

# FOCUS

## WORKPLACE RELATIONS



April 2007

## STEERING TOWARDS A FEDERAL INDUSTRIAL RELATIONS SYSTEM

The recent Federal Court of Australia decision to shut down the NSW Industrial Commission's Tristar enquiry shows the extent of the takeover of state industrial relations. Senior Associate John Naughton and Law Graduate Andrew Stirling report.

We also look at self insurance under Comcare; deficient industrial action notices; and when employers must prove termination reasons

### HOW DOES THIS AFFECT YOU?

- The decision raises the question of what remains of state industrial relations for constitutional corporations.
- WorkChoices deals comprehensively with constitutional corporations in their role as employers. Further, the *Independent Contractors Act 2006* (which commenced on 1 March 2007) also relies on the corporations power to expressly override the operation of unfair contracts laws in Queensland and NSW.

onsite. The employees claim that they have no work to do and that Tristar is only continuing to employ them to avoid large redundancy payouts. The suspicion is that they will be terminated once current redundancy arrangements have lapsed.

In response to the dispute, the NSW Minister for Industrial Relations directed the NSW Industrial Relations Commission (the **Commission**) to undertake an inquiry into the matter and report to him. The inquiry required the Commission to consider:

- the facts and circumstances of the dispute;
- the availability and adequacy of remedies available under Commonwealth and NSW industrial relations legislation in the circumstances presented by the case; and
- any recommendations it would make, including suggested law reform, to resolve disputes of this nature.

### BACKGROUND

Tristar Steering and Suspension Australia Limited (**Tristar**) has been involved in a protracted dispute with its employees at its Marrickville, Sydney, operations. Most of Tristar's Sydney employees have been made redundant, with only 26 employees remaining



## DECISION

The *Workplace Relations Act 1996* (Cth) (the **Act**) is intended to apply to the exclusion of state or territory industrial laws 'so far as they would otherwise apply in relation to an employee or employer'.<sup>1</sup> 'State or Territory industrial law' is defined to include the *Industrial Relations Act 1996* (NSW) (the **State Act**).

The Full Court of the Federal Court accepted unanimously that since the introduction of WorkChoices, the State Act is invalid if it tries to regulate constitutional corporations who are employers, or their employees.<sup>2</sup> The court observed that while the focus of the legislation was on those matters affecting both employer and employee simultaneously, it covers either employers or employees alone.

The court concluded that the Commission did not have jurisdiction to hold an inquiry into the dispute involving Tristar, its employees, or otherwise report on the matters referred to it by the Minister.

## SELF-INSURANCE UNDER COMCARE AND OPTING-OUT OF STATE WORKERS' COMPENSATION REGIMES AND STATE OHS OBLIGATIONS

The High Court has upheld the validity of the Comcare workers' compensation scheme and its extension to specified non-government employers. Senior Associate Ric Morgan and Articled Clerk Ben Ryde report.

### HOW DOES IT AFFECT YOU?

- If eligible, there may be significant cost savings in self-insuring under the federal Comcare regime.

- Companies obtaining a licence to self-insure are covered by Commonwealth law for both their workers' compensation and OHS obligations.

The effect is that two similar companies in the same industry may be regulated by different regimes.

## BACKGROUND

Comcare is a scheme covering those employed by the Commonwealth, by a Commonwealth authority or by a licensed corporation. A corporation is eligible for a licence if it competes with a Commonwealth authority (or a corporation that used to be an authority) and satisfies certain financial criteria.

Optus Administration Pty Ltd (**Optus**) had been granted a licence under Comcare.<sup>3</sup> Optus estimated a saving of \$2.3m a year in premiums.

The Attorney-General for Victoria challenged the validity of the sections under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the **Act**) allowing corporations to self-insure with Comcare and be exempt from state self-insurance.<sup>4</sup> He argued that the laws breached section 51(xiv) of the Constitution, that is the insurance power allowing Federal Parliament to make laws with respect to insurance, other than state insurance.

## DECISION

The High Court split 5:2, along the same lines as the landmark WorkChoices decision of 2006. The majority held that the relevant provisions in the Act are valid. The court also held that Comcare is supported under the corporations power.

The court did not address the validity of the *OHS and SRC Legislation Amendment Act 2006* (Cth) (the **OHS and SRC Act**), broadening the scope of the Commonwealth occupational health and safety (**OHS**) regulations to include those companies licenced as self-insurers with Comcare.

## IMPLICATIONS

The state regimes for workers' compensation will no longer apply to companies self-insuring under Comcare.

3. In addition to Optus, a broad spectrum of industry currently self-insures under the Federal scheme, including John Holland (building), NAB (banking) and Linfox Australia (logistics).

4. *Attorney-General (Vic) v Andrews and Ors* [2007] HCA 9.

1. Section 16(1), *Workplace Relations Act 1996* (Cth).

2. *Tristar Steering and Suspension Ltd v Industrial Relations Commission of NSW* [2007] FCAFC 50.



