id.* at 653.

44 *Id.* at 667 ("Unions . . . are associated with a significant positive productivity differential in U.S. manufacturing. The productivity effect in the United States, however, falls short of the impact of unions on wages. Unions have estimated to lead to wage increases on the order of about 15 percent.") (citations omitted).

45 Weiler, *supra* note 9, at 1771 ("After a short postwar dip, union membership returned in 1954 to near the 35% level. Then began the slide—to less than 30% by 1965, and to just over 20% by 1980.").

46 Mayer, *supra* note 9, at 22–23; Hirsch & Macpherson, *supra* note 9.

47 Ross Eisenbrey, *Strong Unions, Strong Productivity*, ECONOMIC POLICY INSTITUTE (June 20, 2007), https://www.epi.org/publication/webfeatures_snapshots_20070620/.

48 Morris, *supra* note 3, at 6–14.

49 *Id.* at 43–44.

50 *Id.* at 11.

apparent that the United States must change their collective bargaining paradigm in order to conform to international norms and to promote the NLRA policy of good-faith collective bargaining between employers and employee chosen representatives.

Each country varies in its labor relations system. To better operationalize the right to assembly, make good on the policy of the NLRA, and improve the terms and conditions of employment in the United States workplace, reforms to the labor relations system might be necessary. There are ready examples of labor relations systems internationally that may guide the United States towards a more effective labor relations system that also conforms with the country's values. Australia provides one such example.

Australia's labor relations system provides a good comparison to the NLRA because it has undergone a series of major revisions and amendments between 1993 and 2009 as they have been increasingly exposed to a globalized economy.[51] Further, the debate between pro-union and pro-industry interests has played out in a similar fashion to the same industry conflict in the United States. Most recently, the Howard Government in Australia attacked collective bargaining rights in favor of individual agreements, called Australian Workplace Agreements (AWAs), with their Work Choices legislation.[52] However, like a pendulum, the power swung back in favor of pro-union interests with the Rudd Government's implementation of the Fair Work Act 2009.[53] This most current labor relations regime in Australia emphasizes enterprise level agreements between employers and trade unions, and good-faith bargaining between agents and employers.[54] Australia's current labor

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[51] Ron McCallum, *American and Australian Labor Law and Differing Approaches to Employee Choice*, 26 A.B.A. J. LAB. & EMP. L. 181, 182 (2011).

[52] Mark Bray & Andrew Stewart, *What Is Distinctive About the Fair Work Regime?*, 2013 AUSTL. J. LAB. L. LEXIS 15, *45 (2013) ("Most importantly, the Workplace Relations Act introduced a new form of *individual contracting*, so that alongside common law contracts of employment employers had the option of creating and registering a statutory agreement, the AWA."); Rae Cooper & Bradon Ellem, *Fair Work and the Re-regulation of Collective Bargaining*, 2009 AUSTL. J. LAB. L. LEXIS 40, *5 (2009).

[53] Bray & Stewart, *supra* note 52, at *59–60 ("The Rudd Labor Government, which assumed power in November 2007, was elected on a platform that included an industrial relations policy called 'Forward with Fairness'. Some elements of this policy were implemented almost immediately by way of transitional legislation that took effect in March 2008, but the more thorough re-writing of labour law came, after considerable consultation with employers and unions, in the form of the Fair Work Act 2009 and related legislation such as the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009.") (citation omitted).

[54] Aaron Rathmell, *Collective Bargaining After Work Choices: Will 'Good Faith' Take Us Forward with Fairness?*, 2008 AUSTL. J. LAB. L. LEXIS 4, *13–14 (2008) ("Good faith is a

relations structure provides a good contrast for the United States because it is founded on similar good-faith duties on the parties involved. This article explores Australia's current collective bargaining scheme and extracts concepts from two general categories, union recognition and good faith bargaining, that can be applied to the United States' labor relations regime to better facilitate collective bargaining.

II. UNION RECOGNITION

The United States labor relations system, under the National Labor Relations Act, offers few and insubstantial remedies to unfair labor practices prior to the commencement of collective bargaining.[55] In contrast to the American model, the Australian labor relations system, under the Fair Work Act 2009, has a better framework to encourage the commencement of collective bargaining, and is much clearer as to how employees can seek remedy for unfair labor practices.

A. UNITED STATES

Under the National Labor Relations Act, it is an unfair labor practice under sections 8(a)(1) and 8(a)(3) for an employer: to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7; and to discriminate in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership.[56] Under section 7,

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .[57]

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central part of federal Labor's *Forward with Fairness* policy and was at the core of reform proposals by the Australian Council of Trade Unions (ACTU) in its *A Fair Go at Work* policy."); Cooper & Ellem, *supra* note 52, at *10.

55 Weiler, *supra* note 9, at 1787–95.

56 National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3) (2018).

57 29 U.S.C. § 157.

In order for an employee to plead and prove unfair labor practice prior to union recognition, they would have to show that the employer interfered with the employee right to organization. However, case law demonstrates that employees must show discriminatory intent to interfere, restrain, or coerce employees in the exercise of their rights.

