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“A New Era in IR”

Keynote Address to a CEO Institute Briefing

Wednesday 8 July 2009

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Mr Peter Jollie, Chairman The CEO Institute, Ms Yvonne Howie, CEO NSW CEO Institute, Members of the Institute, ladies and gentlemen. Harmers Workplace Lawyers is delighted to be able to partner with the CEO Institute to bring you this morning's event and it's a privilege to be able to address you one week into the operation of the Rudd government's "Fair Work Act".

1 Introduction: the notion of fairness

It is an interesting title for a piece of legislation and a title that had its genesis no doubt in a widely-held perception that the former Howard Government's much-maligned Work Choices legislation was patently "unfair". The notion of "fairness" has figured prominently throughout Australian industrial and workplace relations legislation and regulation. Indeed, when unfair dismissal laws were first introduced into this country the so-called litmus test for assessing whether a dismissal was somehow in contravention of the legislation was to be based on an assessment of whether there had been a "fair go all round". Its perhaps only a matter of time before the phrase "fair shake of the sauce bottle" makes its way into a piece of the current Government's legislation.

Separate from industrial relations legislation, the notion of fairness at an individual employment relationship level continues to evolve. Many decisions of the highest courts in this country appear to be giving growing weight to a recognition that implied in every contract of employment is a term of trust and confidence and that an employer should not be allowed to act in a way that

undermines that duty of trust and confidence: in other words a prohibition against the employer acting unfairly.

It is this notion of “fairness” that the current government took to the last election under a policy platform known as “Forward with Fairness”. The Deputy Prime Minister Julia Gillard said in a press conference on 20 February 2008 (before the Fair Work Bill was drafted) that:

“We want to draft a bill that is right. We think you best do that by working in a consultative and collaborative way ... we will be getting on with it as quickly as possible ... but we will take the time to get the substantive Bill right ... we want to make sure that it is drafted properly. We are going through a very consultative process to do that.”

There can be little argument that, regardless of one’s views about the merits of this legislation, the government *did* consult extensively with most relevant players across industry, the union movement, special interest groups and others. But that is all history. The immediate future presents far more important considerations for all of you here today as leaders of industry; not the least of which is whether this legislation has “got it right” and without wishing to sound in any way glib, whether it is in fact “fair”.

Many employers in Australia are, quite rightly, anxious about the implications of this new legislation. Many people will struggle with the chasm that exists between the political rhetoric (on both sides of the fence or, perhaps more accurately, around the perimeter of the enclosure) and the legal reality. As with all new legislation and particularly so in the workplace relations arena where subjective concepts such as fairness, good faith, justness and reasonableness have to be conclusively determined on a daily basis, that legal reality will only properly be comprehended over a period of time.

There is enough there, however, on the face of the legislation to warrant each of you within your own organisations to at the very least be asking a series of important and incisive questions of those within your organisations charged with the responsibility of looking after human resources and workplace relations matters. These are questions that need to be asked now (to the extent they have not been asked already) notwithstanding that the answers to those questions might not be known for some time and not without a considerable amount of auditing and introspection being conducted. It is those questions that I would like to explore with you this morning.

The most useful manner in which to conduct that exploration, after some thematic comments around the flavour of the Fair Work Act, is to look at:

- (i) where businesses will be tested over the upcoming months and perhaps years around this legislation; and
- (ii) what some of the opportunities for business are that exist within this legislation.

2 The changed dynamic

While workplace relations issues never appear far from the front pages of any Australian newspaper, I have noted with interest the particular prominence given to industrial relations issues over the last week. While much of the discussion around the changed dynamic of this legislation has centred around a swinging back of the pendulum towards unions and industrial organisations and away from employers, to focus on that as being the only change of significance would be a far too selective and superficial analysis of the importance of this new legislation.

I noted with interest the front page of yesterday's *The Australian* where the Fair Work Ombudsman, Nicholas Wilson confirmed that his organisation would actively be investigating allegations of discrimination in the workplace and initiate legal proceedings on behalf of an employee. The existence of discrimination laws is not something new to Australian legislation. However the ability for an external authority to prosecute unlawfully discriminatory conduct at all stages of the employment relationship is a massive development in the protection of human rights in this country.

