Submission
No 44

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

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Theme:

Summary

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NSW Parliament – Standing Committee on Social Issues

Inquiry into the Impact of Commonwealth WorkChoices Legislation - Sydney, 20 June 2006.

Material from Marrickville Community Legal Centre to the Committee

In person - John Gooley – locum / volunteer solicitor – Marrickville CLC

Marrickville CLC contributed to and endorses the submissions made to the Committee

- on 26 May 2006 by the *Combined Community Legal Centres Group*;

and

- we endorse further submissions of 29 May 2006 by the *Inner City Legal Centre*.

Preamble

The Committee has nominated initial questions (especially 2 to 8 inclusive) covering issues and effects flowing from WorkChoices. CLC's are reporting a spectrum of these and some are particularised (e.g., rural workers). The experience at Marrickville CLC since 27 March 2006 has been one of growth and considerable overlap / commonality of these issues and effects in the cases we are handling in practice. This synthesis of issues and effects is highlighting areas of major concern. Some are phenomena not known under the IR systems that the current Australian workforce has experienced. Federal Treasurer Peter Costello acknowledged that "*the generation set to enter the workforce might be the first in about 100 years not to get overtime and penalty rates*" (radio interview with Alan Jones, Radio 2GB, Sydney, 15 June 2006). All planning for these issues and effects has fallen on individual workers because WorkChoices did not envisage any impact outside the "workplace". The sole remedial proposition is the belief that workers will be able to negotiate wage rates that ensure they are not worse off financially, due to trading off conditions such as overtime and penalty rates for increased wages. Workers' assessments and actual outcomes are about to be tested in practice and in the real market (e.g., lending institutions are believed to be monitoring outcomes for reasons of, *inter alia,* home loan application trends and mortgage repayment effects).

We believe the material provided here may help answer the Committee questions. We believe a view of the full spectrum of change-related material is important in a system where an apparently narrow "employment" portal leads to a closely connected, diverse and still growing wider range of social issues and effects.

Why WorkChoices is difficult and cumbersome especially for workers

Some of these impacts were unforseen or unforeseeable. That is hardly surprising in a system where a founding Commonwealth Constitutional power (relating to Corporations as they stood prior to Federation) has now been used to regulate the employment and remuneration of so many Australians.

The Hon Justice Ian Callinan has noted (on 8 May 2006, in the States' Case regarding the WorkChoices legislation, in the High Court) that there have been three referenda since

Federation, where the Commonwealth had sough such powers – and all had been rejected by the franchised voters of each day *(see attached one of many press reports of some exchanges in the Court, including comments from the Chief Justice).* The WorkChoices legislation covers many Australians who do not have a franchise today – young Australians under 18 years of age, migrant workers ineligible to vote, growing numbers of sponsored workers from overseas in Australian jobs etc.

CLC perspective in looking at the social issues and effects

The nature of CLC's and the assistance and services they provide means they are placed to see the full and growing ambit of issues and effects from implementation of WorkChoices. In some regards CLC's are the only "one stop shop" able to help address, or help clients address, all or most of the issues and effects. CLC's do not have a specific or narrow or vested focus, and are obliged to do their best on behalf of eligible clients. Ever-present resource and funding restrictions are now greatly exacerbated by not only the range, but the immediacy of the issues and effects which are presenting through WorkChoices changes. In most cases our clients' first contact is to seek help because of an already accomplished employment termination without notice or with limited notice and / or on grounds clients cannot understand and that they dispute. They frequently have no redress under WorkChoices.

Currently, despite all the voluntary and *pro bono* assistance from individual solicitors and associated para legal and non legal personnel, from large law firms, from generous Counsel, and from many others, the current range of issues and effects are becoming overwhelming. CLC's and their staff members deal in real issues in real time, with real and enforceable legal limitation periods. WorkChoices may have removed the right to have many employment issues settled in the venue of the "fair go all round" (Federal and State Industrial Commissions) but it has raised the spectre of multiple alternative actions in other, diverse, legal places.