In *Power Inc. v. NLRB*,[58] the United States Court of Appeals for the District of Columbia Circuit upheld the Board's decision that Power Inc. violated sections 8(a)(1) and 8(a)(3) by threatening employees, laying off thirteen union supporters, and refusing to rehire a former employee who was a union supporter.[59] If the employer decides to take an adverse action against an employee because of that employee's union activity, the employer violates both sections because the action both "interferes with" and "coerces" employees in the exercise of their rights secured under section 7, and also discriminates and discourages union membership.[60] In *Power Inc.*, the NLRB found that the employers practices were unlawful on both grounds, and that finding was upheld by the Supreme Court.[61] When determining whether termination of employees is an unfair labor practice, the intent of the labor practice is dispositive because it is not itself unlawful to discharge workers.[62] What is unlawful is an adverse employment action because of the employee's union activity.[63] The burden of proof takes the form of a familiar burden shifting approach, where the complainant must first establish a *prima facie* case of unlawful discrimination by demonstrating that the employee's union membership or activity was a "motivating factor" in the adverse layoff decision.[64] Once the employee is able to prove this first step, then the burden shifts to the employer to show that it would have taken the same adverse employment action against the employee even in the absence of the protected union activity.[65]

The D.C. Circuit in *Power Inc.* held in favor of the pro-union employees based on substantial evidence.[66] In *Power Inc.*, the employer terminated thirteen pro-union employees in the days leading up to the

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[58] Power Inc. v. NLRB, 40 F.3d 409 (D.C. Cir. 1994).
[59] *Id.* at 414, 425–26.
[60] *Id.* at 417 n.3.
[61] *Id.* at 417.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 419.

election.[67] The absence of those thirteen employees was enough to tip the balance of the vote against the selection of the union as the employees' bargaining representative.[68] Additionally, there was evidence which showed that the employer held anti-union animus prior to the election, and based their decisions on anti-union animus instead of a permissible motivation like economic necessity.[69] Based on this evidence, the D.C. Circuit concluded that there was substantial evidence to support the conclusion that the layoffs were motivated by anti-union animus, in violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[70]

In *Power Inc.*, the remedy for the employees given by the Board was a retroactive bargaining order.[71] A bargaining order, under the American model, is an exceptional remedy given only when a fair and reliable election is no longer possible because the employer undermined the majority strength needed for the union to prevail.[72] There are two categories when bargaining orders are appropriate.[73] The first category of bargaining orders is for "exceptional" cases where the employer's "outrageous" and "pervasive" unfair labor practices cannot be eliminated with traditional remedies.[74] Traditional remedies typically include, but are not limited to, cease-and-desist orders, new election orders, reinstatement of unlawfully discharged employees, and requiring the employer to post or read aloud a notice advising employees of their rights.[75] These traditional remedies do not relieve the union of the requirement of winning a representation election, even after proving their case.[76] Only the bargaining orders awarded in exceptional cases establish the union as the bargaining representative of the implicated bargaining unit without an election.[77] The second category of bargaining orders is for less exceptional cases where a fair election is still unlikely because

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[67] *Id.* at 418.

[68] *Id.*

[69] *Id.* at 418–19.

[70] *Id.* at 419.

[71] *Id.* at 421.

[72] *See id.* at 422.

[73] The two categories of cases where a bargaining order is an appropriate remedy under the American model are derived from the Supreme Court case NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). *Id.*

[74] *Id.*

[75] *Id.* at 421–22.

[76] *Id.* at 422.

[77] *Id.*

the unfair practices of the employer will continue to undermine the majority strength of the employees.[78] In *Power Inc.*, the D.C. Circuit decided that there was adequate evidence in the record for the Board to conclude that a fair election was impossible because of the continuing effects of the unfair labor practices, and that a bargaining order was the appropriate remedy under the circumstances.[79]

The Court in *Power Inc.* concluded that a bargaining order was appropriate because it was necessary. In their review, the Court noted that:

> Without a bargaining order, Power would have accomplished a postponement of any duty to bargain long enough to allow it to subcontract portions of its work without even consulting the union. "Lesser remedies" would clearly be inadequate to cure that harm—a new election would only further delay bargaining, prospective cease-and-desist orders would not repair the harm already done, and reinstatement and back pay, while making whole those individuals laid off on March 10, 1989, would do nothing for those whose jobs were subsequently lost through Power's unilateral decision to subcontract their jobs. Finally, in these circumstances any remedy short of a retroactive bargaining order might "put a premium upon continued litigation by the employer," such that a "recalcitrant employer might be able by continued opposition to union membership indefinitely to postpone performance of its statutory obligations."[80]

Essentially, the bargaining order is the final stop in remedies for unfair labor practices under the American model. To get to the bargaining order, courts require that employees prove discrimination that either was so pervasive and severe that it precluded a fair election, or had effects which undermined the majority strength in favor of unionization and impeded the election.[81] This bargaining order was finally upheld over five years after the start of litigation, effectively killing any momentum and excitement in favor of unionization.[82] So while the court was concerned that any remedy short of a retroactive bargaining order might

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[78] *Id.*

[79] *Id.* at 425.

[80] *Id.* at 424 (citations omitted).

[81] *Id.* at 422 (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 613–15 (1969)).

[82] *See id.* at 416. A regional director for the NLRB ordered a union representation election in February 1989, and in March of the same year Power terminated 13 pro-union employees. *Id.* The union filed unfair labor practice charges against Power Inc. in March and October of 1989, but an Administrative Law Judge didn't make any formal findings until May 6, 1992, which was upheld by the Board in 1993 and was further upheld by the D.C. Circuit on November 18, 1994, over five years after the start of litigation. *Id.* at 416–17.