Interestingly, the same article references the ACTU website which confirms that the ACTU is:

- conducting courses for organisers that offer to show them how to use the provisions of the law and “act on matters that have not been included in industrial legislation before”; and
- encouraging organisers to “use discrimination and harassment in the workplace as an organising opportunity”.

I do not think that the comments about the energy levels within the union movement are in any way exaggerated.

Similar comments (ie that these laws are taking us to previously uncharted territory) could be made about other aspects of the legislation, such as those dealing with so called “sham arrangements” when dealing with independent contractors. Once again, it has been an age-old imperative for employers to characterise their arrangements with worker in a legally accurate way. That is to say, labelling someone an “independent contractor” when they are in fact an “employee” (or at least would be considered to be an employee under tax, workers compensation, superannuation and industrial legislation) leaves the employer exposed to civil claims from that worker and also penalties from the

ATO. The Fair Work Ombudsman will assume, in this arena just like it has in the human rights arena, an active policing role with the Government's full imprimatur (and from the most recent ACTU Council an expectation from the ACTU) to prosecute and seek to have significant penalties imposed on employers in breach. After all, or so the theory goes, unions work hard to secure terms and conditions for employees and that hard work has the potential to be undermined where employers can avoid their obligations by engaging workers as contractors.

These are two examples of how this legislation, while in some respects only extending existing rights and obligations, is extending the scope of legislation into a potentially very uncomfortable space for employers.

While it is not my intention to dwell on the uncertainties of the current economic climate, it would be remiss of me not to comment on that economic context as adding to the discomfort of employers around this extension.

3 Where businesses will be tested

(a) Good Faith Bargaining

Every workplace law practitioner and advisor will have their own views about what are going to be the so-called "pressure points" for business under the Fair Work Act. I would be surprised if any of those commentators would not have very high on their list the newly introduced "good faith bargaining" provisions.

The Fair Work Act introduces a requirement for bargaining in respect of any enterprise agreement to be conducted in good faith. Let me take a step back and provide some relevant context as to what I am about to discuss. Regardless of whether your organisation has previously had collective agreements, enterprise bargaining agreements or the like, it is available for and at a practical level expected that a relevant union will approach your organisation (so long as they

can legitimately represent the interests of at least one of your employees) with a view to seeking to enter into an enterprise agreement with you.

Enterprise bargaining has been a feature of Australian labour law for the better part of the last 21 years. Having been introduced in the Hawke-Keating era, the theory underpinning enterprise bargaining was to encourage appropriate decisions about regulation of a workplace's terms and conditions to be made at the enterprise level. That is to say, employers and unions (at least in the early days of enterprise bargaining regulation) were encouraged to sort out the terms and conditions of employment that should apply at a particular workforce.

Under the Howard Government, the notion of enterprise bargaining morphed away from unions needing to have a role to employers and employees being able to negotiate themselves and, ultimately, individual employees being able to and empowered to negotiate their own terms and conditions and have that recorded in a statutory instrument known of course as an Australian Workplace Agreement (or AWA).

At a time when, perhaps for these reasons or reasons completely unrelated, union membership was on the decline but unions still recognising that their best opportunity at demonstrating relevance was to obtain a seat at the employer's table in discussions of terms and conditions of employees, unions continued to agitate for new enterprise agreements to be made. Employers chose to respond to this agitation in a number of ways, influenced by ideology, past experience or simply because they had no cause to be troubled by adopting a "we don't care about unions" stance.

Our firm has for a number of years now been acting for Cochlear, an iconic and highly successful Australian company that gives the gift of hearing to so many people around the world. What I am about to share with you is all publicly available information. Cochlear made a decision a number of years ago to

detach itself from any industrial relationship with the union with whom it had previously entered into collective agreements in respect of its manufacturing workforce. Cochlear considered that an individual common law contract of employment (which incidentally was the instrument that regulated terms and conditions of all employees other than manufacturing employees in its organisation) was the better way to regulate terms and conditions for its manufacturing workforce. For the last two years, that Union (of whom less than 50% of Cochlear's manufacturing workforce are members), has been actively agitating for a new enterprise agreement. It has been available to Cochlear over that time not to engage in any dialogue with that Union and there has been very little that the union could do in response, or at least very little that carried with it any real concern for Cochlear. There has been much said of the situation at Cochlear in the press and, without divulging any details of Cochlear's strategy, I merely note that under the good faith bargaining laws that have commenced operation on 1 July 2009, Cochlear or its bargaining representative must:

- attend, and participate, in meetings at reasonable times;
- disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
- respond to proposals made by other bargaining representatives for the agreement in a timely manner;
- give genuine consideration to other representative's proposals and give reasons for responses given to those proposals; and
- refrain from conduct which undermines freedom of association or collective bargaining and recognise and bargain with the other bargaining representative for the agreement.

