

LAW3442 Employment Law

Module 1 – Coverage and Institutions

Historical Context

- Reception of English common law's master & servant model → feudal to industrial relations *Does this ideology still dominate- idea of power/loyalty*
- Collective bargaining in the colonies – the British relic of trade unions as criminal conspiracies & unlawful associations → anti-combination laws

Trade Union Act 1871; Conspiracy and Protection of Property Act 1875 → trade unions legalised; collective bargaining normalised

- **Compulsory conciliation & arbitration of trade disputes** → an Australian invention introduced by some colonies & embraced upon federation - *Conciliation and Arbitration Act 1904 (Cth)* *This was the first in the world. So that was an Australian invention, introduced by some colonies initially, and then embraced upon federation because it made sense that when there are trade disputes that extend beyond the boundaries of any one state, that dispute cannot go on and on forever because it will be too disruptive.*

✋ But in the industrial relations sphere, , what we have is arbitration of trade disputes, conciliation and arbitration. Right. So compulsory conciliation and arbitration of trade disputes was introduced through the *Conciliation and Arbitration Act 1904 (Cth)* Commonwealth legislation.

The Evolutionary Design

- 1904 – 2006 - a myriad of industrial relations systems operated – State & federal legislation
- **'Awards' – industrial agreements covering conditions of employment produced by the relevant tribunal through a process of arbitration**
- 1992 – certified agreements – to promote flexibility & reduce discretion of the AIRC (Aus Ind Relations Commission)
- 1993- enterprise agreements – more flexibility in direct bargaining at the enterprise level; less arbitration *Keating govt- start Certified agreements (variation of award as per AIRC) then*
- 2009 to date – enterprise agreements & modern awards *Enterprise agreement (variation of employers making) Of course, award kicks in when employers can't afford to have an EA.*

Award: Decision by arbitrator decided through arbitration

The Constitutional Design – process

- **s51(xxxv) Constitution – industrial arbitration power – conciliation & arbitration to prevent and settle industrial disputes extending beyond any one State.** *Ex parte Australian National Airways Pty Ltd 1945 case then changed this*

R v Coldham; Ex parte Australian Social Welfare Union (Social Welfare Case) (1983) 153 CLR 297 - the HCA adopted a broad interpretation of 'industrial disputes' = all matters affecting employment relationships; national awards
UNLESS State instrumentality – implied immunities doctrine as in

Re Australian Education Union; Ex parte Victoria (1995) 184 CLR 188 – the HCA upheld the right of States to function autonomously within the federal nature of the Constitution in relation to employment conditions of senior public servants (held State instrumentality)

- **s51(xxix) Constitution** - external affairs power – to incorporate international law and matters of international concern into domestic law – dualist system requires specific domestic legislation (*Parliament needs to put in Act*)

Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 – the HCA upheld legislation implementing ILO Conventions and Recommendations on equal pay, termination, discrimination, family leave, collective bargaining & right to strike; also **s51(xx) Constitution** - corporations power for enterprise bargaining legislation.

The key international treaties (ILO Conventions) were:

ILO Convention No. 87 – Freedom of Association and Protection of the Right to Organise

ILO Convention No. 98 – Right to Organise and Collective Bargaining

ILO Convention No. 111 – Discrimination (Employment and Occupation)

ILO Convention No. 100 – Equal Remuneration

ILO Convention No. 158 – Termination of Employment (unfair dismissal)

- **s351(1) Fair Work Act 2009 (Cth)** - 'General Protections'; & other federal anti-discrimination legislation - *Racial Discrimination Act 1975 (Cth)*; *Sex Discrimination Act 1984 (Cth)*; *Disability Discrimination Act 1992 (Cth)*; *Age Discrimination Act 2004 (Cth)* + these need to be linked to s 51

- **s51(ii) Constitution** - taxation power – used to guarantee superannuation payments by employers

Roy Morgan Research Pty Ltd v Commissioner of Taxation (2008) 268 ALR 232 – upheld as valid by the Full Court of the Fed Court

- **s51(xxxvii) Constitution** – States' referral power

Fair Work (State Referral & Other Measures) Act 2009 (Cth) – intergovernmental agreement reached with 5 States (WA excl). *Fair Work (State Referral & Consequential & Other Amend.) Act 2009 (Cth)* – extended federal law to referring States.

