

**THE VICTORIAN BAR**  
**COMPULSORY CONTINUING EDUCATION PROGRAM**

IN CONJUNCTION WITH  
**THE INDUSTRIAL BAR ASSOCIATION**  
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**“WORK CHOICES & THE COURTS”**

**STUART WOOD**

***Introduction & Summary***

1. According to Neville Wran, Lionel Murphy spent one of his summers charting the appeal route from the Courts of Petty Sessions to the Privy Council, in every conceivable situation. He was very proud of his chart: “There you are Nev, we never have to waste our time working out where to go for leave or on appeal in future.”<sup>1</sup>
2. I have not spent my summer producing a Work Choices chart. But I have identified three aspects of Work Choices, as it affects courts:
  - the penalties;
  - the ancillary liability;
  - the vesting of jurisdiction in the Federal Magistrates Court (“FMC”).
3. I discuss each of these below; and give an example of how these three changes might work in practice. As this paper is designed as a companion paper to Gerard McKeown’s paper, “Work Choices 2: Industrial Action”,

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<sup>1</sup> N Wran, ‘Murphy the Barrister’, in JA Scutt, *Lionel Murphy. a Radical Judge*, The Macmillan Company of Australia, Melbourne, 1987, p 17.

also given this evening, I will try to avoid encroaching on his topic. Thus I will try to concentrate my discussion upon other aspects of Work Choices.

4. Further, as Brian Lawrence is scheduled to deliver a paper in this series, dealing with the Australian Fair Pay Commission ("AFPC"), I will also leave that body alone. Though, it should be noted that interesting questions arise concerning the interaction of the AFPC and the courts. Not least how decisions of the AFPC are to be reviewed; and why the system of federal administrative law does not apply to that body<sup>2</sup>.

### **Penalties**

5. It is not all that long ago that the maximum penalties under the main provisions of the federal industrial legislation were as low as \$500<sup>3</sup>. Now, it is generally \$33,000 for a body corporate and \$6,600 for an individual<sup>4</sup>. And, for similar conduct in contravention of the *Building and Construction Industry Improvement Act 2005* ("BCCI Act"), penalties of up to \$110,000 and \$22,000 are available<sup>5</sup>.
6. Moreover, the "tariff" has been increasing. Over the last two years, in cases under what might be called the 1996 regime of \$10,000 for a body corporate and \$2000 for an individual, penalties of \$75,000 upon Telstra<sup>6</sup>

<sup>2</sup> *Administrative Decisions (Judicial Review) Act 1977*, s3; *Schedule 1* - excludes "decisions under the *Conciliation and Arbitration Act 1904*, the *Workplace Relations Act 1996* or the *Building and Construction Industry Improvement Act 2005*"; see also *Judiciary Act 1903*, s39B(2)(a), which excludes "a person holding office under the *Workplace Relations Act 1996* or the *Coal Industry Act 1946*", from the general operation of s39B.

<sup>3</sup> See eg s178 of the *Industrial Relations Act 1988* (Cth), pre the rise of enterprise bargaining.

<sup>4</sup> See generally Part 14; esp. the Table in Division 2; the "rules" in Division 3 of Part 14 and the penalty under s719(4) (the old s178) of \$33,000 and \$6,600. Note that the Industrial Action penalties under Part 9 are also generally \$33,000 and \$6,600: see eg s448 (the old s170MU); s471 re contravention of a secret ballot direction; s477 re reports of the ballot; ss494/5 (the old s170MN; 170VU); s496 (the old s127 - see Item 5 of the Table in s718(1), and s719(4)); ss507/8/9 (the old s187AA etc in the old Part VIIIA)

<sup>5</sup> See defn of Grade A civil penalty provision: s49(2).

<sup>6</sup> Actually \$74,507.60: *CPSU v Telstra* [2001] FCA 1364, at para [21].

and \$750,000 upon the Commonwealth Bank<sup>7</sup> have been awarded, for breaches of the Act. The largest award against a union has been \$25,000<sup>8</sup>.

7. Perhaps most importantly, the number of ways in which a penalty can be awarded has increased. Work Choices does give more choice; but on pain of penalty. There are now many more penalty provisions in the legislation. Penalties exist for things that did not previously: failing to notify of transmission is an obvious example<sup>9</sup>. Many of the penalties that exist in relation to agreements are new. In the olden days, a contravention meant that one simply did not get one's agreement up. Under the Work Choices self-compliance system, the penalties for contravening the agreement-making process are large<sup>10</sup> and the remedial relief that can be granted is very broad<sup>11</sup>.
8. Finally, it is my guess that enforcement under the new system will be more effective and rigorous than the old. Under the pre-1996 system, unions were the major enforcers. They were either unable or unwilling, to effectively enforce the rights generated by that system. Under the new system, spending on compliance (ie the Office of Workplace Services

<sup>7</sup> *FSU v CBA* [2005] FCA 1847, and note esp. the comments at para [72].

