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Developing a pragmatic approach to management-union negotiations

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1 Introduction

Negotiation is at the heart of workplace relations whether they be negotiations between manager and worker or management and union. As has been demonstrated by Professor Lansbury in the first paper in this FWC Education Series, a collaborative rather than competitive approach appears preferable for all parties. However, the typical image of management – union negotiation (the focus of this paper) seems to be competitive, even adversarial, rather than collaborative. This brief paper will explore some important aspects of why negotiations unfold the way they do in the workplace (apart from the fact that one side always want more than the other is prepared to concede). It will suggest some practical steps that can be taken to prepare the ground for a more constructive negotiation process. Finding better ways to negotiate is increasingly important, given the current emphasis on improving workplace productivity (DEEWR, 2012) including the current Productivity Commissions review.

2 Competitive or cooperative negotiation?

The expansion of negotiations at the enterprise level improved management-union interaction and workplace relationships and led to better productivity outcomes. However, questions are being asked whether the beneficial dividends of this process (such as they were, Hancock, 2012) have now been reaped. There is an indication that the process is becoming something of a chore and the benefits merely incremental (Townsend et al, 2013). Notwithstanding the wide coverage of agreements, the extent of actual bargaining may be far less (Bray and Todd, 2014; Gahan and Perkarek, 2013).

A negotiation perspective on how productive enterprise bargaining has been might take a different approach by suggesting that that the process of negotiation did not change all that much from any negotiations that occurred in the context of the previous arbitral structure. These negotiations would have many of the characteristics of traditional bargaining (see Table 1)(Fells, 1995; 1998). As enterprise bargaining developed, the complexity of the then prevailing work arrangements provided a lot of ‘low hanging fruit’ for the negotiators on both sides to work through and achieve benefits for both the company and the employees. It was easy to cooperate because the prospect of some joint gain was obvious. Cooperation was through the process of give and take – for example, a change in the hours’ clause that permits the introduction of a new more cost efficient roster is traded for a wage increase, resulting in both parties being better off.

Improvements in productivity can be sourced through many aspects of an organisation’s operations, through improved financial structures, better supply chains or new business processes, for example. Improved infrastructure such as better transport networks or a more educated workforce will also enable an organisation to become more productive. New technologies – not only new products but also new technologies for how they are made – impact directly on the workplace and give rise to a need for changed work organisation and different work practices. If these technologies and other productivity initiatives are to reap their full potential then any negotiations over their introduction into the workplace needs to be constructive rather than competitive.

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1 All that will be written here about the process of negotiation between management and union applies equally to negotiations between management and any employee representative negotiators. For convenience we will refer just to ‘management-union’ negotiation rather than ‘union and/or worker representative’
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Table 1: Traditional and interest-based approaches to management-union negotiation
Source: Cutcher-Gershenfeld, 2003: 143, 146

<table>
<thead>
<tr>
<th>Traditional bargaining behaviours</th>
<th>Interest-based bargaining behaviours</th>
</tr>
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<tbody>
<tr>
<td>• Develop target and resistance points in advance</td>
<td>• Assess all stakeholder interests in advance</td>
</tr>
<tr>
<td>• Overstate opening positions</td>
<td>• Convert positional demands from constituents into interests</td>
</tr>
<tr>
<td>• Commit to these positions early and publicly</td>
<td>• Use subcommittees and task forces for joint data collection and analysis</td>
</tr>
<tr>
<td>• Channel communications through a spokesperson</td>
<td>• Frame issues based on interests – avoid positional statements</td>
</tr>
<tr>
<td>• Give as little as possible for what you get</td>
<td>• Encourage open exchange of information and joint problem solving</td>
</tr>
<tr>
<td>• Never ‘bargain against yourself’</td>
<td>• Generate as many options as possible on each issue</td>
</tr>
<tr>
<td>• Always keep the other side off balance</td>
<td>• Take on the constraints of your counterparts</td>
</tr>
<tr>
<td>• Use coercive forms of power</td>
<td>• Ensure constituents are educated and knowledgeable on the issues</td>
</tr>
<tr>
<td>• Mobilize support from constituents</td>
<td>• Anticipate contract administration – ‘troubleshoot’ agreements</td>
</tr>
<tr>
<td>• Divide and conquer the other side; protect against the same on your side</td>
<td>• An agreement enthusiastically ratified by all parties is a sign of success</td>
</tr>
<tr>
<td>• An agreement reluctantly accepted is a sign of success</td>
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</table>
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Set against the traditional approach to negotiation is a seemingly more cooperative approach, the essential elements of which are shown in Table 1. This approach is derived from the Harvard model of principled negotiation (‘Getting to Yes’, Fisher, Ury and Patton, 1991) and was widely advocated as a way forward in the historically adversarial North American collective bargaining system. The move to more cooperative approaches to management-union relations has taken a slightly different approach in the UK where the emphasis is more on building partnerships but if a partnership is to work and survive then it too needs the negotiation between the partners to be collaborative.

