

**INDUSTRIAL RELATIONS  
THE YEAR IN REVIEW  
(2005-2006)**

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## Introduction

With the exception of those of us who have been blessed with the insight of Nostradamus, it is very difficult to predict the future. Take for example the avid horse race punter. Try as she or he may, there is never any certainty in backing the winner of the Magic Mile, or ensuring that a well paying trifecta will come in. Similarly no one could have predicted what happened in Australia and abroad over the past 12 months. For example, who would have anticipated 12 months ago that the sugar cane town of Innisfail in Far North Queensland, would have been so savagely flattened by the force of Cyclone Larry?

At a broader level, 12 months ago, there was little public discussion of Hezbollah and the conflict between the people of Lebanon and Israel. Nor was there any understanding that the city of Toowoomba on the Darling Downs, would become less remembered as the Garden City and more renowned for the preparedness of some of its own people to drink treated effluent water.

Even our own Prime Minister was probably unaware, or at least caught off guard, when his erstwhile faithful Treasurer, Peter Costello was going to reveal to the Australian public, the nature of discussions held at a secret meeting in 1994.

Well life in Australia continues amidst all of this unpredictability and there remains for us all a reality and inevitability, of getting on with our lot.

Despite the highs and lows and the increased threat to national safety, as random acts of terrorism are being exacted against an increasingly larger pool of innocent people, government must seek to guide and manage for the broader public good and we the individuals within the community must realign our own visions and self effort against that backdrop.

The world of industrial relations in Australia and all that shapes it and all on which it has an impact, is no different. We live in uncertain times and we must maintain the skill of being adaptable and responsive to these times.

So where have we been and where are we heading?

## October 2005

The introduction of the *Building and Construction Industry Improvement Act 2005* (Cth) [‘the BCII Act’] saw a new approach by government in seeking to address the long running complaints of employers and contractors within that industry.

The days of Norm Gallagher and the Builders Labourers' Federation ("the BLF") seemed but a distant memory, as the role of the Australian Building and Construction Commissioner (ABCC) established under that Act, came into effect on 1 October 2005.

The key functions of the ABCC are to:-

- Enforce the provisions of the *Workplace Relations Act 1996 (Cth)*
- Take over the role of the former Building Industry Taskforce;
- Investigate reports of unlawful practice and behaviours within the industry;
- Maintain an active presence on construction worksites;
- Provide advice and assistance on the application of the BCII Act, the Workplace Relations Act, federal awards and agreements;
- Act promptly on unlawful industrial action;
- Commence court proceedings in response to breaches of the relevant law and
- Provide representation where appropriate to employers and employees.

In Queensland, on the other hand, legislative reform of a different kind was occurring, when State Parliament introduced proposed changes to the *Workers' Compensation and Rehabilitation Act 2003*, that would enable State Industrial Commissioners to determine whether or not employees were entitled to claim statutory compensation for "injury" under the State's workers' compensation law.

Without any great fanfare, the *Workers' Compensation and Rehabilitation and Other Acts Amendment Bill* proposed to open up an alternative path of appeal, for aggrieved persons seeking to challenge "determination of injury" decisions of the Workers' Compensation Regulatory Authority (QCOMP).

The implications of these proposals were quite significant. A particular growth area in workcover law, is the workplace stress claim. Many of these claims arise from what is being described in modern terms as "workplace bullying" or "workplace harassment".

A central consideration in determining if work is a significant contributing factor to the psychological or psychiatric injury, is an assessment as to whether the stressor that gave rise to the injury, arises from reasonable management action taken in a reasonable way. Often this is an issue that arises out of performance management and personality clashes at work. If it is determined that the stressor that contributed to the injury, arises as a consequence of management action that is regarded as reasonable and taken in a reasonable way, then such a finding provides an exclusion to the eligibility for compensation of an injury by virtue of Section 32(5) of the Act.

One only needs to observe the daily lists of the Queensland Industrial Relations Commission, to appreciate that these amendments have already caused a shift away from the work that had been processed within the Industrial Magistrates Court. There is also

strong support for the option being created from practitioners, as the amendments have enabled the inquiry as to what constitutes “reasonable management action taken in a reasonable way”, to be undertaken by persons who in many cases will have far greater expertise in adjudging the human resource management and industrial issues associated with the claims.

Yet by far the most significant industrial relations matter that occurred in the month of October, was the much awaited release of the Australian Government’s ‘WorkChoices’ Industrial Relations policy.

Not since the advent of the *Commonwealth Conciliation and Arbitration Act* of 1904, had the people of Australia, seen such a wholesale restructure of the employment laws impacting on all of the Australian states. On a daily basis in the media, we were confronted with unprecedented publicity campaigns, explaining in a variety of ways, the general principles pertaining to the proposed new legislative reform.

