

NEWSLETTER

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Note: the views of the contributors are not necessarily those of the IR Society of SA.

From the desk of the President

Once again, the future shape of Australia's IR system is very much under focus. Work Choices is now in its second year and the Federal opposition has announced far reaching proposals to amend the current system. The Society will seek to play its traditional role of providing a forum for independent and informed debate as we lead into the next Federal election.

Recent seminars conducted by the Society have included a review of the Work Choices system from a practical perspective and a review of the unfair and unlawful termination provisions of the Federal Act. Erin McCarthy's excellent presentation on the latter issue is now available on the Society's website.

In April, Commissioner David Steel, Rodger Prince and I attended the National IR Society Convention in Canberra. This was conducted to coincide with the anniversary of the Work Choices reforms. As part of what was an excellent program, speakers addressed the experiences of the new Federal system from legal, employer, union and academic perspectives. Amongst the highlights were a paper from SA's own Chris Platt on the AWA experience of the resources sector, the perspective provided by Zoe Angas as an AWU organiser, and the addresses by Hon John von Doussa, President of HREOC, and the "retiring" Hon Paul Munro, former Member of the AIRC. Papers from the conference are available from the ACT Society website: www.irsact.asn.au

Upcoming events for this Society will include a seminar on the new State Industrial Referral Agreements legislation (see *article below*), and a Student's night to be presented by the State Industrial Tribunals. Details will be provided shortly.

Finally I should advise that your Executive Committee is presently working on a number of governance, planning and promotional initiatives. Members will be informed and consulted in due course.

Peter Hampton
PRESIDENT, IRSSA

The Statutes Amendment (Public Sector Employment) Act 2006

Craig Stevens – Crown Solicitor's Office

The Statutes Amendment (Public Sector Employment) Act 2006 received assent on 14 December 2006, and commenced operation on 1 April 2007. The Act amends a

large number of other Acts with a significant number amended to change the status of various categories of public sector employees to public servants (thus bringing them out of the coverage of the Workplace Relations Act 1996 (Cth) and into the State industrial relations system.

One of the Acts amended by the Statutes Amendment (Public Sector Employment) Act is the Commercial Arbitration Act 1986. The main purpose of the amendments made to the Act, which has been renamed the *Commercial Arbitration and Industrial Referral Agreements Act 1986* ("the Referral Agreements Act"), is to enable employers and employees who would otherwise be covered by the Workplace Relations Act as a result of the passage of the 'Work Choices' amendments, to have access to an alternative agreement-making scheme, with access to the Industrial Relations Commission of South Australia ("IRCSA").

In a media release issued on 20 September 2006, the Hon Michael Wright MP, Minister for Industrial Relations stated, *inter alia*:

"Work Choices has eroded the Australian Industrial Relations Commission's power to be an 'independent umpire', but it does allow parties to select an alternative dispute resolution process by an agreed provider."

The Minister went on to say that the amendments were:

". . . laying the groundwork to enable the Industrial Relations Commission of South Australia to hear and determine industrial matters and disputes, if all parties agree to take that avenue. This also includes the potential to provide a remedy for unfair dismissal disputes."

Schedule 1 of the *Referral Agreements Act* permits parties access to the Commission for the purposes of dispute resolution, by agreement between the parties in writing. Section 2(1) of the Schedule states:

2-Referral of matter to Industrial Relations Commission by agreement

(1) *This clause applies to an industrial matter or an industrial dispute if 2 or more parties have entered into an agreement in writing (a **referral agreement**) to seek the assistance of the Commission by making a referral to the Commission in order to obtain (as the case may be)-*

- (a) *the resolution of an industrial matter arising between the parties (including by making a determination about levels of remuneration, conditions of employment or other industrial matters);*
- (b) *the resolution of an industrial dispute between the parties (including by settling a dispute about whether appropriate remuneration has been paid to a person*

under a contract of employment or whether there has been a breach of a condition of employment);

- (c) *the resolution of the question whether, on the balance of probabilities, the dismissal of an employee was harsh, unjust or unreasonable.*

The effect of the provisions of Schedule 1 is to allow parties to enter into a referral agreement, with a concomitant jurisdiction for the IRCSA.