Comparing the two approaches presented in Table 1 it is clear why the interest-based approach is preferred. However a close analysis of over 50 researched/reported cases reveals a less encouraging picture (see Fells and Prowse, 2013 for a full review). Attempts at a new bargaining approach occur where the employing organisation is facing a financial or market crisis or where there has been a history of bad relations between management and union culminating in a dispute that clearly benefited neither party. The negotiated outcomes are often trade-offs such as a pay cut in return for job security which may well have been appropriate outcomes in the circumstances but were not normally value creating. (This is why the language used changed to ‘interest-based’ rather than ‘mutual gains’ bargaining.) Finally, the cooperative approach tends not to be sustained once the crisis has been addressed. For example, in the car industry there were genuinely collaborative negotiations to address the fallout from corporate decisions made overseas in response to the global financial crisis but not later when the closure of the plants seemed inevitable.

This provides a challenge for managements and for union negotiators/employee representatives. How might they develop a more constructive approach to negotiating?

3 What is so different about negotiating in the workplace?

Readers will no doubt be familiar with many of the books on negotiation that provide useful insights into how the process works and good advice about how to negotiate better. Most are aimed at business negotiations or at conflict resolution more generally. Few focus on the workplace; A Behavioural Theory of Labor Negotiations (Walton and McKersie, 1965) still being the classic analysis. Academics and practitioners have promoted the mutual gains approach which, as we have seen, was an attempt to transpose and apply a general model of negotiation to the workplace context. However, as we have also seen, this transposition has not gained traction, leaving its promoters to reflect upon its unfulfilled promise (Cutcher-Gershenfeld et al, 2007). To consider why this might be so – as a first step to suggesting how workplace negotiations might be improved – this section of the paper addresses some of the core assumptions that are made about negotiation before applying them to the workplace context.

A review of the texts on negotiation, the academic research and the ‘how to negotiate’ books reveals four underlying assumptions about the negotiation process. First, negotiation involves an exchange of information. As a result of this exchange of information the parties are able to develop their agreement; the fuller the information exchange, the better the agreement. Second, negotiation is between two or more parties. Implicit here is that the parties are separate entities, such as two companies negotiating a supply contact or a number of departments in a university trying to decide how to share the Faculty budget. Third, negotiation is essentially a private affair in that the parties set their own goals and pursue them. There is no obligation on them to take account of the impact

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2 The author modestly draws the reader’s attention to a book titled Effective Negotiation. From research to results.
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on third parties (though for their own self-interested reasons they may choose to do so). Finally, negotiation involves the alternative of not negotiating. If you can’t get a good price from one supplier, there is another down the road that you can negotiate with.

When we consider the context of the workplace within which enterprise bargaining and other negotiations occur we find that these four core assumptions might not fully hold. Importantly, they do not apply equally to both parties. The implication of this asymmetry is that it shapes negotiators’ behaviour more towards being competitive rather than to being cooperative. If workplace negotiations are to be more constructive then the way the process is developed must address this inherent contextual nudge towards competitiveness that impacts upon the negotiators. Before exploring this further we will first briefly examine each assumption as it applies in to workplace negotiations and consider the impact of the workplace context on the behaviour of the negotiators.

3.1 Negotiation involves the exchange of information

- It is assumed that both parties have information about the context that is not known to the other party, but which they will be willing to share

In the workplace context, this is not normally the case. Rather than each party coming to the table with information that it can contribute to provide a better understanding of the situation and so form the foundation for a better solution, it is the management that typically has far more information. Management holds the information about the financial, market and technical aspects of the operation and about the possible new technologies or business systems that might contribute to more productive outcomes. Further, they may be reluctant to share this because of the idea that ‘information is power’ and to share it weakens one’s bargaining position. (There is very little research in support of the ‘information is power’ approach to bargaining.)

