

Potential implications of new collective bargaining laws

Australia's *Fair Work Act's* good faith bargaining rules came into effect on 1 July 2009. As these rules have strong parallels with the US good faith bargaining framework, three leading Australian workplace lawyers – Arnold Bloch Leibler's Henry Skene, Freehill's Chris Gardner and industrial relations barrister Stuart Wood – went to the US to learn more about the potential implications of these new bargaining rules for employers.

The trio met with US collective bargaining experts in New York, Washington and Chicago to understand what the new laws might mean for Australian employers.

According to Henry Skene, aspects of collective bargaining trends in the US may act as a caution for corporate Australia. The three key lessons for Australian employers include:

1. Employers will have lower direct control over decisions about: whether they wish to participate in bargaining; who they wish to bargain with; the parts of their business involved; and who will be party to any resulting agreements.
2. The obligations to good faith bargaining mean that an employer must act as if it has the intention of reaching an agreement with the bargaining representative. This has two impacts:
 - a) it can reduce the scope for the employers to pursue other options such as dealing directly with employees and implementing structural change to their business; and
 - b) there are more onerous obligations to justify bargaining positions and provide information to do so – what you say, and how you say it can have far-reaching consequences.
3. This has led employers in the US to become much more sophisticated in their approach to bargaining and the investment they make in it. This is the best way for employers to influence the outcome.

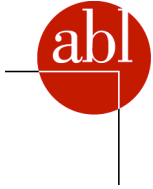
These new rules will involve a high level of regulation that will require increased preparation for and investment in the collective bargaining process. From 1 July, Australian employers will need to re-think their investment made in the collective bargaining process. There are clearly opportunities for the well-prepared, but risks for the poorly prepared.

Front-end campaigning

A key threshold issue in both the US and the new Australian system is whether a majority of employees wish to bargain collectively. This is a trigger for good faith bargaining. As a result, campaigning is another area that will require additional investment from employers. "In many cases the question of whether or not employees wish to bargain collectively is conducted on both sides as a campaign," says Skene. Unions will campaign to gather support to trigger the collective bargaining process, while employers will aim to ensure employees understand the consequences of this position and other options that may be available.

More sophisticated approach to bargaining

The new bargaining framework also entails greater controls and scrutiny over the negotiations. Throughout the negotiation process employers must demonstrate they want to reach agreement and will be judged on their willingness to do so. Skene states that, "These laws will compel all employers to behave to a standard as if they intend to reach agreement".



A further major point uncovered in the US is employers' limited capacity to deal directly with employees in a bargaining scenario. This restricts the direct control of employers, as many decisions will be made by third parties.

"An employer has to deal exclusively with the bargaining representative, which by default is the union. There isn't room for the employer to deal directly with particular groups of employees", says Skene. Doing so could be interpreted as not bargaining in good faith.

While in some certain circumstances aggressive negotiation tactics may be acceptable, 'take it or leave it' bargaining may be limited, as such an approach would also be considered as not bargaining in good faith.

Increased controls, scrutiny and consequences for getting agreements wrong may see Australian employers increase their engagement of consultants, lawyers and finance experts, as demonstrated in the US. By way of example, employers may increase their use of finance experts to cost and justify responses to union bargaining claims, particularly given the involvement of a regulator (i.e. Fair Work Australia) which has the power to scrutinise negotiating positions.

The lessons from the US provide Australian employers with some crucial insights regarding the newly implemented good faith bargaining rules. The high lever of regulation will require a more sophisticated approach by employers, and properly prepared employers will place themselves in a better position to achieve their desired outcomes under the new system.

Over the coming years, Australian employers will assume greater emphasis on the use of experts, campaigning techniques and negotiation strategy and tactics.

To hear an interview with Henry Skene regarding good faith bargaining, please go to: <http://www.brr.com.au/au/8ABL/arnold-bloch-leibler/>

For more information, or to arrange an interview, contact **Katie Elston**, Marketing Communications Co-ordinator, on (03) 9229 9715.

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