"put a premium upon continued litigation by the employer,"[83] that fear was already realized. This premium was no doubt realized because the delay occurred in tandem with threats from an attorney for Power, who threatened several groups of employees that anybody who was found to be contributing to a union-sponsored hardship fund for the laid off employees would "be out there looking for help from somebody else."[84] In *Power Inc.*, the free exercise of the right to self-organization guaranteed to employees under section 7 of the National Labor Relations Act was completely chilled because the employer sent a clear anti-union message: union sympathizers would be without a job, and without support.[85] This is all too characteristic of the American model of labor relations because employers are incentivized to challenge every adverse judgment to delay and complicate the process for vulnerable employees.[86] The delay alone tends to discourage the success of representation elections.[87]

The question in *Power Inc.* was employer motive, and it took five years for the employees to prevail in their case and get a final resolution—which is itself a victory for the anti-union employer. The difficulties with resisting unfair labor practices and proving a case of unfair labor practice under the American model is also apparent in *NLRB v. Gissel Packing Co.*[88] In *Gissel*, the issues on appeal involved the extent of an employer's duty under the NLRA to recognize a union that based its claim of representative status on the possession of union authorization cards, and the steps an employer may take in resisting such card-based recognition.[89] While the court noted that employers have a duty to bargain with a union which claims representative status through the possession of signed authorization cards, employers could respond by demanding an election to test the majority strength of the union when the employer has "good faith doubt" as to the union's majority status.[90] An employer is not required to justify their insistence on an election by

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[83] *Id.* at 424.

[84] *Id.* at 416.

[85] *See id.* at 414–16.

[86] Weiler, *supra* note 9, at 1769–70.

[87] Herbert G. Heneman III & Marcus H. Sandver, *Predicting the Outcome of Union Certification Elections: A Review of the Literature*, 36 INDUS. & LAB. REL. REV. 537, 544 (1983).

[88] NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

[89] *Id.* at 579.

[90] *Id.* at 592. This is referred to as the *Joy Silk* doctrine. *See* Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732 (1950).

investigating and showing affirmative reasons for doubting the majority strength demonstrated by the signed union authorization cards.[91] Essentially, the employer has no reason not to challenge the validity of the signed authorization cards, unless it is apparent that they are aware of their validity, because if it is proven that the employer knows that the signed union authorization cards are legitimate then it is a violation of section 8(a)(5).[92] Further, under the NLRA, employers are afforded the free speech right to communicate their views to their employees.[93] A violation under section 8(a)(1) then occurs only when the expressions by the employer turn into threats of reprisal or force or promise of benefit, or interferes, restrains, or coerces employees in the exercise of their self-organization rights.[94] This, in turn, requires a complicated balancing between an employer's right to free speech and the employee's right to self-organization.[95] Further convoluting the process is the insistence of Congress and the courts that employees have the right not to self-organize, which must also be balanced when determining whether a violation of section 8(a)(1) occurs.[96] Overall, this test is complicated, and is only resolved in favor of union recognition (i.e., a bargaining order) when the court is convinced that lesser orders, like cease-and-desist orders and orders to conduct an election, have only a slight possibility of resolving the conflict.[97] Greater institutional support should be preferable to this weak framework.

B. AUSTRALIA

In contrast to the American model of labor relations, Australia, under the Fair Work Act 2009, definitively shifted the Australian labor relations regime towards a strong institutional framework in favor of

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[91] *Gissel Packing Co.*, 395 U.S. at 609.

[92] *Id.* at 598–600. Section 8(a)(5) states that it shall be an unfair labor practice for an employer—"to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." National Labor Relations Act, 29 U.S.C. § 158 (2018). Section 9(a) states in relevant part that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . ." 29 U.S.C. § 159.

[93] *See* 29 U.S.C. § 158(c).

[94] *Gissel Packing Co.*, 395 U.S. at 617.

[95] *See id.*

[96] *See id.* at 607–08.

[97] *Id.* at 614–15.

collective bargaining. The new regime relies on concepts of good faith bargaining to secure compliance and to measure when parties are in violation of the FWA. The policy is summed up in section 3 of the Fair Work 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: (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.[98]

Additionally, the new regime establishes a clear escalation for bargaining representatives to take in order to secure quick and effective remedy.[99]

Unlike the American regime, Australian employees that desire to bargain collectively for an enterprise agreement vote simply to bargain collectively.[100] The good faith provisions as it relates to union recognition combats a historical problem in Australia with union recognition.[101] Under the Australian model, collective bargaining occurs between employers and their employees, instead of employers and union representatives.[102] The new Fair Work Act approaches the problem of union recognition by focusing on individual rights instead of the rights of the bargaining representative.[103] The question whether to be represented by a union is a separate question than whether to bargain collectively at all. This simple change ensures that employees can bargain collectively whether they desire to be represented by a union or not, and discourages employers from engaging in unfair labor practices because their opposition would be towards collective bargaining itself instead of opposing union recognition. Further, the choice to have a union representative as a bargaining representative is a personal choice that can be made by each employee individually. Unless there is a problem with the number of representatives at the table,[104] there is no restriction on the

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[98] *Fair Work Act 2009* (Cth) s 3 (Austl.).

[99] *See, e.g.*, *id.* pts 2–4 (Enterprise Agreements).

[100] Cooper & Ellem, *supra* note 52, at *31.

[101] *Id.*

[102] *See Fair Work Act* s 172.

[103] Cooper & Ellem, *supra* note 52, at *32.

