

## Workplace Update

### **UNION SCHADENFREUDE (FOR THE MOMENT)**

We think clients should be closely monitoring the workplace changes being wrought by the use of bargaining orders and so called good faith bargaining tactics under the *Fair Work Act 2009* (the Act). Those that are not gearing up for the inevitable request to commence bargaining from a union or employees will likely be very surprised to find that “no” is not an acceptable response. Being unprepared is also a mistake. The bargaining provisions of the new Act aren’t enigmatic. Just ask Cochlear and Total Marine.

Our feedback suggests that unions are seizing upon the golden opportunities under the Act to increase membership and gain footholds in workplaces where there is nil or minimal membership. *Carpe diem* with majority support applications, good faith bargaining orders, scope orders and the like which are now part of the solution the industrial umpire can offer bargaining representatives in its new ‘*general role (of) facilitating bargaining*’ [under the Act].

Additionally, Fair Work Australia (FWA) has felt the need to further meddle with workplace relations by interpreting the Act as requiring that dispute clauses in enterprise agreements provide a pivotal role for FWA to arbitrate disputes even if a party does not agree to such role. This decision is under appeal.

FWA has also taken a very formal approach to the procedural rules attaching to the processing of enterprise agreements and it would appear the new BOOT test will be a tougher test to satisfy than the previous no disadvantage test. For example, an enterprise agreement, which sought flexibility in rostering and hours, was rejected by FWA notwithstanding a majority of the workplace participants, including the relevant unions, agreed to the proposed changes. This is another decision under appeal.

One has to wonder how a third party would know better than those working in the enterprise about what employment conditions are best suited. It is not a matter of blaming the new Act because it contains wriggle room in the form of discretion and a stated object of less technicality and relaxation of strict legal rules.

It would appear some people are still bringing pre-Work Choices logic to the table when IR life was simpler and some workplace participants less willing to take control of their own destiny given the (then) predominance of the AIRC, National Wage Case Principles and industry associations. Maybe it’s all a sign that those days and players are returning to positions of influence under the Act.

Additionally, it could also be argued that the Act has proven to be ineffective when serious industrial disputes develop as we recently witnessed in Western Australia. The maritime industry dispute was settled when an employer collapsed under the weight of the costly industrial action and employee demands. The employer was reported as stating that there were *no productivity* trade-offs to fund the (*so called*) enterprise agreement, and that it will mean cost increases to consumers to fund the substantial wage and allowance increases. A maritime union official was quoted in a newspaper as stating that people who thought productivity trade-offs were still necessary in such agreements were ‘dinosaurs’.

For many of you, this somewhat ironic, blunt response to the bargaining quest should send a chill up the corporate spine. The very next day, *The Australian* newspaper headline of 5 February screamed “Rio warns of Pilbara IR war”. The New Year has only just begun. Whatever happened to the GFC? Some people have short memories.

The government was, not surprisingly, reported as supporting the agreement. This *agreement* looks likely to flow through the maritime industry (pattern bargaining at its best). Not all these cost increases will be absorbed by the maritime employers. More likely, all of us will bear the brunt in one way or another.

Clients are questioning whether business is witnessing a return to the bad old days of industry wide bargaining, a halt to productivity trade-offs funding wage increases, and some utter stupidity thrown in for good measure. Who could forget the dispute during the construction of Darling Harbour when employees walked off the job seeking an allowance to compensate them because they could smell Chinese food from Chinatown? For many of you who attended our IR forums on the *Fair Work Act* last year, these comments are nothing new.

Unions would be under no illusion that they have, maximum, two terms of government to get their membership numbers sorted and themselves cemented into workplaces through enterprise bargaining, associated orders and dispute clauses. The modern awards will also help to open the breach given the extended reach of those awards under the State Governments’ referral of many unincorporated employers into the federal system, other than public sector and local government employees.

The new industrial environment means that workplace relations strategies need a good rethink using lots of experience gathered from the past. We suggest you don’t wait for an invitation to bargain but get out there and initiate it yourself. If you don’t, the union will claim bragging rights in its communication plans to your employees. Employers must enter negotiations with clear, modern strategic goals, simple but focused communication plans, reliable analysis / costings of the productivity trade-offs, and be tooled up with the necessary industrial and legal responses should negotiations suddenly head south.

Part of the change, as we see it, is generational. Many HR practitioners and industrial lawyers are likely to have professionally grown up under Work Choices, which incited minimal use of any form of IR strategy, and created an environment in which some HR practitioners have never seen a union official, let alone an enterprise bargaining strategy. This new Act is a very different piece of legislation and demands from HR a very coherent, deep rooted approach to workplace relations (or for some, a revised approach) to enable their workplaces to overcome change resistance and advance in a proactive rather than reactive way. Don’t hesitate once you commit to workplace reformation because you may find yourself on the back foot from day one.

If you need any help developing your IR/workplace strategy please give us a call. We are passionate about advising our employer clients on how to deal with enterprise bargaining, bargaining disputes and developing workplace/IR strategies that can move your business forward. We have been doing it since 1987.

### ***In the Media – Avoid Glowing References and Advocate Restraint***

Partner Brad Swebeck was quoted in *hr daily* in February 2010 advising that employers should resist giving departing workers glowing references – regardless of their achievements – in favour of a simple “statement of service”. To read the complete article in *hr daily*, please use the following link:

[http://www.hrdaily.com.au/nl06\\_news\\_selected.php?act=2&nav=1&selkey=1377&utm\\_source=daily+email&utm\\_medium=email&utm\\_campaign=Daily+Email+Article+Link#](http://www.hrdaily.com.au/nl06_news_selected.php?act=2&nav=1&selkey=1377&utm_source=daily+email&utm_medium=email&utm_campaign=Daily+Email+Article+Link#)

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## **UPCOMING CLA SEMINAR**

**Hicksons will sponsor and present at the upcoming Commercial Law Association (CLA) seminar on workplace relations and the impact of the *Fair Work Act*.**

Brad Swebeck, Sarah Jones and other experts in the field will present at the half day seminar which is set to tackle emerging issues brought on by the Federal Government's new workplace and IR regime under the *Fair Work Act*. The seminar will be held on Friday 14 May (from 9.15am to 12.30pm) in the Dixson Room, NSW State Library, Macquarie Street, Sydney.

Stay tuned for more details about this seminar in our next *Workplace Update* bulletin.

**For further information, please contact:**



**Brad Swebeck, Partner, Workplace Relations Group**

Phone +61 2 9293 5450  
Fax +61 2 9293 5250  
Mobile 0411 234 063  
Email [brad.swebeck@hicksons.com.au](mailto:brad.swebeck@hicksons.com.au)



**Sarah Jones, Partner, Workplace Relations Group**

Phone +61 2 9293 5420  
Fax +61 2 9293 5220  
Mobile 0421 051 299  
Email [sarah.jones@hicksons.com.au](mailto:sarah.jones@hicksons.com.au)

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