What is the implication of this asymmetry? Given that management holds most of the pertinent information it has scope to be cooperative (or not). However, the union negotiators will have little new information to share and so cannot reciprocate – matching behaviour being one important way negotiators can build trust across the table. As a result they appear to be reactive and competitive. Further, the dynamics of negotiation processes that require a constituency ballot has an unfortunate effect. Often the only information a union can bring to the table (and often the only information that management is really interested in hearing about) is whether the workforce is fully behind the claims that their negotiators are arguing for. This leads to the negotiation being structured around two phases – before and after the ballot – which is not conducive to maintaining a constructive process of interaction across the negotiating table.

3.2 Negotiation is between two (or more) parties

- It is assumed that each party is a single entity or that the negotiator is acting on behalf of another (such as a lawyer on behalf of a client)
- It is assumed that the two parties are separate and communicate through the negotiation process

The effect of negotiating on behalf of another person is to make the negotiator more competitive – they push harder for their demands if only because they have to report back to the person or people they are representing about how well (or not) they have done. This applies to the
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management negotiators reporting back to their board as much as to union negotiators reporting back to the workforce.

This constituency effect is a well established phenomena across a wide range of negotiating contexts. Two companies were hoping to merge their operations but the negotiators could make no progress. The reason lay with the line managers of the two companies back at their various sites across the country. As these managers got to hear of the changes that were being proposed at the negotiating table, constantly harangued their respective negotiators, “You can’t agree to that! Our way of doing it is far better than theirs! Make them change.” The negotiations collapsed.

In workplace negotiations, the constituency that the union negotiator has to represent is normally a far larger and more diverse constituency than the group to which the management negotiators report to. We can’t easily envisage a situation where the HR manager puts a proposed enterprise agreement to a vote of all managers in the organisation, requiring 50%+1 for it to be approved.\(^3\) The more diverse nature of the union constituency, combined with the clearer level of accountability will mean that union negotiators feel the constituency pressure more than management negotiators. As a result they will be more competitive in how they pursue issues and more cautious in considering innovative proposals.

The other assumption about the party structure of negotiation is that they are separate such as the two companies negotiating their potential joint venture. In the workplace it is different. One party – the workforce – is employed by the other. This means that while negotiations are taking place management has the right to communicate through newsletter, supervisor’s meetings etc. directly to its employees whereas there is no equivalent opportunity for union or employee representatives to communicate directly with those managers not at the negotiating table. Perhaps the only way they have to communicate to the senior executive might be through a placard demonstration outside the main entrance. Hardly a constructive or conciliatory form of communication!

3.3 **Negotiation is essentially a private affair**

- It is assumed that the parties are pursuing their own interests, though others (audiences) may be affected by the outcome

In most negotiations the parties are, rightly, pursuing their own interests. When negotiating to buy a house the buyer and seller do not have to take account of the effect of their settlement price on other houses in the street. Workplace negotiations can be very public and not only when the trains stop running due to a drivers’ strike or the planes stop flying due to a management lock-out. This public dimension has the effect of making any compromise also more public and so can lead to negotiator intransigence rather than cooperation. Despite this, managements or unions will often attempt to invoke public support for the position they have taken at the bargaining table. This may be more effective for nurses than for tug boat crews but going public with a dispute is a risky strategy and normally requires there to be a very effective ‘back channel’ for negotiations to be resumed quietly away from the public view. Relying on a back channel requires trust, trust that may have been tested by some of the public commentary and actions by the parties. Third party involvement may be required to rebuild the negotiation but maintaining direct negotiation is preferable.

\(^3\) A further difference is that worker representatives are elected. The author was once researching what was held to be a landmark collaborative labor contract (in the USA) and sought out the key union negotiator. He had been voted out by the workforce who felt they had no choice but to accept the contract, but blamed him for negotiating it.
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3.4 Negotiation involves the alternative of not negotiating

- It is assumed that each party has alternatives – such as resolving their differences through a court action rather than through negotiation
- However it is also assumed that both parties are motivated to achieve an agreement (provided it results in them being better off)

We always have alternatives. If you can’t reach a good price with a car dealer, you can always go to a dealer down the road, just as the dealer can always start to negotiate with another potential customer. One party’s alternatives may be better than the other’s but they are always there. For many years the Australian workplace relations dispute resolution system has been based on the premise that the alternative to sitting down and negotiating is to take the dispute to a third party for some form of mediation or arbitration. This institutionalised process has led to a framework of awards and agreements that cover a significant proportion of employees. More recently individual contracts (which have always existed) have become prominent and have been formalised through public policy. The result is a clear asymmetry of alternatives on either side of the negotiating table. If management cannot get the outcome it wants across the bargaining table it can offer its employees individual contracts. The union, if it is not getting the outcome it wants, has no such equivalent. Management’s individual contract option directly challenges the union’s role in the workplace so its presence as an option, even if only in the background, inclines union negotiators towards a more defensive and competitive response to any of management’s substantive proposals.