For many practitioners there was a sense that the baby was being thrown out with the bath water, while others who had operated across the dual systems of state and federal industrial law, saw inherent advantages for employers and individual workers in what was being proposed. What became apparent after a study of the available policy documents, was that there was a wholesale shift proposed in the language and structure of the law and an unashamed attempt by the legislature, to rely on the corporations powers at Section 51 (20) of the *Australian Constitution* in a bid to secure the unitary system of industrial relations for the country.

The Official Announcement read something like this

*“WorkChoices represents sensible and practical change to ensure that Australia can continue to enjoy high levels of prosperity and productivity into the future.”*

Less clear at that time, was the full extent of the implications for small business and those employees who work in corporations that employ fewer than 100 employees.

At one level, we were told that the Australian Government will establish a new and totally independent wage setting body, the Australian Fair Pay Commission, with the primary objective of promoting the economic prosperity of Australians, while at another, there were claims that more than 3.6 million Australians who work in businesses with fewer than 100 staff, will lose their right to protection from unfair dismissal.

## November 2005

With the traditional passing of the Melbourne race week, the southern States in particular had begun preparing for a national day of protest action, to coincide with the introduction of the *Workplace Relations Amendment (WorkChoices) Bill*.

In Queensland, over 60,000 workers reportedly turned out to protest against what the ACTU labelled as the Federal Government's "draconian workplace laws". In Brisbane alone, 25,000 people crowded into the South Bank precinct, to hear the Opposition Leader Kim Beazley address the labour faithful. In other parts of the state, thousands of workers gathered in pubs, clubs and sporting venues to illustrate, according to the QCU General Secretary Grace Grace, "that working people would not accept cuts to their basic rights, pay and entitlements".

The figure nationally, was reported at over 550,000 people, in what was being labelled as the biggest ever worker meeting conducted in the country. According to the ACTU President Sharon Burrow:

*working families built this country, fought and died for it, and do not deserve to have their living standards and rights at work taken away from them.*

## December 2005

Well as we all know the bill was passed with the new Senate majority in December, with some of the laws that dealt with the new statutory offices, such as the establishment of the 'Fair Pay Commission', coming into effect at the date of assent.

In a bid to keep the momentum going, the newly established Award Review Taskforce, at this stage only with 1 full time member, released 2 discussion papers on '*Award Rationalisation*' and '*Rationalisation of Wages and Classifications*'.

But the smell of resistance remained in the air, with the New South Wales Attorney-General announcing on 21 December, that his government would mount a challenge to the new laws and seek the support of the other States of the Commonwealth in the High Court.

## January 2006

Undeterred, in January 2006 the Minister for Employment and Workplace Relations announced the appointment of six prominent industrial relations specialists to form the Award Review Taskforce Reference Group.

