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▶▶ Cochlear and Endeavour decisions show FWA needs more powers: Forsyth

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RMIT University associate professor Anthony Forsyth says the recent Endeavour Coal and Cochlear decisions demonstrate the shortcomings of the FW Act's good faith bargaining provisions and that broader access to arbitration is needed.

Forsyth told *Workplace Express* one of the disappointing outcomes of the FW Act review was its failure to extend access to arbitration where surface bargaining was taking place. Forsyth and Adelaide University's Professor Andrew Stewart made a joint [submission](#) to the review in which they pressed for more arbitral powers for FWA.

FWA Commissioner Helen Cargill agreed to make good faith bargaining orders in the long-running Cochlear enterprise bargaining dispute last week (see [Related Article](#)), but Forsyth says they are unlikely to be much help in achieving an agreement.

He says the Commissioner was clearly influenced by the Federal Court's recent Endeavour Coal decision (see [Related Article](#)), in which Justice Geoffrey Flick set aside FWA bargaining orders despite upholding the tribunal's finding that the BHP Billiton subsidiary had not made genuine efforts to negotiate an agreement with APESMA.

While Justice Flick said a bargaining party could not adopt the role of a "disinterested suitor", it also could not be compelled to make concessions or indicate what subject matter it would be prepared to include in an agreement.

In Cochlear, Commissioner Cargill said (in para 545 of her decision) that Endeavour Coal made it clear that "a bargaining party cannot be required to bargain in any particular way or to put any particular type of response."

Forsyth says this demonstrates the inconsistencies inherent in [s228](#) of the Act. "Justice Flick said the Act does require you to put a position, but at the same time it is difficult to give effect to that through orders without running into s228(2)," he says. Section 228(2) states that the good faith bargaining requirements do not require a party to make concessions during bargaining or to reach agreement on terms to be included in the deal.

But the AiGroup's national IR director Steve Smith disagrees. "The Act already has too many powers for FWA to intervene in the bargaining process", Smith told *Workplace Express*. Smith said the AiG had taken a strong view in the lead up to the consultations over the Fair Work Act about the restrictions in sections 228 and [255](#).

Smith also said there was no need for more arbitral powers for FWA. He said the fact that negotiations went for a lengthy period was immaterial. "Enterprise bargaining is not easy," he said.

The FW Act review panel [report](#) includes a section on "Surface Bargaining" which considers the Cochlear and Endeavour Coal disputes (pages 136-138), but prior to the recent decisions. The panel concluded that the law on good faith bargaining was still developing, and it would therefore be "precipitous to recommend any significant changes" to the regime.

The panel said the good faith bargaining provisions had "operated to allow the substance of a bargaining situation, rather than just the formal processes, to be considered."

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