Topic 1 - Introduction

Topic 1 – Key Points

- Overview of the big issues highlighted in chp 1 of the TB
  - This is explorative no clear answers
  - History of labour law in Australia
    - See later ppts here for time line
- Basic reason for labour law (particularly legislative law)
  - Redress an imbalance between workers and employer (powers of capital)
    - Power of capital – workers are supressed by those who are able to raise capital and invest and starts businesses
  - Europe has most developed labour law regimes e.g. Sweden, Norway
    - High trade union membership rates – more than 50%
  - Australia – trade union members less than 20%
- Trade unions
  - Social phenomenon where workers came together to barter for better terms of employment
  - Largely successful
  - One driver (not only) that improved living conditions for workers
- Labour law protects workers and labour
- Industrial relations is considered collective labour relations (topics 8A and 8B)
- Employment law – individual – most of course
  - Contracting
- Close relationships between politics and labour law
  - Especially in Australia
  - Many changes throughout history – possibly unstable
  - Labour legislation connected to who is in federal power at the time
    - Fair Work Act – Kevin Rudd and Julia Gillard
- Role of state as feature of labour law in Australia
  - State means government and various apparatuses of governments
  - Also institution of Australian industrial relations commission – Fair Work Commission
    - Role: informing and shaping terms of conditions in employment
      - Integral to our history
- Changes in labour law – various ways that it changed from award system to enterprise bargaining
- Bigger issues to do with employment not covered by labour law
  - E.g. how to get long-term unemployed into work? Big social issue that labour law doesn't deal with
  - Labour law deals with **paid workers –** not wider issues such as helping unemployed participate and obtain work
  - Europe – CLOSER relationship between social security law and employment law
  - Australia – social security law distinct to labour law
  - Connection to **corporate law –** ISSUE: if employees entitled to a voice in corporate governance? In Australia, employees are **OUTSIDERS to internal processes of** company decision making
    - Not part of internal governance system of company and the power structures within
- Discrimination and OHS
- Immigration - e.g. business owners seeking advice regarding multiple visas to sponsor people coming from overseas
- Challenges facing labour law in the future
  - Flexible work arrangements that aren't traditional long term employment
  - Less and less people have the one job that is permanent full time
  - People are wanting flexibility these days – but then may not get paid well
- Technological changes on work

    - People working from home
    - What does that mean re OHS? OHS set up for where people worked in the physical workplace and employer controlled level of safety
    - Now people working from home, what are the obligations? No answers
    - Diminishing separation between private time and worktime
        - E.g. answering an email at any time – 11pm when you're not in the office, that's **still work** – where is division between private and work time? Legal changes as a result
        - Challenge for trade union
- Names of institutions in chapter 3
    - Idea of the relevant institutions e.g. Fair Work Commission
    - Fair Work Commission's functions
    - Judicial power – federal court and federal circuit court
- Issues highlights in 'Year in Review 2014-15'
- Answer questions

Summary of Key Dates for Federal System

- 1901 – Federation and Commonwealth Constitution
    - Birth of consti
    - Conciliation and arbitration power (**S51(35))** enacted to conciliate and arbitrate industrial disputes
        - Not a power that allows government to legislate in area, about making laws that **enable** processes that can resolve industrial disputes
        - This power and way it was designed – set an established the way our system developed until 2006 (when it was replaced)
        - Remnants of the system: Awards System (Topic 4)
- 1904 – Conciliation and Arbitration system was set up after Australian Constitution was drafted and Federation
    - Anything dealing with this is largely historical and not examinable
- 1988 – Industrial Relations Act (Hawke ALP)
    - Replaced Conciliation and Arbitration Act
    - Nothing radical
- 1993 – **Industrial Relations Reform Act** (Paul Keating introduces enterprise bargaining)
    - **RADICAL**
    - **Revolutionary –** allowed government to directly legislate in this area without need to set up tribunal that would conciliate and arbitrate industrial disputes
        - Particular interpretation allowed by HCA – powers wide enough to enact this legislation
    - Keating decide to enact new laws – but not based on traditional conciliation and arbitration power (**S51(35) of consti)**
    - They enacted these laws through **corps power** and external affairs power of consti
    - Corps power is basis upon which the Fair Work Act is enacted
- 1996 – **Workplace Relations Act** – (Howard Coalition - Brand new act- introduces AWA)
    - Historical – not relevant
- Summary of Key Dates for Federal System
- 2005 – **Work Choices** (Howard; It is the same name as 1996 act but act totally changed and renumbered
    - Conciliation and arbitration were dismantled and system moved to individual and collective bargaining
    - **Radical**