Section 2(6) of the Schedule states:

- (6) *On a referral under this Schedule, the Commission has and may perform or exercise such functions or powers with respect to the matter as the Commission might exercise in the exercise of its jurisdiction under section 26 of the Fair Work Act 1994, **subject to any limitation or exclusion specified in the referral agreement and not so as to give any form of relief outside the referral agreement.***
[emphasis added]

Two or more parties may enter into a referral agreement. 'Parties' is defined in section 2(3) as:

- (3) *The parties to a referral agreement may be-*
 - (a) *an employer, or group of employers,*
 - (b) *an employee or group of employees,*
 - (c) *a registered association;*
 - (d) *the United Trades and Labor Council.*

In summary, the South Australian Government has created an alternative agreement making scheme which has primarily been provided for those parties that are otherwise covered by the *Workplace Relations Act*. The unregistered agreements created between parties who utilise the alternative agreement making mechanism in the *Referral Agreements Act* will gain legal standing and enforceability through the operation of the common law of contract.

The Society will be conducting a seminar dealing with the Industrial Referral Agreements legislation during May. Details will be provided shortly.

Comcare and Private Sector Employers: Some Significant Developments

Prof Andrew Stewart – Consultant, Piper Alderman

The "Comcare" system established under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) is

primarily concerned with providing compensation for injured workers in the Commonwealth public sector.

Since 1992, however, it has been possible for certain private sector employers to apply for a licence to operate under Comcare on a self-insured basis, rather than under one or more State or Territory workers compensation schemes.

Under what is now Part VIII of the 1988 Act, a corporation can make such an application if it obtains a declaration of eligibility from the Minister for Workplace Relations. To get this it must either be (or about to be) a former Commonwealth authority, or carry on business in competition with a current or former Commonwealth authority.

It was not until 2004 that the first such licence was granted to Optus (as a competitor of Telstra). Further licences have now been obtained by companies such as Linfox, John Holland and the National Australia Bank.

In an important ruling, the High Court has rejected a challenge to the validity of these licensing provisions. Coincidentally, its decision was handed down just a week after changes took effect to federal occupational health and safety (OHS) legislation. These changes are likely to make the option of seeking Comcare coverage appear more attractive to businesses.

The High Court decision

The decision to grant a Comcare licence to Optus was challenged by the State of Victoria, on the basis that the licensing provisions themselves were beyond Commonwealth power. The challenge was supported by New South Wales, South Australia and Western Australia.

Section 51(14) of the Constitution makes it clear that the Commonwealth cannot legislate on the subject of "State insurance". To the extent that Part VIII of the 1988 Act overrode the obligation imposed on Optus to insure against work-related injury under State workers compensation legislation, it was said to stray into that forbidden territory.

In *Attorney-General (Vic) v Andrews* [2007] HCA 9 (21/3/07), however, the High Court has ruled by a 5:2 majority that the relevant provisions of the 1988 Act should not be regarded as a law about State insurance. Accordingly the provisions are valid and the Optus licence stands.

Interestingly, the majority made it clear that the licensing provisions can be regarded as a valid exercise of the corporations power in s 51(20) of the Constitution, just as the Work Choices legislation had been upheld by the same judges last year.

This suggests that the Commonwealth could, if it wished, extend the Comcare option in the future to any trading, financial or foreign corporation, regardless of whether it is, or competes with, a former Commonwealth authority.

The OHS changes

On 14 March 2007, just a week before the High Court decision, the *OHS and SRC Legislation Amendment Act 2006* took effect.

This has renamed the *Occupational Health and Safety (Commonwealth Employment) Act 1991* as the *Occupational Health and Safety Act 1991*. The change in title reflects the fact that the Act now applies not only to Commonwealth authorities, but to any corporations that have been granted a licence to operate under Comcare.

By virtue of s 4 of the 1991 Act, such employers are no longer to be subject to State or Territory OHS laws, at least as they apply to employment relationships. Unfortunately, it is unclear exactly which laws may apply where, for example, workers employed by an outside contractor come onto a site operated by a licensed employer.

It remains to be seen whether the federal government moves to clarify the effect of s 4 in this regard, perhaps through new regulations.