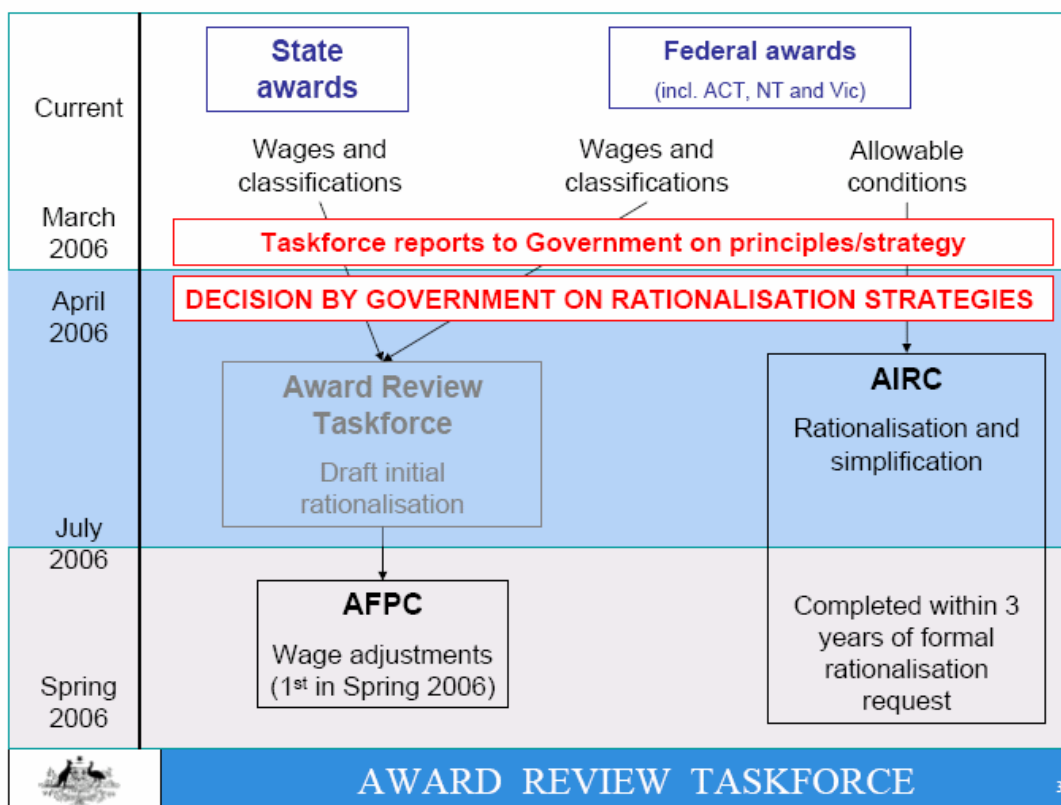
The members were:-

- Matthew O'Callaghan (Taskforce Chairman);
- Peter Costantini;
- Andrew Herbert;
- Greg John;
- Tony Slevin;
- Warren Stooke; and
- Nick Wilson.

The terms of reference for the Taskforce, together with a process model for the formulation of its recommendations to the Minister were as follows:-

## Terms of Reference

- Federal Awards
  - Industry basis
  - General coverage
  - How to handle 'preserved award entitlements'
  - Development of a recommended strategy
- Wages and classifications
  - Providing a more easily understood list of classifications and pay rates
  - Removing state-based differences within three years
  - Amalgamating pay scales from federal and state



In addition, January also saw the first phase of the education assistance for industry being 'rolled out', with the Minister announcing the release of a tender to develop a national network of industry-based advisors, who would be capable of delivering advice on the application of the WorkChoices reform to industry.

## February 2006

In one of the first public demonstrations of might by the Australian Building and Construction Commissioner, 400 construction workers engaged at the dispute ridden Western Australian Metro-Mandurah Rail Link Project, were put on notice that they would be prosecuted under the new building industry laws for taking 'unlawful industrial action', following the sacking of a CFMEU show steward. The walk off took place, despite the union's recommendations that the workers return to work and let the Australian Industrial Relations Commission resolve the termination of the union steward.

In a similar show of strength, the Queensland Industrial Relations Commission rejected the submissions of the Australian Government advocate to adjourn the 2006 State Wage

Case proceedings, until such time as the first ruling of the Australian Fair Pay Commission (AFPC) had been issued. The Queensland Council of Unions General Secretary Grace Grace, said the decision was a “major blow to the credibility of the Federal Government's argument that workers should not receive a pay increase until the AFPC is operational”.

The decision reinforced to practitioners, that the bathwater needed to be released slowly down the kitchen sink, not by pushing the bathtub (baby and all) off the kitchen table.

### **March 2006**

St Patrick's Day had been over for nearly a fortnight, when the remaining and substantive provisions of the WorkChoices legislation came into force on 27<sup>th</sup> March.

At the same time, Minister Andrews announced that the Federal Government would release 291 pages of Regulations, to bring the total legislative package, even without the Rules of the Commission, to in excess of 1050 pages of law.

And the detractors of the new law took no time at all, to highlight cases where the employees working in businesses of less than 100 employees were being denied access to unfair termination laws, or where unscrupulous employers had commenced renegotiating employment entitlements of workers, in a bid to take advantage of the newfound benefits of WorkChoices.

### **April 2006**

The claims and counterclaims continued in April of this year, when 29 pig and beef line workers of the Cowra Abattoir were terminated and then reinstated in a bid by the employer to reduce labour overheads at the workplace.

From the worker's point of view, the new contracts involved pay cuts and losses to bonus payments of up to \$180 a week. From the employer's perspective, the proposal sought to put an end to the ongoing losses being realized by the company and an attempt to ensure the future viability of the firm.

In a bid to show the evenhandedness of the WorkChoices law, the re-badged Office of Workplace Services was called in to investigate the lawfulness of the company's action and in particular claims that the employer had targeted union employees as part of the selection process. The investigation by the Office, found no evidence to support claims that the firm had targeted union members. The Office Head, Nick Wilson, also denied the decision was a "green light" to sack and hire workers. According to Mr Wilson, "if a company is masking its real reasons, if it doesn't really have financial difficulty or if it

really does have an ulterior motive of moving industrial instruments (awards), then that would be unlawful".

And so the first real fracas over what constitutes 'operational reasons' for terminating employment contracts commenced.