- Historical
- 2009 – **Fair Work Act 2009 – IMPORTANT – WHAT WE WILL MOSTLY COVER**
  - Return to more protected labour standards. Collective bargaining being the primary method of resolving disputes and determining conditions of employment

TODAY

THE *FAIR WORK ACT* (2009) CTH

- Major features
- Collective/enterprise bargaining
- Floor of comprehensive individual workplace rights **BULK** – topic 4, 5, 7, 8B
  - Overlap – can apply to same fact scenario, not mutually exclusive

Year in Review

- Chapters written every year that **examines** various areas and changes that occurred in the areas that govern this area
- Talks about proposed legislative changes
- FWC introduced administrative changes – relevant if you were in a case before the FWC
- National minimum wage decision – new weekly national wage from 1/7/15 is $17.51 = $656.9 weekly.
  - Minimum that aren't on award rates
  - Those on awards – maybe higher depending on which classification/level they come under
- Issues surrounding consti limitations of **Fair Work Act.** Reason for issues:
  - Because corps power has been used to enact legislation, it does NOT deal with everything
  - **Cannot cover institutions** that aren't subject to corps power
    - E.g. corps that aren't considered to be trading
  - Topic 2 (assignment) – **EMPLOYEES AND INDEPENDENT CONTRACTORS**
    - Debate over what factors important to demonstrate whether someone employee or independent contractor (relevant info on File Review for assignment)
    - Topic 2
- National employment standards – discussed
- Modern awards
- General protections – very **IMPORTANT –** Topic 5
  - Becoming central type of litigation brought by employees and unions
  - **Paragraph 1.70**
- Unfair dismissal
- Bullying (Topic 9)
- Enterprise bargaining
- Industrial action

Introduction

- Labor law is relatively new discipline, although by the 1800s the law and courts had addressed and focused on its surrounding issues.
- By middle 20th century about law had emerged as its own discrete discipline - both as an academic and professional discipline.
- The term labor law has never had a precise meaning and there is frequent discussion as to what falls within and outside its confines.
- '*Labour Law encompasses a broad and amorphous body of rules and regulation that govern enormous array fo features of the working lives and economic welfare of workers and their families…'* Prof John Donohue Yale Law School

- There has been various changes to workplace law in Aus
    - Such as dramatic reforms in 2005 known as WorkChoices
    - More recent changes to the *Fair Work Act* 2009 which places collective bargaining as the primary method of resolving dispute and determining conditions of employment
- Study in this area essentially relates to the legal regulation of the relationship between employers and employees
- There is ordinarily a subordination of workers interest in favor of the larger capital goals of enterprise. The role of labour law is to counter balance this.

Workplace/Industrial Relations

- Relationship b/w worker and employer is one both legal and economic consequence.
    - Workers exchange labour in return for wages or salary and products of employees' labour normally yield profits/benefits for employer
- All relations arising out of this are loosely referred to as **workplace relations, industrial relations or labour relations.**
- **Industrial Relations In Australia: Development, Law and Operation** pg 5
- These relations can encompass:
    - Pay disputes
    - Supervisor communication with workers
    - Extent of employer control over workplace
    - Promotional system
    - Union rights and actions

Significance of employment as a Social Relationship

- Employment relationship is also a significant social relationship – not only because workers and employers have to co-operate harmoniously in production process but because work environment is central to our culture and quality of life
    - Our lives revolve around our work
- It is acknowledged that through the process of work individuals can become integrated within society as whole and as such

Society and public interests

- Labour law reflects economy and society within which it operates
- Decisions of industrial tribunals tread a fine line, balancing interests of disputants and national economy's interests
- Labour has plenty of jargon reflecting social, economic and political interests and values e.g. 'public interests' and 'ability of economy to pay'
- Cannot ignore economic, social and political factors when studying labour law
- Control on trade unions not only there to minimise economic harm on employer but also motivated by need to protect public from fall-out of industrial dispute

Relationship between politics and labour law

- Law is product of politics and politics is influenced by existing and proposed law. In Aus, the values of past generations is embodied by the law and frequently needs to be adjusted to meet the changing view of the workplace and the relationship between worker and employer.
- The interrelationship of politics and labour law is shown very starkly by the reforms in Aus workplace between 2005-2009.
    - **2005 Work Choices**– Howard Govt pursued a free labour market ideology, dismantled the system of conciliation and arbitration and replaced it with a system where collective and individual bargaining took place, arguably without the safety net of federal awards

but rather with a sparser safety net of legislated conditions and no protection for most of the Australian workforce against unfair dismissal.
    - Work Choices also radically supported the notion of increasing the individualization of the workplace that agreements negotiated individually between an employer and an employee dominated over collective agreements.
    - These reforms were noted to have contributed towards an expansion of role in managerial prerogative and workplace control
- **2009 FW Act** – Rudd govt FW Act returned some of the rights lost under the previous reforms such as unfair dismissal protection and the safety net of awards and provided more extensive range of statutory minimum employment standards and the elimination of individual bargaining through Australian Workplace Agreements (**AWA**).