The 1991 Act has also been amended by the *Occupational Health and Safety (Commonwealth Employment) Amendment Act 2006*, which came into force on 15 March 2007. The main thrust of the changes is to reduce the role played by trade unions in the regulatory scheme established by the 1991 Act and give employers greater flexibility in developing OHS management arrangements.

Taken together, the various amendments have the effect that private sector employers with Comcare licences will now (at least in relation to their own employees) be subject to an OHS regime that is less burdensome in certain respects than the State regimes to which they were formerly subject.

Making the switch?

Some employers will now be considering/ (a) whether they are eligible to apply for a Comcare licence, and (b) if they are, whether they have anything to gain by doing so.

In terms of eligibility, some of the recent decisions to grant licences under Part VIII of the 1988 Act suggest that the federal government is now taking a liberal view of the "competition" criterion.

Aside from banks or other financial institutions, who are plainly in competition with the Commonwealth Bank (or the Reserve Bank), there may be a significant number of businesses that can qualify by competing with current or former Commonwealth authorities in areas such as transport, communications, employment services, and so on.

The question then becomes whether it is worth making the switch. The obvious attraction is to deal only with a single workers compensation system, rather than up to eight systems in the case of truly national businesses.

There may also be cost savings. It was noted in the High Court proceedings that Optus expected to save \$186,000 per month in Victoria alone from moving to Comcare. However each employer would obviously need to make its own assessment of any potential savings. This would need to include an assessment of the cost of finalising or transferring claims lodged prior to any transition.

Finally, some businesses may see advantages in becoming subject to an OHS regime that may impose lower standards of compliance and carry a lower risk of prosecution, especially when compared to the New South Wales system, for instance.

Broadening eligibility for Comcare?

For the present, the Howard Government is denying any intention to expand eligibility to seek a Comcare licence. However if the Coalition is returned at this year's election, there will undoubtedly be pressure from business groups to do that.

Conversely, an ALP government is likely to come under pressure from the States to close up the Comcare "loophole". Either way, it seems unlikely we have seen the last of developments in this area.

This article originally appeared in the Piper Alderman publication 'Employment Matters', and is reproduced with permission

Our Work, Our Lives 2007: National Conference on Women and Industrial Relations

The 2007 National Conference on women and work welcomes papers or presentations from policy makers, industry, HR / IR practitioners, academics, unionists, activists, community stakeholders, and postgraduates. Academics wishing to be considered for the DEST - eligible, peer-reviewed, conference proceedings should submit a 200-word abstract. Note that time constraints may prevent the inclusion of all papers.

Non-academic presenters should submit outlines of 200 words, which clearly spell out the topic, the material you intend to present, and how it fits the themes of the conference.

The event organisers particularly encourage submissions on the effects of WorkChoices, welfare to work issues, and community activist / union campaigns for justice on women and work.

SA Unions and the Working Women's Centre network will also host special sessions on the future of women and work. All intending presenters should email the Conference Secretariat jackiet@bigpond.net.au to obtain further information on submission of outlines and abstracts.

Date: 20 to 21 September 2007

Venue: Lakes Resort, Adelaide, South Australia

For further information about the conference or to receive a copy of the guideline for applicants, contact Jackie Thompson on 08 8338 4186 or email jackiet@bigpond.net.au.

Full details can be found on the Women's Information Service website at <http://www.wis.sa.gov.au>

BOOK REVIEW

The Labour Market Ate My Babies: Work, Children and a Sustainable Future

Barbara Pocock, The Federation Press, Sydney 2006, RRP \$44.95

Any review of this book has to begin by saying something about the title. The image is peculiar, playful about Australian popular mythology, and a neat summation of the book's argument. The recurrent theme of the book is of a 'voracious market', mainly the market for labour, in which individuals' knowledge and time are 'sold' in return for wages, but other markets too, the childcare market in particular. Professor Barbara Pocock argues that market arrangements are increasingly 'eating into' all spheres of our economic and social life. While markets help co-ordinate information and

ensure efficiency, they are competitive mechanisms that benefit those with knowledge and resources in demand, to the exclusion of fairness, equity, and justice – unless these are externally imposed through regulation. Unchecked markets shape the behaviours and experiences of their human participants in ways that may not be immediately obvious.