[104] See *Fair Work Act* s 231(2)(a)–(b), which states that the kinds of bargaining orders that FWA may make in relation to a proposed enterprise agreement include: (a) "an order excluding a bargaining representative for the agreement from bargaining"; and (b) "an order requiring some

number of representatives that may be present at negotiations under the FWA model. For example, some employees may choose to be represented by a union, while others may choose to have another employee as their representative, or may even opt to represent themselves during collective bargaining.[105] Under the FWA, there is no prohibition on who may represent an employee during collective bargaining, as long as the employee chooses them expressly as their representative.[106] To further disincentivize employer opposition to the collective bargaining process, the FWA requires that enterprise agreements include flexible terms that may later be altered on an individual basis between employees and employers.[107] An enterprise agreement becomes binding when the terms are agreed to by the representatives and the majority of the employees that will be covered by the agreement vote in favor of its passage.[108]

The Fair Work Act 2009 allows for greater flexibility to bargain, and avoids the American problems with employer opposition to union recognition as a bargaining representative for covered employees. Under the FWA, collective bargaining is between employees and the employer instead of paid union representatives and the employer. All throughout the bargaining process, good faith requirements attach to all representatives.[109] There is a clear, statutory escalation of institutional measures to prevent unfair labor practices. Part 2-4 Division 8 of the Fair Work Act detail the orders and determination that the Fair Work Commission may order upon application by a bargaining representative to facilitate bargaining and resolve disputes.[110] These orders include: bargaining orders, serious breach determinations, majority support

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or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining."

[105] *Id.* s 176.

[106] *See id.* The Fair Work Act allows employee organizations, persons appointed by the employee in writing, and the employee himself or herself to represent the employee in collective bargaining. *Id.*

[107] *Id.* ss 202–04.

[108] *Id.* s 182 ("If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is made when a majority of those employees who cast a valid vote approve the agreement."). Enterprise agreements have to be "made," which for single-enterprise agreements requires majority support by those covered by the agreement. *Id.*

[109] *Id.* s 228.

[110] *Id.* ss 228–240.

determinations, scope orders, and other remedies that the Fair Work Commission may otherwise determine to be appropriate under the circumstances.[111] Generally, instead of litigating discriminatory intent and coercion, as is the case under the NLRA model, employees simply must show that their employer is refusing to recognize majority support and scope of the employees seeking to be covered by an enterprise agreement, or is refusing to bargain in good faith.[112]

The good faith bargaining requirements are found under section 228 of the Fair Work Act. Importantly for pre-negotiation disputes are subsections 228(1)(e) and 228(1)(f) which state, respectively, that bargaining representatives must: refrain from capricious or unfair conduct which undermines freedom of association or collective bargaining; and recognize and bargain with the other bargaining representatives for the agreement.[113] In the event that a bargaining representative feels that the employer or their representative is failing to meet these good faith requirements, there is an escalation of actions that the employee bargaining representative must take in order to receive a remedy from the Fair Work Commission.[114]

In the event of a labor dispute, a bargaining representative must first give a written notice which sets out their concerns to the relevant bargaining representatives and allow them a reasonable time within which to respond.[115] If the prerequisites for making an application are met, then a bargaining representative may apply to the Fair Work Commission for a bargaining order, and thus escalate the dispute.[116] Unlike the American model of labor relations disputes, bargaining orders are not the greatest remedy available to employees in the event that the employer continues to engage in bad faith bargaining. If the employer or their representative continues to be in violation of section 228, then the employee bargaining representative may apply for a serious breach determination, which could in turn trigger the Fair Work Commission to issue a bargaining related workplace determination under section 269 of

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[111] *Id.*

[112] *See, e.g.*, *Constr, Forestry, Mining & Energy Union—Mining and Energy Div v Tahmoor Coal Party Ltd* [2010] FWAFB 3510 (5 May 2010) paras. 23–35 (Austl.) ("Whether a party observes or fails to observe the good faith bargaining requirements of set out in s.228(1) is to be determined in light of all the relevant circumstances.").

[113] *Fair Work Act* s 228.

[114] *Id.* s 228–40. *See also* Cooper & Ellem, *supra* note 52, at *22-23.

[115] *Fair Work Act* s 229(4).

[116] *Id.* s 230.

the Fair Work Act.[117] A bargaining related workplace determination is an order where the Fair Work Commission sets reasonable terms for the agreement through arbitration.[118] The factors that the Fair Work Commission takes into account when deciding the terms to include in a workplace determination include: the merits of the case, the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements, the interests of the employers and employees, how productivity might be improved in the enterprise or enterprises concerned, the public interest, the conduct of the bargaining representative (and whether it was reasonable during bargaining), and incentives to continue to bargain at a later time.[119] The Fair Work Act specifically details what must and what may be in the workplace determination orders, on the determination of the Fair Work Commission.[120] Generally, the workplace determination includes the terms that were agreed to before the serious breach determination, and the terms that the Fair Work Act fills in as required through arbitration. Once the workplace determination is made, it has the same effect as an agreed and approved enterprise agreement.[121]

The detailed and clear institutional support for collective bargaining by the Fair Work Act is utilized by the Fair Work Commission. In *NSW Nurses & Midwives' Association v SOS Nursing & Homecare Service Pty Ltd*[122] the applicant contended that the respondent employer was not meeting the good faith requirements under the Fair Work Act by not recognizing and bargaining with them as a bargaining representative.[123] After determining that the applicant would be covered by the broader possible scope of the proposed enterprise agreement, the applicant union bargaining representative was entitled to a seat at the table by order of the Fair Work Commission.[124] Upon an agreement to bargain, a majority support determination, or a scope order, the parties to

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[117] Cooper & Ellem, *supra* note 52, at *23-24.

[118] *Id.*

[119] *Fair Work Act* s 275; *Workplace Determinations*, FAIR WORK COMM'N, https://www.fwc.gov.au/disputes-at-work/industrial-action/resolving-issues-at-the-commission/workplace-determinations (last modified Mar. 30, 2016).