Development of Workplace Law in Australia

State and Government Intervention in Labour Relations

- State intervention exists on a variety of different levels including:
    - Establishment of an independent tribunal – 1st level of intervention is the establishment of an autonomous industrial tribunal to mediate disputes and in appropriate circumstances make rulings and impose orders or arbitration settlements with the force of law. Started at state level but now at federal level, reflects standards of the feature of Australian statements
    - Legislated Standards – 2nd level of intervention is the direct imposition of standards through legislation. These standards typically regulate workplace health and safety or levels of compensation for injury, but also create and regulate trade unions themselves. In more recent times, the Federal Parliament has legislated directly for some labour standards in the FW Act
    - Courts of Law – 3rd level is through ordinary courts of law, which shape the CL and the manner in which it applies to industrial relationships
- The importance of each of these levels of intervention has varied throughout the development of Workplace law, with jurisdictions changing, states referring power over workplace relations and other advancements altering the distribution of importance

New Federal Regulation in 1904: Dominance of Conciliation and Arbitration

- The Australian system of labour law was dominated for a century by mechanisms of conciliation and arbitration and by the industrial awards, and in the latter period.
- There are **several reasons** for the former dominance of these mechanisms:
    - In the system of award regulation, the award, which is its instrument, was capable of overriding the CL and private arrangements of the parties. The parties generally cannot contract out of their award obligations
    - Major institutional actors, unions and employees associations, were clients of the system. Through registration they were created by conciliation and arbitration legislation thereby gaining legal status and being subject to legal controls. They alone were able to represent their member's interests before the arbitration and conciliation bodies.
    - The system was the creation of the state and was the instrument through which industrial relations were implemented
    - The extensive jurisdiction of this system allowed them to exert dominance over the area as well as closely regulate the actions of the system.
    - The permanent nature of the industrial tribunals and their expansive jurisdictions allowed them to perpetuate the dominance of the system. Their coverage has been remarkably extensive

Constitutional and Legislative Foundations

- The Commonwealth Parliament does not have any single power that enables it to regulate work in a comprehensive manner.
- Historically the power with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of anyone state' (**Constitution s 51xxxv**) has been dominant
- The enactment of the first piece of legislation under the conciliation and arbitration power was the **Commonwealth Conciliation and Arbitration Act 1904** (Cth).
    - The system that this legislation established was envisaged as providing, in the words of one of its founders Henry Higgins, 'a new province law and order' and an alternative to the 'rude and barbarous' method of the strike that was an inevitable part of any system of collective bargaining.
    - In the strikes of the 1890s the main issue had been the workers claim to a right to join together in trade unions to negotiate collectively with their employers, who were insisting on 'freedom of contract' to agree to terms and conditions of employment with work is on an individual basis
- Awards made to prevent and settle industrial disputes would thereafter often establish the same terms and conditions for all employees across an industry, thus fostering a quality and a sense of social cohesion, and many of the disruptions of the industrial action were avoided through the establishment of a public and fair system for resolving disputes between capital and labour

Binding Parties to Industrial Disputation

- Constitutional limitations meant that the awards or orders of the tribunal could only bind the parties to the industrial dispute and those who brought themselves into the arena of the dispute and who it was necessary to bind in order to secure its effective ongoing settlement.
- The tribunal therefore never had any general regulatory powers, although in practice 'test cases' and national wage cases often lead to the establishment of standards that were then adopted widely across different industries through a 'flow on' process involving variation of awards.

Deregulation and Flexibility

- Further change occurred in the 1990's coming into the present, more so then in any other period previously.
- Vic and WA parliament went down the path of deregulation via state legislation. This established that the primary governing mechanism for labour relations was the individual contents of the workplace agreement.
    - **1992 Employee Relations Act (Vic) –** established mechanisms of individual employment contracts as primary means of governing labour relations
- Federal govt pursued the direction of collective bargaining, enacting reforms via the WR Act.
- The term flexibility attracts the following terminology:
    - Emphasis now being placed on enhancing flexibility in so many aspects of the organization and regulation of work
    - Workplace system is both a hindrance and a facilitator of industrial relations.
    - Enhanced flexibility is as much in the hands of the regulators as it is in the labor practices actually adopted by employers, unions and employees.
- **Deregulation** referred to the notion of reducing regulation of labor relations and shifting responsibility for setting terms and conditions of employment to the workplace itself.
    - The real issues are not whether to have regulation, or even more or less regulation, but what kind of regulation to have, what assumptions it contains, who or what it privileges, and who or what it neglects