Legal duty to advise on heads of action

CLC's are finding that their legal and ethical duties to clients are now expressed in practice to be much wider than the realities under the "old" system. We cannot (today) advise a client to have the multiple issues always involved in termination, settled in the IR system. The legal obligation to advise on the several alternative pathways available was always there, but the opportunity to bring all issues under the IR solution is now gone in most cases. The prospect of reinstatement (which always required mutual concessions in practice) is virtually gone. The alternative envisaged by WorkChoices is common law action, but that ignores the realities of industrial matters. The emerging alternatives always existed but were usually foregone as part of an IR settlement. These may be more unpalatable for employers than the perceived wrongs of the "old" system.

Two Factual examples plus anecdotal material

Unheralded aspects of the "old" system included the actual outcomes achieved by its ability to finalise "all matters" in an employment-related dispute. These were often recorded under the veil of confidentiality in enforceable non-disparagement and other clauses in a Deed of Settlement, which finalised all of the issues and causes of action involved. Experienced practitioners, Commissioners and Judges are aware of the multiplicity of such issues in even the simplest of termination matters. Anyone who believes that system did not also benefit employers denies actual outcomes and undervalues the benefits of that system.

Example 1 "Ms A"

This matter was finalised in early April 2006. It began in late 2005. It was finalised by a typical Deed of Settlement amended for the specific facts. That Deed prevents disclosures etc by either party. The matter has been sanitised and depersonalised here to prevent recognition except perhaps by the parties, their legal representatives, and the Commission. Even so, requisite confidentiality is requested to eliminate even that prospect.

Purpose:
to compare what happened under the NSW IRC system, and what would likely occur under WorkChoices on similar facts; and to note the effect on competitive employers who do not exploit workers under WorkChoices in such scenarios.

Synopsis:
Ms A was a 20 year old female shop assistant in a retail shop operated by an owner plus 1 FT manager, 6 PT staff. She was a tertiary student PT. She was selected at interview for the lead up to opening in a major centre and ongoing role as assistant manager and started in July 2005. In early Jan 2006 she attended MCLC for assistance after commencing proceedings herself in the NSW IRC for unfair dismissal in November 2005. Two days after filing her ex employer began Local Court proceedings in debt, alleging cost of lock replacement after non return of keys after termination, mediation to be early January 2006. The termination matter had been to unsuccessful conciliation in December 2005 and was listed for hearing in late January 2006. Ms A was concerned that the ex employer was threatening her via the LC matter which she disputed.

Research indicated the matter should be taken on as a case and a retainer obtained.

Representation at LC on the debt matter (mediation before Registrar) resulted in the employer claim being described as "shaky" and costs awarded against the employer, who persisted with the matter.

Exchanges of documents as required prior to IRC Hearing led to further aspects for client assistance. Ms A also provided sworn statements covering (inter alia) statements by the ex employer at a staff meeting in October 2005 that "once the John Howard work laws come in you'll all beg me for a job". At the Hearing it was noted that Ms A may proceed (apart from the termination)

- For improper use of a security surveillance camera in relation to her and other females (Workplace Surveillance Act (NSW));
- For discrimination on the grounds of sexual harassment regarding the camera and the in-house employer system (documented) for "Princess of the Month" based on sales figures (HREOC or NSW ADB);
- For unpaid superannuation contributions deducted but not paid (ex employer opened an account for her with industry fund, then closed it two weeks later without her knowledge; uncovered when she was asked to check by MCLC staff) (ATO)

During the Hearing the employer argued many points that raised further areas of legal and industrial concern; these included non display of ABN on documents etc (ASIC), and PAYG and SGL for all employees (ATO) and the employment status of staff (who subsequently joined the appropriate Union). The employer relied (regarding the contract of employment, basis of employment, Award coverage etc) on a contract form downloaded from an Internet site. It had been amended to show a non existent NSW Industrial Award, unknown pay rates etc., and prescribed "permanent part time status" even though he argued casual status in the Hearing. Claims by the employer regarding the original job advertisement (May 2005) were refuted after retrieval of the electronic records of the SEEK website. In the face of the realities and after hiring then firing his own lawyers the ex employer agreed to a settlement. A standard form of Deed provided by the Commission was amended after negotiation to reflect full and final settlement of those issues that could be covered, with undertakings regarding ATO etc and abandonment of the debt claim. This was a typical result obtained within the parameters of the common sense jurisdiction of the IRC, where emotive and regrettable aspects could be salved and repaired in many instances. The particular case required non-disparagement clauses by both parties, a proper and accurate reference for Ms A (both of which are vital for young people if their careers are not to be tarnished by innuendo and inaccuracy, a process not available under most WorkChoices terminations), minor compensatory payment, paid in cash in the Commission to avoid misunderstandings, payment of SGL outstanding etc.