A failure to do any of the above leaves an employer exposed to bargaining orders and worse.

There are many employers, and I am sure many of those of you present today, who would say that they aspire to quality direct relationships with their employees and that they would not see a union or an industrial organisation as a partner in facilitating that aspiration. As potent as legislation can be it can never go so far as to compel a CEO to change his or her ideological views. But this legislation certainly does everything just short of that. It will no longer be available to an employer not to participate in a bargaining process. While the legislation makes it clear, at least on paper, that employers will not be required to:

- make concessions during bargaining; or
- reach agreement on terms to be included in the agreement,

the ability and willingness of employers to withstand the impending onslaught from the union movement over the next 12 to 18 months will be greatly tested.

It should be noted in this context that many of your HR teams will not have the bench strength to deal with industrial negotiations. I make that observation merely because traditional industrial relations skills have not been too much of a priority for HR Heads when selecting members of their teams. There can be no doubt that at least for a while the internal resources of an organisation will be nowhere near on par with the skills that a union might be able to bring to the table.

And so employers need to make an assessment of their “industrial risk profile”. Specifically, CEOs need to be asking themselves:

- how receptive might our people be to a union indicating to them that arising from recent legislative changes, that union will be able to deliver better terms and conditions than that person currently enjoys (or perhaps pitch to your employees that it can enshrine more generous redundancy entitlements at this uncertain economic time);
- even if an employee is not necessarily pro-union (and it is my view that the silent majority within workforces that need to be influenced) what is ultimately stopping that employee from going along for the ride with a union's industrial campaign;
- what might be the specific points of pressure for your organisation (the industry of which you are a part or the economic environment might be two such examples);
- what contingency plans do you have in place to deal with what might be a long and protracted bargaining process and the impact on your managers' time; and
- what is going to be your response strategy to any industrial action that might be threatened in your own organisation.

In talking about industrial action much has been said by the Government about the Fair Work Act retaining “clear, tough rules regarding industrial action”. Once again while absolutely correct on paper this is a perfect example of the rhetoric being disconnected from the reality. Any industrial relations practitioner can tell you that the likelihood of industrial action taking place or not taking place at a workplace is not about the “rules”, but rather about emotion and momentum. Emotion, in an industrial context, is influenced by a range of factors, not the least of which is the pitch that can be put to a workforce by a union and often the strength of the pitch will fall to be determined on the extent

to which the external environment facilitates a union being able to deliver on its promise. Under this legislation, it is going to take very little for a union to escalate a breakdown in a bargaining process to Fair Work Australia and obtain any or all of the following:

- bargaining orders;
- a serious breach declaration (where it can be demonstrated that an employer has breached a bargaining order); and
- ultimately, a workplace determination which regardless of its title is nothing short of an agreement being imposed on the parties by Fair Work Australia in circumstances where they have been unable to agree.

If you are a union official why wouldn't you feel supremely confident about the traction you might be able to generate amongst members and potential members. The external environment is more favourable to the Union's momentum than arguably has ever been the case in Australia's history.

(b) Unfair dismissal

Under Work Choices, the ability to access unfair dismissal remedies was severely curtailed. In fact, largely stemming from the definition of a "small business" being a business that employed 100 or fewer employees, a significant portion of the Australian workforce was unable to bring an unfair dismissal claim in the event that their employment was terminated. That small business exemption has now been taken back to what it previously was and a small business now is a business that employs fewer than 15 people.