- Traditionally there have been multiple regulatory layers governing work in Australia and the significant role of the state in the past has been generally acknowledged
- Even in the global era, the state through law continues to play a critical role in creating and shaping labour law

Work Choices: Moving to individualization and more deregulation

- These reforms resulted in further embedding of the individualization of workplace relations.
- It commenced the introduction of AWAs into the **Workplace Relations Act 1996** .
- Key aspects include:
  - Supremacy of the AWA over collective agreements
  - The removal of the 'no disadvantage' test so that the AWA neither needed to meet the basic award conditions nor disadvantage the employee overall
  - The dismantling of unfair dismissal protection for most Australian employees
- Bargaining could take place without resorting to compulsory arbitration and no new awards could be made.
- **Employees were generally** less protected from market forces and system but the making of individual agreements was not unregulated as there were safeguards for making AWAs ad there were matters that could not be includes in AWAs (e.g. Certain union-related matters) even where the parties willingly and voluntarily wanted to include them

New Wave of Regulation: Enshrining Fairness – Fair Work Act

- **Fair Work Act** set up a system of collective bargaining underpinning a system of legislated and award employment standards
- Returned (in part) the system to the pre-**Work Choices** model but the government took the opportunity in the Act to modify and modernise certain aspects and not revert to the traditional system of conciliation and arbitration
- Policy aimed to provide for system leading to efficiency and productivity in workplaces while **maintaining fairness**
- Flexibility **retained** by 2 mechanisms in **FW Act**
  - **S65 –** conferred as a national employment standard, a right to request flexible work for certain employees
  - Individual flexibility clauses in modern awards and enterprise agreements whereby individual arrangements could be made by employers and employees without recourse to the federal industrial tribunal for approval

<u>Perspectives on Labor Law</u>

Gender Issues and Social Justice

- The supposed growth in precarious employment, referred to by Campbell and Brosnan, has implications for social justice and for women. Until recently women were the neglected employees in Australian labour relations. Labour law scholars have already recognized that the needs of women in employment differ to that of men.
- The implication for women and other less powerful groups in relation to deregulation is of serious concern
- Work Choices caused individualisation and dominance of AWA's and stripping away for unfair dismissal protection resulting in groups with less bargaining power (hospital, retail workers, women) suffering loss of conditions

Social Inclusion

- **FW Act S3 –** principal objects of the At is social inclusion and national economic prosperity

- In more recent times the importance of, and therefore the encouragement of, work as a form of engagement, **inclusion of participation in society** has come to be articulated as a significant object of the law governing work
- Work, especially paid work, is seen as one of the most critical ways in which citizens are integrated into society
- The minimum wage objective considered by FW Commission includes requirement that commission consider 'promoting social inclusion through increased workplace participation': **FW Act S284(1)(b)**
- The construction of labour markets – and especially the regulation of unemployment and the monitoring of those who are dependent upon social welfare – this becomes a concern of the law of work
- This can extend the scope of the law of work to such matters as education and training
- A more commonly adopted iteration of the idea of social citizenship insists on a **reciprocity between the citizen and the state**
- Thus the **citizen has a duty or responsibili**ty to society to **participate** in **work**
- The purpose of law is to ensure that all that can, do engage in productive work
- The **Fair Work Act 2009** maintains this emphasis on economic participation, in part through its adoption of the goal of 'social inclusion'
- The law's purpose in identifying work as a signifier of meaningful participation and inclusion in the community, and encouraging participation in the workforce, this risk suggesting simultaneously that those who do not participate in paid work in the market place are not worthy members of the community

Social Security and Welfare

- The interrelationship of labour law and social security is well known
- Many social security policies are aimed at ensuring that people re-enter the workforce
- Many studies have been directed between the existence of workplace regulation, social security and increases in the minimum wage

Intersection Between Labour Law and Corporate Law

- Very strong link between the two in FW Act given that the source of authority for both is the corporations power
- Was an innovative use of the corporations power at the time, highlighting the roles of corporations in employers of labour.
- Significant issue in this area is the interest that workers have in the sound management of the company
- There is also debate over employee entitlements in the event of insolvency. In Aus the Federal General Employee Entitlements and Redundancy Scheme was introduced to administer such situations
- **Labour law as a regulatory tool for labour market –** labour law doesn't operate in vacuum but has consequences for labour market and can be used as a significant tool for labour market regulation, with impacts on work relationships

