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Workplace Rights and the States

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> *This is one of the most important cases with respect to the relationship between the Commonwealth and the States to come before the Court in all the years of its existence. If the legislation is to be upheld the consequences for the future integrity of the federation as a federation, and the existence and powers of the States will be far-reaching. The Act in its present form is well beyond, and in contradiction of what was intended and expressed in the Constitution by the founders.*[1]

It was at The Samuel Griffith Society Conference in Canberra, in May 2006, that Stuart Wood, QC, delivered a speech that predicted that a majority of the High Court would dismiss the States' appeal in *State of New South Wales & Ors v Commonwealth of Australia (Work Choices Case)* (2006) 229 CLR 1 (*Work Choices*). He was right. By a majority of 5:2 the High Court handed down their decision on 14 November 2006, dismissing the States' appeal.

In effect, the High Court validated the Howard Government's assault on the States, essentially stripping them of almost all rights to legislate in respect of industrial relations and

employment for corporations and their employees. The result was 85 percent of private employers in Australia were quarantined in the Federal industrial relations system. This meant big change for some.

The following year, 2007, at The Samuel Griffith Society Conference in Melbourne, Eddy Gisonda, Julian Leeser [now a member of the House of Representatives], and John Gava separately provided their views of the outcome of the *Work Choices* decision, both in terms of political posturing by the States and their approach to the appeal, as well as the High Court's application of principles of constitutional interpretation.

Today, just over 10 years on from the *Work Choices* decision, presents an appropriate time to revisit and reflect on what occurred, how the States responded, whether the Commonwealth has been more effective in dealing with workplace rights than the States, and what can we look to for the future in terms of any possible change.

Work Choices

The *Workplace Relations Amendment (Work Choices) Bill* 2005 (Cth) (Work Choices) was introduced in the Commonwealth Parliament in 2005 (commencement 27 March 2006). The bill, amongst other things, sought to establish a statutory minimum of national standards called "fair pay and conditions" as well as displacing the State award system by preserving them as Commonwealth instruments. The more controversial aspects of the legislation included limiting access to unfair dismissal, reducing the role of the Australian Industrial Relations Commission, curtailing union influence and having individual statutory agreements – called Australian Workplace Agreements – sitting at centre stage.

Historically, the Commonwealth system of industrial relations was only concerned with inter-state disputes. Section 51

(xxxv) of the Constitution, the "conciliation and arbitration" power, was included by the founders after much debate. It is a power for the "prevention and settlement of industrial disputes extending beyond the limits of any one State". Prior to Work Choices, a Commonwealth system of awards existed that captured some corporations around the country: others resided in the State industrial relations systems.

It should be noted that the Commonwealth unsuccessfully attempted by referendums on six occasions, from 1911 to 1946, to gain greater power over industrial relations.

In 1983, the *Tasmanian Dam* case was handed down. It has been described as the case that sharpened the axe that would eventually deliver industrial relations to the Commonwealth. This case looked at the Commonwealth's power to regulate in respect of trading corporations under section 51 (xx) of the Constitution. Within a fortnight of the judgment in that case, the Federal Labor Minister for Employment and Industrial Relations commissioned a review into the remit of section 51 (xx). The review indicated reliance on this corporations power to regulate corporations in respect of industrial relations and their employees was "exotic".

Following a series of High Court challenges to the *Trade Practices Act* 1974 (Cth) and the *Industrial Relations Reform Act* 1993 (Cth), reforms relying on the corporations power (in part) to allow the Commonwealth to regulate trade practices and industrial relations eventually gathered momentum through the late 1980s to mid-1990s, building the case each time that the Commonwealth Parliament had the power to legislate as to the industrial rights and obligations of constitutional corporations. It was during this period, through a number of decisions, that the High Court effectively handed the Commonwealth the power to legislate in respect of industrial relations through the expansion of powers in section 51 (xx).

As a result, for a period of time there was a hybrid in Commonwealth industrial relations regulation:

- The conciliation and arbitration power (section 51 (xxxv)) relating to the prevention and settlement of disputes; and
- The corporations power (section 51 (xx)) sustaining other aspects of legislation in the *Industrial Relations Act* 1988 (Cth) and then the *Workplace Relations Act* 1996 (Cth) that related to agreements made between constitutional corporations, employees and unions.

The phasing out of reliance on conciliation and arbitration power was all but completed with *Work Choices*. On 4 November 2006 the High Court by a majority of 5:2: Gleeson, Gummow, Hayne, Heydon and Crennan (with Callinan and Kirby dissenting) dismissed the appeal by the States and upheld the validity of the legislation. As the Honourable Chris Jessup of the Federal Court subsequently said, *Work Choices* was "almost [a] complete abandonment of the conciliation and arbitration power as a constitutional justification for industrial relations legislation."