- **S122 Constitution** – territories power

ACT and NT subject to federal system; sporadic domestic legislation

- **s51(xx) Constitution** - corporations power – used to regulate private sector employment conditions nationally

Workplace Relations Amendment (Work Choices) Act 2005 (Cth) – agenda of wide deregulation; promoted individual contracting via Australian Workplace Agreements; weakened trade unions; enhanced managerial prerogatives (*more power to employers, return to master and servant?*)

New South Wales v Cth (Work Choices Case) (2006) 229 CLR 1 – the HCA (majority) upheld the constitutionality of the federal legislative design; cf J Kirby's dissent. Pushed more power to the Cwealth

In the joint judgment, Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ affirmed what Gaudron had previously said about the corporations power, 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. (Re Pacific Coal Pty Ltd; Ex parte CFMEU (2000) 203 CLR 346 at 375.

In his dissenting judgment, Kirby J could not accept that the corporations power was intended to deal with industrial affairs, stating that a broad reading of the power would permit 'a destabilising intrusion of direct federal lawmaking into areas of legislation which, since federation, have been the subject of State laws' (Work Choices Case at [611]).

Fair Work Act 2009 (Cth) - preserved prior general national framework; abolished Australian Workplace Agreements; improved right to unfair dismissal claims; introduced good faith bargaining etc. No real changes to EA, abolished 1:1 contracts

Current Industrial Relations Design

- Federal law - **Fair Work Act 2009 (Cth)** corporations & external affairs powers; introduced NES (National Employment Standards) - safety net - list of minimum standards; system of modern awards; system of enterprise agreements. [FWA creates an ascending tiered system of employment entitlements] (*better off test*)
- Coverage of **FWA** → national system employee (s13) & national system employer (s14); all private sector & some public sector (Vic) *Victoria has referred all of its industrial relations power to the federal system even the public sector (not the top top earners)*
- 'constitutional corporations' only - in relation to 'nat system emp' in non-referring States (WA) - sole traders and partnerships under WA laws
- Although Western Australia did not refer its industrial relations powers, companies operating in WA are governed by the Fair Work Act because the High Court in the Work Choices Case upheld federal workplace laws under the corporations power, while sole traders and partnerships remain subject to WA law.*
- State laws - e.g. **Industrial Relations Act 2016 (Qld)** etc.

Current Industrial Relations Design

- 'constitutional corporations' → activities test to determine if trading / financial corporation; may include not-for-profit sector & charities:

Quickendon v O'Connor (2001) 109 FCA 243 Can a public university be a constitutional corp: yes!

Educang v QIRC (2006) 154 IR 436 Churches running Private Schools? Yes

Orion Pet Products v RSPCA (Vic) Inc (2002) 120 FCR 191

- Inconsistency between State law & **FWA** → *QLD is still holding onto public service, gave away sole traders and partnerships*
- **s26(1) FWA** - automatically excludes applicable State or Territory industrial laws for national system employers and employees
- **s109 Constitution** - federal law prevails
- **s27(2) FWA** - list of prevailing State law (anti-discrimination; superannuation; workers compensation; long service leave; outworkers; workplace surveillance, minors) *So some still kicks in*

Federal Industrial Relations Institutions

- Fair Work Commission Fair Work Amendment Act 2012 (Cth)** That historical body was the Conciliation and Arbitration Court then the Aust Ind Rel Commission now the Fair Work Commission
- Members of FWC - President, Deputy Presidents, Commissioners & Expert Panel
- **s576 FWA** - jurisdiction *what it can hear*; - **s577 & s578 FWA** - 'manner' of performance of functions
 - Appeal lies to the **Full Bench of FWC** on leave
- Fair Work Ombudsman** - s682 FWA - functions *The policeman of workplaces*