[120] *Fair Work Act* ss 267, 268, 272, 273.

[121] *Fair Work Act* ss 276–79.

[122] *NSW Nurses & Midwives' Ass'n v SOS Nursing & Homecare Serv. Pty Ltd* [2013] FWC 5062 (2 August 2013) (Austl.).

[123] *Id.* ¶ 4.

[124] *Id.* ¶¶ 68–70.

an agreement are to meet and negotiate in good faith.[125] The parties to an agreement may choose who represents them at the negotiating table, and it is a good faith requirement that all bargaining representatives recognize the others.[126] In *Health Services Union*,[127] the applicant union petitioned for a bargaining order because they claimed that the employer violated several good faith bargaining requirements, including: attending and participating in meetings at reasonable times; responding to proposals made by other bargaining representatives in a timely manner; giving genuine consideration to the proposals of other bargaining representatives, then giving reasons for their response to those proposals; and refraining from unfair conduct that undermines collective bargaining.[128] After reviewing the process by which the employer brought their proposed enterprise agreement to a vote before the employees,[129] Deputy President Barclay concluded that the Respondent failed to bargain in good faith by putting their proposed enterprise agreement to a vote before the employees without conferring with the applicant.[130] The outcome of that finding is that the dispute "enlivens the discretion contained in s 230 of the Act."[131] The parties were then ordered to reconvene for the further determination of whether there will be a bargaining order, and, if so, what the contents of that bargaining order would be.[132]

The Australian regime allows and lives up to the flexibility and institutional support for collective bargaining promised by the purpose of the Act before any parties get to the bargaining table. Employees may choose whether to collectively bargain, who will be their bargaining representative in such discussions, and if they ultimately agree with the contents of the proposed enterprise agreement, the details of which were negotiated by all parties involved. The measure of compliance with the Fair Work Act is at all times measured by good faith compliance,

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[125] Cooper & Ellem, *supra* note 52, at *34.

[126] *Fair Work Act* s 228.

[127] *Health Services Union v Healthscope Operations Party Ltd* [2017] FWC 4054 (3 August 2017) (Austl.).

[128] *Id.* ¶¶ 26–33. *See also Fair Work Act* s 228(a), (c)–(e).

[129] *Health Services Union* ¶¶ 41–70.

[130] *Id.* ¶ 71.

[131] *Id.* ¶ 73. Section 230 of the Fair Work Act details when the Commission may make a bargaining order. *Fair Work Act* s 230. Section 230 itself requires compliance with section 229(4) (in addition to section 229(5) in some circumstances) which pertains to the prerequisites before a bargaining representative my make an application for a bargaining order. *Id.* s 230(3)(b).

[132] *Health Services Union* ¶ 73.

outlined in section 228 of the Act. While Australia's labor regime is more complicated by statute, it begets simplicity and adaptability for the judges and litigants on review and strongly supports the national policy of collective bargaining. The United States should adopt both the Australian principles of employee choice, which would have the effect of discouraging employer opposition to the collective bargaining process, and the Australian principles of good faith bargaining, which installs clear institutional parameters to the process and avoids steeping the parties to the proposed agreement in legalistic disputes that take years to resolve. In America, employers are incentivized by the system to oppose majority support determinations because the vote accomplishes all three of the Australian employee decisions at once: whether to bargain, who will bargain, and who ultimately accepts the contents of the agreement. It is less likely that employers would mount such vigorous battles against collective bargaining under the Australian regime because those decisions are compartmentalized at different times in the process and are vested at each point with the individual employees themselves, maintaining that employees are bargaining with the employer at every step, and not a third party.

III. GOOD FAITH NEGOTIATIONS AT THE BARGAINING TABLE

Once the employer and their employees agree to bargain, good faith requirements permeate the negotiations in both the American system of labor relations, and the Australian system. What good faith means in both contexts is similar in scope. However, similar to issues of union recognition, the Australian system offers more comprehensive remedies for unfair bargaining practices.

A. UNITED STATES

The standards governing the conduct of the parties that are collectively bargaining are found under sections 7 and 8 of the National Labor Relations Act.[133] The key standard by which the parties are measured is good faith.[134] The term "good faith" in this context is mainly an affirmative obligation on the part of the employer to make an honest effort to adjust differences and reach common ground with the

[133] National Labor Relations Act, 29 U.S.C. §§ 157, 158 (2018).
[134] NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 402–03 (1952).

employees and their bargaining representative.[135] It is more than simply an obligation to confer with the employees' bargaining representative.[136] The obligation placed on the employer is to attempt to reach an ultimate agreement, as opposed to maintaining a position of "take it or leave it" with respect to fundamental terms in the agreement.[137] The Act is not concerned with the substantive terms of the ultimate agreement, as long as the terms were agreed to voluntarily and without coercion.[138] The principal provision establishing the good-faith test is found in section 8(d) of the Act. It states as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .[139]

Good-faith bargaining under the National Labor Relations Act is therefore a series of formal obligations, mostly imposed on the employer, to negotiate in the first instance. The Board has stated that it is not their function to declare substantive provisions to be in bad-faith if they were agreed to mutually and without undue influence or coercion.[140] The obligation on the labor organization to negotiate is found under section 8(b)(3) of the Act, which states simply: "It shall be an unfair labor practice of a labor organization or its agents—to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provision of [section 9(a)]."[141] While it may seem apparent that unions would be formed for the purpose of bargaining collectively with their employer, Congress added section 8(b)(3) to make sure that the unions would actually arrive at the bargaining table willing to bargain and ultimately reach an agreement with the employer and their

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[135] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485 (1960).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 485–86.