This brings us to the last assumption about negotiation and what is needed for it to work, namely that both parties are motivated to reach an agreement. In some situations management may well invoke an individual contract strategy simply as a threat to induce the union negotiators to be more conciliatory. However, it may be part of a longer-term union avoidance or marginalisation strategy. That is, management may not want to reach agreement at all and, indeed, may feel that to have a less than constructive negotiation may actually help its longer term goal of disconnecting the union from any employee support. It is not surprising if the union (perhaps counter-productively) reacts competitively to any indications by management that it has a union avoidance strategy in play.

3.5 Taking stock

By this stage a reader might well be thinking that this analysis of the workplace context for negotiation is pretty uncomplimentary to management and is giving union negotiators lots of reasons why they can behave as competitively as they like. This is not the case.

This analysis is simply exploring why, when the parties sit down with the full intent to cooperate, that genuine cooperation is not inevitable. It says nothing about either party asking for too much (or offering too little) – either of which sets up an issue-based competitive dynamic; it says nothing about egos (on both sides of the table) getting in the way of an acceptable solution; nor about

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4 Employment legislation may prescribe when and how individual contracts might be offered. However the proposition being made here is that the option of individual contracts is now well and truly on the table in a way that was not the case, for example, during the enterprise bargaining reform period of the 1980s/early 1990s. Debating whether having a legal framework that is 2cm thick helps or hinders collaborative workplace bargaining is best left to another discussion paper.

5 Some interesting research into the making of threats – particularly a threat that invokes an alternative to negotiating – suggests that threats are more effective when made late in the negotiation rather than early (Sinaceur and Neale, 2005).
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either side bringing broader ideological issues to the negotiating table. Here we simply make the point that if managements and unions want to sit down and find new cooperative solutions – and if the public policy makers wish to encourage this approach – then all concerned should recognise that it is going to be a very pragmatic form of cooperation. This is not because the negotiators are unwilling, or are dogmatic or incompetent. It is because negotiating cooperatively in the workplace is hard, particularly if you sit down to try it only once every two or three years.

4 Some pragmatic suggestions

It is time to make some recommendations about building a more constructive negotiation process.

4.1 Don’t hope for cooperation – build it

With so many factors pushing the negotiators towards the more competitive end of the negotiation spectrum, it is not sufficient to just talk about the need to cooperate and then hope it will happen. A wholesale transformation in the negotiators’ behaviour is unlikely due to the strength of past practice and pressures from their constituents.

Trust – a key ingredient in cooperation – is built through interaction and through information exchange. The quality of the next round of enterprise bargaining will be determined in large part by the way the parties have interacted with each other during the life of the present agreement. The time to start investing in the next negotiation is right after the negotiations for the current agreement have finished, not 3 months out from the agreement’s expiry date. In one company, the enterprise negotiations broke down to such an extent that lawyers were issuing writs on the employees. Once the dispute was finally settled, the two sides sat down and went through a joint ‘lessons learned’ workshop that involved developing a far better way of negotiating. However, a couple of years later when they got down to negotiate their next agreement they started out negotiating competitively as they always had done. (We don’t change our behaviour just because we’ve been on a training course.) But the investment paid off. As the negotiations progressed, they realised, “if we carry on like we did before, then we’ll end up where we did before”. They took stock, went back to the better approach to negotiating that they developed in the workshop, decided to follow it, and reached a good agreement without any disputation.

It is much better to be pragmatic about improving our negotiation than idealistic. Employing a facilitator to coach the negotiators when they seem to be slipping back into their previous behaviour is one way to keep the negotiations on their new track (McNeil and Bray, 2013). It is better if the negotiators do this themselves.

The second key element in building cooperation is information exchange. As we have seen, management holds most of the information that is needed to build value-creating agreements and so the responsibility for building trust and cooperation in this respect lies with them. Providing a swath of information – usually bad sales or wage comparative data – just before a negotiation is due to start is not being cooperative, just the reverse. It signals, “we haven’t trusted you with any important information about business performance until now, but now that we need you to moderate your wage demands, read all of this”.

