

High Court Upholds Validity of Work Choices

On Tuesday 14 November 2006, the High Court of Australia by a 5-2 majority dismissed the States' and unions' challenge to the constitutional validity of the federal Workplace Relations Amendment (Work Choices) Act 2005 (Cth) ("Work Choices Legislation"). The Work Choices Legislation had significantly amended the main federal statute with respect to workplace relations, the Workplace Relations Act 1996 (Cth), with effect on and from 27 March 2006.

In its joint judgement Chief Justice Murray Gleeson and Justices Bill Gummow, Kenneth Hayne, Dyson Heydon and Susan Crennan

rejected the challenges by the States and unions and effectively upheld the constitutional validity of the Work Choices Legislation in its entirety.

Justices Michael Kirby and Ian Callinan dissented, both finding the Work Choices Legislation invalid in its entirety, but for different reasons.

For present purposes all employers and employees should proceed on the basis that all current provisions of the Work Choices Legislation are valid and remain unchanged.

Transmission of Business Under "Work Choices"

The implementation of the amendments to the Workplace Relations Act 1996 ("the WPR Act") brought about by the Work Choices legislation has significant ramifications for trading corporations involved in the transmission of business. In particular, the changes affect the obligations imposed on the "successor, transmittee or assignee of the whole or part of a business of another person". The rules relating to a transmission of business are contained in Schedule 9 of the WPR Act.

Termination of Employment

At common law, the practical effect of a transmission of business is that all contracts of employment are terminated as from the transmission date. An employer may

not, without the consent of the employee, transfer the employment contract it has with an employee to another employer. Accordingly, when a business is transmitted, employment contracts are terminated either by notice or by mutual consent. A new employment contract may only be entered into with the consent of both parties.

In the event that an employee is offered and accepts employment with the new employer, issues can arise in relation to the continuity of service and the transmission of particular employee entitlements such as parental leave, annual leave, long service leave and personal carer's leave (including sick leave). The transmission of business rules contained in the WPR Act provide some guidance and clarification.

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Transmission of Business Under “Work Choices” (cont.)

Has there been a Transmission?

In order to determine whether a transmission of business has occurred it must be established as a threshold issue that the new employer has acquired the business or part of a business of the old employer. Importantly, it is not necessary to show a transaction between the parties or the existence of a direct dealing or legal relationship in order for a transmission of business to occur. In *Construction, Forestry, Mining and Energy Union v Fugen Masonry Pty Ltd (AIRC) (PR974320) 2006* the transfer of a number of employees to a different employing entity within a company group structure was found to be a transmission of business for the purposes of the provisions of the WPR Act. The CFMEU claimed that the wages and conditions offered to the employees under a collective agreement were inferior to the pre-existing entitlements. The union successfully argued that a transmission of business had occurred in circumstances where there was no actual purchase of the business assets or shares and, as a consequence of the transmission of business, the employee’s prior entitlements were preserved for a period of 12 months effective from the transmission date.

What Entitlements are Transmitted?

The intended effect of the changes is to ensure that a transmitted employee receives the same entitlements from the new employer that they enjoyed immediately prior to the transmission of the business. Importantly, the new rules place restrictions on the extent to which a new employer will be bound by an award, collective agreement or an Australian Workplace Agreement (“AWA”) following a transmission. The rules also delineate liability for employee entitlements such as annual and parental leave.

Section 599 of the WPR Act provides that the new employer is liable for a transferring employee’s parental leave entitlements if the parental leave entitlement is derived from an entitlement under the Australian Fair Paying Condition Standard (“the Standard”) and the old employer was liable for the parental leave entitlements immediately prior to the transmission of the business. Parental leave entitlements transfer even if the transferring employee is on parental leave at the time of transmission.

The transfer of other accrued entitlements such as annual leave and personal carer’s leave (including sick leave) is dealt with in Section 600 of the WPR Act and is contingent upon the purchaser agreeing in writing, prior to the transmission, to assume liabilities which have accrued under the Standard and to recognise continuity of service for those entitlements. Where the Purchaser and the Vendor are unable to reach agreement about the transfer of a particular entitlement then the old employer will

remain liable for the accrued entitlements and these should be paid out on or before the transmission date.

It should be noted that long service leave entitlements continue to be governed by the applicable state legislation. In New South Wales the provisions of the Long Service Leave Act 1955 provide that continuity of long service leave is not broken by a transmission of business and the leave transmits to the new employer. Superannuation contributions are not subject to the Standard and accordingly should be paid prior to the transmission of business.

Transfer of Industrial Instruments

The rules relating to the transfer of industrial instruments such as awards, collective agreements and AWAs are complex. Generally, a new employer will be bound by a pre-existing award, agreement or AWA for a period of 12 months from the date of transmission (“the Transmission Period”) after which time the terms and conditions of employment will be determined by the applicable Federal award or the Standard. The exception to this rule is that the industrial instrument will not bind a new employer if:

- the industrial instrument ceases to operate,
- there ceases to be any transferring employees,
- the award or agreement is replaced by an AWA, or
- the transmission period of 12 months expires.

