

LEAP OF FAITH

Employers need to devote more time to developing negotiation skills or face losing control of enterprise bargaining. **Report Georgina Dent**

● New workplace laws mean Australian employers need to up the ante in collective bargaining negotiations or risk having their enterprise agreements negotiated for them.

The industrial relations regime now includes an obligation to bargain in good faith from July 1. This requires employers to negotiate with integrity. For example, if an employer says it cannot afford a certain pay increase then it has to back this up with evidence.

Lawyers say this changes the negotiation landscape in work relations. Arnold Bloch Leibler partner Henry Skene warns that although the obligation may seem procedural to employers, it has a substantive effect. "Plenty of employers at the moment approach negotiations as procedural, [but] employers who are not sufficiently prepared risk adverse outcomes," he says.

Adverse outcomes include failing to get an agreement on preferred terms or losing control of negotiations altogether.

"If you haven't thought through your position and how to justify each stance, you could find yourself exposed to orders from Fair Work Australia that you haven't negotiated appropriately," Skene says. "If you breach those, the agreement may be taken out of your hands and negotiated by FWA."

In order to prepare for the new regime, Skene travelled with Freehills partner Chris Gardner and barrister Stuart Wood to the United States, where the good faith clause has been in play for 35 years.

The trip revealed that the consequences of the good-faith obligation could be far more onerous than they first appeared, and employers should take their lead from more sophisticated US bargainers.

"Australian employers need to rethink the level of thought and investment in the process as we move to a regime where there is a higher degree of regulation and scrutiny," Gardner says.

The good-faith requirement applies to employers, employees and employee representatives alike, but Gardner says the new regime will disadvantage inexperienced negotiators.

"In the Australian environment, it's often line mangers who are sent in to negotiate – whose day job is to run a production line," he says. "They are usually opposed by a union organiser whose day job is to negotiate agreements. That skill imbalance is likely to be exacerbated with this regulatory overlay."

The production of relevant information – and even experts – to validate certain claims is a reality that Australian employers need to adapt to, Gardner says.

"It's vital for employers to think through why it is a claim can't be met and be prepared to justify their position. If they can't or the justification is wanting, the integrity of their negotiating position will be compromised. . .

"I think we'll see a greater emphasis on negotiation strategy and tactics, the use of experts, and campaigning techniques over the coming years. It bears upon how parties go about negotiation – what is said and how it's said." BRW

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