

## PENDLEBURY WORKPLACE LAW UPDATE

Developments in HR & IR Law in Australia  
May - June 2009

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Hello to all friends & colleagues of Pendlebury Workplace Law. This Update will consider comments made by University of Adelaide professor of law, Andrew Stewart, in relation to the Fair Work Act. We shall also consider a recent AIRC decision to reinstate a worker summarily dismissed for fighting.

### THE FAIR WORK ACT

The AIRC has been a "flexible, adaptive institution" that has made a major contribution to the social and economic fabric of our society, he said.

But some in the IR community felt it had been allowed to "wither on the vine", particularly after Work Choices, while the labour movement had criticised the Howard Government's move to draw 14 of its 20 appointments to the Commission from employer groups and only two from unions.

A "progressive lack of trust" by successive Labor and conservative governments had led to an explosion in the volume of IR legislation as they sought to regulate "in painful detail" how the Commission should do its job, gradually stripping it of discretion.

However, the Rudd Government, in its bid to achieve simpler, less prescriptive IR laws, had reversed that trend and restored a much greater level of trust in Fair Work Australia.

### Fair Work Act Challenges

Fair Work Australia is central to Labor's bid to deliver a simpler, more efficient Industrial Relations framework, but could face challenges in meeting the ambitious objectives the Government has set for it, according to University of Adelaide professor of law, Andrew Stewart.

Delivering the Industrial Relations Society of Victoria's 2009 Sir Richard Kirby Lecture in Melbourne last week, Stewart said Fair Work Australia, (the new independent umpire to oversee the new workplace relations system effective 1 July 2009) would have a much broader discretion in exercising its powers than the Australian Industrial Relations Commission (AIRC) had under the *Workplace Relations Act*.



That trust, and the greater level of discretion that flowed from it, meant it would be "up to Fair Work Australia itself - its members, its as yet unappointed general manager, and above all its President - to decide what kind of agency it wants to be," he said.

A key choice it would face was when it would make decisions using its administrative process, rather than the more conventional tools of the tribunal such as public hearings and conciliation, he said.

The answer to that question would determine, not only the extent to which it diverged from the inheritance of the AIRC and its predecessors, but also its ability to deliver on the Government's expectation of a new system that operated more quickly, cheaply and informally than the current regime.

On wage-fixing, he said it seemed clear it would choose largely to follow the Australia Fair Pay Commission's general methods of operation, for which there had been "a great deal of support".

It might depart from the AFPC's practices only "in holding the occasional hearing for major stakeholders to express their views and be publicly questioned from the bench," he said.

This approach, which was essentially that the AIRC had adopted in the award modernisation process, allowed for greater community input and transparency than the old wage cases had and seemed more in tune with "modern sensibilities", he said.

But Stewart said it was much harder to predict the agency's approach to two other significant and high-volume processes: dealing with unfair dismissals and approving enterprise agreements.

It would be likely to deal with **unfair dismissals** by conducting some preliminary investigations, then allocating the matter to a conciliator who would try to broker a quick settlement, possibly without a face-to-face conference.

If it could not be resolved at that initial phase, or was not simply rejected as lacking merit, it would then pass to a commissioner or deputy president to decide whether a hearing was necessary, he said.

However, it remained to be seen what proportion of matters could be resolved at the initial investigation/conciliation phase, and how much sensitivity Fair Work Australia would have to questions of procedural fairness throughout the process, according to Stewart.

He noted that the Fair Work Australia members who transferred across from the AIRC would have been working in a tribunal where there had been a strong awareness of procedural fairness principles.

"How willing then will they be to temper the operation of those principles in the interests of providing speedy, and potentially very rough, justice?" he asked.

On **enterprise agreements**, Stewart said the Government's aim of having most approved



within seven days would often be hard for Fair Work Australia to meet - "at least without cutting corners, or relying on the parties themselves to do a lot of pre-submission work in providing the necessary information".

Its workload would be increased by having to ensure agreements met a broader range of criteria than was currently the case, included a larger range of mandatory terms, and, from 2010, complied with the National Employment Standards, he said.

While there would be less work to do in vetting for prohibited content, "the net effect is to demand at least as much scrutiny of agreements as at present, yet on the basis that decisions must be forthcoming in days, not weeks or months," he said.

It also remained unclear to what extent Fair Work Australia would allow parties such as minority unions or a dissident group of workers to challenge the approval of an agreement.

"For Fair Work Australia to invite submissions or challenges might wreak havoc with the objective of meeting the seven-day timetable," he said. In the end, he said, Fair Work Australia would have to choose the extent to which it continued the practices of

The AIRC or adopted the best aspects of the other, newer, agencies it replaced. "I hope that it finds a sensible balance between continuity and change.