Discrimination and occupational health and safety

- Both fields seen extensive state and federal legislative activity
- Encompasses both discrimination and OHS laws
    - Discrimination relates to preventing employers from discriminating employees/prospective employees based on personal characteristics such as sex, sexual orientation, age, ethinicity, etc.
        - FW Act extended this protection to prospective employees

    - Employers must provide and maintain workplaces that are reasonably safe places in which to work and enter
    - OH&S relates to whether workplace agreements and awards possess the necessary vehicles for addressing workplace health concerns
        - FW Act assumes that separate legislation deals with details of OH&S

Immigration and Workplace Law

- Link between labour supply and immigration and Australia's post WW2 immigration scheme which had its origins in expanding the labour supply
- Clear overlap in relation to migrant workers and the Australian 457 Visa programme (allow workers to **temporarily** enter Australia).
    - Serious issues with compliance and enforcement of minimum labour standards and conditions for vulnerable workers
    - Commenced in 1996 and has only grown in the face of the skilled worker shortage present in Australia
- Additional protections in place via the Fair Work Ombudsman and the Department of Immigration and Border Control.

International Law and Human Rights

- The International Labour Organisation (ILO) has been the pre-eminent international institution with oversight of work since 1919
    - It was first established as an arm of the League of Nations
- The foundation of the ILO in 1919 was premised upon the conviction that universal and lasting peace can only be established and maintained if it were based on social justice and improving working conditions
- The aims of the ILO is broadly expressed in its constituent document are:
    - To establish and achieve the application of global standard of social justice with respect to work, and thereby to ensure that some workers are not placed in a position of competitive advantage or disadvantage vis-a-vis others
- The preamble of the ILO constitution was revised by the 1944 ***Declaration of Philadelphia***
    - This decoration included **anti-discrimination principles** as well as affirming the right of everyone to **pursue both their 'material well-being and their spiritual development** in conditions of freedom and dignity, of economic security and equal opportunity'
    - It encouraged **international and national policy** to have a **central aim**, the attainment of the conditions necessary to achieve these objectives
    - The aspirations of the ***Declaration of Philadelphia*** placed to work in a broad social and economic context
- **Goals** were reaffirmed in the context of 21st century globalisation and in the 2008 ***Declaration on Social Justice for a Fair Globalisation*** the 2008 declaration orders the ILO's overarching goal of decent work into four priority areas:
    - Employment;
    - Social protection;
    - Social dialogue; and
    - Rights at work

Structure of the ILO

- The structure of the ILO includes the **representatives** of not only the **governments** of its various member states but **also of workers and trade unions** and **employers** in the organisation
- This structure is incorporated within the ILO's three principal bodies
    - The International Labour conference

    - The governing body and
    - The International labour office
- The International Labour Conference
    - The most important work of the conference is the adoption of conventions and recommendations
    - It also has ultimate supervision of the application at the national level through the receipt of reports from member states
- The Governing Body
    - Every three years the conference elects the governing body which is the executive of the ILO
        - they usually meet three times a year to formulate the policy and programs of the organisation is composed of 56 regular members
- The permanent secretariat of the ILO is the International Labour Office
    - The work of the International Labour Office includes research in the collection and distribution of information relating to conditions of industrial life and labour, especially for the preparation of conventions
    - It also produces publications provide technical support to member states and of his training to employer and worker organisations

The International Labour Code

- The **conventions and recommendations** of the **ILO** are often referred to collectively as the International Labour Code
- The process leading to the adoption of the Convention is a lengthy one
    - There consultations with representatives from the member state
    - The ILO undertakes an extensive review of existing law and practice in member states
    - The subject matter of the proposed new convention is discussed at two successive sessions of the conference and only adopted when supported by two thirds majority
- After adoption, a Convention is open to ratification
    - Where a **nation agrees to be bound by its provisions**
- **Recommendations** are **not available** for **ratification** and **create no formally binding legal obligation** on member states
    - They are **intended to provide guidance** in relation to national policy legislation and practice
    - Sometimes they provide more detailed elaboration of Convention principles and in some instances may include provision that are inappropriate for inclusion in Conventions
- Prior to WW2 the stress was on securing basic conditions at work
- After World War II there was a stronger emphasis on general standard applicable to all workers such as freedom of association equality and the abolition of forces labour
    - At the same time the international law of human rights was developed