However, an employee and an employer can, during the 12 month transmission period, agree to negotiate an AWA which will override the transferred industrial instrument.

Notice Requirements

A new employer must, within 28 days from the transmission date, give transferring employees a copy of a transmission of business notice which contains information about the employee’s transmitted instrument (award, AWA or collective agreement), the date on which the 12 month transmission period expires, the type of instrument that can exclude or replace the transmitted instrument and any applicable provision of the Standard which will continue to apply. Importantly, the new employer is required to provide a copy of the notice to the Employment Advocate within 14 days after notice is given to the employees. The notice is only “lodged” when it has been received by the Employment Advocate and substantial monetary penalties can be imposed in the event of non-compliance with the statutory requirements.

Transmission of Business Under “Work Choices” (cont.)

Duress and Coercion

Section 400(5) of the WPR Act provides that an employer must not apply duress to an employee “in connection with an AWA”. The Office of Workplace Services (“OWS”) is currently prosecuting a Perth company based on allegations that the company applied duress to force employees to sign an AWA during the Transmission Period. The AWAs that were offered to the transmitted employees removed future pay rises and also reduced holiday leave loadings and paid rest breaks. A conundrum arises because on one view, the transmitted employees terms and conditions are set for a period of 12 months during the Transmission Period. However, if an employee enters into an AWA during the transmission period then, and on

a technical construction of the WPR Act, the pre-existing terms and conditions of employment are no longer applicable. In such circumstances, the employer can, arguably, force the employee to enter into an AWA which will reduce the terms, and conditions of employment.

The difficulty is that whilst the WPR Act purports to create a special category of transferring employee, there appears to be no statutory protection for transmitted employees who are forced to enter into an AWA as a condition of ongoing employment. The OWS prosecutions will be determined in the Federal Magistrates Court in the near future and both lawyers and employers will be keeping a watching brief on the outcome.

Employers Beware: You Will Be Bound By Your Workplace Policies Documents

Most employers have written policies documents or manuals which set out a wide range of policies and procedures which are intended to apply to employees, and which are in addition to an employee’s individual employment contracts. A landmark ruling by the Federal Court in *Nikolich v Goldman Sachs J B Were Services Pty Limited* [2006] FCA 784 has sent a clear message to employers that these policies will be legally binding and form part of their employment contracts with employees. The consequence of this decision is that any failure by an employer to comply with a provision which is contained in a policies document can be argued by an employee to constitute a breach of the employment contract, giving rise to the possibility of an award of damages against the employer. The decision is currently on appeal.

This decision is particularly significant given the erosion in remedies previously available to employees by virtue of following:

- The “Work Choices” amendments to the Workplace Relations Act 1996 (Cth) (“the WPR Act”) significantly reduced the scope for employees to commence action against employers alleging unfair dismissal. Employees who are now specifically excluded from bringing an unfair dismissal application under the WPR Act are:
 - (i) Employees who have not completed a “qualifying period employment” of at least 6 months (or such shorter or longer period which has been agreed in writing, which must be reasonable in the case of a longer period);

- (ii) An employee who is employed by an employer who employees 100 or less employees at the time of the employee’s termination of employment (including employees of related corporations);
- (iii) An employee who has had their employment terminated for “genuine operational reasons or reasons that include genuine operational reasons” (including redundancy);
- (iv) Fixed term, casual, trainee and seasonal employees;
- (v) Employees serving a period of probation the duration of which is determined in advance, and is 3 months or less, or otherwise reasonable given the nature and circumstances of the employment;
- (vi) An employee not employed under an award or workplace agreement whose remuneration exceeds \$98,200.00 per annum (or such other amount as altered annually by indexation).

- The WPR Act applies to the exclusion of all other State and Territory industrial legislation, meaning that remedies which were previously available to employees, such as the unfair contracts jurisdiction contained in section 106 of the Industrial Relations Act 1996 (NSW) are no longer available to employees.

Given these factors, it is more likely that employees will commence common law claims for breach of contract, including claims based on an employer’s failure to comply with its own policies and procedures.

Employers Beware: You Will Be Bound By Your Workplace Policies Documents (cont.)

Outline of the Case

Nikolich v Goldman Sachs J B Were Services Pty Limited [2006] FCA 784 involved a former Financial Adviser of Goldman Sachs J B Were ("the Company") who developed a depressive disorder and was ultimately terminated by the Company. His depression followed a long dispute with management regarding the manner in which clients were allocated to advisors. At the time that he accepted employment, he was provided with a policy document entitled "Working with Us" ("the Policy") which set out a wide range of procedures and policies including in relation to integrity, safety, harassment and grievance procedures.

Nikolich had filed a grievance against his manager in relation to his manager's decision to assign members of Nikolich's investment adviser team to another team. Subsequently, Nikolich left work on sick leave and his solicitors advised the Company that returning to work would have a detrimental impact on his health. The Company responded by saying that it was clear that Nikolich did not intend to return to work and therefore regarded his employment as having been terminated.