The first six months are going to be undeniably difficult, but I'm optimistic that, given time, the makeover the Government has imposed will produce a better and more effective regulator," Stewart said.

[Source: Professor Andrew Stewart, Industrial Relations Society of Victoria's 2009 Sir Richard Kirby Lecture, 21 May 2009. Workplace Express, 22 May 2009.]

## Worker Reinstated by AIRC

**A Toyota worker summarily dismissed after being involved in two violent incidents with a co-worker off-site and after his shift was over has won reinstatement and \$32,304 compensation, after the AIRC found there was no valid reason for his sacking.**

Commissioner Lewin accepted that "for reasons unknown to the Commission", the co-worker had before the first incident "made clear an extremely prejudicial and physically threatening attitude" towards the sacked man.

He found that on the balance of probabilities, the co-worker created an "ambush" for the sacked worker as he was driving away after finishing his shift in the early hours of October 21 last year, coming up behind him, cutting him off, then reversing his car "quite likely with intent to cause a collision" to ensure the sacked man stopped.

The co-worker then "viciously and violently" assaulted the sacked man, with the sacked man acting "only to protect himself from flailing punches and headbutting", before another colleague forced the co-worker to stop and leave

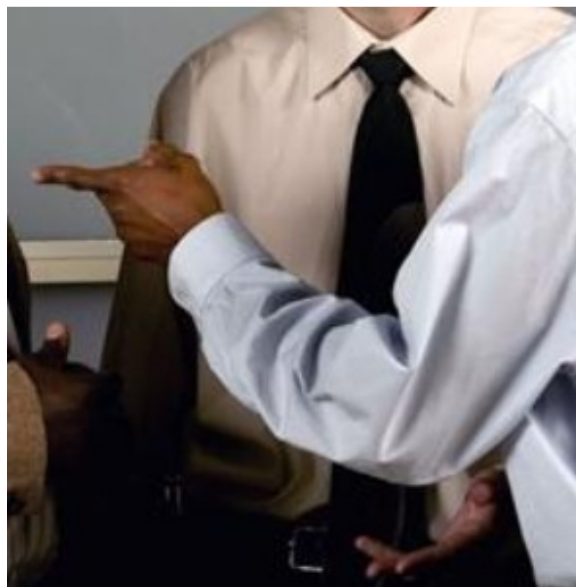
in his car. Commissioner Lewin continued that the co-worker then "once again lay in wait with malevolent intent" for the sacked man's car to pass, and once again overtook it, making violent threatening gestures, driving dangerously and again cutting the sacked man's vehicle off, forcing him to stop.

He said there was a possibility the sacked man "may have been able to escape the scene by driving his vehicle away", but the way the cars were positioned could have made this problematic, and given the co-worker's dangerous and aggressive driving, it would have been reasonable to calculate there was a risk from pursuit and further dangerous driving.

He accepted the evidence of the sacked man that he said, "Can we solve the problem?", whereupon the co-worker, "immediately, and once again viciously and with extreme prejudice and intent", initiated another assault, with a colleague again eventually separating them. The co-workers then "stalked" the sacked man on the road for some time, before "finally breaking off the engagement".

While a witness gave evidence that the sacked man punched the co-worker during the second incident, the Commissioner said he was not satisfied this had occurred, and it was more probable that he "assumed a defensive position against the assault".

"Even if I had found that [the sacked worker] did attempt to punch [the co-worker], I consider on the evidence before me that such action, in all the circumstances, would constitute legitimate self defence. In light of my findings and for all of the above considerations I conclude that there was no sound defensible or well founded reasons, no valid reason, for the termination of [the



sacked worker's] employment in either the first or the second incident," he said.

**Meanwhile, the AIRC has rejected another Toyota employee's unfair dismissal claim after finding he had slapped a co-worker's buttocks with a piece of wood.**

The worker argued he had delivered the blow in a light, playful fashion and had struck the co-worker's legs, but Commissioner Deegan preferred the co-worker's evidence that it had "stung like hell" when she was hit on the buttocks.

"This action by the [worker] was deliberate and clearly in breach of the (company's) "hands-off" policy," Commissioner Deegan said. The company had a valid reason to terminate the worker's employment given his actions and dishonesty after the event, she said.

*Mr John Sattout v Toyota Motor Corporation Australia Limited [2009] AIRC 412 (15 May 2009)  
Damien Kleidon v Toyota Motor Corporation [2009] AIRC 419 (22 April 2009)  
Workplace Express May 2009.*

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