

## Latest News

### ▶▶ Employers must learn from US on good faith bargaining

10 June 2009 9:43am

"Labour persuaders", "direct dealing" and "unfair labour practices" – this is the language of bargaining in the US, and it could be coming to a workplace near you.

Arnold Bloch Leibler partner Henry Skene, Freehills partner Chris Gardner and industrial barrister Stuart Wood discovered much more than just novel terminology on their recent 10-day fact finding mission on good faith bargaining to the US, however.

They told *Workplace Express* there are strong parallels between its good faith bargaining framework, which has been in place since 1935, and the one about to commence in Australia from July 1.

For Australian employers, the message from the US is simple – bargaining under the *Fair Work Act* is going to require greater sophistication, and the consequences of getting it wrong are going to be more serious.

Skene says good faith bargaining in the US has brought with it intense scrutiny of communications between employers and unions before and during the bargaining process, to the extent that a transcript is sometimes made to provide evidence of what was said in negotiations.

If, for example, an employer rejects a union offer on the ground that it is unaffordable, that can later become the basis for an inquiry by the independent umpire – in Australia's case, Fair Work Australia – on whether that position was justified, including a rigorous examination of the employer's financial information.

"It may well be that the truth is not that they can't afford it, but because it will affect their competitive position or because they don't want to be first, there could be a whole range of reasons that need to be evaluated and a throwaway line in the bargaining process could hurt you," he says.

Verifying financial information has taken on a greater importance in the US, with both employers and unions often bringing in their own financial experts to assist them in bargaining.

Ambit claims could also become common as unions and employers try to give themselves greater room for "concessions" that provide the appearance of reasonableness, he says.

Another issue likely to loom as large in Australia as it does in the US is the question of what is taken to undermine good faith bargaining.

Conduct by employers, such as giving workers a unilateral pay increase, outsourcing jobs, preparing in advance for strike action, or even communicating with employees before the union, have all been found to breach good faith obligations in the US, Gardner says.

"Direct dealing – the extent to which employers can deal directly with employees – is something that is subject to real limits in the US, and there are things in the legislation to suggest that will be the case here," he says.

According to Wood, getting communication right has taken on such paramount importance in the US that employers have attempted to match the unions by hiring their own campaigning professionals – known as "labour persuaders".

SESSION ACTIVE

LOGOUT ▶▶

SETTINGS ▶▶



WORKPLACE  
▶▶ express  
IR & HR Jobs  
Click here to  
see more jobs



World Labour  
Law Congress  
www.labourlawaustralia.com  
LabourLaw09  
1-4 September 2009  
Sydney Australia  
Registration  
now open!

"Employers will need to invest extra resources in bargaining, and one aspect of that will be campaigning – in Australia, only unions have really used campaigning techniques, but in America employers are very committed to campaigning for the outcomes they want at all stages of the bargaining process," he says.

Specialisation is also more common in the bargaining process itself, with the need "to get the words right" meaning US employers often engage lawyers to conduct bargaining, rather than simply bringing them in at the end when things go wrong.

Gardner is not sure that is a trend Australian employers will universally follow, however.

"We might see more advice, whether that's people in the room with you or professional negotiators doing the bargaining, but more than anything else I think it will require will require a much higher skill level from employer negotiators than is often the case now – if that doesn't happen, the quality of the outcomes will be poor and reached almost entirely on the unions' terms," he says.


**PRINT PAGE** 

 **Advanced Search**

<b>Search for</b>		
<b>Within</b>	From:	
	To:	
<b>Display</b>	10	25
<b>Words</b>		
<b>Articles</b>		



The source for IR/HR news

 1.0



[Latest News](#) | [HR Stream](#) | [IR/HR Jobs](#) | [What's On](#) | [Resources](#) | [About Us](#)

[Free Trial](#) | [Subscribe](#) | [Feedback](#) |  1.0

**Specialist News**

© Specialist News 2009