

MEDIA RELEASE

Fair Work Act 'good faith bargaining' provisions should prompt company executives to assess their 'industrial risk profile'

23 July 2009 – Joydeep Hor, Managing Partner at Harmers Workplace Lawyers, said the new Fair Work Act's 'good faith bargaining' provisions would be one of the main pressure points for businesses. In particular, employers' obligation for bargaining in good faith with any relevant union should prompt them to assess their 'industrial risk profile' to help determine the likelihood of increased IR or union activity, as well as consider the make-up of their HR team and its ability to respond to any potential increase.

In his keynote address delivered to 180 CEO Institute members recently, Mr Hor said, "While much has been said by the Government about the Fair Work Act retaining 'clear, tough rules regarding industrial action', 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," he said.

Mr Hor said under the new legislation, it would 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)
- 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.

"The external environment is more favourable to the union's momentum than arguably has ever been the case in Australia's history," he said.

Mr Hor also warned CEOs that 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. In particular, he pointed out the likely lack of IR expertise, experience and resources among a typical in-house HR team.

"It should be noted in this context that many companies' HR teams will not have the bench strength to deal with industrial negotiations. The reason for this is because traditional industrial relations skills have not been too much of a priority for HR directors 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,” he said.

Mr Hor also explained that many of the issues of uncertainty that currently existed would become more certain over the passage of the next few months.

“However, it must also be noted that the Fair Work Act does not operate in a vacuum. Over the past few weeks and months we have seen significant developments in the arena of a national OH&S harmonised scheme, restrictions to be imposed on executive termination payments and recent 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 response strategy to this brave new world of workplace relations,” he said.

In order to assess a company’s “industrial risk profile” Mr Hor said business leaders must ask themselves:

- How receptive might employees 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 employees that it can enshrine more generous redundancy entitlements at this uncertain economic time)?
- Even if an employee is not necessarily pro-union, what is ultimately stopping that employee from going along with a union’s industrial campaign?
- What might be the specific points of pressure for your organisation? E.g. 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?
- What is going to be your response strategy to any industrial action that might be threatened in your own organisation?

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Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past four years running.

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