The changing face of australias industrial scene

The Changing Face of Australias Industrial Scene7TH APRILPETER SELLERS2010The changing face of Australia??™s industrial scene. The industrial relations arena in Australia is a very complex area. It comprises of businesses, employer groups, employees, unions, governments as legislators and the court system in respect to common law.

Australia??™s industrial laws have been developed over many years both by the court system and the legislative powers of the Federal, State and Territory Governments. Since 1996 there has been a stark change in the direction that the legislators and courts have taken to continue building Australia??™s industrial scene. It is moving away from a state managed system to a more national combined system with the Federal Government assuming more control over industrial relations and employment conditions. This is being achieved by the use of the Australian Constitution (Cth) and rulings of the High Court of Australia. The Commonwealth Government does not have the power to legislate directly on the industrial relations and or employment conditions throughout all of Australia. The Australian Constitution (Cth) (??? the Constitution???) underlies the relations between the federal and state governments in the industrial arena. The Constitution provides the foundation for federal legislation in all areas of the Federal Governments legislative powers and also sets out that the state parliaments continue to have their original (colonial) legislative powers except where the Constitution vested a power in the Commonwealth or withdrew a power from the state.

This is outlined in section 107 of the Australian Constitution (Cth). Where there is a direct conflict between a commonwealth law and a state law, the

commonwealth law will prevail under section 109 of the Constitution and override the state law. By virtue of section 122 of the Constitution the Commonwealth has plenary power to pass laws on any subject in relation to the territories.

This power in reality has never been fully exercised in relation to employment. Unlike the states, the territories never developed their own arbitration systems and continue to use the federal system. (Stafford, 2008, p. 30)The Commonwealth Government under section 51(xxxv) of the Constitution has started to move into the field of regulating the industrial scene Australia wide. Section 51(xxxv) enables the federal 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. Since the early 80??™s the High Court of Australia has passed decisions with respect to industrial situations and specifically section 51(xxxv) of the Constitution that has also helped shape the face of the industrial arena in Australia. Most importantly is the way the High Court rulings have expanded the role of the then known Australian Industrial Relations Commission and the latitude that it has given the Commonwealth Government in using the various heads of power contained in the Constitution.

This has enabled the Commonwealth government to legislate with respect to industrial law and employment relations. igh The High Court of Australia??™s decisions when interpreting section 51(xxxv) of the Constitution has had important consideration for industrial relations practices. The High Court has given very broad definitions of the terms ??? industrial dispute??? and ???

industry???. Two significant cases during this era are The Social Welfare Case (Voll, 2010, p. 67-76) and The 1986 Teachers Case (Voll, 2010, p. 93-10). These two cases are an example and outline the broad terms the High Court applied to the meaning of industrial dispute and industry to allow Commonwealth industrial relations policies to apply to employees and employers that would otherwise be governed by state policies.

These broad definitions are what has led to the Commonwealth Government being able to legislate with respect to industrial relations and employment matters that also encompass a large area of the state based workforce and employers. Of course there must be an element that will take the disputes across state borders before the Commonwealth will have jurisdiction. With the developments in the High Court cases above the role of the Australian Industrial Relations Commission (??? AIRC???) has also expanded. The historical role of the AIRC was to create awards that set the minimum standards of employment for people who worked for certain employers. The AIRC would also certify enterprise agreements, register trade unions, deal with demarcation disputes with trade unions and deal with unfair dismissal cases.

The prime function of the AIRC was to conciliate and or arbitrate on matters of industrial unrest. In line with the decisions of the High Court during the 80??™s and the definitions placed on industrial dispute and industry the AIRC also moved into adjudicating on areas that were historically considered managerial prerogative. Areas that have been entered into are technological change, redundancy, manning and methods used to recruit labour such as contractors or casual employees. The Manufacturing Grocers Case (Voll,

2010, p. 153-160) also opened up the way for superannuation to be dealt with by the AIRC, amongst other things such as third party payments like health insurance and union fees. In the High Court??™s decisions since 1983 it is evident that many of the barriers used to exclude the AIRC from adjudicating on issues historically defined as managerial prerogative were removed under the judgements from Crams case (Voll, 2010, p.

143-147), The Social Welfare case (Voll, 2010, p. 67-76) and the Federated Clerk??™s case. (Voll, 2010, p.

119-132). The High Court has now held a broad definition of what industrial matters are. (Voll, 2010, p. 146). This has narrowed managerial prerogative in the respect that unions and employees can have issues that would normally have been considered management decisions now conciliated or arbitrated on by the AIRC. This in effect has taken some of the ability of management to manage the business in the way they see fit away from them and installed some power back to the employees. The ensuing years into the 90??™s have seen even more change in the industrial relations arena.

The reforms by the Keating government in 1993 changed from a system of dispute settling by way of conciliation and arbitration to a system of direct bargaining at enterprise level. (Creighton & Stewart, 2005, p. 56-57)During the mid to late 1990??™s up until now the various federal governments of the times started to change their reliance on section 51(xxxv) of the constitution and started to use other heads of constitutional power for the enactment of laws in relation to industrial matters. These powers have

included in particular: (a) The corporations power: s51(20); (b) The external affairs power: s51(29); (c) The trade and commerce power: s51(1); (d) The incidental power: s51(39); and (e) The taxation power: s51(2)In the year 1996 the Howard government made sweeping industrial relations reforms. The government introduced a new industrial relations act to parliament and it has subsequently operated since the start of 1997. The act was named The Workplace Relations Act 1996 (Cth) (??? the Act???). This act is the next step in building a national industrial relations system. The goal of these industrial relations reforms were to bring about more direct negotiations between employers and employees and do away with the previous third party approach with the use of trade unions, tribunals and broad scale enterprise agreements.