April 2006, also saw the announcement of the much awaited review of the Commonwealth *Occupational Health and Safety (Commonwealth Employment) Act 1991*. This review of the Commonwealth Employee's OHS law, is the first substantial review of the legislation since its inception in 1991. What is intended, is to bring the legislation in line with the structure and underpinnings that are characteristic of other state based laws. For some pundits, this is seen as only a first step in what is also regarded, as a wider agenda to assume responsibility for state based OHS arrangements.

In Queensland, occupational health and safety was also high on the industrial agenda of Government, with the Minister for Industrial Relations introducing a right of entry for OHS representatives into the *Queensland Workplace Health and Safety Act 1995*.

Under the proposed amendments, union representatives would be able to apply to the Industrial Registrar and be given the right to enter workplaces on health and safety grounds.

The proposed amendments gave representatives wide ranging powers of entry to investigate workplace health and safety issues, where there is a reasonable suspicion of contravention of the Act. The representatives would also have a right of entry for consulting with workers on occupational health and safety matters, subject to undertaking approved training.

**And if there was ever any better illustration of the importance of government's role in establishing effective workplace health and safety laws, then it can be illustrated by the surrounding events that took place at 9.23pm on 25th April at the Beaconsfield Gold mine, 40km north-west of Launceston.**

A rock fall at the mine, was to change the life of the 17 miners working underground that evening. Fourteen workers make it to a safety chamber and escape unhurt. Three men remained trapped in the mine, sparking the commencement of a large search and rescue mission. Two days later, one of the missing men was found dead. A further three days later, the remaining two men were claimed by rescue workers to be alive and the nation's attention is drawn to the small Tasmanian town.

## May 2006

International Labour Day, saw the Australian Fair Pay Commission inviting written submissions from interested organisations and individuals, in preparation for the first minimum wage determination.

The commencement of May also saw the large trail of senior constitutional and industrial lawyers making its way to Canberra, as part of the major stage of submission making to the High Court. ([\*State of New South Wales & Ors v Commonwealth \(AKA Workplace Relations Challenge\)\*](#)).

At issue was the role of the corporations power provided within the constitutional framework and the ability to use the powers to regulate financial and trading corporations, in a more universal sense

On the morning of the 9<sup>th</sup> May, at Beaconsfield Gold Mine, Todd Russell and Brant Webb emerge from the mine entrance, after being trapped 1 kilometre underground for two weeks. The fate of the mine and its workers remains unknown.

At the local level within the Queensland public sector, May also signalled the commencement of the consultation phase for the proposed 'EB6', that had been developed for nurses at public hospitals across the state.

The month of May also saw the retail giant Spotlight come under the spotlight, when it was claimed to be forcing new employees to sign an AWA that scraps overtime, weekend and public holiday loadings in exchange for [just 2 cents an hour](#) above the award rate.

## June 2006

By June 2006, the Minister for Employment and Workplace Relations had come under even more attack, as new figures released by the Opposition party had revealed that 22% of workers entering into Australian Workplace Agreements had received no pay rise at all in the last 12 months.

On the other hand, the Government had sought to recognize the need to protect independent contractors and other workers, by introducing into the House of Representatives on 22 June 2006, the Independent Contractors legislation.

The proposed legislation is made up of two bills, the *Independent Contractors Bill 2006* and the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*. The intent of the legislation is to:

*“Protect genuine employees from ‘sham’ contracting arrangements (where an employer seeks to disguise a genuine employment relationship as an independent contracting relationship), and from threatening or deceptive behaviour aimed at making them change their status to independent contractors. “*

The proposed changes are quite detailed in nature and will include:-

- Maintaining existing specific protections under State legislation for contracted outworkers in the textile, clothing and footwear (TCF) industry.
- Ensuring that where a contracted TCF outworker is not covered by a State or Territory law providing for some form of minimum remuneration, they will be covered by the Australian Fair Pay and Conditions Standard.
- Override State laws which ‘deem’ certain categories of independent contractor to be employees for the purposes of State industrial relations legislation.
- Replace existing State unfair contracts jurisdictions with one single federal unfair contracts jurisdiction, using related constitutional powers, including the corporations power.

At the State level, on 21 June the Minister for Industrial Relations announced that an Inquiry would be conducted into the impact of WorkChoices legislation.

The announcement by the Minister on 21 June, saw Deputy President Dierdre Swan appointed to head a 3 person Task Force to take evidence and report on the impact of the federal law on Queensland workplaces, employees and employers.

According to Minister Barton, the inquiry would gather evidence across Queensland’s provincial and regional centres between July to October, with a view of finalizing their report to Government by 23 December 2006.