The decision in this case coincides with the commencement of the OHS and SRC Act. Subject to any constitutional challenge to that Act, eligible employers will be regulated by Commonwealth laws for both workers' compensation and OHS obligations.

## INDUSTRIAL ACTION RESTRAINED DUE TO DEFICIENT NOTICES

Notices of industrial action during enterprise bargaining negotiations must be sufficiently clear when describing the action to be taken. Lawyer Stacey Van der Meulen reports on a decision of the Federal Court finding fault with a union's notice.

### HOW DOES IT AFFECT YOU?

- Parties seeking to rely on notices to support industrial action must ensure they comply with the technical requirements of the *Workplace Relations Act*.
- An employer is entitled to challenge any notice if these requirements are not met. Further, industrial action taken in reliance on deficient notices may not be protected and is consequently unlawful.

The Liquor, Hospitality and Miscellaneous Workers' Union (the **LHMU**) issued a notice to CSBP Ltd (**CSBP**) under section 441 of the *Workplace Relations Act 1996* (Cth) (the **Act**) advising that certain of its members would be taking 7 days' industrial action (protected action notice).

CSBP sought urgent interlocutory injunctive relief against the LHMU on the basis that the threatened industrial action was not protected and therefore unlawful.<sup>5</sup>

CSBP argued that the notice initiating the bargaining period (the initiating notice) was invalid and that there was no valid bargaining period because:

- the initiating notice was directed to CSBP and two other unions as negotiating parties and stated that the LHMU intended to make

a collective agreement with these other negotiating parties; and

- the Act did not allow a union to initiate a bargaining period in pursuit of a multi-union agreement.

In the alternative, CSBP argued that the protected action notice did not adequately state the nature of the intended action and was therefore invalid. The protected action notice failed to state:

- whether all employees who were members of the LHMU would take part in the threatened action, which could have had serious safety issues for CSBP; and
- the specific times the action would commence and when work would resume.

### SERIOUS ISSUE TO BE TRIED

The court was satisfied there was a serious question to be tried as to whether the initiating notice and protected action notice were valid. The court found the issues raised by CSBP to be of reasonable substance and significant legal complexity. Given that CSBP faced very significant financial loss and that there was the real prospect of damage to third parties, the court considered the balance of convenience weighed heavily in favour of an injunction.

The court ordered the LHMU to withdraw the protected action notice and restrained the LHMU from giving, or threatening to give, any further notices under section 441 of the Act or any further notice initiating a bargaining period which named any other union as a negotiating party.

## EMPLOYER MUST GIVE REAL REASONS FOR TERMINATION

When an employee claims their termination was on the basis of a prohibited reason, it is up to the employer to prove that the termination was for another reason. Lawyer Elena Tsangari reports.

### HOW DOES IT AFFECT YOU?

Employers should plan terminations carefully and consider whether the employee has any attributes that might give the termination a

5. *CSBP Ltd v Liquor, Hospitality and Miscellaneous Union* [2007] FCA 539.

flavour of unlawful termination. If so, it is important to ensure that there is sufficient evidence to prove the real reason for the termination and rebut the presumption about prohibited reasons.

## FACTS

Mr McLroy and Ms St Henry (the **employees**) were employed by CE Marshall & Sons Pty Ltd (**CE Marshall**). Both had previously been employed by CE Marshall for periods during 2005 and were re-employed (on three months' probation) in February 2006. Both were advised during their probationary period that their employment would not be extended after that period.

It was common ground between the parties that the employees had, before their termination, been spoken to by a union organiser, applied for CFMEU membership, attended a CFMEU workplace committee meeting and approached other employees and invited them to attend a WorkChoices presentation by the CFMEU. The CFMEU claimed on behalf of the employees that CE Marshall had dismissed the employees for a prohibited reason, being:

- the employees were members of an industrial association; and/or
- as members of an industrial association, they had taken action to further the purposes or protect the industrial interests of the CFMEU.

Among other remedies, the CFMEU sought civil penalties against CE Marshall.

## ONUS OF PROOF

The *Workplace Relations Act 1996* (Cth) (the **Act**) provides that as long as one of the reasons for the dismissal is a prohibited reason, the dismissal will be unlawful.

The Federal Court observed that the Act reverses the onus of proof when an applicant makes an allegation of this kind, obliging the employer to prove that the dismissal was for a reason other than that alleged.<sup>6</sup> The policy reason for reversing the onus of proof is that the real reasons for a dismissal can be known only by the employer.

## STANDARD OF PROOF

The court accepted that it was for CE Marshall to prove, on the balance of probabilities, that the termination of the employees' employment was not motivated by a prohibited reason.

In this case, CE Marshall was able to show – through evidence from several witnesses – that the actual reasons for termination were unrelated to the employees' union activities.

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6. *Construction, Forestry, Mining and Energy Union v CE Marshall & Sons Pty Ltd* [2007] FCA 169.



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