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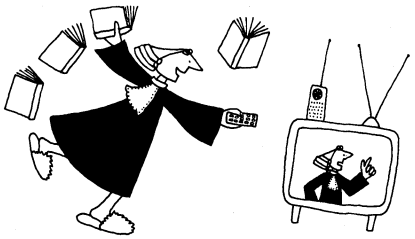

FAIR WORK: THE NEW WORKPLACE LAWS AND THE WORK CHOICES LEGACY

Anthony Forsyth and Andrew Stewart (eds); Federation Press, 2009; 288 pp; $85 (paperback)

This scholarly book seeks to trace and analyse the changes to workplace relations which have characterised Australian law in the second half of the first decade of the 21st century. The story really begins in 2004, when the coalition parties, led by John Howard as prime minister, won an emphatic victory in that year's federal election. For the first time since the Coalition's election victory in 1975, one political grouping controlled both houses of the Australian parliament.

This election result was to have profound consequences for the legal regulation of workplace law. The Coalition's 2004 election victory ensured that, for the first time since taking office in 1996, the then government had an opportunity to implement workplace relations reforms which had previously been stymied by the Senate — and in some instances to go even further.

As many would be aware, the legislative enactment of these workplace relations reforms occurred through the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices*'). *Work Choices*, among other things, sought to create a national workplace relations system for the private sector through the use of the corporations power,[1] replaced the traditional safety net role played by awards with five legislated minimum conditions of employment, placed individual statutory agreements at the fulcrum of the new system, wound back unfair dismissal protection, and placed additional limits on collective bargaining and the taking of industrial action by employees.

In the lead up to the 2007 election, the Australian Labor Party promised to 'bury' *Work Choices*. Whilst the claim to have succeeded in doing so is contestable, the Labor Government's desire to reform Australian labour law as one of its key priorities in its first term of office is not. Forsyth and Stewart's edited collection examines those reforms as contained in the Fair Work Bill 2009 (Cth) ('*Fair Work*'). This is the first time that these significant reforms to Australia's labour laws have been considered from a legal, as opposed to a labour market, perspective.

The first and last chapters by the editors encapsulate the spirit of the collection by looking backwards and then forwards respectively. These chapters consider, in broad terms, the changes in Australian labour law over the past five years, and the influences that may shape our labour laws moving forward in the short to medium term.

The remainder of the collection is divided into nine separate chapters, each dealing with a discrete area of Australian labour law. Chapter 2 by Andrew Stewart considers the constitutional underpinnings of both *Work Choices* and *Fair Work*. The chapter begins by considering the important question as to whether either *Work Choices* or *Fair Work* provide for a truly national system. With his usual clarity and insight, Stewart argues that neither *Work Choices* nor *Fair Work* represent a national system of workplace relations. This is due both to the limitations of the constitutional powers granted to the Commonwealth by the *Australian Constitution*, and to the uncertainty surrounding the application of the corporations power to non-profit organisations, local government entities etc. Stewart cites many cogent reasons why the states may wish to refer their powers over industrial relations to the Commonwealth, and ultimately expresses the view that the *Work Choices* case[2] and Commonwealth activity in this area have 'marginalised' state industrial relations systems forever (p 39). It is noteworthy that since the date of publication of Stewart's contribution, Victoria and the Commonwealth have passed legislation updating the Victorian referral of industrial relations powers to the Commonwealth.[3] Tasmania and South Australia have agreed to refer their powers,[4] while Queensland, the ACT and the Northern Territory have all expressed their support for a national system.[5] These developments point to the real possibility of a truly national labour law system — at least with respect to the private sector — in the not too distant future.

Chapters 3, 4 and 9 deal with the related issues of minimum standards and their enforcement, together with the resolution of workplace grievances. Chapter 3, by Jill Murray and Rosemary Owens, on minimum standards is one of my favourites in this collection. Murray and Owens both have a wealth of experience researching and writing on minimum labour standards and regulation more broadly, and this chapter draws on this experience to unpack the changes brought about by both *Work Choices* and *Fair Work* to the traditional Australian system. The chapter argues that the *Fair Work* vision for minimum labour standards maintains many of the features which characterised *Work Choices*, whilst boosting protections in some important respects. Murray and Owens also note that there is an increased opportunity for Labor's new body, Fair Work Australia, to play a dynamic regulatory role in shaping these new workplace standards.

In chapter 4, Tess Hardy examines one of the more surprising aspects of *Work Choices* — the growth of a well-resourced inspectorate, responsible for enforcing workplace laws. Hardy notes that this increased emphasis on compliance by government following the introduction of the *Work Choices* legislation stands in contrast with the very minimalist role played by government in the traditional Australian system of conciliation and arbitration. She analyses the enforcement provisions under *Work Choices*, and compares these provisions to those available under *Fair Work*. Usefully for practitioners, Hardy also notes some of the significant jurisprudence which has developed as a result of the Workplace Ombudsman's prosecution activities.

Chapter 9, by Joellen Riley, recognises that, since *Work Choices*, there has been a shift in Australian labour law away from the constitutionally entrenched focus on the conciliation and arbitration of industrial disputes. The model which has replaced conciliation and arbitration is essentially a system characterised by a private alternative dispute resolution (ADR) approach to the resolution of workplace grievances, coupled with access to the courts for parties wishing to enforce rights.

