The WA industrial relations system – a bridge over troubled water?

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The IR Society has again chosen a very topical theme for the convention – IR choices for the future – and I intend to put to you today that when considering that future, the WA IR system is well placed to be a bridge over the currently troubled waters of industrial relations.

I will firstly reflect upon where the State industrial relations system is now, and I will then look at where it might go in the future.

The Now
Looking at the “now”, since the last IR Society convention here in 2006 I think it has become more widely understood in the community that Work Choices did not create a national workplace relations system. To give credit to the Commonwealth government, it did not say in March 2006, at the time that it was championing Work Choices, that Work Choices did create a national workplace relations system; rather, it described Work Choices as “moving towards” such a system.

Although Work Choices applies nationally, in each State and Territory, it is generally applicable only to trading, financial and foreign corporations and their employees as well as those areas within Commonwealth power being employers of flight crew officers,

1 The views expressed in this paper are necessarily my own and do not represent the views of the members of the WAIRC individually or together.
maritime employees and waterside workers, the Commonwealth itself and its authorities, Territory employers and in relation to Victoria.

In WA, not only does Work Choices not apply to the many employers that are not trading, financial or foreign corporations and State government employment, Work Choices states\(^2\) that it is not intended to override State laws in certain specified areas - for example, long service leave, health and safety, superannuation, method of payment of wages, frequency of payment and deductions from wages and so on - so where those issues are covered by State legislation they are still part of the State industrial relations system even for those employers who are covered by Work Choices. In that respect, far from moving towards a national workplace relations system, Work Choices fragments some aspects of workplace relations.

Therefore, in common generally with the other State industrial relations jurisdictions, one effect of Work Choices is that the WA industrial relations system applies to the industrial relations of those employers in WA who are:

- corporations which are not trading, financial or foreign corporations,
- partnerships,
- trusts, or
- sole traders, and
- employees of the State government,

which were previously covered by State awards or agreements, and

- the industrial relations of those employers in the State which are trading, financial or foreign corporations in relation to the specified “non-excluded” matters.

It also seems that no-one really knows extent of Work Choices and State IR system coverage. The ABS Employee Earnings and Hours (EEH) survey is the most reliable data available, however it does not include employees in agriculture, forestry and fishing. It does not identify employers which are constitutional corporations; it identifies the

\(^2\) *Workplace Relations Act 1996* s16(2) and (3)
proportion of employment by either incorporated or unincorporated business. However, not all incorporated businesses will be constitutional corporations. Nor does the survey identify whether any of the employees are employees in their own business. We also do not know at any point in time the numbers of transitional employers who are not currently in the State system.

The Commonwealth government itself does not know the precise coverage of Work Choices: in an answer to a question in the House of Representatives on 15 February 2007 about the number of State and Territory employees estimated to be under the jurisdiction of the federal workplace relations system, the then Minister for Employment and Workplace Relations Mr Andrews quoted figures from 2004. For WA, the answer was “between 64% and 87% of employees, representing between 447,000 and 648,000 employees” which is a wide range.

In WA, based upon the updated 2006 ABS EEH data, the Commission has concluded that potentially 38.6% of all WA employees are in the State industrial relations system, a marginal decrease upon the 40% in the 2004 data. Of these 38.6%, approximately 31% are estimated to be employed in the private sector and approximately 8% by the State Government. This figure is consistent with the estimate by Professor George Williams in his Issues Paper where he estimates Work Choices’ coverage of employees Australia-wide to be likely to be between 60% and 65%.

In addition to that 38.6%, the State industrial relations system also applies to the other approximately 61% of employees who are covered by Work Choices in relation to the non-excluded matters in ss.16(2) and (3) of the Workplace Relations Act 1997 (Cth) ("WRA"). When these figures are added together, a significant proportion of the State’s workforce is covered by the State industrial relations system.

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3 Hansard, House of Representatives, Thursday 15 February 2007, Question No. 4824
4 Inquiry into Options for a New Industrial Relations System, NSW Government, September 2007
And, the coverage of the State industrial relations system is also likely to increase further after March 2011 because Work Choices itself will then return to the State system those transitional employers who are not by then trading, financial or foreign corporations.

Work Choices effectively swept away the previous well-understood boundaries between the federal and State systems and has created new boundaries. One boundary is whether the employer is a constitutional corporation. In most matters the issue whether the employer is a trading or financial corporation has been clear and where that is the case, and Work Choices applies, the claim will be dismissed or discontinued. In matters where the respondent is a government body, especially local government, or an organisation with charitable objects, the issue has not been as clear.