Another key change in the unfair dismissal arena is the modification of the redundancy exclusion from the Work Choices laws. Under Work Choices, where an employee was dismissed for a "genuine operational reason", that

person could not bring an unfair dismissal claim. Under the Fair Work Act, it will not be enough for an employer to say that there was a genuine operational reason that acted as the catalyst for the termination of employment, rather the employer will have to prove that the termination of employment was a genuine redundancy. In other words the employer must prove that it no longer wished the position to be performed by anyone. We regularly see cases where an employer wishes for a position to be performed by someone, just not the person who is performing it at that time. This, of course, is not a true redundancy situation but, if anything, a performance based termination issue.

It is these performance based termination issues that will once again require considerable diligence amongst organisations. While it has never been the case that there is a requirement to provide three warnings before an employer can terminate the employment of an individual, consistent with the “fair go all round” test, where an employer considers that an employee has not been performing to an acceptable standard, that employer will once again be required to go through a proper performance management process. This performance management process will generally involve:

- performance improvement plans being entered into;
- informal and formal counselling taking place between the line manager and the employee; and
- in the majority of instances, the issuing of at least one written warning to an employee.

It is my experience that over the last three years there has been a slackening in the level of diligence which organisations and line managers have applied to proper and fair performance management. I would strongly encourage all of you to consider a program of education of your line managers, particularly

around performance management (but arguably on all aspects of people management having regard to the very changed environment in which we now operate).

(c) *General Protections*

As alluded to earlier, the Fair Work Act has introduced a new suite of general protections. These new general protections apply at all stages of the employment relationship, from hiring right through to firing. Specifically, an employer must not:

- refuse to hire; or
- discriminate against in the terms and conditions offered

to a prospective employee on a number of protected bases.

These bases include that:

- (i) the person enjoys particular workplace rights (for example, the right to bring claims under workers compensation legislation or the right to make complaints under their employer's complaint-handling policy);
- (ii) the person is a member of a union or has engaged in industrial activity (for example, that a candidate has a track record of being a union delegate at previous places of work); and
- (iii) the person has one or more of the attributes that are protected by discrimination laws (for example race, sex, age, disability etc).

It has historically been difficult, if not impossible, for an unsuccessful candidate in a recruitment context to be able to prove that the reason they were not offered employment was because of particular attributes that they possessed. While a part of this challenge was always an evidentiary one (that is to say it is hard to

imagine any employer being naïve enough to document or even state an unlawfully discriminatory reason as being the reason why a candidate was unsuccessful for employment), it is also the case that resourcing and costs would operate as a disincentive to a prospective claimant. All of that changes with the powers that have been conferred on the Fair Work Ombudsman, whose resources are not limited and who will no doubt have their eyes on some test cases over the next few months.

These general protections do significantly impact on the freedom that has been enjoyed by employers in a practical sense to make hiring decisions. Just as importantly, these general protections extent throughout the entirety of the employment relationship.

(d) Sham Arrangements

A lot of attention has been paid, most notably at the recent ACTU congress to the “sham arrangement” provisions of the Fair Work Act. It is easy to forget that corresponding provisions have been a part of workplace relations legislation for the last few years.

Specifically, it is an offence for an employer to misrepresent a contract for services. That is to say, if a worker is in fact an employee it will be an offence under the Fair Work Act to misrepresent to that worker that they are an independent contractor. While it will be a defence, at least in theory, that an employer did not know and was not reckless it is my view that the prospects of relying on this defence for any organisation are quite limited.

The second category of sham arrangement arises in similar situations and one which has been a reality of organisational change for many years. It specifically relates to a decision taken by an employer to dismiss an employee in order to re-engage them as an independent contractor performing the same work. Many

organisations have downsized due to headcount pressures but have retained the services of a retrenched employee, often on an identical basis in terms of work performed and hours worked, only with that worker providing services as a contractor or consultant. This action amounts to a breach of the legislation and, particularly seen in context, is likely to be the source of considerable enquiry, investigation and prosecution.

To be clear, these sham arrangement provisions ensure that in addition to the civil consequences of characterising a worker incorrectly, there may well be penalties and fines imposed on an organisation for engaging in the same conduct.

(e) Award and NES Compliance

Many of our firm's clients have already engaged us to start the process of working with them to identify exactly what changes will need to be made to their contracts of employment. This is a matter that your human resources or personnel managers should have well underhand at this point in time. The key operative date whereby there needs to be compliance with the new infrastructure is 1 January 2010. That is the date on which the new National Employment Standards which are a creature of the Fair Work Act together with the so-called "modern awards" will commence operation.