(Stewart, 2009, p. 27)The Work Place Relations Act 1996 (Cth) was designed to create a more balanced system for employers and employees. A large part of the Act was to setup individual agreements. Under the Act compulsory trade union membership and preferential treatment for union members was outlawed although membership by choice is still allowed.

The laws were designed to make unions and their organisers more responsible for their actions. The right to entry for union officials is now a strictly defined right and stops unions entering or interfering with specific site issues unless invited or they obtain a permit, while the right to take industrial action under certain conditions was protected other industrial action was effectively outlawed. That is, industrial action sanctioned or protected during collective bargaining wage negotiations was effectively the only time employees could legally take industrial action. Under the Act the

Australian Industrial Relations Commission has greater powers than under previous legislation to direct that industrial action stop or not occur. This provided employers with more certainty that their operations would not be disrupted sporadically by strike action. Another outcome of this new legislation was to create a simpler industrial platform. This involved changing the federal award system to only provide minimum standards to protect employees in respect to things such as pay, leave and notice of termination of employment. There were limitations to 20 allowable matters that made up the minimum federal awards.

These allowable matters also were the limitation of the AIRC??™s power. The actual employment conditions will be determined by agreements at the workplace level. This has created a more flexible labour market and has given some of the management prerogative control back to management. The Act allows management to exercise tighter control over the conditions of employment above the minimum standards set by the awards that effect its operations and the way its labour is employed and utilised. The Work Place Relations Act (Cth) has also changed the unfair dismissal laws in that larger firms will have some restraints as to the process of unfair dismissal however smaller firms with say less than 100 employees had much more freedom to hire and fire as business needs determine. This created an environment that promoted employment rather than discourage permanent employees from being hired as the previous legislation did.

During the Howard Federal Governments last term in office the Work Choices Amendments to the Work Place Relations Act (Cth) came into effect on the 27th March 2006. Effectively these amendments were the next stage in

decentralising Australia??™s work place relations and creating a truly national system of work place relations. With the power in both houses of federal parliament the Howard government completed its industrial relations reforms. This was achieved by using the Australian Constitution (Cth) section 51 (xx) which effectively enables the Commonwealth Government to legislate industrial relations laws to govern any entity registered as a corporation within Australia. The High Court??™s decision in R v Federal Court of Australia; ex parte WA national Football League (1979) 143 CLR 190 (Adamson??™s case) outlines the definition that the High Court has given to section 51(xx) of the Australian Constitution (Cth). The Commonwealth Government then used section 107 of the Australian Constitution (Cth) to override any state laws that were in contradiction to the Work Choices amendments. The states and territories challenged the Commonwealths expanded use of the corporation??™s power in the High Court as well as other parts of the legislation.

By clear majority the High Court rejected the challenge. NSW v Commonwealth [2006] HCA 52 (14 November 2006). Another key difference between the 1996 Act and the 2006 amendment was the role of the AIRC in dispute settling. The 2006 Act effectively removed the conciliation and arbitration powers of the AIRC. The focus is now on industrial disputes being solved at the workplace level and the AIRC may only be involved to the same extent as any private mediator.

All new work place agreements must have a dispute settling procedure. Part 13 of The Work Place Relations Amendment Act outlines the rules with respect to dispute settling procedures. The next aim of the Work Choices

reforms was to individualise employment relations between employers and employees with Australian Workplace Agreements (AWA??™s).

The next phase in the Australian industrial scene was the voting to office of the Rudd government in 2007. This new labour government proposed to change the industrial scene left by the Howard government. Although the Rudd Government did make changes in the Fair Work Act 2009 (Cth), this act was still based on the same constitutional powers as the Work Choices legislation. The main differences were that the Fair Work Act 2009 (Cth);??? Set up the new Fair Work Australia which took over the dispute handling and award making duties. Set up the safety net comprising of 10 national standards and modern awardsOutlaws individual agreementsWages and conditions will be set by collective enterprise agreements and /or modern awardsModern awards will contain 10 allowable award matters as well as dispute settlement proceduresEnterprise agreements can contain permitted matters that are much broader than those allowed under Work ChoicesIntroduction of statutory obligations to good faith bargaining The easing of the right of entry restrictions under Work ChoicesThe process of taking protected industrial action has remained largely unchanged from Work Choices???, (Voll, 2010, p.

29)These changes have narrowed the managerial prerogative gap that was created under Work Choices to a more even footing. The Fair Work Act 2009 (Cth) has not allowed a return to the 1980??™s where managerial prerogative was almost extinguished. The changes in Federal Governments over the last 30 years and the new legislation that has been subsequently developed in line with various High Court decisions have changed the

industrial scene in Australia. These changes have moved from one where managerial prerogative was being encroached on by the AIRC and employees to the stripping of powers of the AIRC and implementation of individual contracts under the Work Choices legislations which increased managerial prerogative, to the Fair Work Legislation which assumes to create a more balance between managerial prerogative and employee rights.

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