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Employment Matters

The High Court decides ... and still more changes to Work Choices

The High Court has handed down its much anticipated ruling on the constitutional validity of the Work Choices reforms.

As widely predicted, the majority of the Court has held that the Commonwealth could validly use the corporations power to underpin workplace laws.

What was perhaps less expected was that the ruling would be so decisive. The majority judgment, written by Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan, rejected every single one of the various challenges to provisions in the amended *Workplace Relations Act 1996* (the WR Act).

The decision thus removes the cloud of uncertainty that has (no matter how faintly) hovered over the new legislation since the constitutional challenge was announced.

In an interesting piece of timing, the Court's decision was preceded by an announcement from the federal government of yet more changes to the legislation - the fourth in all since the Work Choices amendments took effect in March 2006.

In this special issue of Employment Matters we look at both of these important developments.

Outcome of the Challenge

The challenge to the *Workplace Relations Amendment (Work Choices) Act 2005* was initiated by five States - New South Wales, Victoria, Queensland, South Australia and Western Australia - and by a number of unions and peak union bodies, including Unions NSW and the

Australian Workers Union. Tasmania, the Northern Territory and the ACT intervened in support of the challenge.

The proceedings attracted a record 39 barristers and argument was heard over the course of six sitting days in May 2006. The judgments that have now been published - the majority judgment plus separate dissenting judgments from Justices Kirby and Callinan - run to over 400 pages.

Scope of the corporations power

The principal issue in the challenge was the scope of the Commonwealth's power under section 51(20) of the Constitution to make laws with respect to "foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth".

According to the challengers, those parts of the amended WR Act that operate by reference to employers who are constitutional corporations were not validly supported by section 51(20). Indeed if the challengers were correct, it is not just the Work Choices amendments that would have been invalid, but many provisions that had been in the federal statute since 1996 (or in some cases 1993).

However their arguments on this point were rejected by the majority. They adopted what Justice Gaudron had said about the corporations power in the *Pacific Coal* decision in 2000, that it:

"extends to the regulation of the activities, functions, relationships and the business of a [constitutional corporation], the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the

conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business”.

As the majority noted, and again in the words of Justice Gaudron, that broad view of the power clearly permits the Commonwealth to pass laws “prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”.

The majority rejected any suggestion that the scope of the corporations power should be limited in order to avoid any conflict with the industrial arbitration power in section 51(35) of the Constitution, or to disturb a suggested “balance” in the Constitution between the Commonwealth and the States.

On its broad reading of the corporations power, the majority upheld the provisions of the amended WR Act that regulate minimum employment conditions, workplace agreements, industrial action and so on.

It also, perhaps more surprisingly, rejected a strongly mounted challenge to the validity of the provisions in Schedule 1 for the registration and control of trade unions and employer associations. As the majority observed:

“If [it is] within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs.”

Who is a trading corporation?

The Court made it clear that the issue of the type of body that qualifies as a trading corporation had not been addressed by the parties. This was not an appropriate case to reconsider the established “activities test” for identifying such a corporation, a test based on a string of High Court decisions since the WAFL case in 1979.

Accordingly whether not-for-profit bodies such as local councils, private schools, sporting clubs, community services organisations and the like qualify as trading corporations (and hence as federal system employers) will continue to be determined by reference to that test.

Exclusion of State laws

Section 16 of the WR Act purports to exclude the operation of State industrial laws even on subjects that are not otherwise regulated by the federal statute. While the challengers accepted that a valid federal law will prevail over a State law on the same subject, by virtue of section 109 of the Constitution, they argued that section 16 took this principle too far. It was nothing more than a “bare attempt to limit or exclude State legislative power”.

The majority of the Court, however, confirmed that section 16 should properly be interpreted as excluding State laws only in so far as they relate to federal system employers and employees, and then subject to the various exceptions for “non-excluded matters”. Read in that way, the provision was a valid exercise of power.

As the majority noted, it is open to the Commonwealth to define a “field” of regulation, pass laws that relate to that field, then exclude the States from trespassing on it. And this can be done regardless of whether the federal regime is more detailed than the State regimes, less detailed or - as in this case - more detailed in certain respects and less detailed in others.

The finding as to the validity and broad operation of section 16 will have important implications for those States which have been looking to pass laws that fill gaps left by Work Choices - though the potentially broad scope of some of the “non-excluded matters” (such as OHS or child labour) may still leave them some room to manoeuvre.

Regulation-making powers

One of the more striking features of the amended WR Act is the large number of matters that are now left to regulations, rather than being contained in the main body of the statute. Under these provisions, the executive government can change the law without specific parliamentary sanction, though the regulations may be retrospectively disallowed by the Senate if a majority oppose them.

A challenge was made to a number of the regulation-making provisions in the Act, including section 356 which leaves it entirely to regulations to prescribe what constitutes “prohibited content” for workplace agreements.

The majority commented that “the technique employed in s 356 is an undesirable one which ought to be discouraged”. They noted that “it requires the lawyers (and the many non-lawyers) who have to work with the new Act to look outside it in order to apply it: identifying what regulations are in force is a task which many inquirers have found difficult”. Furthermore, it “creates difficulty in assessing whether particular regulations made under the legislation are *intra vires*” - that is, within power and thus valid.

