



# HIGH COURT DECISION ON *WORKCHOICES* IS RIGHT FOR THE TIMES

**T**he November High Court decision on the validity of the Australian Government's *WorkChoices* legislation represents a significant step forward for a national industrial relations system. Contrary to the views of some, state industrial relations systems could not legally act as a safe haven from hostile federal laws, and the powers of unions, union officials and tribunals will now be decided by parliament, rather than unions themselves.

On 14th November 2006 the High Court of Australia delivered its judgment on a challenge by the State and Territory governments, and some unions, to the constitutional validity of the Commonwealth government's *WorkChoices* legislation.

In a comprehensive decision the Court ruled (5:2) that the laws were valid.

The case was brought because *WorkChoices* was based on the constitutional power of the Commonwealth parliament to make laws about 'trading or financial corporations' rather than the power to make laws about 'conciliation and arbitration of interstate industrial disputes' which had been the more generally used power for Commonwealth laws over the past 100 years.

The major policy issue involved in the case is whether the Commonwealth parliament had sufficient legislative power to establish a national industrial relations system, at least one applying to all companies and their employees. This was one of the objectives of *WorkChoices*.

## IMPLICATIONS FOR EMPLOYERS

There are a number of implications arising for employers from the decision:

- the decision gives certainty to business in being able to implement *WorkChoices*. *WorkChoices* will remain valid law unless and until it is varied by the Commonwealth parliament. Debate about that will be a political matter, not a legal one;
- the decision is nation-building because it takes a substantial (and almost irreversible) step towards a national industrial relations system for a national economy;

- the decision does not abolish State industrial relations systems, but it confirms the effect of *WorkChoices*, which reduces the range of workplaces covered by State laws on industrial relations;
- the decision confirms that all employers that are corporations (within the constitutional meaning of that term) and all employees employed by those corporations are employed under *WorkChoices*. This has been the legal obligation of employers since *WorkChoices* commenced on 27 March 2006. The High Court decision confirms that, rather than alters it;
- the decision makes the foundation for our Commonwealth industrial relations laws more rational. It will be no longer based on union-initiated logs of claim and dispute findings but by what parliaments decide should be the rights and obligations of corporations and the people they employ; and
- the decision of the Court will, over time, require sensible dialogue and intergovernmental agreements between the Commonwealth and the States to complete the national system (so that it includes unincorporated employers).

## ANALYSING THE DECISION

The High Court decision validating *WorkChoices* has garnered plenty of commentary, some of which has predictably been coloured by the position governments, political parties, unions, business groups or academics hold on the merits of *WorkChoices*, rather than the underlying legal and constitutional principles behind the decision.

Not unexpectedly, much of the commentary on the decision has focused not just on the industrial relations aspects, but also on the broader implications for

federalism.

The media has been similarly caught in this bind. A quick account of the extensive press coverage in newspapers and the industrial relations press in the days after the decision shows that the two dissenting judgments were quoted three times more often than the five majority judgments.

With this amount of spin, employers and the community can be excused for wondering whether the decision was a good or a bad one.

In legal terms, the decision was not revolutionary. In the weeks and months prior, almost all constitutional law experts publicly and privately held the view that the State government and union claims would fail. This was because the decision was consistent with the way the High Court had interpreted the power of the Commonwealth parliament to make laws about corporations for at least a generation.

Nor was it precedent-setting to use this power to regulate industrial relations. This was not first done by the Howard Government in *WorkChoices*. It was first done by the Keating Government in 1993.

Nor was it radical for the High Court to say that Commonwealth laws like these were valid. As the High Court judgment this week pointed out, when the Keating laws were challenged by the States, the High Court ruled they were constitutional.

Nor did the decision transfer an exclusive area of State responsibility to the Commonwealth. Since 1904 the Commonwealth has made industrial relations laws, as has the States. What the decision did was permit the Commonwealth parliament to increase the coverage of Commonwealth laws from about 55 per cent of the private sector workforce to about 85 per cent.