The ILO committee Structure and it's Supervision of Convention Compliance

- All member states of the ILO are required to bring new conventions and recommendations to the attention of the appropriate national authorities with a view to ensuring their implementation at the national level
- Advice is available in relation to everything from legislative drafting, methods of administration and inspection, and training in the prevention of accidents
- The **ILO also has a range of institutional mechanisms to respond to instances of non-compliance with the International labour code**
    - International Court of Justice is the body responsible for the unauthoritative interpretation of the ILO constitution and the code

    - In reality several key ILO committees are more significant and their decisions effectively make up a body of practical jurisprudence of the interpretation of the Code
- Implementation of ratified conventions is monitored through the committee of experts on the application of conventions and recommendations (CEACR) which reports to the annual conference
- Article 22 of the ILO constitution states that **members have to report annually to the committee** on the measures taken to ensure compliance with the obligations under the International labour code
    - Where it appears there is non-compliance the committee may make a direct request to the member state
    - If the response from the member state is inadequate the committee may publish an observation in its annual report which is presented to a special committee on the application of standards, which in turn reports to the conference in plenary session
- NOTE: See page 35 for more issues on non-compliance

The ILO and the Law of Work in Australia

Ratification and Implementation of the International Labour Code in Australia

- By mid-2010 of the 188 ILO conventions Australia had 55 rectifications of which 47 remain in force
    - This is more than most nations in the developing world including some industries important trading partners in Asia region
- NOTE: See page 36-38 for more

Compliance with the International Labour Code

- The CEACR has made numerous direct request to Australia including
    - Provisions dealing with discrimination in employment and equality of opportunity
    - The regulation of essential services
    - Regulation of both the form and content of bargaining
    - The capacity of public servants to take industrial action
    - The encouragement of individual over collective-bargaining
- Australia's laws in relation to the right to strike and secondary boycotts have all been the subject of numerous 'direct requests' which had been condemned on more than one occasion both Australian common law and statute law
- Australia is continually requested to amend legislation to conform to the principles of the International Labour Code and accordingly will also scrutinise the **Fair Work Act** closely in the future

Institutions and Their Impact on Work Arrangements

- Under the FW Act responsibilities relating to specific operations of industrial relations system are shared between the Fair Work Commission (FWC), Federal Court of Australia and Federal Circuit Court and Office of the Fair Work Ombudsman.
- FWC is body that makes and reviews modern awards (comprise safety net for enterprise bargaining(
    - **FW Act S171:** FWC has powers to facilitate good faith bargaining and making of enterprise bargaining
    - FWC approves enterprise bargaining arrangements, ensuring they meet statutory requirements
    - FWC's role in bargaining jurisdiction also requires it to manage negotiation process to ensure that bargaining between parties is undertaken in good faith and that protected industrial action complies with necessary statutory requirements e.g. protected action secret ballot

Role of an Industrial Tribunal - FWC

Fair Work Commission

- No longer exercises broad arbitral powers to resolve industrial disputes as was the case under previous legislation
- Previous role was to make awards to prevent/settle disputes in accordance with **S51(xxxv)**
- However even though Cth system shift towards bargaining system, FWC retained arbitral powers on some occasions during bargaining process, can be utilised when:
    - Serious breach of bargaining orders significantly undermining bargaining for agreement
    - Cases where serious industrial action which is harmful to public safety or causing damage to Aus economy
    - Under framework of new low-paid bargaining provisions dealing with groups of employees who haven't been covered by enterprise agreements or experience difficulty access bargaining process
- Commission has power to:
    - Resolve unfair dismissal claims
    - Assist with resolution of industrial disputes
    - Assist in bargaining process for enterprise agreements
    - Approve enterprise agreements
    - Set minimum wage
    - Review, vary and create modern awards
    - Conciliate (or mediate) general protection claims

Fairness, public interest and ROLE OF UNIONS

- Under previous conciliation and arbitration system, the statutory tribunal acted as independent statutory body acting in public interest to resolve disputes and impose fair outcome (industrial award) on disputing parties
- Award-making jurisdiction was mechanism to protect the weak or low paid
- Assumed that parties appeared before tribunal on equal footing
- Union parties played a representative role in these arrangements
    - Collective organisations representing rights of their members
- Underlying core features of traditional industrial relations system continue to apply even though FWC no longer focused on conciliation and arbitration of industrial disputes
    - Public interests continue to guide the FWC in many of its functions
- Trade unions role remains central to industrial relations system based on enterprise bargaining
    - Trade unions remain most likely representative of employees in claims under FW Act
    - Act as default bargaining reps under bargaining provisions
    - Typically represent employees during bargaining process and seek to be covered by agreement
- However now possible for individuals **alone** to maintain claims under legislation – unions no longer have monopoly status as representative of employees – but nevertheless remain core feature of the system