In *Aboriginal Legal Service of Western Australia Incorporated v. Lawrence* the Full Bench of the WAIRC upheld a finding made at first instance that the Aboriginal Legal Service of Western Australia Incorporated (“ALS”) was not a constitutional corporation and therefore the Commission had jurisdiction to hear and determine an unfair dismissal claim brought by a former employee of the ALS. As identified by the Commission at first instance and by the Full Bench, there was little by way of factual issues in dispute between the parties. The ALS provides legal services, amongst other things, to members of the Aboriginal community in Western Australia. Its sole source of funding for the services is by way of a contract entered into between the ALS and the Commonwealth government. It was the existence of, and the terms of, this contract that founded the appellant’s argument that the ALS was a constitutional corporation, both at first instance and on appeal.

The Full Bench considered in some detail relevant High Court and Federal Court authorities in relation to what is a trading corporation. It considered that the arrangement between the Commonwealth department which provided funds to the ALS and between the ALS providing a service to its clients was a tripartite arrangement which could not be ignored in considering the ALS’ activities as a whole. The Full Bench concluded that the

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ALS entering into and performing the contract with the Commonwealth department did constitute trading with that department because of the combined effects of the contractual documents between them.

However the Full Bench considered the ALS was not a trading corporation because the use made of the funds as specified by the Commonwealth department is the provision of legal services without charge to clients. The funds from the Commonwealth department are provided on a regular basis over three years in accordance with a single contract, are large in size and by far the majority of the total income received by the ALS. There is no specific nexus between the provision of legal services for the clients of the ALS and the receipt of funds from the government in accordance with the contract, and the provision of the legal service, is more than just the predominant activity of the ALS; it affects in a qualitative sense the trading with a Commonwealth department as against the activities of the ALS as a whole. The Full Bench concluded that the Commission at first instance did not err in concluding that the ALS is not a trading corporation and the appeal was dismissed.

The decision of the Full Bench has been appealed to the Industrial Appeal Court and a date for the full hearing is yet to be set. It is quite unfortunate that the uncertainty about jurisdiction created by Work Choices means that an employee who has been dismissed or denied a benefit may have to go through the entire appeal process to the WA Industrial Appeal Court without anyone even beginning to look at the merit of his/her case.

In relation to local government, we have had nine unfair dismissal and contractual benefit applications against local government authorities referred to us in the 12 months since July 1st last year. In each case the local government authority challenged the jurisdiction of the Commission to hear and determine the claim on the basis that its jurisdiction to do so is excluded by operation of the WRA. Of these matters, one was referred for hearing and determination. The issue was whether the Shire of Cue was a trading corporation and thus a constitutional corporation and it was held that it was not. It is a first instance

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decision and there has not been an appeal lodged against it. All of the other applications were discontinued either prior to or following a conciliation conference.

We have not yet been asked to determine whether an employer who is a trust with a corporate trustee is a constitutional corporation.

Interestingly the numbers of claims of denied contractual benefit have not reduced to the same extent as the numbers of claims of unfair dismissal. The WAIRC has had to deal with the issue of whether the Commission’s denied contractual benefits jurisdiction was overwritten by the Commonwealth’s Work Choices legislation. Initially, it was held that it was not. However, since the High Court decision in *State of New South Wales and Others v. The Commonwealth of Australia* it appears that Commonwealth legislation can cover the field even though that Commonwealth legislation does not provide for a matter covered by State legislation.

There has not yet been a conclusive determination of the extent to which Work Choices overrides the Commission’s power to hear and determine a claim by an employee of a denied contractual benefit where the employer is a constitutional corporation. The transitional arrangements set out in Regulation 1.2 of Division 2 of Part 1 of Chapter 2 of the *Workplace Relations Regulations 2006* may preserve the jurisdiction of the Commission to hear and determine some contractual benefit claims. The issue remains unconsidered by the Full Bench as none of the decisions of single Commissioners on the subject have been appealed.

The Future

Having brought you up to date, what then of IR into the future as far as the State IR system is concerned? The immediate future is relatively straightforward. The State government has introduced into the Parliament a number of legislative initiatives which,

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if passed, will expand the range of matters which will be able to be referred to the Commission.

- The *Childrens and Community Services Act 2004* is to be amended to require constitutional corporations employing children, whether as employees or contractors, to comply with certain specified award conditions with recourse to the Commission for claims of breaches, of unfair dismissal or of denied contractual benefits;
- a new Act is to be created giving employees of constitutional corporations the right to refer a denied contractual benefits claim to the Commission;
- the *Workers Compensation and Injury Management Act 1981* is to be amended to enable employees to refer a claim of unfair dismissal to the Commission if they have been dismissed in breach of the obligation on an employer in s.84AA to provide the employee with a position if they return to work within 12 months;
- the *Occupational Safety and Health Act 1984* is to be amended to enable the OSH Tribunal to deal with claims of workplace bullying or of discrimination for having raised safety concerns;
- a new Employment Dispute Resolution Act is to be created to enable the Commission to conduct Alternative Dispute Resolution (“ADR”) and mediation by agreement, including under Australian Workplace Agreements (“AWAs”);
- the *Magistrates Court (Civil Proceedings) Act 2004* is to be amended to allow the Magistrates Court to hear claims by employees of a breach of the contract of employment, and for the claim to be mediated by the Commission;
- there are to be amendments to the *Industrial Relations Act 1979* to allow joint sittings of the WAIRC with other State Commissions on State Wage Cases or cases of significance, and to make some other changes.