[139] 29 U.S.C. § 158(d).

[140] *Ins. Agents' Int'l Union*, 361 U.S. at 486–87.

[141] 29 U.S.C. § 158(b)(3). Section 9(a) states that the union representatives designated for the purposes of collective bargaining by the majority of the employees in the bargaining unit is the exclusive representative of all the employees in such bargaining unit. 29 U.S.C. § 159(a).

representatives.[142] In summation, the Act mandates that the parties meet and discuss the points of their disagreements, but does not at all mandate the substance of the ultimate agreement. The National Labor Relations Board will not control the settlement of those terms.[143] The standard of conduct is that the two sides meet and negotiate in "good faith."

This discussion now begs the question "what do 'good faith' requirements actually mandate under the National Labor Relations Act?" Good faith requirements regulate the way that the parties are to deal with each other.[144] According to Professor Archibald Cox, "it tells them what they may do and what they may not do, even though each recognizes the authority of the other and honestly seeks to reach an agreement."[145] The Supreme Court has stated that the determination of whether good faith requirements have been met involves a case-by-case application of the facts to law.[146] There appears to be few hard-and-fast rules that prohibit certain bargaining practices. The old National Labor Relations Board imposed the duty on the employer "to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement."[147] But a requirement to make counter-proposals and make every "reasonable effort" to reach an agreement must be squared with the provision in the National Labor Relations Act that makes clear that "such obligation *does not* compel either party to agree to a proposal or require the making of a concession."[148] Case law establishes, however, that good faith bargaining cannot include proposals offered on a "take-it-or-leave-it" basis.[149]

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[142] *Ins. Agents' Int'l Union*, 361 U.S. at 487.

[143] *Id.*

[144] Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1402 (1958). While Professor Cox's article is rather old, it remains an authority on good faith bargaining principles. *See* Rathmell, *supra* note 54, at 24 n.39.

[145] *Id.*

[146] *See* NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 409 (1952) ("The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions together.").

[147] Cox, *supra* note 144, at 1405 (citing *Houde Engineering Corp*., 1 N.L.R.B. (old) 35 (1934)). The *Houde Engineering* case is still relevant case law because its good faith principles were cited approvingly by Senator Wagner during his speeches before Congress in support of the NLRA. *Id.* at 1407.

[148] National Labor Relations Act, 29 U.S.C. § 158(d) (2018) (emphasis added).

[149] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 485 (1960).

Good faith bargaining under the National Labor Relations Act is thus a balancing act between conferring and offering proposals, and being able to refuse the opposing parties' offers. It has little to do with the substance of the proposals themselves.[150] In the context of the old NLRB cases, like in the *Houde Engineering* case, the statutory scheme was aimed at encouraging compromise and industry stability.[151] Under this scheme, an affirmative duty to match proposals with counterproposals may have been intentional.[152] The Wagner Act, which became the foundation for the current labor relations scheme, was proposed and passed in this context.[153] Senator Wagner stated, in relation to proposed section 8(5), the section that now imposes good faith obligation on the employer, that "[it] does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."[154] The Act's purpose was to encourage collective bargaining and balance economic power between the parties.[155] The Act mandates that parties engage in discussion, listen to each other's proposals, and give grounds for their disagreements.[156] It is unclear to what extent these obligations impose substantive requirements on the proposals and ultimate agreement.

In *NLRB v. American National Insurance Co.*, the Supreme Court made clear that "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."[157] Yet it is considered an unfair bargaining practice for an employer to completely foreclose a discussion on a particular topic, even if they do so for apparently justified reasons.[158] Professor Cox believes that these perhaps competing values are meant to compel a give-and-take debate, where each side explains their convictions to the other side in an effort to find a unique compromise,

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[150] *See id.* at 487 ("The same problems as to whether positions taken at the bargaining table violate the good-faith test continue to arise under the Act as amended . . . it remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements.").

[151] Cox, *supra* note 144, at 1405–06.

[152] *Id.* at 1406.

[153] *Id.*

[154] 79 CONG. REC. 7571 (1935).

[155] Cox, *supra* note 144, at 1409.

[156] *Id.* at 1411.

[157] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).

[158] *See* Andrew Jergens Co., 76 N.L.R.B. 363, 365–66 (1948).

and that the costs of this debate is slight enough to justify the legal compulsion for parties to consistently explain and re-explain their positions.[159]

But this compulsion leads one to wonder whether unions could just be talked to death by their employer at the bargaining table.[160] The crux of the duty to bargain in good faith gets to the intent of the bargaining parties. That is, talking without the intent to actually arrive at a compromise is not *bargaining* at all.[161] "One who merely went through the outward motions knowing that they were a sham could be said to lack good faith and held to violate [section 8(d)] despite the formal appearances."[162] In *NLRB v. Montgomery Ward & Co.*, the Ninth Circuit upheld an NLRB order declaring that the employer refused to bargain in good faith because, among other things, the employer's representatives disagreed over routine matters, delayed feedback over employee proposals, and refused to offer their own proposals.[163] In enforcing the NLRB order, the Ninth Circuit announced that the duty to bargain in good faith requires active participation and an intention to find common ground and a basis for agreement.[164] The above discussion indicates that whether the employer is bargaining with their employee's representative is determined by their state of mind.[165]

Bad faith bargaining on the part of the employer at the negotiation table includes refusal to ratify the terms agreed to, unilateral altering of employment conditions, refusal to meet with the opposing party, and bypassing the employee representative.[166] The remedy

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[159] Cox, *supra* note 144, at 1412.