Management needs to make a broader decision of the extent to which it is going to involve its workforce, and any workforce representatives, in the decision-making processes throughout the organisation. As has been shown in Professor Lansbury’s paper in this Series, cooperation reaps dividend and the investment in information sharing during the life of the agreement will pay off in the next major negotiation. This is no different from other areas of an organisation’s operations. In
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the procurement area, for example, most companies rightly give emphasis to developing relationships with their suppliers and build value adding partnerships by sharing information.

While the initial responsibility for information exchange lies with management, because it is they who have the information that needs to be shared, unions and worker representatives have an equal responsibility in how they receive and handle that information. Negotiation is two-sided; trust can be offered but if it is misused it may never be rebuilt.

4.2 Get the constituents involved

We have seen that a key characteristic of workplace negotiations is that they are on behalf of constituencies – line managers on one side, employees on the other. This constituency dimension was quickly recognised as a challenge for those seeking to reform their negotiating processes (Friedman, 1994). Building a new process of negotiation must involve these constituencies because they will have their own expectations of what ‘proper’ negotiating involves. To do something different without it being understood can look to the constituents as selling out to the other side. Employees might consider that by engaging in ‘working parties’ and by not periodically threatening to strike, their negotiators would be going ‘soft’ on management. Line managers might think the same when HR department proposes to put work design issues onto the negotiating agenda. Consequently one critical element in building a more constructive process is for the negotiators to provide reassurance to their respective constituents that the process is working and will deliver better results. Union negotiators can’t do this if access to those they represent is a problem (that issue of trust again). The risk here – for both parties – is that if the union negotiators don’t (or can’t) communicate with those they are representing, then when major issues such as pay begin to be negotiated over the competitive mindset will re-emerge.

Constructive negotiation takes time. Many enterprise negotiations take time but that’s often because the negotiators schedule a long sequence of meetings in their diaries and don’t do too much in between. In one manufacturing company, the parties agreed – the union negotiators a little warily – to go away for a couple of days and try to finalise the agreement in one go. They managed to achieve this. One of the union negotiators commented that one of the reasons they got so much done in such a short time was that they were not spending half of each meeting ‘getting up to speed’ on the issues from a meeting two or three weeks previous.

4.3 Still set yourself strong goals

Being cooperative does not mean giving in. Nor is a negotiation cooperative only when the other party gives in. Strong goals lead to better outcomes (Halpert at al, 2010) as does maintaining a strategic focus (Fells, 2013). The key is in being firm on what you want to achieve but flexible in how that goal might be obtained. If the goal is to improve workplace productivity then to allow discussion over only one way to achieve this is going to be counterproductive. In a series of similar negotiations across different work areas in a steel manufacturer, those bargaining teams that unpacked workplace change proposals and reworked them through quite competitive negotiation achieved the best outcomes for both employer and employees (Bacon & Blyton, 2007). In one local authority where the CEO regards enterprise negotiations as a key tool in bringing about change in the workplace, their enterprise agreement is the vehicle for a range of skill development and work-life programs. On the other hand, if wage rates, shift rosters and penalties are all that are put on the negotiating agenda, it is not surprising if the negotiations are then competitive.
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Conclusion

The focus of this paper has been on the negotiation process and the effect that the workplace has on how workplace negotiations ‘work’. It has explored some of the challenges facing management and union negotiators who set out with the intent of negotiating collaboratively. There are other strategies available to the parties to achieve their goals but if they chose the negotiation route, then those negotiations must be genuinely collaborative for good agreements to be reached. However ‘collaboration’ does not mean a simple expectation that ‘the other party being reasonable and concessionary’. Constructive negotiation requires both parties to be clear on their goals and to have a process that is well understood by those they represent. For the negotiations to be effective there needs to be trust between the parties, and particularly between the negotiators, trust that will have been built upon the on-going exchange of information.

Finally, for a negotiation to be a genuine negotiation – and these are the sort that create value – the parties have to have clear options to not negotiate. It is beyond the scope of this paper to explore the impact of the legislative framework on how workplace negotiations are conducted but the examination of workplace bargaining here raises a question for the policy makers: if the goal of workplace relations policy is for managements and the representatives of their employees to sit down and genuinely negotiate an agreement that best suits their respective needs, does the present complex legislative framework help or hinder this process?

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