If that opening paragraph has put potential non-academic readers off the book, let me make an effort to bring them back. For *The Labour Market Ate My Babies* deserves a wide audience, and very little of it assumes a familiarity with economic theory. The aim of the book is to explore some of the consequences for families and children of our increasing reliance on markets. Its unique contribution is to report these impacts from the perspective of a cohort of young people, principally teenagers, rather than the usual focus on adult perceptions and problems. The views of 93 primary and high school students were collected in focus groups in different states, suburbs and regions. The reporting of verbatim quotes from these conversations, interspersed with further comments and reflections from the author, forms the backbone of the book. As in the best qualitative research, these quotes help ‘ground’ the discussion by showing us the world as the students see it, and ensure that the discussion never lingers too long in one place. Since the data were gathered from groups of students rather than interviews running consecutively, there is room for spontaneity, and Pocock lets the presentation of the material follow the students’ cues. What we get is a sequence of chapters which focus on particular themes – childcare, parental guilt and spending, future aspirations.

The impressions of the school students first appear in Chapter 3, which reflects on the centrality of work in modern life. Borrowing from other authors, Pocock argues that we have developed a culture in which labour is a ‘fetish’, and work increasingly gives us not only a source of income, but our status and identity. This has consequences for how our time outside of work is spent. Quotations from the focus groups indicate that many young people prefer increased parental time over more money, that this feeling is most pronounced in areas where incomes are already relatively high, and that there is a special yearning for increased contact with otherwise ‘absent’ fathers. But not just any time will do – ‘unstructured’ time, spent freely in the company of parents, is what children crave most.

Other chapters probe the distance between what the young people want and aspire to, and how they see their actual family lives. We learn that too much

parental contrition over long working hours and the absence of family time can be just as wearying and damaging for children as if parents ignore the fact entirely (Chapter 5). In stark detail we see the future Australian workforce and family laid out, as the youths discuss their own ideal families and jobs (Chapter 6). The ‘breadwinner’ family looks set to lose more ground to the ‘dual-earner’ family, with all the difficulties related to fertility, childcare, and the responsibilities for the dishes and the vacuuming at home that this implies, being replayed again in the next generation. Pocock breaks out of the current din of future-gazing by showing clearly why the re-regulation of the labour market ought to happen now, and why it cannot wait for future workers to break down the door. The preferences of these young people already exhibit a cautiousness about how much they can challenge established gender roles. If another generation of men is not to be drawn into long hours of paid work, leaving their partners at home with the cleaning and the kids, we should begin the redesign of our work-care regime now.

For me the most remarkable chapter is the fourth, which deals bravely with the issue of job ‘spill-over’. We are faced with further striking evidence on the nature of the ‘work-life collision’ which Pocock brought to light in an earlier book of that name (2003, also Federation Press). Here she gives us an insight on the sadness, frustration, and disappointment that pervade families when parents’ working lives are out of sync with their own hopes and desires. Our attention is drawn to the powerful connection between what children see in their parents, and what they expect of their own lives. Just as some children thrill to the realisation that their father works in an underground mine, others deal with emotionally distant adults, and either adopt their parent’s mood or develop resistance strategies for keeping the peace. Over time, as they observe and relive their early family experiences, children learn behaviours and responses which shape their own designs on work and family. Whether they manage to break the cycle, or revisit the ‘negative spill-over’ on their own families, is a vital question for future research. Following these same children in subsequent research would be a welcome extension of the current findings.

When I told a friend that I was reading this book, and mentioned something of its contents, he replied that he had ‘never even thought to think about’ the question of how children perceive their parents’ work, and how that might shape their own plans. He has every reason to consider it now, and so do the rest of us. *The Labour Market Ate My Babies* provides compelling evidence that the conditions in which adults are employed shape not only their own experiences, but the attitudes of their children. We

are only beginning to appreciate these inter-generational effects. Barbara Pocock has succeeded in showing why we should take seriously issues which, until now, have barely been mentioned in the debate over industrial relations 'reform'.

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