

Employment Update

"High Court Upholds Constitutional Validity of WorkChoices Legislation"

November 2006

On Tuesday, 14 November, the High Court ruled, by a 5-2 majority that the Federal Government's "WorkChoices" legislation is constitutionally valid in all respects.

Everyone potentially affected by the WorkChoices legislation will now have to give attention to compliance with it - there are no excuses now for putting off that process!!

What did the Court decide?

The High Court's decision in *State of NSW & Ors v The Commonwealth of Australia* is of monumental importance for a number of reasons (political, industrial and legal) but the outcome was perhaps not unexpected by most commentators. However, it is to be noted that the Commonwealth has had a complete victory on all issues.

While it will take everyone a while to fully digest the Court's 400 page decision, the following are the points we believe should be immediately noted.

First, the five member majority have upheld all of the WorkChoices legislative amendments, and in particular have upheld the extensive use of the Corporations power (Section 51 (xx) of the Constitution) in this regard. The corporations power has been found to justify a wide range of laws relating to "employment" by corporations, in particular agreement making, minimum terms and conditions of employment (including the Fair Pay Commission provisions), the transforming of State awards and agreements into notional federal transitional instruments and the registration and

regulation of employer and employee corporations. The Majority ruled that the corporations power allowed laws "prescribing the industrial rights and obligations of [the relevant corporations] and their employees and the means by which they are to conduct their industrial relations".

Second, the Majority stated on at least three occasions in their joint judgment that the definition of "trading and financial corporations" was not before them to decide and gave some implicit hint, in our view, that they may be prepared to review the existing law in that area. This means that at some later date not for profit corporations might be found not to be covered by WorkChoices. However, the situation will remain unclear until the Court rules on that specific issue.

Third, the challenges mounted to Section 16 of the Act (which seeks to exclude the States from a wide area of industrial relations regulation in relation to employers covered by the WorkChoices legislation) failed, the Court ruling that Section 109 of the Constitution could be invoked by the Commonwealth to exclude the States from an area despite the Commonwealth not implementing its own detailed regime in that area. That ruling thus leaves the Commonwealth with full power over all areas of State industrial law for those employers covered by WorkChoices, if it chooses to use it.

Fourth, the argument that Section 51(xx) of the Constitution had to be limited in some way by the fact that the Constitution placed a limited power over industrial relations in the hands of the Commonwealth under Section 51(xxxv) (the interstate conciliation and arbitration power) was rejected emphatically.

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Fifth, the Court mildly criticised the Commonwealth for its extensive use of the regulation power (see paragraph 399) but nevertheless found the provisions in question to be valid. This mild rebuke may prompt the Government to look at perhaps using legislative provisions for important matters of detail in future, bearing in mind that the Government has flagged the fact that it is considering further changes to the legislation.

Sixth, Justices Kirby and Callinan strongly dissented, and Justice Kirby has been (as he has been in other cases recently such as *Combet v The Commonwealth*) rather critical of the majority. However the Majority in favour of validity is a large one and points the way to the future of industrial relations regulation in the country, both for the current Government and the Labour opposition.

No doubt industrial relations will be a big political issue in the lead up to the next Federal election. We suspect there will be further changes to WorkChoices over the next twelve months, as that election comes closer.

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What does this mean for your organisation?

If you are a company in commerce for profit?

You are covered by WorkChoices and must be compliant - whether covered by Federal Award/Agreements or State Award/Agreements.

If you are a "not for profit" corporation?

Your situation remains unclear until the Court rules on a specific case involving a "not for profit" corporation. The Court has given "hints" that it might review the existing case law on the definition of a "trading corporation". If you need specific advice, please contact us.

If you are a Government Agency?

You are covered by the State industrial system and not by WorkChoices (unless you are in Victoria) and that situation probably will not change any time soon.

If you are a sole trader or partnership?

You are not covered by WorkChoices. But it is possible, perhaps next year, that State Governments might decide to give up the fight over industrial law with the Federal Government and agree to a fully national IR system. But this is only a possibility.

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