In Victoria, that coverage is almost 100 per cent, because both the Kennett Government referred industrial powers to the Commonwealth and the Bracks Government has, to its credit, kept it that way.

What the case underlines is that the industrial relations power that previously existed in the Constitution has now been used to create a near-national workplace relations system.

## IMPLEMENTING THE DECISION

From a business perspective, the Court decision creates certainty about the legal basis of *WorkChoices*. That is

a good thing. However, it does not mean any instant change. The day before the decision businesses were obliged to comply with *WorkChoices*, in exactly the same way they are now.

Certainty however is an important ingredient when businesses plan to invest, grow and employ. Indirectly, the decision will contribute to these spin-offs if and when they flow from the implementation of *WorkChoices*.

Some have asked whether business would applaud a national industrial relations system being validated if it was a Commonwealth government implementing an industrial relations policy hostile to business interests.

This question is based on a false premise about how Commonwealth and State law interact.

State industrial laws cannot legally be a safe haven for business from hostile federal laws. Our Constitution says (and always has) that federal IR laws override inconsistent State IR laws. That point was proven in the early 1990s when the Kennett Government's Victorian IR system was no safe haven from the Keating Government's federal IR system. It was proven again when the Gallop Government in Western Australia was not able to prevent the mining and other industries moving into federal laws when State Labor emasculated the right to make individual employer/employee agreements.

Any power over industrial relations, whether in the hands of a federal government, state government or a combination of both, needs to be used wisely and for the overall good.

There is a huge difference between supporting a national industrial relations system and supporting this or that content.

Industry would be worse off if a federal government took our IR system back to compulsory union bargaining, compulsory national arbitration and job-destroying unfair dismissal laws. But it won't be worse off as a result of the High Court decision.

Businesses will now find the rules about which industrial relations law applies are simpler. *WorkChoices* applies federal IR law to all companies. This is much more sensible than the previous system where federal IR laws applied to those employers who were randomly selected by trade union officials for national coverage.

The days of union officials wading through telephone books to find business names to 'rope them in' to disputes and federal laws have gone for good.

That system, developed in the horse and buggy days, was always a bad foundation for employment law. It gave enormous institutional power to trade unions - a power that has now sensibly been removed and unlikely to ever be restored. The powers of union officials, and for that matter the power of industrial tribunals to settle disputes, will now be decided by parliaments, not by some legal fiction created so that industrial relations law can exist. That is the way it should be.

It is also helpful for federal policy makers to have more small and medium employers in the federal system. It should improve the quality of law making. Larger, unionised employers traditionally represented the profile of employers under federal laws. This meant that many of the important past industrial relations cases that shaped our laws were seen through the prism of businesses with high union engagement. Today, only 17 per cent of the private sector workforce is unionised. Fewer than one in ten businesses employ union members. By being in the federal system, smaller business may have more influence than before, when they usually had to cop the outcome of deals done or decisions made under the disproportionate influence of how a unionised workplace operates. Decision makers about industrial relations law will get a better profile of the businesses affected by their decisions.

## NOT ALL OUTCOMES ARE IDEAL

The High Court chose not to rule on how a trading and financial corporation is to be defined, beyond past decisions. Those decisions require a significant degree of trading activity. Uncertainty over this issue remains for employers that are not established for commercial purposes but which engage in commercial activity such as employers like charities and local councils where this is often a matter of degree.

The excessively wide regulation making power of the executive in *WorkChoices* was criticised by the Court, but not struck down or wound back.

Of course another inherent limitation of the corporations power is that it cannot regulate unincorporated employers.

## COMMONWEALTH/STATE CO-OPERATION STILL NEEDED

A national industrial relations system, now a reality, can only be completed if future intergovernmental agreements are struck between the Commonwealth and the States for the remaining 15 per cent of the private sector workforce not employed by companies.

Although the current political environment is not

conducive to sensible dialogue on industrial relations between governments, over time this will occur.

