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Legislated Standards: The Australian Approach

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Introduction

The words 'legislated standards' connote labour standards which are given the force of law because they have been enacted into law by parliaments. When governments intervene in their labour markets by enacting laws, they usually do so to place restrictions on the labour market for terms and conditions of employment. In other words, governments seek to limit the scope of bargaining between employees and their employers by providing that the costs of hiring labour cannot fall below a specified minimum wage and a set of minimum terms and conditions of labour including maximum weekly hours of work and appropriate periods for rest and for leisure.

In countries like Australia whose legal foundations spring from the British common law, governments have been obliged to place boundaries around the scope of individual contract-making in the field of employment because it has only been in recent times that the common law rules of contract have explored the fairness or unfairness of contracts of employment. History has shown that without some form of external intervention, the market for labour, especially for unskilled labour, often produced unfair outcomes. Put another way, without a floor of minimum conditions of employment, many workers at the lower end of the labour market end up undertaking work for unacceptably low wages with very few beneficial terms and conditions of employment. It is usually the case that these legislated standards prescribe the minimum terms and conditions of employment with which all employers must comply when employing labour. It is often the case that such legislated standards also prescribe a minimum rate of wages which must be paid to all employees.

Australia is an interesting case study because in this country, the words 'legislated standards' have a special meaning. This is because in our nation not all general labour standards are to be found in legislation. At the present time, the legislated standards which are set out in the *Fair Work Act 2009*

Conclusion

The purpose of this chapter has been to examine Australia's legislated standards which specify minimum terms and conditions of employment. The National Employment Standards are found in Pt 2.2 of the *Fair Work Act 2009*. However, these legislated standards are of very recent origin. Before 2005, in the vast bulk of instances, the Parliament of Australia, together with the State and Territory parliaments, left it to labour courts, and later to industrial relations commissions, to specify minimum rates of wages and terms and conditions of employment. These terms were specified in awards which were the products of conciliation, and where conciliation failed, then of compulsory arbitration. This recent change from minima solely based upon awards to a position where minima are now shared between the NES and awards, marks one of the most significant changes in Australian labour law.

In this chapter, I have examined the prior role of conciliation and arbitration, the 2005 move to legislated standards in the Work Choices era, and finally, the NES of the *Fair Work Act* have been analysed. Legislated standards are a new and largely untried feature of Australian federal labour law, and we will have to wait to see if the parliamentarians are as successful at providing a fair and reasonable safety net of terms and conditions of employment, as were the labour court judges and industrial relations commission members.

References

Aroney N (2009) Constitutional choices in the *Work Choices Case*, or what exactly is wrong with the reserved powers doctrine? *Melbourne University Law Review* 32(1): 1-43.

Cooney S, Howe J and Murray J (2006) Time and money under workchoices: Under the new Workplace Relations Act as a scheme of regulation. *University of New South Wales Law Journal* 29(1): 215-241.

Creighton B and Stewart A (2010) *Labour Law*. 5th Ed. Sydney: Federation Press.

Fenwick C (2006) How low can you go? Minimum working conditions under Australia's new labour laws. *Economic and Labour Relations Review* 16(2): 85-126.

Forsyth A and Stewart A (2009) The journey from work choices to fair work. In: Forsyth A and Stewart A (Eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy*. Sydney: Federation Press, 1.

Isaac J and MacIntyre S (Eds) (2004) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration*. Cambridge, UK; New York: Cambridge University Press.

Kirby M (2004) Industrial conciliation and arbitration in Australia – A centenary reflection. *Australian Journal of Labour Law* 17(3): 229-244.

McCallum R (2007) The Work Choices Case: Some Reflections. *Judicial Officers Bulletin* 19(4): 29-33.

Murray J and Owens R (2009) The safety net: Labour standards in the new era. In: Forsyth A and Stewart A (Eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy*. Sydney: Federation Press, 40-74.

Owens R and Riley J (2007) *The Law of Work*. Melbourne: Oxford University Press.

Owens R, Riley J and Murray J (2011) *The Law of Work*. 2nd Ed. Melbourne: Oxford University Press.

Riley J and Peterson K (2006) *Work Choices: A Guide to the 2005 Changes*. Sydney: Thomson.

Stewart A (2009) A question of balance: Labor's new vision for workplace regulation. *Australian Journal of Labour Law* 22(1): 3-50.