It would be a bold step to look too far into the future but if this legislation is passed in its present form I foresee the WAIRC’s much broader dispute resolution powers being used with increasing frequency. The Employment Dispute Resolution Bill allows the WAIRC to:
(a) mediate upon receiving a simple request to do so, and
(b) resolve disputes according to the functions given to it in a written agreement.

It will be irrelevant whether or not the employment dispute is an “industrial matter” under the IR Act. It is intended to be speedy, convenient and informal so it will be able to be requested by employers or employees directly, by email or letter and not necessarily by filling in a form. If agreement is reached it can be registered, to give it the same status as an industrial agreement, but it cannot override an award or an industrial agreement.

The Bill also provides for referral agreements between an employer and employees, or between an employer and a union, that a particular employment dispute, or class of dispute, can be referred to the WAIRC. The referral agreement can specify the functions to be performed by the WAIRC such as mediating or arbitrating, and the WAIRC is restricted to those functions: if it is mediation only, then the WAIRC cannot arbitrate; it can only mediate. If a dispute is resolved the WAIRC can file a copy of it or, if agreed, make it into an order which can override an award or industrial agreement.

The Bill also allows the WAIRC to act under an AWA where the AWA provides that the WAIRC is the dispute provider.

To that end, earlier this year we invited the 3 representatives from the Advisory Conciliation and Arbitration Service in the United Kingdom, the Labour Relations Commission of Ireland and the Federal Mediation and Conciliation Service in the USA you have heard speak at this convention, to come to the Commission. Over the 3 days following the Convention on 29, 30 and 31 October 2007 they are going to speak to us in considerable detail about international practice of mediation.

The WAIRC has been using conciliation over its entire history, although its coercive powers are only rarely used. However, there are differences between conciliation and
mediation and we intend that they speak about, and conduct practical sessions based upon, mediation of industrial issues in their own jurisdictions. Assuming the legislation is passed, the mediation role will be a discrete part of the Commission and we look forward to hearing directly the practice in those other countries. We have invited the other State IR Commissions and the AIRC to attend and they are sending Commissioners to join with us and it is an important initiative taken by the Commission.

That is the shorter term future. Talking about the longer term future is a little more problematic. The imminence of the federal election, and the major parties’ respective policy positions on industrial relations means that the changes wrought by Work Choices are not the last changes we shall be seeing, irrespective of which party forms the next Commonwealth government. I would not be at all surprised if the State government re-examined the position of the WA industrial relations system once the Commonwealth’s position becomes clearer.

One issue for the future may well be whether employees should be given a greater right of access to the Commission. There is already a greater individual employee right of access in WA than in other jurisdictions. The was first the rights created in WA in 1979 for employees to refer not just a claim of unfair dismissal, but also a denied contractual benefit or a dispute over their long service leave, to the Commission. This was far sighted and a credit to the vision of the then Senior Commissioner Eric Kelly, whose 1978 report to the then Minister first recommended it.

The 2002 amendments to the WA IR Act which retained statutory individual contracts (now called Employer-Employee Agreements (“EEAs”)) also extended the rights of individual employees to refer matters to the Commission. Individual employees covered by them were given the right to refer to the Commission a question, dispute or difficulty that has arisen out of, or in the course of employment under an EEA, and the
Commission was given the power to deal with and determine those matters referred to it.\textsuperscript{10}

The bigger picture however lies in the discussion since Work Choices about whether the time has come for there to be a truly national system of industrial relations. The issue is a political, not an industrial, issue and the outcome of the federal election will set the political framework for any discussions between the States on the one hand and the Commonwealth on the other. It is a matter for judgment whether there is any greater prospect for an agreement between the States and a future Commonwealth government now about the content of a national industrial relations system than there has been in the past.