Although recognising its benefits, Riley is nonetheless critical of this private ADR approach, particularly the *Work Choices* model which contained extensive privacy provisions preventing the publication of decisions by either the Australian Industrial Relations Commission, other tribunals empowered to settle disputes or private arbitrators. The chapter compares in detail the provisions for dispute resolution under *Work Choices* with those proposed in *Fair Work*, and considers dispute resolution in labour law in the context of the scholarly literature, both positive and critical, concerning ADR more broadly. While recognising that the growth of ADR in the labour law context is part of an overall trend toward less costly and legalistic dispute resolution, Riley is concerned that these processes may lead to an entrenchment of managerial prerogative at the expense of workers' rights.

Chapters 5, 6 and 7 are in my view compulsory reading for students, lecturers and busy practitioners trying to come to grips with the *Fair Work* system. These three chapters deal with agreement making, collective bargaining and the rules concerning industrial action respectively. Chapter 5, by Carolyn Sutherland, will be very useful for practitioners and students trying to come to grips with the changes to agreement making. Sutherland methodically reviews these changes in a style which is both perceptive and easy to read. Chapter 6, by Anthony Forsyth, on collective bargaining is interesting, as the author outlines some key features of the new regime, such as the new majority support determinations and scope orders, along with good faith bargaining provisions. In relation to good faith bargaining, Forsyth draws on his experience of the manner in which such laws have operated in the United States, Canada and New Zealand to proffer valuable insights as to possible judicial interpretations of the new good faith provisions. Chapter 7, by Shae McCrystal, contains a careful analysis of the laws relating to industrial action, both under *Work Choices* and also *Fair Work*. What is striking about the author's findings are that, despite Labor's rhetoric of a fairer workplace relations system, the restrictions imposed on the taking of industrial action under *Work Choices* remain largely intact. As a result, trade unions hoping for the removal of some of the more onerous restrictions will be disappointed.

Trade unions are also likely to be disappointed by Labor's amendments to both the right of entry and freedom of association provisions. Chapter 8, by Colin Fenwick and John Howe, is dedicated to traversing these changes in detail, commencing with an historical overview and charting the gradual tightening of both right of entry provisions and freedom of association laws. The high watermark (or low watermark, depending on your viewpoint) of these restrictions occurred under *Work Choices*. Whilst noting that the right of entry provisions and freedom of association laws proposed in *Fair Work* do afford unions greater legal security, Fenwick and Howe conclude that 'unions will have to continue to work hard to ensure their own security' (p 185).

Chapter 10, by Anna Chapman, deals with the vexed question of statutory remedies for unfair and unlawful termination of employment. After briefly examining the historical context of statutory termination of employment laws, Chapman gives careful consideration to the *Work Choices* reforms and compares these to *Fair Work*. Chapman questions whether Labor's reforms really amount to a new system, given that *Fair Work* retains many of the features of the unfair dismissal regimes which operated prior to *Work Choices*. Whilst recognising that *Fair Work* creates a simpler regulatory framework with fewer exemptions from coverage, Chapman questions the wisdom of imposing lower standards on small business operators. The author is disappointed that the federal government has failed to engage with labour market research in fashioning an unfair dismissal regime which is appropriate for these small businesses.

Although this excellent book was published prior to the Senate amendments to *Fair Work*, it is my view that it will be of enduring value to practitioners, academics and students alike. This is because it is impossible to understand the *Fair Work* system without an appreciation of *Work Choices* and the labour law developments which preceded it. This edited collection will enable busy practitioners and time poor students to come to grips with these developments in our labour laws, and gain a critical insight into their operation.

My one complaint (and it is a small one) is that the book does not contain a chapter on the extent to which the *Fair Work* laws comply with international labour law norms. The *Work Choices* regime (and the *Workplace Relations Act 1996* (Cth) as it stood immediately prior to *Work Choices*) were criticised on a number of occasions by various supervisory bodies of the International Labour Organisation (ILO) for their non-compliance with key ILO conventions.[6] In my view a chapter addressing the extent to which this situation has changed after *Fair Work* would have been warranted. Having said this, the editors' task in preparing a collection such as this will almost always involve difficult judgments about what to include.

I highly recommend *Fair Work: The New Workplace Laws and the Work Choices Legacy*. It will be an invaluable addition to the libraries of all those with an interest in labour law.

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REFERENCES

1. *Australian Constitution* s 51(xx).

2. *New South Wales v Commonwealth* (2006) 231 ALR 1.

3. See *Fair Work (Commonwealth Powers) Act 2009* (Vic) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth). Note that on 11 June 2009, the Victorian Government signed a bilateral inter-governmental agreement to govern the Victorian referral of power until a multi-lateral inter-governmental agreement is reached between the Commonwealth and all referring States.

4. See Communiqué from Australian, State and Territory and New Zealand Workplace Relations Ministers Council, 11 June 2009. In September 2009, South Australia gave effect to its commitment to refer powers when it introduced into the SA Parliament the Fair Work (Commonwealth Powers) Bill 2009.

5. Ibid.

6. For an excellent discussion of complaints against the government of Australia regarding its compliance with international labour standards, see Rosemary Owens and Joellen Riley, *The Law of Work* (2007) 467–74.