The critical mass of coverage now under federal law is likely to make it unviable for States to keep financing duplicate and expensive IR systems for a receding percentage of the workforce. The trend towards incorporation could see to that. So too will State treasurers or the public concluding that (at least) \$120 million of taxpayers money could be better spent on roads, police, schools and hospitals rather than providing duplicate State IR laws, bureaucracies and courts.

The irony is that by challenging *WorkChoices* in the High Court, the States have weakened their bargaining power in the dialogue that will inevitably occur. Employer organisations encourage governments to engage in that dialogue notwithstanding their differences over the content of industrial relations policy.

It is also important that State governments do not respond to the Court decision by creating new State legislation on industrial relations that seeks to impose additional employment obligations on employers (incorporated or unincorporated). There were already some moves in this direction before the High Court decision and they have the potential to not only burden employers with greater costs, but also create confusion over which law (Commonwealth or State or both) applies.

It is also wrong for the States to muddy the water by claiming that the Commonwealth's use of the corporations power in *WorkChoices* to create a national workplace relations system is a breach of trust by the Commonwealth and a misuse of the powers referred by the States in the 1980s to create uniform company law. *WorkChoices* is based on the corporations power given to the Commonwealth by the Australian Constitution, as interpreted by the High Court. It is an inherent power of the Commonwealth parliament. It has nothing to do with the power the States referred to the Commonwealth in the 1980s for company law purposes.

The irony is that it was the States' decision to make a political debate about *WorkChoices* into a legal issue in the High Court which has significantly weakened their bargaining power with the Commonwealth.

## IMPLICATIONS FOR FEDERALISM

The Court ruled that the merits of using a power, and the merits of the laws that are made in the exercise of that power, are not matters for the Court. They are matters for the governments and parliaments of the day or in the Court's words they are 'legislative choice'.

In saying this, the Court adopted a very traditional approach to the law, not a radical one. The long-standing principle that Courts interpret the law and democratically elected parliaments make it has been upheld.

The potentially far reaching nature of the decision is not so much in industrial relations but the fact that it may allow the Commonwealth to make a wider range of laws affecting economic and commercial matters if there is a relevant constitutional connection to a 'trading or financial corporation'.

The Prime Minister was right when he said after the decision that the Court's ruling allows a national industrial relations system for a national economy. Reading both the judgment and the tea leaves, he also said that Commonwealth powers would only be used for national interest purposes.

Under the Constitution, the fact that the Commonwealth has a legislative power does not mean that it has to use it. And very few of those powers are for its exclusive use. States could still make laws about economic and commercial matters affecting corporations (including industrial relations) so long as they were not inconsistent with Commonwealth laws. Nonetheless, the States are concerned at potential legislative intrusion.

## ACCI INITIATIVES ON FEDERALISM

The issue of federalism is one of ACCI's six policy priorities for 2007, as decided by ACCI members in November 2006 prior to the High Court decision. This reflects the importance of industry being actively engaged in this national debate.

An early initiative in implementing this priority was a 'Federalism Forum' held by ACCI late last month. That briefing opened industry debate on the appropriate mix between Commonwealth and State roles and responsibilities, how to make the system function better and issues regarding current funding arrangements.

Input was provided by former ACCI President David Gray, former NSW Premier and Finance Minister John Fahey and Professor Neil Warren of the University of NSW.

ACCI will pursue further initiatives on federalism during 2007.

## CONCLUSION

As a result of the High Court decision, a significant nation-building step has been taken for industrial relations.

We have a near-national industrial relations system. Taking that final step will be another test of the maturity of our governments, our leaders and our federation.

There are also implications for federalism which need to be examined, and industry needs to be engaged in that debate. ACCI is geared up to participate in this high profile national issue on behalf of employers throughout 2007.

Further analysis of the case for a national industrial relations system from an industry perspective is contained in an Issues Paper prepared by the Australian Chamber of Commerce and Industry in October 2005. The paper is titled *Functioning Federalism and the Case for a National Workplace Relations System* and is available on the ACCI website [www.acci.asn.au](http://www.acci.asn.au).