I would encourage all of you to ask your human resources team what impact the modern awards will have on your particular organisation and what steps are being taken to audit your existing contract and policy documentation to ensure compliance with any relevant award but also the National Employment Standards.

4 The opportunities for business

As with any new legislation, the Fair Work Act brings with it some useful opportunities for businesses and in particular those businesses who are prepared to be innovative and strategic in terms of their workplace relations practices.

(a) *Good Faith Bargaining*

From an employer perspective it is often said that good faith bargaining can be as much of a sword as it can be a shield. There can be no doubt that those businesses that are prepared to get on the front foot and consider introduction, for example, of bargaining frameworks and codes with which they are prepared to comply but which impose corresponding obligations on unions and union officials will be far better placed than those organisations that merely play defence.

Similarly, a tactical approach to bargaining whereby, for example, no individual item is said to be agreed until and unless an entire package has been agreed will most certainly take the wind out of the sails of a union campaign and how that campaign might otherwise utilise Fair Work Australia's extensive powers.

I recognise that many employers self-assess themselves as being low-risk from an industrial perspective. Perhaps this is because they have not had any union attention or are not aware of anyone within their organisation being a union member. Relying on such a self-assessment and not being proactive has the potential to have consequences of such magnitude that the entire fabric of your organisation could be changed irrevocably, or at least for a very long time.

(b) *Redundancy Pay*

One of the other key changes that has been introduced under this legislation, and particularly under the auspices of the National Employment Standards is a legislative entitlement to severance pay. This scale (that ranges from 4 weeks'

pay to 15 weeks' pay) for the first time creates a legislative entitlement to severance and redundancy.

While it might be seen as a source of some consternation that for the first time such a payment has to be made to employees in the circumstances of redundancy, the reality is that this scale is by any standards minimalist. An employee receiving 16 weeks' pay after 9 years' service is receiving less than 2 weeks' pay per completed year of service. It is commonplace in many industries that employees receive at least 3 if not 4 weeks' pay per year of service and often on an uncapped basis. More pertinently, such informal formulae have been commonplace in determining senior level termination packages.

There are opportunities in this legislation for an organisation to look at its likely termination practices (particularly in the context of payments) and consider the introduction of a redundancy policy that exceeds the legislative obligations and thereby give a workforce some level of comfort in these uncertain economic times.

(c) Cashing out of annual leave

While a point of detail, I imagine it would be of great interest to many of you to know that as of 1 January 2010 there will be an ability to cash out the annual leave balances of all employees so long as they are left with a balance of 20 days' annual leave. Again, at a time when employers are looking at all options to position themselves better financially, this in many ways is a boon.

(d) Flexible working arrangements

New laws will require employers to think very carefully prior to responding to any request an employee makes to change their working arrangements to incorporate an element of flexibility into those working arrangements. An employer, indeed, will only be able to refuse such a request if there are

reasonable business grounds for doing so and mere convenience for employers will not in and of itself be a reasonable business ground.

This, together with the increased unpaid parental leave entitlements from one year to two years will certainly challenge a number of employers who will have to think about flexible work for the first time. It is the response to that challenge that I think provides the greatest opportunity for businesses to derive a competitive advantage for themselves in relation to their people practices. Understand what is being done in the market and consider what you can do to implement strategies that are as commercially astute as they are employee-friendly.

I again emphasise that this is an area where line managers in particular will need to be better educated and a failure to do so could well carry with it consequences. Discrimination cases continue to attract enormous publicity and few employers have historically been able to respond from being characterised negatively in a particular light.

5 Conclusion

In closing, there is a lot of work to do; there are a number of questions that I would encourage all of you to ask. There will be many test cases and many of the issues of uncertainty that currently exist will become more certain over the passage of the next few months.

It needs also to be noted that the Fair Work Act does not operate in a vacuum, indeed it does not even operate in a workplace relations legislation vacuum. Over the last few weeks and months we have seen significant developments in the arena of a national occupational health and safety harmonised scheme, restrictions to be imposed on executive termination payments and recently introduced initiatives to allow for paid parental leave in Australia from 1

January 2011. All of these things need to be factored in as part of any organisation's consideration of their response strategy to this brave new world of workplace relations.

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