

Work Choices *slow start to the revolution?*

Work Choices has little immediate impact in Victoria, but in the longer term changes will be profound. Victoria has had a system of minimum terms and conditions under the old Sch 1A of the W.R.Act, and common rule awards, and these minima are preserved under the new regime. Meanwhile, there is now a national system of industrial regulation, and the two powerful new institutions, the Australian Fair Pay Commission which sets the Fair Minimum Wage, and the Office of Workplace Services, which has a mandate to enforce compliance, are already at work. The AFPC also has power to establish a range of classification standards. The AIRC, which has a lesser role, will be required to have regard to any classification standards as it goes about its task of award rationalization. Industrial action under the regime is restricted, but the AIRC has shown its flexibility by being in a position to give its approval to a strike ballot. Meanwhile, the High Court has reserved its decision on a constitutional challenge to the scheme.

For practitioners, in the short term, there are three areas where you are likely to have to engage with the new regime: unfair dismissal, workplace agreements, and transmission of business.

Unfair dismissal

The important changes are as follows:

- (a) *firms with less than 100 employees are exempt: s 643(10)*
- (b) *the qualifying period of employment has been increased to six months: s 643(7)*
- (c) *dismissals for genuine operational reasons cannot be litigated: s 643(8)*
- (d) *procedural amendments allow the AIRC to expeditiously deal with jurisdictional challenges: ss 645-649*

The effect of these changes is likely to be a significant decline in litigation in this area. Areas to watch, however, are attempts by employers to evade the 100 employee limit, which they cannot, and attempts to disguise misconduct dismissals as "operational reasons" dismissals. The AIRC will be vigilant on any attempt at such a pretext. Importantly, the current provisions governing unlawful terminations remain, and therefore employees who suspect that employers are using misconduct or operational reasons dismissals to disguise a dismissal based on status such as sex, race, disability, union activity etc will retain the benefit of the reverse onus provisions in such matters should they be referred to the Federal, or Federal Magistrates' Court.

Workplace agreements

The clear focus of Work Choices is that there should be a substantial increase in the proportion of the workforce whose wages and conditions are the subject of individual agreement. Key changes include that the abolition of the "no-disadvantage test", and agreements don't require approval from the Employment Advocate, but they still must be lodged to be in force. Work Choices provides for the following types of workplace agreements:

- (a) *Australian workplace agreements (s326);*
- (b) *Employee collective agreements (s327);*
- (c) *Union collective agreements (s328);*
- (d) *Union greenfields agreements (s329);*
- (e) *Employer greenfields agreements (s330) (new);*
- (f) *Multiple-business agreements (s331) (new).*

For practitioners, it is important to note that under the transitional provision existing agreements continue in force generally unchanged. It is when an employer seeks to negotiate a new agreement (which may be up to 5 years in duration) with existing or new employees, or when current agreements expire that familiarity with the regime becomes important.

A significant change in relation to union greenfields, and employer greenfields, agreements is that they apply to a new business of an employer. The definition under s 323 has been substantially widened to virtually include any new project of a business, thus allowing a separate industrial regime to be put in place for business expansion. Under s325 an employer greenfields agreement (which an employer makes with itself) has a maximum duration of 12 months, and so while it will provide an opportunity to establish a project, the employer must then negotiate a substitute agreement.

Topical seminars very successful

Counsel from Gordon & Jackson's List presented three very successful seminars to solicitors over the last few months.

- "Current Developments in Family Provision & Informal Wills" presented by Richard Boaden and Arthur Bolkas.
- "Work Choices Legislation: Guiding Clients through the Maze" presented by Damian Murphy, Tony Lawrence and John Snaden.
- Damian Murphy, Tony Lawrence and John Snaden represented the "Work Choices" seminar to solicitors from the Ballarat Law Association

These seminar papers can be obtained from the Publications section of the Gordon & Jackson website at www.gordonandjackson.com.au

If you would like one of our list members to make a presentation on a selected list of topics to your firm or Law Association please contact Ross Gordon or Leigh Jackson.