The employer had been totally unable to make out grounds for termination beyond the fact he "didn't like" the ex employee and that she "did not fit in" to the corporate culture he wanted (exemplified by the Princess of the Month philosophy).

Had this termination occurred under WorkChoices it would have been unchallenged on that basis. But the ex employee would more than likely have proceeded on all or some of the other bases noted above. Those jurisdictions do not provide confidential Deeds of Settlement in the way the IR system did and thus no anonymity for the employer. The work-related injustices and ensuing issues and effects, on a young worker moving through tertiary qualifications and needing to rely on every period of paid employment for reference purposes when entering the workforce, are obvious. They would include no proper work reference and no bar on the employer disparaging her to future employers.

There was no union involvement in this matter, but all continuing employees have joined one since. No doubt they have learned the avenues available pre and post WorkChoices,

from this experience. Employers will learn from it as well. The employer of Ms A operates in a highly competitive retail segment, upper end consumer goods with almost exclusively young female staff. Apart from Princes of the Month, the ethos of the corporation is to put competitors out of business wherever possible to increase market share. Avoidance of statutory obligations and legitimate costs of doing business, along with "holding the bet" on PAYG and SGL deductions, have always been around. The amounts withheld are frequently equal to or exceed the profit margin. Such practices have been enhanced and the ability to drive wages and employee on costs down, under WorkChoices, will accelerate the use of such practices for those who wish to remain in the market.

It is a general downward spiral to an as-yet not measured lowest common denominator.

Example 2: "Ms B"

This matter occurred after WorkChoices commenced and is listed for conciliation (AIRC) and, due to employer response to those proceedings, for anti discrimination action in the NSW ADB. It has been sanitised to ensure anonymity. Requisite confidentiality is requested to eliminate even that prospect.

Purpose:
To provide example of current situation under WorkChoices and relevant effects.

Synopsis:
Ms B was a single female early 20's when she began working for a manufacturer in 2000. She married soon after. She was engaged in semi skilled hand tool operations and from January 2001 began doing heavier work requiring lifting and pushing. She acquired valuable skills and a good work record. In April 2001 whilst 3 months pregnant she miscarried at work. The employer told her she should "return to work fast or lose her job" and she returned 3 days later.

About mid 2003 she was retasked to lighter and more technical work with higher skills, and worked without incident until March 2005 when she went on maternity leave. She was programmed to return on 1 October 2005. She contacted the employer prior to that date to confirm details and was told she was not allowed to come back and to try again in January 2006. She was eventually "allowed" to return to work on 16 January 2006. No reason was given for the refusal to meet the agreed date in October 2005. Upon return she did not return to previous duties, and was given a number of areas of unfamiliar work to perform in each day. She was given no retraining. She was not allowed to draw and use appropriate new hand tools and was required to use old and worn tools, resulting in painful wrist and hand conditions. Other staff were supplied with appropriate equipment. She was too frightened to go to the doctor over her pain, until May 2006 when she could not bear it any longer. She showed her supervisor a ganglion that had developed on her wrist and was told to "go to the doctor in your own time". On starting work next day she was asked for her "medical certificate" and replied that she had not had any time off. The certificate said she should be off work. The supervisor took it. She was sacked the next day without written notice or time in lieu of notice; she has not been paid accumulated leave or long service leave.

From 6 January 2006 to termination she has been subjected to verbal abuse including two occasions when she was marched into the supervisor's office and accused of being "slow" despite the lack of retraining and unfamiliarity with the new tasks required, her painful hand problems, and no English language abilities. On both occasions she saw something being written on documents she believes are her personnel file. On the second occasion she asked to be allowed to return to the job she did between mid 2003 and March 2005 but was not answered. A fellow language speaker was used as a translator.