[160] *Id.* at 1413.

[161] This practice is sometimes referred to as "surface bargaining."

[162] Cox, *supra* note 144, at 1413.

[163] NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686–88 (9th Cir. 1943).

[164] *Id.* at 687–88 ("To do [what Montgomery Ward & Co. did] and nothing more is to fall far short of the accomplishment of the statutory duty to bargain collectively, because the affirmative efforts of both parties are required—there must be, in a real sense, active cooperation . . . The greatest of rascals may solemnly affirm his honesty of purpose; that does not foreclose a jury from finding from the evidence submitted that he possesses no trace of such innocent quality. We think the Board had full authority to determine as a fact whether petitioner [Montgomery Ward & Co.] was acting in good faith or whether its actions amounted to a mere superficial pretense at bargaining—whether it had actually the intent to bargain, sincerely and earnestly—whether the negotiations were captious and accompanied by an active purpose and intent to defeat or obstruct real bargaining.") (citations omitted).

[165] *See also*, Cox, *supra* note 144, at 1414 (discussing the strength of the above inference when read against the background of old National Labor Relations Board opinions).

[166] 2–4 LITTLER ON UNION ORGANIZING § 4.2 (2016); *Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, NATIONAL LABOR RELATIONS BOARD, https://

available to employees in the event that their employer refuses to negotiate in good faith (that is, in an intentional effort to find common ground) is an order from a court compelling the employer to cease and desist from bargaining in bad faith.[167] If the court order is ignored, the aggrieved party has to return to the courts and seek a contempt charge.[168] The National Labor Relations Act does not allow courts to fill in the details of the agreement.[169] In this respect, the United States is considered to lack 'institutional support' for good faith bargaining, in practice.[170] Again, this scheme encourages obstinance on the part of the employer. As Cooper and Ellem stated: "This form of good faith bargaining, and the system of which it is part, has become adversarial and legalistic."[171] While the law may push the parties to the bargaining table, there is no practical reality that encourages or compels the employer to actually agree to anything that the employees are asking for.

B. AUSTRALIA

The good faith requirements under Australia's Fair Work Act are substantively similar to those under the National Labor Relations Act. Section 228 of the Fair Work Act lays out what is good faith bargaining in the Australian labor relations regime. It states:

> Bargaining representatives must meet the good faith bargaining requirements
>
> (1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
>
> (a) attending, and participating in, meetings at reasonable times;
>
> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

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www.nlrb.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-section (last visited Aug. 7, 2018).

[167] Cooper & Ellem, *supra* note 52, at *11–13.

[168] *Id.*

[169] *Id.*

[170] *See id.* at 14.

[171] *Id.* at 13.

> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognizing and bargaining with the other bargaining representatives for the agreement
>
> (2) The good faith bargaining requirements do not require:
>
> (a) a bargaining representative to make concessions during bargaining for the agreement; or
>
> (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.[172]

At the outset, this section appears to be a more detailed codification of the United States' good faith bargaining requirements. Like the American system, the Fair Work Act focuses on the bargaining process and not on the outcomes in the ultimate agreement. Indeed, it likewise states explicitly that there is no requirement that the parties make concessions during bargaining.

However, the critical difference between Australia's labor relations regime and the United States' labor relations regime is determining what a party bargaining in bad faith means. The Fair Work Act empowers the Fair Work Commission to make a workplace determination which fills in terms to the agreement. A breach of good faith bargaining requirements is a factor that FWA is required to take into account when deciding such terms, per section 275 of the Fair Work Act.[173] Also, whether the parties have been conferring in good faith can impact which employees will be covered by the ultimate agreement, because whether the good faith bargaining requirements have been met is

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[172] *Fair Work Act 2009* (Cth) s 228 (Austl.).

[173] *Id.* s 275 ("The factors that FWA must take into account in deciding which terms to include in a workplace determination include the following: (a) the merits of the case; . . . (d) the public interest; (e) how productivity might be improved in the enterprise or enterprises concerned; (f) the extent to which the conduct of the bargaining representatives for the proposed agreement concerned was reasonable during bargaining for the agreement; (g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements; (h) incentives to continue to bargain at a later time.").

a factor that the FWA is mandated to consider when asked to make a scope order.[174]

It is perhaps instructive to consider the order that these remedies can be sought. If the good faith bargaining requirements have not been met, then a bargaining representative may seek a bargaining order. If the bargaining order is further breached by a bargaining representative, this could cause the opposing party to petition FWA for a serious breach determination, which would in itself open the door to having the terms of the agreement completed before the Fair Work Commission.[175]

In many ways, the Australian labor relations regime prohibits the same bad faith conduct as the United States regime, but the Australian regime provides clearer institutional penalties for failure to negotiate in good faith. The Fair Work Commission disallows bypassing bargaining representatives,[176] unilateral changing of work conditions,[177] refusing to provide information and counter-proposals,[178] failing to recognize and excluding the opposing bargaining representatives,[179] and generally unfair and capricious conduct.[180] What makes the Australian regime unique is the Commission's authority and willingness to quickly resolve the dispute, even by filling in terms if necessary, to effectuate the policy of collective enterprise bargaining. Obstinance and litigiousness provide no benefits for employers.