Congratulations to Tony Lawrence

Tony Lawrence, a longstanding member of our List, who specializes in Industrial and Employment Law, has been appointed the Victorian Workplace Rights Advocate by the Victorian Government. We wish him every success in this demanding new role.

Andrew J Laird-details omitted from Law Institute Diary 2006

Andrew Laird's entry was mistakenly omitted by the Law Institute from the 2006 Law Institute diary. We ask that you update your diaries with his details. Andrew was admitted to practice in 1991 and signed the Bar Roll in 1992. He practises in the areas of building & construction law, commercial law, contract, insurance, mediations/ADR, and professional negligence. His telephone number is 9225 7693 and his fax is 9017 1275. Andrew's chambers are at ODE room 404.

New workplace agreements will supercede existing industrial instruments. Thus it is lawful for an employer to offer existing employees a promotion on the basis that they sign an AWA, or to only offer new positions on the basis of an AWA. Another major change is that expired workplace agreements may be unilaterally terminated on 90 days notice: s 393. At the end of the period the employees fall back onto any preserved award conditions, or the AFPC Standard.

Work Choices generally maintains the current provisions that employees may appoint a bargaining agent for negotiations (ss 334 and 335) and must be provided with an information statement 7 days prior to execution, although this period can be waived: s 338. Under s 356 and Regulation 7.1 there are very detailed provisions as to what may be not be contained in the agreement, and the whole agreement making regime is the subject of substantial penalties for non compliance, with the additional possibility that the agreement will be set aside by the Court: s 409.

Transmission of business

Practitioners are likely to be dealing with questions arising out of business sale arrangements. The new regime simplifies matters. Although existing industrial instruments transmit to a successor employer Work Choices provides that the successor employer is only bound in relation to employees who actually transfer: s 581(1). This includes employees who were employed one month before the transfer, or who were re-employed within two months. Subject employees must be given notice of the instrument that governs their employment: s 602. Most importantly, the transmitted instrument only applies for a maximum period of twelve months: ss 583, 587, 597, and only to work covered by the instrument. After 12 months the parties must negotiate a new agreement. In addition a transferring vendor may approach the AIRC to have a successor relieved of any liability under the instruments.

Conclusion

The focus of Work Choices is on the individualization of employment relationships, and it establishes a very proscriptive regime. Practitioners are likely to have little choice but to brave the two thousand odd pages of legislative material. It will be some time, however, before a clear view can be obtained as to whether it has fundamentally changed our society.



DAMIAN MURPHY - Barrister at Law

The Long Arm of VCAT Stretches.....?

A recent Victorian Civil and Administrative Tribunal decision in the matter of *Geopec Pty Ltd v Ausbuild Constructions Pty Ltd* [2005] VCAT 2708 highlights the breadth of the Tribunal's jurisdiction under the Fair Trading Act 1999 (FTA) and will be of particular interest to those who practise in the area of commercial construction disputes.

The decision in *Geopec* is particularly significant because:

1. the decision was made by a Vice President of the Tribunal, His Honour Judge Bowman;
2. the subject matter of the proceeding involved a commercial construction dispute with no domestic element;
3. the Tribunal found that the Civil Claims List of the Tribunal has jurisdiction to hear commercial construction disputes; and
4. it appears that the Tribunal will probably be unwilling to refer commercial construction disputes that are issued in the Civil Claims List out of the Tribunal in the majority of cases.