In keeping with the prevailing mood of the Union movement, the end of June saw another scheduled industrial day of action, when thousands of workers returned to the streets to protest against the federal industrial laws. In Queensland, ACTU Secretary Greg Combet addressed a crowd of union stalwarts at the Roma Street parklands, as the ongoing opposition to the nature of the laws, saw no sign of dissipating in the short term.

## July 2006

On 1<sup>st</sup> July, the *Queensland Child Employment Act 2006* came into operation, with a primary aim of ensuring that school-aged or young children may not perform work between the hours of 10pm and 6am.

And in a bid to increase the 'sell' of the WorkChoices law, the Prime Minister announced the establishment of a Workplace Relations taskforce, to assist Minister Andrews in communicating the WorkChoices legislation to the community.

That Task Force was to be chaired by Mr Andrew Robb and in a show of strength for the Queensland liberal party, also included Senator Santo Santoro as its Deputy Chair.

Several weeks later, on 25th July, the Australian Building Construction Commissioner commenced legal action in the federal Court against 107 construction workers involved in the unlawful industrial stoppages on the Perth to Mandurah rail project . According to Commissioner John Lloyd, when the workers walked off the job for seven days in February, the construction company Leightons, lost an estimated \$200,000 a day in costs under the contract.

Returning again to the Sunshine State, new work practices were beginning to emerge. A case in point was at the Mater Private Hospital, where some of its nursing staff according to the Queensland Nurses Union, were being offered individual Australian Workplace Agreements, something reasonably foreign to the nursing industry in this state at its key hospitals.

July also saw the handing down of the Queensland State Wage Case Decision, with predictable cost of living adjustments to the basic entitlements as follows:-

- (i) increase the Queensland Minimum Wage by \$19.40 per week;
- (ii) increase award rates of pay by \$19.40 per week; and
- (iii) increase award allowances which relate to work or conditions which have not changed and service increments by 4%.

By the end of July, the Award Review Taskforce had also provided to the Federal Minister, their interim reports on proposed strategies for the rationalisation of federal awards and the rationalisation of wage and classification structures. Unfortunately for those keen to know more, the findings and recommendations were not made available to the public.

## August 2006

With the passing of time, some policy shifts are emerging, as 'The Australian' newspaper reports on 11 August:

*“that the Labor Opposition will consider a national system of workers' rights and conditions in a move designed to simplify the regime and win the support of business.”*

According to that paper, the “concept, pushed by senior party figures who want to embrace the simplicity of a single system, is a dramatic departure from the old model of state and federal awards, which state Labor premiers have launched a High Court challenge to reinstate”.

And if that isn't enough to create complete confusion among workers who have rallied long and hard for the preservation of the state based industrial laws, the Spirit of Australia, QANTAS announces that it will be soon introducing AWA's into certain parts of its workforce. According to the Herald Newspaper, the Chief Executive Officer, Geoff Dixon believes that

*"We have come to the conclusion in recent months that we need a range of industrial instruments and we will be still, very much, having our enterprise bargaining agreements with a lot of our people, but where we need greater flexibility, where we think it's better utilised, we will be using AWAs."*

In forecasting future changes, Mr Dixon announced that there will be approximately 1000 management positions being made redundant within the company over the next six to nine months.

For the time being, that announcement has been overtaken by that made by Premier Beattie on 15th August, that he was going to the polls in an election to be fought on water, power and healthcare.

## September 2006 and Beyond

So where are we heading?

At this stage it remains somewhat unclear. There is a sense that the federal industrial relations law is here to stay and that one way or other we are facing a national system of industrial relations. It also may be a possibility that the state systems will develop more

sophisticated models for their public sector workforces, as these areas for the most part, will remain outside of the scope of the federal constitutional power.

It is also likely that we will see a growth in single workplace agreements, as the greater evidence of individualism in society, causes people to broker arrangements with only themselves in mind.

Despite evidence of Unions membership increasing, the nature of 'one off' service provision, should also be considered more seriously by the Union movement, as more and more individuals fall victim to bargaining inequality essentially, driven by the lack of affordability of legal representation services.

Yet despite all of these new features of our industrial work life, after 100 years of regulated industrial relations, some of the basics remain.

What is clear is that there remains a need for all of the participants (particularly the practitioners) to respect the rights of the individual worker. In a similar vein, is the requirement that workers and their Unions, must respect the rights of the owners of capital to determine how they decide to invest in production.

Ultimately though, there is a broader requirement and that is the need for an ongoing appreciation of fairness at work, to ensure that the social fabric that has held our society together and distinguished it from so many others, is allowed to remain.

**Andrew See**  
**23 August 2006**

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