TOPIC 1
FEDERAL LABOUR LAW LEGISLATIVE FRAMEWORK FAIR WORK ACT 2009 (CTH)

Introduction

The Present System

S 3 *Fair Work Act 2009* (Cth): Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

→ Compare with

S 2 *Conciliation and Arbitration Act 1904* (Cth): Objects of Act

2. The chief objects of this Act are—

I. To prevent lock-outs and strikes in relation to industrial disputes;

II. To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes;

III. To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties;

IV. In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award;

V. To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;

VI. To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act;

VII. To provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes.

Federal Industrial Relations Regulation: From Conciliation and Arbitration to Work Choices (1904-2005)

- *Conciliation and Arbitration Act 1904* (Cth): Established the federal system of conciliation and arbitration.
    - Ultimately existed for a century → Undergoing some changes of emphasis on arbitration versus bargaining and some legislative changes.
    - Key concepts:
        - Industrial dispute;
        - Interstate dispute;
        - About 'industrial matters';
        - Award system.
    - Conciliation first:
        - If dispute settled, outcome → Certified agreement.
            - Result → Binding on the parties, enforceable.
        - If matters still in dispute → Arbitration.
            - Result → Award.
            - Binding on parties to the dispute.
    - Arbitration: Determination by industrial tribunal (1904-1950's Court of Conciliation and Arbitration performed arbitration and enforcement functions).
    - 1904 – early 1930's: Strikes prohibited.
    - Trade unions could be 'registered'.
        - Registration conferred 'legal status'; corporate status.
    - 'Co-existence' of awards and certified agreements.
- The Act was enabled due to s 51(xxxv) *Constitution.*
- 1988 → Change to the Act (*Industrial Relations Act*).

The Constitution, the Labour Relations Power, the Corporations Power and the National System

- Labour relations power: S 51(xxxv) *Constitution.*
    - Enables the Commonwealth Parliament to make laws with respect to "*conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*".
    - Origin of conciliation and arbitration (1904).

TOPIC 3

UNFAIR DISMISSAL UNDER FEDERAL LAW

Background to Federal Unfair Dismissal Law

Developments

- Adoption by Australian Commission of standard award provisions prohibiting unfair dismissal in *Amalgamated Metals, Foundry and Shipwrights Union v Broken Hill Pty Co Ltd, Whyalla (Termination, Change and Redundancy Case)* (1984) 294 CAR 175.
    - Provided a measure of protection against unfair dismissal for award employees.
- Following that case, the courts regarded the unfair dismissal provisions as incorporated as terms into the K of employment, thus giving rise to contractual remedies for breach of unfair dismissal clauses.
    - Until *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274.
- In some circumstances, relief was available from the AIRC in its dispute-settling jurisdiction, following a more expansive interpretation of the commission's jurisdiction by the HCA.
- From 30 March 1994 → New statutory remedies were available for the first time federally in respect of unfair dismissal.
    - This came with the enactment of the *IR Reform Act* to amend the *IR Act.*
    - Parliament largely used the corporations power and external affairs power to enact these provisions to provide minimum protection to employees against unfair dismissal and dismissal that was not for a valid reason.

Termination of Employment and Unfair Dismissal under Work Choices

- New statutory protection brought into Australian law ILO Conventions and Recommendations in relation to termination of employment, and was stated to give effect to some Conventions and Recommendations made by the ILO:
    - Convention concerning Termination of Employment at the Initiative of the Employer;
    - Convection concerning Discrimination in respect of Employment and Occupation; and
    - Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.
- The *WR Act*, in its overhaul of the federal system of industrial regulation, amended the 1993 laws relating to termination of employment.
    - This avoided the reliance on the external affairs power to re-enact the amended laws.

Unfair Dismissal Protection under FWA

- The *FWA* expressly confers jurisdiction on the FWC in respect of unfair dismissal (s 394).

S 385 *FWA*: What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Eligibility for Unfair Dismissal

Time Limits for Applications

S 394: Application for unfair dismissal remedy

1. A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

2. The application must be made:
   (a) within 21 days after the dismissal took effect; or
   (b) within such further period as the FWC allows under subsection (3).
3. The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
   (a) the reason for the delay; and
   (b) whether the person first became aware of the dismissal after it had taken effect; and
   (c) any action taken by the person to dispute the dismissal; and
   (d) prejudice to the employer (including prejudice caused by the delay); and
   (e) the merits of the application; and
   (f) fairness as between the person and other persons in a similar position.

- S 394(2) FWA: Applications must be made within 21 days of dismissal; or
  - (3): Within such period as FWC allows, if exceptional circumstances.
    - Don't have to be rare or unprecedented.
  - *Ho v Professional Services Review Committee No 295* (2007) FCA 388 at [25]
  - *Nulty v Blue Star Group Pty Ltd* (2011) IR 1 at [13]

TOPIC 6
SECRET BALLOTS AND PROTECTED INDUSTRIAL ACTION: LAW, PROCEDURE AND PRACTICE AND THE ROLE OF THE FAIR WORK COMMISSION

Secret Ballots on Proposed Protection Action: Background and Workplace Relations Act 1996 (Cth)

Role of protected action ballot

- S 436: *"To establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement"*.