Industrial Action and Right of Entry

- FWC retains considerable authority re bargaining process
    - E.g. possible for forms of industrial action to be undertaken during bargaining towards industrial agreement
    - However only possible where first been secret ballot of employees
- FWC may also be called upon to terminate or suspend industrial action in certain circumstances
- Where industrial action not protected, commission can order stop action
- Right of entry provisions – FWC deals with right of entry disputes

- Important since union reps required to have entry permits and complex requirements existing depending on whether entry for purpose of investigating breaches of awards or statutory provisions or to discuss with employees
- Work choices had made right-of-entry requirements difficult for unions

Individualism v Collectivism

- Prior legislation (Industrial Relations Act 1988) had a collective based system – unions acting on behalf of collective groups of employees
- **Individual rights increased** since Keating governments (Industrial Relations Reform Act 1993)
  - E.g. FWC has unfair dismissal disputes jurisdiction, discrimination and/or treated adversely
    - Claim filed with FWC
    - However if matter cannot be resolved in preliminary mediation, typically proceed to Federal Circuit Court
  - FWC can hear and determine bullying claims

FWC Organisation of Functions – pg. 88

- Functions carried out by President and members
- President role: significant – expectation that he will ensure functions of commission carried out in efficient manner and way that adequately serves needs to employers and employees
  - Requirement also linked to public interest
- Pres has broad responsibility for giving direction to commission members and Full Benches about hearing of matters
- General manager assists president – ensuring FWC performs functions and exercises its power
  - GM's role – manage administrative functions of commission and ensure that institution complies with financial accountability requirements and reviews developments and conducts researches into matters related to making enterprise agreements, use of individual flexibility arrangements and effect of wages and conditions of employment upon various disadvantage groups. Also required to prepare reports concerning commission's functions and ongoing research.
  - Powers – previously within Industrial Registrar's unction concerning activities of registered organisations e.g. inquiries and investigations into organisation's conduct and responsibility for training and levels of accountability within registered organisations
- FWC's functions can be carried out by singe members of commission
  - However this doesn't apply re creation of modern award or 4 yearly review of awards (Full bench)
- FWC work divided into panels

Guidelines for FWC Functions

- FWC required to perform functions fairly an justly, quickly, informally and avoid unnecessary technicalities: **S577 FW Act**
- **Take account of FW Act's objects –** equity, fairness and merits of matter – need to respect and value diversity of the workforce **S578(a)-(c)**
- Functions different to court – strict legal rights are the issue
- Role of FWC dependent on powers in legislation – these enable it to require that parties appear before it, docs are prepared for its use and it is able to commission inquiries, undertake research, conduct references and hold hearings
- **S591 FWA** – FWC not bound by evidence rues and procedure when dealing with matters – different to court
- No appeal from individual member to Full Bench – only made if in public interest
- Costs generally not awarded in proceedings before FC

- **S611 FWA:** Although parties may be required to bear some or all of costs of another person I proceedings commenced without reasonable cause or should have been apparent that 'no prospect of success'

Exercise of Judicial Power Under Australia's Fair Work System

Judicial vs arbitral functions

- **S562 FWA –** Federal Court and Federal Circuit Court (**S566)** have jurisdiction re matters under legislation
  - Court of conciliation and arbitration can no longer make awards and enforce them **– Boilermaker's Case**
- Cth government established separate bodies – Conciliation and Arbitration Commission (makes awards – now the FWC) and the court enforcing them

Role of HCA

- Supervisory role in dealing with applications that commission had exceeded its jurisdiction
- Role in expansion of federal system – broad interpretation of **S51(xxxv)**
- Dispute resolution system became nationally dominant system
- **NOW:** with change of industrial relations legislative framework and virtual elimination of arbitral power, this role for HCA has passed
- Appeals to HCA from Fed Court on points of law can still be made: **Bendigo Tafe v Barclay**
- HCA remains influential in matters relating to employment contracts