The corporations power in section 51 (xx) of the Constitution therefore offered an attractive potential way for the Commonwealth around the wreckage of its failed referendum proposals. The obvious straightforward method would be to regulate the employment relations of employers who were "corporations" under the Constitution, thereby bringing the industrial relations of the vast bulk of the corporate sector within the purview of the Commonwealth. As Greg Craven wrote:

> In terms of federal theory, the Howard Government's use of the corporations power to implement its industrial relations programmed in *Work Choices* undoubtedly represents an historic breakdown in the traditional support of Australian conservatives for the concept of Federalism.

> That support has been based on a deeply-held view that Federalism is to be defended as a prime expression of the conservative attachment to checks and balances as a means of limiting power.

Work Choices proved to be very unpopular with the electorate. In 2007 the Australian Labor Party swept to power at the Federal level with a mandate for industrial relations reform. The replacement legislation, ironically called the *Fair Work Act* 2009 (Cth), commenced, in part, on 1 July 2009, with the remaining aspects commencing on 1 January 2010. The *Fair Work Act* 2009 (Cth) continued and broadened its reliance on the corporation's power.

States' responses

So what were the States' responses following the *Work Choices* decision? As Leeser indicated in his paper to The Samuel Griffith Society Conference in Melbourne in 2007, the State Labor governments involved in the *Work Choices* decision were always content for the Commonwealth to have power over industrial relations, and pulled their punches in the case that, in a constitutional sense, required a full-frontal attack.

The State Labor governments' rhetoric leading to *Work Choices* both in and outside the Court appears to have totally backfliped when it came to Federal Labor's broadening legislative ambit under the *Fair Work Act* 2009 (Cth).

New South Wales, Queensland, South Australia, Victoria and Tasmania (Referring States) in fact passed legislation in 2009 to facilitate the uniform application of the *Fair Work Act* 2009 (Cth) to all employers in those States save for certain groups: public sector, judiciary, law enforcement and local government (other than Victoria). The Northern Territory and the Australian

Capital Territory were already subject to Federal legislation in this field.

Western Australia is the only State to remain firm and not to refer its powers. This remains the situation. In fact, Western Australia commissioned a review to consider how it could retain legislative powers over industrial relations and employment. Western Australia responded with two pieces of legislation, albeit with limited effect:

- *Contractual Benefits Act* 2007 (WA) – restoring the capacity for employees of constitutional corporations to make claims for denied contractual benefits in respect of their common law contracts of employment in the WA Industrial Relations Commission.
- *Employment Dispute Resolution Act* 2007 (WA) – which provides employers, employees and organisations in both Federal and State industrial relations systems with options for resolving their disputes by way of mediation and conciliation in the WA Industrial Relations Commission.

The fact is Labor always wanted the Commonwealth to have power over industrial relations. It appears a conservative government handed over those reins in *Work Choices*, with disastrous long-term consequences for employers and employees.

Has the Commonwealth been effective with workplace rights?

Then Liberal Leader of the Opposition in Western Australia, Matt Birney, said in 2005:

> If we only have one federal system and the Federal Government of the day is Labor, then you are kidding to think they won't hand over our industrial relations system

> to the union movement. . . . If we continue to operate a dual system then a future State Liberal Government will no doubt provide a safety net for employers who would have been otherwise trapped by a Federal Labor Government union-based industrial relations system.

And this is what actually happened.

As stated earlier, the Rudd Labor Government swept to power in 2007 and delivered the Fair Work reforms in 2009. It is a disastrous piece of legislation that cripples business, prohibits jobs and promotes the failing union movement beyond comparison to any legislative scheme that ever came before it.

But, most of all, it demonstrated how the Commonwealth has failed not only to protect the workplace rights of employers, but it has failed to protect arguably the greatest workplace right of all: a person's right to work.

The *Fair Work Act* 2009 (Cth) fails in this regard for a number of reasons, including:

- Minimum wage – too high for some struggling State economies and businesses operating therein which leads to loss of jobs and no means of creating any new jobs.
- Penalty rates – they are job prohibitive, keeping a number of people out of work in circumstances where jobs would be available on ordinary rates.
- Minimum hours of work – restricting jobs – in particular the ability for young people to enter the labour force for the first time to perform work on weekends or after school.