Applying for a Secret Ballot Order

- Form F34.
- Who can apply:
    - S 437(1), (2): A BR of an employee to be covered by the proposed single enterprise, non-greenfields agreement may apply to the FWC for an order requiring a PAB to be conducted.
    - The ballot determines whether employees wish to engage in protected action for the agreement.
- Application requirements:
    - The application must specify:
        - S 437(3): The group(s) of employees to be balloted;
        - S 437(5): The questions to be put in the ballot, including the nature of the proposed industrial action; and
        - S 437(4), 444: Who the ballot agent will be, unless it is the AEC.
- Other requirements:
    - S 438: The application must not be made earlier than 30 days before the nominal expiry date of an existing enterprise agreement;
    - S 437(2A): There must have been a "notification time" in relation to the proposed enterprise agreement;
    - S 440: A copy of the application must be given to the employer and ballot agent within 24 hours of its making.

Employee group

- The group of employees to be balloted is taken to include only employees who:
    - Will be covered by the proposed enterprise agreement, and
    - Either:
        - Are represented by a BR who is an applicant, or

        - S 437(5): Are a BR for themselves but are a member of a union that is the applicant.

Questions

- The questions to be put in the ballot should describe the IA in such a way that employees are capable of responding to them.
    - In most cases the drafting of the questions is a matter for the applicant.
- Ambiguous questions however may later lead to the conclusion that the IA specified in a notice to the employer was not authorised by the ballot and is therefore not protected action (*John Holland v AMWU*).

Protected Action Ballot Determination

- S 441: FWC must, as far as practicable, determine an application within 2 working days.
- S 442: FWC may deal with 2 or more applications simultaneously if they relate to the same employer or workplace.
- S 443(1): FWC *must* make a Protected Action Ballot Order (PABO) if:
    - An application is made, and
    - Satisfied each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees to be balloted.
- S 606(3): No stay order applies to a decision to make a PABO.
- The PABO made by the FWC must specify:
    - Name of the applicant(s);
    - Group(s) of employees to be balloted;
    - Date on which the voting closes;
    - Ballot agent (if other than AEC) and independent advisor (if any);
    - Questions to be put (including the nature of the proposed industrial action).
- The PABO made by the FWC may specify:
    - Up to 7 working days written notice of employee claim action (s 443(3), (4), (5), 444, regs.3.11 and 3.12)

Genuinely Tried, or Trying, to Reach Agreement under WR Act

- The bargaining representative is the party that needs to genuinely try.
    - Form 34B.
- Temporal element: Prior to and at time of FWC determination of protected action ballot order application (*Coles v AMIEU*).
- Finding of fact having regard to all of the facts and circumstances of the particular case (*Esso v AMWU*).

TOPIC 10

APPROACHES TO ENFORCEMENT AND COMPLIANCE IN FEDERAL LABOUR LAW

Enforcing Awards, NES and Enterprise Agreements under the FWA

- Awards, legislated standards (NES) and enterprise agreements are binding and enforceable.
- Enforcement proceedings are heard in court (not FWC).
    - Federal Court; Federal Circuit Court; or eligible state/territory court.
- *Award*
    - S 45: 'A person must not contravene a term of a modern award' (*FWO v Gaura Nitai; FWO v AIMG; FWO v JS Top*).
- *NES*
    - S 44: 'A person must not contravene a term of a provision of the National Employment Standards' (*FWO v AIMG*).
- *Enterprise agreements*
    - S 50: 'A person must not contravene a term of an enterprise agreement'.
- *All are civil enforcement provisions.*
    - No stigma of conviction when compared to criminal conviction.
    - Court has discretion to make penalty be paid to individual or paid to consolidated revenue.
    - Onus of proof is balance of probabilities.
    - FWC ch 4 governs enforcement and compliance.
- Pecuniary penalties
    - S 539: Maximum: 60 penalty units for individual; 5 x 60 penalty units for corporation.
    - Currently $10,800 for an individual and $54,000 for a corporation.

Enforcement Agencies and Role of Unions

- Unions give employees a voice.
- Important for weaker groups, those with less bargaining power.
- Supportive legislative provisions:
    - Right of entry to employer's premises (s 481 entry to investigate suspected contravention);
    - Right to apply to courts re breach of award, EA, NES.
- Fair Work Ombudsman.
- Part 5 *FWA.*
- S 550: Individuals can be found liable.
- S 545: Enables the Court to make an order to restrain the individual (eg director) for a period of three years from being associated with any conduct that contravenes the FWA.