Nikolich brought proceedings against the Company on three bases:

- (1) that the Company breached his contract of employment.
- (2) that the Company unlawfully terminated his employment by reason of his mental disability, or his temporary absence from work because of illness, contrary to the WPR Act; and
- (3) that the Company engaged in misleading and deceptive conduct contrary to sections 52 and 53 of the Trade Practices Act 1974 (Cth) and also the Fair Trading Act 1987 (NSW).

While rejecting claims 2 and 3, Justice Wilcox accepted that the Company was in breach of the employment contract by failing to adhere to the procedures contained in the Policy. After considering evidence that employees could be disciplined for breaching the Policy and that managers were expected to adhere to it when dealing with staff, the Court held that the Policy was binding as part of the employment contract and as such conduct which amounted to a failure to apply the provisions contained in the Policy could amount to a breach of the employment contract.

In this case, the Company was in breach of the Policy by failing to prevent the employee being bullied and harassed, and failing to comply with grievance procedures set out in the Policy. Of significance was that the Court was prepared to interpret broad statements of philosophy as imposing binding contractual obligations.

The Court held that the Company's breaches of the Policy were responsible for causing Nikolich psychological

damage including a major depressive disorder. Damages of \$515,000.00 were awarded to the employee for lost income from the date of termination until the date of the decision and loss of future earnings on the basis that it would take the employee 6 months to find a new job.

Practical Consequences

This decision highlights the importance of employers recognising that they will be contractually bound by their policies and procedure documents.

For example, it is commonplace for policies documents to contain highly detailed and prescriptive provisions dealing with termination of employment. These provisions may set out procedures which need to be followed in any case of disciplinary action being taken by the employer against an employee. Such policies are usually drafted having regard to common law principles of due process, including the requirement for counselling, warnings, meetings and dismissal procedures. Note that it would be prudent for an employer to have regard to these principles in circumstances where an employee is still able to commence proceedings for unfair dismissal. These policies become problematic for an employer in circumstances where the employer wishes to terminate an employee and that employee would not ordinarily have recourse to any unfair dismissal remedy by virtue of a specific exclusion under the WPR Act. If an employer dismissed an employee summarily and provided that employee with payment in lieu of notice in accordance with the employee's contract of employment, the employer may still expose itself to a common law breach of contract claim by the employee if the employer had not complied with a specific procedure included in a policy document.

Many policies documents also contain grievance handling procedures which require the employer to follow a specific process in handling any employee grievance, including the requirement to conduct a full investigation and report. An employee may point towards any failure by an employer to comply with such a grievance handling procedure in a claim for breach of contract.

As highlighted by the Nikolich case, broad statements of philosophy may impose binding contractual obligations. For example, a policy document may contain a general provision such as: "this policy is provided to protect the interests of employees and ensure that any disciplinary action is fair and reasonable and complies with current legislation." Such a provision is problematic in that it arguably imposes a positive obligation for the employer to act fairly and reasonably, and by referring to current legislation may

Employers Beware: You Will Be Bound By Your Workplace Policies Documents (cont.)

import the provisions of a range of discrimination and employment related legislation.

Suggested Action

Employers should be aware that the Courts now appear willing to look outside the express terms of an employee's individual employment contract with respect to the termination of employment. For example, damages in *Nikolich* were awarded far in excess of the notice of termination provision contained in the contract. Damages

for psychological injury, which are unable to be awarded for unfair dismissal under the WPR Act, were also awarded.

Employers should therefore review the terms of any policies which apply to employees and determine whether the provisions contained within these policies impose any significant and burdensome obligations on the part of the employer, and if necessary, consider amending these policies to minimise the risk of employee litigation.

Occupational Health & Safety Legislation Changes

The New South Wales government has released the Occupational Health & Safety Amendment Bill 2006, which contains proposed amendments to the current Occupational Health and Safety Act 2000. An inquiry has been called to investigate the proposed changes.

One of the main changes proposed would see the words "so far as is reasonably practicable" added to the previous requirement to ensure the health, safety and welfare of employees and those at the place of work:

"Ensure, so far as is reasonably practicable, the health safety and welfare...."

This proposed change is unlikely to have any significant impact. A defence already exists based on "reasonably practicable" compliance. In the past it has been very difficult to establish this defence with the Courts making

the "reasonable practicable" test a highly onerous one. It is only in the rarest of cases that the defence has succeeded and whilst the onus has now moved to the prosecution, we do not believe it will be any easier to defeat a prosecution if the amendments ultimately come into effect.

The Bill also proposes to provide WorkCover with the power to consult and advise employers on safety related matters. This includes providing written advice. Whilst we see this as a positive step, our concern is that the Bill states such advice cannot be tendered to the Court. This essentially means an employer can comply completely with WorkCover's written advice and recommendations, but not be able to present this to the Court in defence to a prosecution or in mitigation of any penalty.

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