The decision of the High Court in \textit{NSW v. The Commonwealth} (see footnote 8) certainly gives the upper hand to the Commonwealth over the States in respect to its use of the corporations power. A future Commonwealth government might also seek to also use the external affairs or the conciliation and arbitration powers in the Constitution to extend federal coverage and describe the result as a further “move towards” a national system. However, a uniform and complete legislative system (to use the words of Gibbs CJ in \textit{R v. Duncan and Others; Ex parte Australian Iron and Steel Pty Ltd} concerning the validity of the joint Coal Industry Tribunal in NSW\textsuperscript{11} where the States and the Commonwealth each acting in its own field, supplied the deficiencies in the power of the other), is only possible if there is co-operation between the States and the Commonwealth.

If the aim is to create a truly national system, I find it difficult to see how it will be achieved by yet further unilateral action by the Commonwealth. On the contrary, to achieve it, to fix the present uncertainties and not create further ones, the Commonwealth needs the States to agree to such a system. On one view, this gives the States in combination considerable bargaining power.

\textsuperscript{10} \textit{Industrial Relations Act 1979 (WA) s.97Wl}

The States, or some of them, may choose to refer their industrial relations powers to the Commonwealth as the State of Victoria has done. I suggest however that by the measure of the legislation it has now introduced into the Parliament, the present WA government is indicating a preference to retain the power of the WA Parliament to make laws in respect to industrial relations in WA. Whatever the outcome of the federal election there are, I suggest, good reasons why a WA government should not refer any of its industrial relations powers to the Commonwealth. I mention some of those reasons now, not necessarily in any order of importance.

A significant proportion of employees in the private sector in WA are not covered by Work Choices and I would be surprised if a number of WA businesses and organisations would not support being able to access a responsive State-based industrial relations system. The State should retain the capacity to make workplace laws affecting those workplaces to suit local conditions, or emerging circumstances, where it is warranted. The State currently has the right to make workplace laws affecting the working conditions of its own public sector and no good reason presents itself for handing that right to the Commonwealth.

The WA industrial relations system has a dispute resolution system based upon fairness in the workplace. It is a broad conciliation and arbitration power over industrial matters, and the requirement on the WAIRC to decide matters according to a “fair go all round”, has stood the test of time, yet that might not be a requirement that a future Commonwealth government wishes to include in federal legislation. Again, it is difficult to see why a Western Australian government should voluntarily relinquish its right to set its own standards of fairness in Western Australian workplaces.

The right of an employee to refer to the WAIRC a denied contractual benefit is a matter about which Work Choices is silent; that right is likely to be lost if the State refers its powers because it is an exercise of judicial power the Commonwealth has not considered worthy of including in its own legislation. Finally, given the emphasis on reaching agreement at the workplace level, the ease with which industrial agreements can be
registered in the State industrial relations system is simple and straightforward – certainly when compared with registering agreements under the Work Choices legislation.

These considerations, in my view, mean that it is entirely appropriate that the State retain for the future, and not refer, its power to make laws relating to industrial relations. If an agreement with the Commonwealth is possible which provides at least that Commonwealth industrial relations laws are not intended to override complementary State laws, it is far more likely, I suggest, that the State will choose to enact mirror legislation which complements Commonwealth laws in order to achieve an industrial relations system that in relevant respects is uniform and complete. The Commonwealth and the State legislation can provide that proceedings can be commenced in either the Commonwealth or the State Commissions. It is reasonably clear from Gibbs CJ’s consideration of the Joint Coal Industry Tribunal in NSW in Duncan that mirror legislation between the States and the Commonwealth can encompass two tribunals, one State and one federal, deriving power from different sources but constituted by one person12.

The Commonwealth would be able to enact laws which set national workplace standards. These might not be able to be varied at State level although the States would retain the power to make laws which recognise local conditions. Prior to Work Choices, consistency across Australia in relation to the minimum wage was achieved even though the WA legislation required the adoption of the minimum wage set in the National Wage Case unless there was “good reason not to do so”13. In practice, there was one national minimum wage.

While there are other ways of achieving a national system, I suggest that the circumstances in WA favour a model which utilises the State’s industrial relations powers to assist in creating a national system. This is not an impractical suggestion: there are similar models in the areas of family law and consumer protection. In consumer

12 Ibid
13 Industrial Relations Act 1979 (WA) s.51(2)(a), now repealed
protection, the Commonwealth legislation provides that the consumer protection provisions are not intended to exclude or limit the concurrent operation of any law of a State or Territory. Together the States and the Commonwealth have created a national system of consumer protection legislation. Yet, as Professor Williams observes, in the field of consumer protection laws the States have not only passed their own Fair Trading Acts to complement the Commonwealth’s Trade Practices Act but in addition enacted other provisions regarding, for example door-to-door selling, which are not in the Commonwealth’s legislation. It is nevertheless a national system of consumer protection.

The adoption of a similar model in industrial relations appears attractive and it is in this respect that I suggest the WA IR system is well placed to be a bridge over the currently troubled waters of industrial relations.