The relevant background facts can be briefly summarized as follows:

1. Geopec retained Ausbuild to design and construct a retail and commercial complex at Caroline Springs under a contract dated 17 May 2005 (contract);
2. Disputation occurred between the parties, which culminated in both parties contending that they had validly terminated the contract;
3. Ausbuild issued an application against Geopec in the Civil Claims List of the Tribunal on 7 September 2005 which:
 - a. indicated in the relevant box on the Civil List pro-forma application form that the claim was brought under the FTA; and
 - b. attached points of claim which asserted an entitlement to progress payments in the sum of \$71,354.24 alleged to be due to it under the contract.
4. On 29 September 2005 Geopec filed both points of defence and an application of its own in the nature of a counterclaim in the Civil Claims List against Ausbuild and a director of that company. Relevantly:
 - a. in its points of claim Geopec claimed relief under the *Trade Practices Act 1974 (TPA)*, not the FTA; and
 - b. in its points of defence Geopec contended that the Tribunal did not have jurisdiction to hear the dispute between the parties and foreshadowed that application would be made to transfer both proceedings to the Supreme Court.
5. Geopec then applied to the Tribunal seeking orders that both proceedings be summarily struck out or dismissed pursuant to s.75 of the Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act) for want of jurisdiction or alternatively that the proceedings be referred to the Supreme Court of Victoria pursuant to s. 77 of the VCAT Act.

In support of its applications Geopec submitted, inter alia, that:

1. Ausbuild's application did not assert any breach of the FTA that would confer jurisdiction on the Tribunal;
2. it was implausible that Parliament had intended that commercial construction disputes could be heard in the Civil Claims List of the Tribunal under the rubric of them being "consumer and trader disputes" within the meaning of s. 107 of the FTA; and
3. even if the Tribunal was to find that it had jurisdiction to hear the dispute the natural jurisdiction for commercial construction disputes was the Supreme and County Court Building Cases Lists and accordingly the Tribunal should refer the dispute to the Supreme Court given the probable quantum of Geopec's counterclaim.

Following argument the Tribunal dismissed both applications finding in substance that:

1. the Tribunal had jurisdiction to deal with the dispute between the parties (save for the TPA allegations) as it was a “consumer and trader dispute” within the meaning of s. 107 of the FTA, which the Tribunal can hear and determine under s. 108 (1) of the FTA; and
2. there was no discretionary reason that warranted the referral of the proceedings to the Supreme Court in preference to the Tribunal.

It is submitted that the following general propositions can be distilled from the Tribunal’s decision in Geopac:

1. the definition of “consumer and trader dispute” within the meaning of s.107 of the FTA is sufficiently broad to encompass a commercial construction dispute irrespective of:
 - a. *the quantum involved;*
 - b. *the fact that no breach of the FTA is alleged; or*
 - c. *the fact that the dispute may be contractual in nature;*
2. there is no presumption that the Supreme or County Court Building Cases Lists are the natural forum for commercial construction disputes;
3. on the contrary the Tribunal “could almost be described as the first port of call” for a normal commercial construction dispute;
4. the Tribunal has experienced members who are well equipped to hear commercial construction disputes and appropriate case management procedures can be implemented to cater for such disputes; and
5. the volume or complexity of a specific commercial construction dispute could however potentially provide the basis for a referral out of the Tribunal in a particular case.

The decision in Geopac builds upon a line of previous Tribunal authorities that have interpreted the jurisdiction conferred on the Tribunal by s. 107 of the FTA broadly. Given this stream of authority and the fact that the decision was made by a Vice Presidential member it appears likely that the decision will be followed in future cases before the Tribunal. It remains to be seen what approach the Tribunal will take to referral if and when a major piece of commercial construction litigation is issued in the Civil Claims list.

ANDREW LAIRD - Barrister at Law



We welcome the following Readers who commenced taking briefs on 11 May

Bruce Cohen Ph.D, M.Comm, LL.B (Hons), B.Comm

Bruce Cohen practices in commercial and administrative law, with a particular interest in the regulation of infrastructure services (including electricity, gas, water and rail).

He comes to the Bar with a background in public policy, regulatory development and government administration, having worked as a senior economic adviser to both the Premier and Treasurer of Victoria.

Bruce holds degrees in law and commerce from Melbourne University, as well as a doctorate in public policy from the Australian National University. He has also served as a director on the boards of VENCORP, Snowy Hydro Ltd and VicTrack.