The United States should adopt similar steps in their labor relations regime because it will provide more effective support for the parties and install meaning within the good faith bargaining requirements. As it stands, the American regime provides ineffective remedies when a party breaches their good faith bargaining duties. Under

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[174] *Id.* s 238(4) ("FWA may make the scope order if FWA is satisfied: (a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements; and (b) that making the order will promote the fair and efficient conduct of bargaining; and (c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and (d) it is reasonable in all the circumstances to make the order.").

[175] *Id.* ss 234, 235; Cooper & Ellem, *supra* note 52, at *23–24.

[176] *Alphington Aged Care v Australian Nursing Fed* [2009] FWA 301 (17 September 2009) ¶ 57 (Austl.).

[177] *Australian Workers' Union v Woodside Energy* [2012] FWA 4332 (30 May 2012) ¶ 93 (Austl.).

[178] *Ass'n of Prof'l Eng'rs, Scientists & Managers, Austl v BHP Coal Party Ltd* [2012] FWA 4435 (20 June 2012) ¶ 105 (Austl.).

[179] *Australian Mun, Admin, Clerical & Serv Union v Queensl Tertiary Admissions Ctr Ltd* [2009] FWA 53 (29 July 2009) ¶ 13 (Austl.).

[180] *Liquor, Hosp, and Misc Union v Foster's Austl Ltd* [2009] FWA 750 (28 October 2009) ¶ 5 (Austl.).

the Australian regime, negotiations occur in the shadow of workplace determinations. While the threshold is high for a party to obtain a serious breach determination,[181] which is a precursor for a workplace determination,[182] it at least places a substantively significant remedy at the end of these disputes which motivates employers and employees alike to refrain from bad faith practices. As it stands today, the United States lacks the significant remedies required to deter employers from bad faith union busting tactics. As a result, many labor unions decide to circumvent the legalistic NLRB process entirely and just work directly with the employer.[183] The United States should ratify an appropriate remedy, like under the Fair Work Act, to encourage good faith negotiations and make the whole process more meaningful.

IV. CONCLUSION

To fulfill the policy of the National Labor Relations Act of promoting collective bargaining and supporting the right to association, several issues need to be addressed. These issues need to be addressed to comply with international agreements, and to support wage equality and productivity. Importantly, there must be better remedies in order to deter unfair labor practices on the part of the employer. Currently, employers are incentivized to utilize the legalistic structure of the National Labor Relations Act to delay elections, and prolong resolution of claims with the National Labor Relations Board. Delaying elections and claims is relatively cheap for the employer, and the longer that pro-union employees are kept from achieving union recognition and getting to the bargaining table, the harder it is for the unions to successfully achieve their goals. The focus of this article has been to demonstrate several points in the legal framework that can be changed to provide earlier and more effective remedies by contrasting the NLRA to Australia's labor relations regime under the Fair Work Act 2009. The recommendations of this article are split into two broad categories. First, the union recognition process should be split into several employee centered decisions. Instead of having one vote for the bargaining unit to collectively bargain and have a union be the sole bargaining agent for the bargaining unit, the employees within the bargaining unit should first vote simply on whether

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[181] Cooper & Ellem, *supra* note 52, at *25.
[182] *Fair Work Act 2009* (Cth) s 269 (Austl.).
[183] Cooper & Ellem, *supra* note 52, at *13.

to collectively bargain at all, and then, if successful, to allow the employees to decide who will be their bargaining representative at the table. Also, providing individual employees with the option to choose for themselves who will represent their interests at the bargaining table separately from their choice of whether to collectively bargain at all will afford employees a greater freedom of choice, which is inherent in the right to freedom of association. Each employee would choose for themselves who will best represent their interests at the bargaining table. By fragmenting this process into several points where individual and group decisions are made, the process would have fewer incentives for employer interference. Second, there should be a clearer legal process for employees to rely on if employers engage in bad-faith bargaining once the parties begin negotiations. The American labor relations regime needs to be more responsive to these claims and provide more significant remedies for employers to take the system seriously. Currently, the system is overly legalistic and rewards employers for prolonging litigation because it is easy to appeal decisions and frustrate the bargaining unit's efforts to reach a beneficial agreement.

The Australian regime under the Fair Work Act 2009 provides a good model from which the American regime can adopt some common-sense changes. The statutory framework for the Australian labor relations regime is more detailed and provides a clear escalation of remedies for employers and employees alike to seek. First, if an employer refuses to recognize that their employees have voted to collectively bargain, then the Fair Work Commission will issue a majority support declaration which can lead to a bargaining order, which can then escalate to a serious breach declaration if not followed. The end result, if an employer continues to be obstinate, is a bargaining related workplace determination. This outcome provides actual closure for the employees, instead of endless discussions or appeals. Second, if an employer refuses to bargain in good-faith, the remedies are essentially the same under the Australian regime for refusing to recognize majority support to collectively bargain, except that the majority support declaration is not an applicable remedy (considering that majority support is a precursor to negotiations). That is, the remedy available to employees when their employer is refusing to bargain in good-faith is a bargaining order, followed by a serious breach determination, which can lead to a bargaining related workplace determination. This clear framework ensures that the parties to these negotiations are operating in the shadow of the law which has a clear structure and clear boundaries. This kind of

framework is desirable because it provides certainty for all involved as to what will happen if the law isn't followed. If the United States wants to be serious about following the policies of the National Labor Relations Act and wants to faithfully adhere to the international agreements that it is a party to, they should strongly consider adopting a similarly detailed statutory regime that provides early and significant remedies for breaches to their collective bargaining policies. Without such a framework, employers can continue to tread on the rights of their workers because they can continue to beat the system.