Role of Federal Court and Federal Circuit Court

- **S563(c)-(e) –** FC power to hear prosecutions and issue declarations and injunctions under FW Act
  - Hear appeals from FCC and
- **S608 –** hear cases where FWC president refers question of law arising before commission for Court's opinion
  - Only utilised where Pres of FWC refers matter to FC for **question of law**
- **FCC role:** hear direct applications made under provisions of legislation
  - Deals with matters of compliance and enforcement under FW Act
  - FCC and FC have jurisdiction to deal with all matters designated under civil remedy provisions under legislation e.g. breaches of awards, enterprise agreements or failure to comply with requirements concerning payment of minimum wage
    - These matters likely to commence in FCC
  - Commonly hears matters arising under general protection provisions of FWA
    - Hears claims dealing with adverse action against individual on basis of workplace right or membership of industrial association (**S340, S346)**
    - Workplace discrimination claims (**S351)**
      - Initially lodged with FWC but forwarded to FCC if cannot be resolved by mediation or conciliation
- FCC and FC hear matters re – coercion, misrepresentation, sham arrangements, unlawful demands for bargaining service fess that are civil remedy provisions
- Courts deal with questions of law and enforcements – FCC and FC **DO NOT** assist in industrial disputes or bargaining process, approve enterprise agreements or determine applications for min wage – FC does this
- Costs don't necessarily follow under FW Act (different to most civil cases) – party only awarded costs where proceedings instituted vexatiously or unreasonably
- **Federal courts** designed to **exercise judicial power (enforcement of matters or determination of legal claims)** under federal industrial relations system

- **FWC** largely involve **non-judicial power (**although arguable that some exercise of judicial power may be in FWC when determining unfair dismissal claims**)**

Specialist Courts and Special Appeals Tribunal

Specialist Labour Courts

- Functions of Industrial Court (judicial) transferred to Fed Court (superior court dealing with federal matters e.g. tax, competition and immigration)
    - However Industrial Division introduced to enable form of specialisation so that judges with industrial law expertise would deal with labour law matters
- **Past:** the Industrial Relations Court heard matters e.g. unlawful termination, now FC hears appeals on questions of law from industrial tribunal and enforces awards, agreements and FW Act

Independent Statutory Agency – Fair Work Ombudsman

- Different institution sits alongside FWC – Fair Work Ombudsman (FWO)
    - Takes over some functions that Workplace Authority had under Work Choices
- **DUAL FUNCTION** – promoting arrangements existing under FWA (providing **education** and advice and best practice guides about legislation) AND ensuring **compliance** with the act
    - **S682(1)(e)(f) - Compliance function** enables FWO to investigate breaches of legislation, commence proceedings in court or make application to FWC and refer matters to relevant authorities
    - **Educative** function (provide education and advice about fair work practices),
    - **Investigative function** (undertaking investigations into suspected breaches of workplace laws)
    - Ability to **litigate** matters (**enforce** workplace rights and deter further breaches).
- FWO may be party to proceedings representing employee's interests
- FWO may appoint inspectors – ensure legislative requirements complied with
    - **Inspectors** have power to enter premises to **inspect** work/processes, conduct interviews and require production of documents: **S709-S712**
    - Inspectors have power to investigate possible **breaches** of workplace laws and enforce **compliance**
    - Act **impartially** and not favour employee or employers (not act on their behalf)
- Possible for FWO to bring proceedings for suspect breach of law to Fed Court
- **Role:**
    1. Promote harmonious, productive and co-operative workplace relations; and
    2. Ensure compliance with Aus workplace laws

Impact of Existing Institutions on Work Arrangements Under Fair Work Act 2009

- Nature of Australia's industrial system changed – moved from award-based system to one based on enterprise bargaining
    - Tribunal's dispute-settling powers **overtaken** by functions of assisting the parties to make enterprise agreements
    - **However** Tribunal doesn't have arbitral power where parties' actions demonstrate that bargaining system broken down (**S269-S271)** or where protected industrial action threatens risk to Aus economy/public health (**S266-268)**
        - In these circumstances tribunal would be arguably returning to original functions (mandating existing rights between parties)
- FWC's role under FWA limited to conciliating and mediating in most collective disputes
- Jurisdiction GROWING to manage individualised disputes Since **IR Relations Act** e.g.
    - Unfair dismissal
    - General protection Claims

    - Bullying allegations
- 60% of applications lodged to FWC are dispute resolution
- Challenge for FWC (individual dispute resolution) – individual stakeholders who are often self-represented and unfamiliar with commission procedures. Significant change in way tribunal undertakes responsibilities, **NOW:**
    - Need for tribunal to engage with community more – educate self-represented parties about commission functions and procedures
    - Work together with employer and union bodies to facilitate change and innovation
    - Includes undertaking and public research – may include developing best practice clauses in enterprise agreements enhancing productivity and efficiency
- Trade union roles CHANGED considerably in new bargaining environment
    - Less enforcing workplace rights
    - **FWO** now expressly handles matters concerning investigation of suspected breaches of awards and agreements
- Union density becoming historically low
- Work Choices subjected unions to complex right-of-entry requirements before they could enter workplaces to investigate breaches
- Unions have guaranteed role as employee reps under FW Act, however their long-standing privileges have been refocused in new bargaining era
- Australian established institutions have been readjusted in system that emphasises bargaining at individual level and protects individual rights