Ms B has filed in the AIRC on the basis of unlawful dismissal on discrimination in employment grounds. A response from the employer challenges the jurisdiction as the "company employs less than 100 people" (it's website skites otherwise and promotes its 'employer of excellence' status, Government supply contracts, and "proud record of building and growing Australian products against those who departed overseas years ago"), and claims termination was on performance and/or operational requirements grounds. The employer also claims the period between 1 October 2005 and 16 January 2006 is a break in employment and no LSL is due. In advising Ms B, MCLC was obliged to advise her of her rights in all areas, including the risk (if the employer is correct) that she has no redress under WorkChoices. She has exercised her right to commence anti-discrimination proceedings as well as in the AIRC, to protect her situation as best she can. Action through the Chief Industrial Magistrate is also possible regarding unpaid entitlements, and workers compensation aspects via Work Cover is probable.

Because the employer alleges no jurisdiction and intends to fight the matter(s), reinstatement seems unlikely. A settlement to cover "all matters" will not be a prospect if the AIRC is ousted as to jurisdiction. Ms B was not a union member. This may well be a typical scenario for the future. However experience is showing that unions are becoming rapidly appreciated for a number of reasons by those who once lacked impetus to join.

As far as employer claims of excellence extend, they are made in a context where they allege publicly that they alone stood up and manufactured in Australia when tariff changes made it easier for others to move offshore. They say they combat such imports by manufacturing locally.

It appears in fact that they are importing off shore conditions and attitudes, to combat existing worker entitlements in this case. This is now a valid scenario for those employers who lack the capital to move off shore and exploit overseas workers.

Anecdotal material

(a) Agreed Settlements

The author has privately researched over the last 7 years regarding publicised accounts of employers claiming to have had bad decisions forced upon them (in the form of agreed settlements) in various Industrial Tribunals. These have been researched for private use in advocacy and case workups; and they indicate that such instances are quite rare in fact.

Also in fact, they indicate that employers (after the event) seem to "revalue" aspects rolled into settlements, such as not being identified in separate actions across a range of matters attached to the central termination matter. When complaining about these decisions (which were in fact agreements between by the employer and employee under the auspices of an Industrial Tribunal), employers generally neglect to mention the binding Deed and the ancillary matters covered by it. This seems more pronounced when there is no involvement of a union or employer peak body. It smacks of complaining about the referee after the decision was taken by the parties themselves.

(b) Young persons incomes

There is a perception (not yet confirmed) that youth wages are falling under WorkChoices. This comes at a difficult time for young workers who already have cost pressures not matched by wage increases. In particular, anecdotal material of the cost of necessary petrol and toll imposts in order to get to and from jobs at required times, without overtime and penalty rate income, is coming in. Necessity of a mobile phone for casual employment compounds the issue. Sydney living costs in particular are quoted as a problem.

Attachment: EXTRACT: re States' High Court Case

FINANCIAL REVIEW

Effect of referendums queried

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High Court chief justice Murray Gleeson yesterday raised questions about whether previous failed referendums to give the commonwealth power to regulate all employment issues could be relevant in determining the validity of new workplace relations laws.

Justice Gleeson asked lawyers for the states and unions to make a submission on the relevance those referendums had in the court's deliberation on the validity of the Work Choices legislation.

"Did the meaning of the constitution change after the referenda failed?" Justice Gleeson asked counsel for Queensland Walter Sofronoff, QC.

He asked after Justice Ian **Callinan** had again raised concerns about the use of the corporations power to cover employment matters given the past referendums.

Solicitors-general for Western Australia, South Australia and Queensland again tried to argue there were limits to the use of the corporations power to cover all aspects of employment relations.

While all counsel to appear so far have made alternative submissions to the High Court, all have tried to argue that the corporations power in s.51(20) of the federal constitution is limited by the words "foreign", "trading" or "financial".

Mr Sofronoff said the reason they were used rather than just using the term "corporations" was because the constitutional founders were concerned by the development of companies in the last half of the 19th century, in particular their use of limited liability and a number of high-profile corporate collapses.

"The selection of those types of [companies] for special treatment brought with it the notion that there must be something special about those [companies] that justify the interest of the national legislature," he said.