In addition, Bruce is a co-author of the Halsbury’s Laws of Australia publication, “Legal Practitioners”.



Chamindri Kahagalle LL.M, LL.B, B.Comm.

Chamindri has a broad range of experience having commenced her career in taxation initially with Pricewater House Coopers and thereafter with Blake Dawson Waldron where she gained experience in both direct and indirect taxation. More particularly her work involved drafting contractual documentation and advising on complex commercial transactions for institutional and commercial clients. Through her work on structured finance deals Chamindri also gained experience in the area of banking and finance.

More recently Chamindri has also worked as the Principal of Western Suburbs Legal Service and Broadmeadows Community Legal Service. In that capacity she gained a breadth of experience in areas of law such as family, criminal, social security, guardianship, wills and probate and general commercial law. She has appeared in the Magistrates’ Court, Family Court of Australia, Victorian Civil and Administrative Tribunal and at the Social Security Appeals Tribunal.

Chamindri has also recently completed a Master of Laws at the University of Melbourne.



John Oswald-Jacobs BA, LLB

John comes to the Bar with a great breadth of experience both in and outside the law. Admitted to practice in Victoria in 1985, he became a partner in the firm of Gadens Ridgeway (as it then was) in 1989. At Gadens Ridgeway, he practised initially in commercial litigation in all jurisdictions, then subsequently in commercial and residential property development, and general commercial work. When a partner in that firm, he spent a year and a half in the firm's Port Moresby office acting for financial institutions and trading companies, and heading the real property division in that office.

In 1993 John established his own law firm in Kooyong practising in Real Property, Private Business Support (including Sales & Acquisitions, Commercial Agreements and International Trade), Estate Planning & Trusts, and commercial dispute resolution.

In 1997 John moved to London and remained in the United Kingdom for nine years. For most of that period he worked at Deutsche Bank in the City of London, initially in Equity Capital Markets in a convertible bond/equity-linked origination team, then for some years in Structured Capital Markets. In the latter role he was principally involved in executing large, multi-jurisdictional, principally tax-driven financing and investment transactions.

Before leaving the UK, John spent a year living in the Scottish Highlands during which time he consulted to a 'start-up' venture in virtual/home-based outsourcing. He has many interests outside the law, a number of which lead him to the Scottish Highlands!



Lee Pascoe LL.B (Hons)

As a Senior Associate with Dibbs Abbott Stillman (Melbourne/Sydney) and with Brian Ward & Partners, Lee conducted large complex commercial litigation in a diverse range of legal areas including trade practices, intellectual property, defamation, breach of contract, professional negligence, corporations law, banking and finance, and equity/trusts. Lee also has considerable experience in litigation in the areas of insurance law, commercial leasing disputes and banking and finance. She has also provided non-litigious advice to national corporate clients and is proficient at drafting pleadings, affidavits and commercial documents.

Lee has practised in all Victorian Courts as well as the Federal Court in Victoria and Western Australia and the Supreme Courts in NSW and Queensland.



Ursula Stanisich LL.B, BA.

After completing articles at the Office of the Crown Solicitor in 1998, Ursula was employed at Mills Oakley Lawyers in the commercial department. For the last 3 years Ursula has practised in general litigation in Geelong. Ursula has also gained valuable experience prior to practicing while employed as a Magistrates Court Clerk.

Ursula has a broad range of experience having conducted proceedings in the Supreme Court, County Court, Magistrates' Court and VCAT (various Lists) and running civil matters in the Local and District Courts of NSW. These proceedings have covered a range of commercial and civil disputes including wills and estates (including TFM claims), contract, domestic and commercial building, copyright and trademarks, debt recovery and intervention orders. Notably Ursula has also handled the day-to-day running of a complex multiparty Supreme Court proceeding regarding a company takeover and directors' duties.

Ursula has a particular interest in wills and estates.

