

LABOUR LAW SUMMARY 2010



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Current State of Australian Labour Law

1.1 Overview of Labour Law

- Labour law essentially relates to the regulation of individual contracts of employment including the terms and conditions of their employment.
- In Australia, the type of regulation to which employees are subjected depends upon their employer. Moreover, if an employee is employed by a constitutional corporation, they are subjected to the federal legislation (currently the *Fair Work Act 2009*) whereas employees of an unincorporated entity, such as sole traders, are subject to state legislation (*Industrial Relations Act 1992* (NSW))¹ and state awards in their relevant industry.
- Labour law has been subject to significant changes in the past decade and we will begin our examination with the *Work Choices* legislation.

1.2 Work Choices Legislation

- Labour law in Australia was significantly affected by the enactment of the *Workplace Relations (Work Choices) Act 2005* (Cth.) because it:
 - resulted in every common law aspect being modified by statute;
 - shifted the power to make laws in relation to workplace law to the federal government (in reliance of the Corporations Power (s 51(xx) of the Constitution); and
 - attempted to establish a national workplace relations system.
- This legislation culminated in a notable gap in regulation as a consequence of the fact that the statute is based on the corporations power. Moreover, only employees of corporations are covered by the legislation which leaves employees of unincorporated entities regulated by state legislation. However, Victoria has responded to this gap in legal regulation through referring their residual power of industrial relations to the federal government.
- The *Work Choices* legislation was primarily the third wave of labour law reforms which aimed to reduce external forms of regulation:
 - The first wave was the legislation enacted by the Keating Labor Government which increased the incidence of agreement making but retained the notion of a safety net based on awards outlining minimum wages and conditions; and
 - The second wave was the legislation formally introduced by the Howard Coalition Government in 1996 which further increased the incidence of agreement making by including non-union agreements made between

¹ *Industrial Relations Act 1999* (Qld); *Fair Work Act 1994* (SA); *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1984* (Tas). Note that Victoria referred their power to establish a State industrial system to the Commonwealth in 1996 through the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

employer and employee without interference by trade unions, known as Australian Workplace Agreements (AWAs).

- The changes introduced by the *Work Choices* legislation can be summarised as follows:
 - establishment of a national industrial relations system by removal of access to State awards;
 - removal of the role of the Australian Industrial Relations Commission (“AIRC”) in approving collective workplace agreements and thereby creating a simple lodgment process involving lodgment with the Employment Advocate and making all agreements subject to:
 - minimum wages set by the Fair Pay Commission; and
 - four employment conditions entitlements (annual leave, personal leave, parental leave and maximum ordinary hours of work);
 - abolishing the role of the AIRC in making awards and restricting their overall role in industrial dispute resolution;
 - reduction of access to unfair dismissal and unfair contract remedies to only employees of enterprises of 101 employees or more; and
 - introduction of the “fairness test” in substitution of the “no disadvantage” test.

1.3 Workplace Agreement-Making After Work Choices

- Before the enactment of the *Work Choices* legislation, there were two types of workplace agreements:
 - certified agreements – collective agreements made between an employer and one or more trade unions and were approved by the AIRC before gaining statutory force; and
 - AWAs – individual agreements made between an employer and employee and were approved by the Employment Advocate.
- In relation to AWAs, they would need to satisfy the “no disadvantage” test which meant that no agreement could be approved if it provided in effect that there was a less favourable net outcome for employees than under the relevant State award. This test was abolished by the *Work Choices* legislation and substituted for a set of five non-excludable statutory minimum entitlements known as the Australian Fair Pay and Conditions Standard. This substituted test was known as the “Fairness test” and required that an AWA provide “fair compensation” for the removal or modification of any “protected award conditions” which would have applied under a State award.

1.4 Bargaining Environment Under Work Choices

- Under the *Workplace Relations Act*, there is no duty on an employer to bargain in good faith with their employee, but they are prohibited from organizing or threatening any industrial action or other action with intent to coerce another person to agree, or not to agree, from making, approving, lodging, varying or terminating a collective agreement (s 400(1)). It is to be noted that this provision will have no effect where a trade union takes protected industrial action.
- The meaning of “intent to coerce” should be interpreted as requiring something more than a mere inducement to comply, it should involve a high degree of compulsion which negates choice (*National Tertiary Education Industry Union v Commonwealth*).

1.4.1 Duress

- Employers and employees are also subject to s 400(3) which prohibits the application of duress in connection with an AWA. However, an employer can require an employee to sign an AWA as a condition of engagement and not be prohibited under this section (s 400(6)).
- The relevant intention of the employer is to apply pressure, which viewed in light of the circumstances, is illegitimate (*Schanka v Employment National (Administration) Pty Ltd*). In addition, an employer can intend to apply duress to an employee in connection with the making of an AWA even though such illegitimate pressure does not culminate in the making of an AWA (*Schanka*).
- *Canturi v Sita Coaches Pty Ltd*
 - Facts
 - An employer informed his employees that if they did not sign an AWA, they would receive less congenial and lucrative work.
 - Held
 - The categories of illegitimate pressure are not closed and in these circumstances, the pressure applied by the employer amounted to duress.
- *Bishop v Ropola Services Pty Ltd*
 - Facts
 - An employer told his existing staff that they would not receive promotional positions if they did not sign an AWA.
 - Held
 - The decision in *Canturi* was distinguished and the pressure did not amount to duress.

1.5 Fair Work Act

- The *Fair Work Act 2009* has significantly amended labour law and will be implemented in two stages in July 2009 and January 2010.
- The legislation essentially involves:

- the establishment of a universal safety net of ten national employment standards;
- the abolition of AWAs under a two stage process where AWAs will operate for their full term and introduction of Individual Transitional Employment Agreements (ITEA) for a period of two years which are effectively statutory agreements made between an employer and employee provided that it does not disadvantage the employee against a collective agreement;
- the introduction of “modern awards” which are to be established by the AIRC and contain a flexibility clause that will enable arrangements to meet the needs of employers and employees (note that these awards will not apply to those who earn over \$100k and will begin operation in January 2010);
- the requirement that collective agreements must pass the “Better Off Overall Test” in substitution of the “no disadvantage” test;
- the establishment of Fair Work Australia to administer the changes and eventually replace the AIRC; and
- reintroduction of access to unfair dismissal remedies to employees of enterprises less than 100 employees.

2. Formation of a Contract of Employment

2.1 Introduction

- The starting point for an employee in acquiring their rights and entitlements is the common law contract of employment. Moreover, once it is proved that there is a contract of employment in existence, the employee becomes entitled to rights not only arising out of the contract, but out of various industrial instruments (including awards, registered agreements, AWA's, ITEA's) and statutes (*Workplace Relations Act; Workers Compensation Act; Occupational, Health and Safety Act; Anti-Discrimination Act; Industrial Relations Act*).
- A contract of employment, like all contracts, involves a legally binding obligation for an employee to provide services in exchange for the payment of wages by the employer. These obligations are generally determined at the commencement of the contract which may occur before the commencement of work.



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