Nonetheless, despite these criticisms they found that section 356 and other similar provisions were constitutionally valid. Whether a particular regulation is or is not within power will depend on the terms of that regulation, and whether it bears a “rational connection” to the regime established by the statute. But if that regime is otherwise within the Commonwealth’s power to establish, then a general authority to make regulations in support of it, no matter how imprecisely worded, must also be considered to be valid.

Transitional provisions in Schedule 6

Schedule 6 of the WR Act establishes transitional provisions for employers who do not qualify as federal system employers, but who were covered by federal awards as at the commencement of the Work Choices amendments. Schedule 6, unlike the rest of the Act, is still underpinned by the industrial arbitration power.

During the challenge, it was argued that certain provisions in Schedule 6 could not fairly answer to the description of a law with respect to the arbitration of industrial disputes, on the basis that they unduly fettered the discretion of the AIRC to resolve disputes affecting employers covered by the Schedule.

But this too was rejected by the majority, concluding that the arbitration power does not bind Parliament “to maintain any particular system of regulation of industrial

disputes”. If Parliament can make laws for the conciliation or arbitration of industrial disputes, it can also unmake them. In so far as Schedule 6 provided a “staged withdrawal” from the old arbitration system, it was a valid exercise of the Commonwealth’s power.

The wash-up

What the Court’s decision confirms is that the Commonwealth can make use of the corporations power, in combination with other legislative powers, to regulate employment conditions and labour relations for a majority of the workforce - and in ways that simply could not have been possible under the industrial arbitration power.

The immediate effect of the decision is to uphold the Work Choices reforms. But the decision also sets a clear precedent for a future Labor government that may wish to use these powers to rather different ends.

Further amendments to Work Choices

On 13 November 2006 the federal government announced that it would be introducing a further round of legislative “fine-tuning”. Unlike previous changes this year, however, these measures will apparently involve amendments to the WR Act itself, not merely the *Workplace Relations Regulations 2006* (the Regulations). Given the full programme of Bills currently before Parliament, it may well be into the new year before those amendments are introduced.

Relaxation of record-keeping requirements

The main change is one that will be very welcome to employers. It concerns the requirement to keep records as to hours worked by employees.

Under the original version of the Regulations, federal system employers would have been required to record the hours worked by *all* employees, even those on an annual salary and with no fixed hours. In June this was changed to limit the requirement to those with base annual salaries of less than \$55,000,

though starting and finishing times would still need to be kept for anyone eligible for overtime payments.

The government has now belatedly acknowledged the practical difficulties that even these amended rules would have caused, by promising to “streamline” the record-keeping requirements.

Employers will now have to record “only those hours for which an employee is entitled to overtime or other penalty rates, rather than all hours worked”.

The new rules will presumably be introduced before 27 March 2007, when the current moratorium on prosecutions for breaching the record-keeping requirements is due to expire.

Leave entitlements

A further area of concern for many employers has been the new Australian Fair Pay and Conditions Standard, and in particular its rules and requirements on annual and personal leave. These have been found in many instances to conflict with established provisions in awards or agreements.

The government’s proposed changes in this area by no means address all of the anomalies or uncertainties highlighted in our recent round of seminars on the Standard. Nevertheless, three significant amendments have been announced:

- > in calculating an entitlement to annual leave, no account will be taken of any overtime worked by an employee, no matter how regular;
- > personal leave is to be paid for at ordinary rates of pay, not (as section 247 of the Act currently requires) the amount the employee “would reasonably have expected to be paid” (including penalty rates) had they worked at the relevant time;
- > it will be possible under the Standard for an employee to agree with their employer to cash out accrued personal leave, provided they retain a balance of at least 15 days.

This last right will only apply to leave accrued since the Standard came into effect. Whether previously accrued leave can be cashed out may still need to be determined by reference to the instrument under which that leave was originally granted.

A general right to stand down

It has been common for awards to contain stand-down clauses authorising employers to send workers home without pay where there is no useful work for them to perform - most obviously because of industrial action affecting another part of the employer’s business.

The government is now proposing to amend the Act to create a general power for federal system employers to stand down workers whenever work is unavailable “due to factors outside the employer’s control”. It remains to be seen whether the eventual provision is drafted in such wide terms, and what (if any) limitations are put on its use.

Redundancy entitlements after termination of agreements

Collective agreements often provide for redundancy benefits that are considerably more generous than those in the award that would otherwise apply.

However a recent dispute in Adelaide involving Radio Rentals highlighted the possibility of an employer seeking to have an agreement terminated, then retrenching workers and paying them out under a much lower award standard. Indeed had that agreement been made under the Work Choices system, the workers concerned may have had no entitlement to severance pay at all.

In an apparent bid to allay such concerns, the legislation will be amended to provide that after an agreement is unilaterally terminated, any redundancy provisions will remain binding for a further twelve months - unless a new agreement is struck in the meantime.

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