The so-called "independent umpire", the Fair Work Commission, wields significant control under this system in terms of minimum wage setting, Modern Award content and approval of enterprise agreements. The Fair Work Commission

has arguably demonstrated that it is not equipped to set the relevant standards throughout Australia. For example:

- Minimum wage review decisions provide for increases that appear out of step and contradictory to economic data referred to in the decisions.
- The so-called "Modern Awards" which, ironically, again, are currently being reviewed to implement "plain English drafting", are now arguably being used to implement broader social agendas: such as domestic violence leave and anti-casual employment.
- It has also been suggested that the Fair Work Commission can be used as a political tool. For example, one may question the timing of the penalty rates decision and the phasing out of some penalty rates in Modern Awards in light of upcoming Federal political cycle.

After 10 years, one must sit back, reflect and answer: are Australian businesses and workers better off with the Commonwealth taking over industrial relations? For the reasons stated earlier, probably not.

The future

Our current industrial relations system, dominated and controlled by the Commonwealth, is broken. The workplace rights of employers and employees are not being adequately protected by a single government repository.

Unfortunately, we have seen further assaults by the Commonwealth on industrial relations and associated fields; for example, the regulation of workplace safety. Again, Western Australia remains the only State not to adopt the model unitary safety laws. The Western Australian Labor Government has, however, recently indicated it will. Perhaps referral of Western Australia's industrial relations powers will also be on the Western

Australian Labor Government's agenda. It may also be anticipated that a future Federal Labor government will take over regulation of labour hire – which is currently being considered by Labor State governments on a State-by-State basis. And what will happen with possible regulation of the "Gig economy" (Uber, Air B&B, etc.)? The best thing for all levels of government to do in that emerging technology space is stay out. But they will not be able to resist.

So what are some possible solutions to restoring some balance?

Refer the powers back? The Referring States can revoke the referral of their industrial relations powers in certain circumstances in the future, that is, to reverse the effect of the legislation such that the affected employees would be once again subject to a State system. This includes, for example, the *Fair Work Act* 2009 (Cth) being amended in a manner inconsistent with the industrial relations principles set out in the Referring States legislation and an inter-governmental agreement. An example of this would be re-introduction of individual statutory agreements. But the reversal of the effect of the Referring States legislation will be limited and only affect on around 15 percent of Australian businesses.

The situation requires a political solution. Ultimately this may include the Commonwealth giving powers back to the States in respect of industrial relations and allowing for policy competition between States and the Commonwealth in respect of industrial relations laws. Greater financial and legislative autonomy of the States is desperately needed as industrial relations laws critically affect economies of the States, and have demonstrated that they can constrain or enable growth.

It could only be imagined how much better off Western Australia could be now if Western Australian-based employers caught in the Federal system by virtue of the corporations power

in section 51 (xx) had a choice to opt out of the Fair Work System and opt into a more competitive and flexible Western Australian industrial relations scheme that likely would have been introduced by the Liberal State Government. How many jobs could it have saved? How many Western Australian-based businesses would remain in operation? At a time when iron ore prices fell, oil and gas took a major hit and three major resources construction projects came off the boil. Perhaps there would still be a vibrant manufacturing strip in Kwinana (Western Australia). For example, a Liberal State government could have introduced a Kwinana manufacturing award that offered greater flexibility to keep businesses alive as opposed to the applicable Federal Modern Award (the *Manufacturing and Associated Industries and Occupations Award* 2010), or re-introduced a State Court Liberal Government-style employer-employee statutory individual agreements to provide certainty over labour arrangements and prevent risks associated with possible industrial action by the workforce.

The Honourable Chris Jessup believes that industrial relations was much simpler under the old approach of section 51 (xxxv). Ideally, we need the Commonwealth to step partially out of the industrial relations arena. Businesses need choice. State governments are also much closer to the pulse of their economies and readily able to listen and respond to business, which differs from State to State.

Perhaps there could be a set of Commonwealth national employment standards that applies to all employers and employees in all States and Territories as a non-obligatory "floor" with a set of industry guides as to possible terms and conditions. Companies operating across borders can opt into the Federal system. Parts of their business could voluntarily opt into a State system. Ultimately Fair Work has demonstrated that one centralised system does not fit or protect all. Further thought and

academic resources need to be committed to exploring this concept.

The key is a system that gives flexibility and responsiveness whilst protecting the rights of workers and business. Centralism never provides for this. The current system is broken and the States must be provided with a greater role in industrial relations for the sake of our economies and for jobs.

Endnotes

1. Callinan, J, *State of New South Wales & Ors the Commonwealth of Australia (Work Choices Case)* (2006) 229CLR 1 at [619].

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Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

State

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