<sup>8</sup> *Carr v AMWU* [2005] FCA 1802, at para [15]. Of course, penalties are higher under the IPA: see eg *Australian Competition and Consumer Commission v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2004] FCA 517.

<sup>9</sup> See ss599,602,603,605.

<sup>10</sup> Note that the Workplace Agreements penalties under Part 8 generally range from \$3,300 to \$6,600: see the table in s407(2). Examples include s334(2) refusing to recognise an AWA bargaining agent; s335(3) re opportunity to meet and confer; ss337(8),(9) re access to and information about agreements; s339, s341 re approval; s342 re lodgment; s343 re authorisation; s346 re provision of receipts; ss357, 362, 364, 365, 366 re prohibited content; s370(8),(9) re access to and information about variations; ss372, 374, 375, 376 re approval and authorisations re variations; s379 re provision of receipts re variations; s384(4) re information re termination; ss385, 387, 388 re approval re termination; s391 re provision of receipt re termination; ss393(6), 394(6) re provision of undertakings; re notice of termination; s397 re provision of termination receipt; Division 10 of Part 8, including s400, re coercion (the old s170NC); s401 re false and misleading statements (the old s170WG(2) now applies to all agreements); and s402 re discrimination

<sup>11</sup> Note remedies in Subdivision C of Division 11 of Part 8: eg s409 re declaration that agreement is void; s410 re variation of agreement; and s413 re compensation

("OWS") and the Employment Advocate) is budgeted at \$140 million<sup>12</sup>, over the next four years (including \$40million in 2008-9).

### ***Ancillary Liability***<sup>13</sup>

9. Whether or not the old s4(8) (now s4(5)) was a true ancillary liability provision is not a point which I would like to debate this evening. It is now clear that the Act has a true ancillary liability provision: the new s728 in Division 3 of Part 14.
10. The impact of this provision will, in my view, be profound. The clarity of the provision, and that it is clearly derived from s75B of the *Trade Practices Act 1976* (Cth) (and ultimately from the old federal Crimes Act), means that practitioners will begin to think about ancillary liability. By contrast, the old s4(8) was so little known, that it was ignored in the first major case that came to consider it<sup>14</sup>. Moreover, there was a respectable argument that it was not a true ancillary liability provision<sup>15</sup>.
11. Also, the increase in the size, scope and number of penalty provisions, means that the range of potential ancillaries is also increased. So too is the incentive to pursue them.
12. I imagine that this provision will generate much litigation. Not all of it will be very well thought out. Issues such as whether or not any primary contravention arises; the facts which make the ancillary liable and the level of knowledge required of an ancillary, will assume real importance,

<sup>12</sup> Workplace Express, "Work Choices to cost \$452 million over four years", 16 December 2005.

<sup>13</sup> Also called accessorial liability.

<sup>14</sup> See *Australian Paper Limited v CEPU* (1998) 81 IR 15, at 21-2; cf *Kilpatrick Green Pty Ltd v The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [1998] FCA 559.

<sup>15</sup> *Hawker de Havilland v AMWU* [2005] FCA 804, at para [15]; cf *Emwest v AMWU* [2002] FCA 61.

particularly in cases in which a body corporate (union or employer) is said to be liable on a primary basis, and attempts are made to make (to use a cover-all term) a human agent liable on an ancillary basis<sup>16</sup>. Remember that, so often in these types of cases, the human agent is the vehicle through whom the body corporate is liable on a primary basis<sup>17</sup>.

### **Federal Magistrates Court**

13. It was not all that long ago that the attempts to vest a very limited industrial jurisdiction in the FMC were fought tooth and nail<sup>18</sup>. Seven years

<sup>16</sup> For example, the old s349 made the union liable for something the (say) organiser had done. It did not cover the situation of (say) an organiser's liability (as an ancillary) for a shop-steward's actions. The new ancillary liability provision could apply to such a situation.

<sup>17</sup> *Laing v CFMEU* [2005] FCA 765. Cases such as *Wesfarmers v AMWU (No 2)* (2004) 138 IR 362; *Seven Network (Operations) Pty Ltd v CEPU and Others (No 2)* [2001] FCA 672; 110 IR 372 (and the No1 case - 106 IR 404), should be approached with some caution, given the new s728. Given this new ancillary liability provision, it might be better to start with Justice Dixon's decision in *Mallen v Lee* (1949) 80 CLR 198, esp. at 213-6, as the first port of call.

<sup>18</sup> At the time the *Federal Magistrates (Consequential Amendments) Bill 1999* was debated, relations between the State Supreme and Federal Courts were bad; and the so-called "second wave" of reforms constituted by the *More Jobs, Better Pay Bill 1999*, was introduced. This Bill attempted to vest the Supreme Courts with powers in s127 cases<sup>18</sup> and to prevent the Federal Court from granting anti-suit injunctions. The attempt to vest the *Workplace Relations Act* jurisdiction in the Federal Magistrates Court was opposed by the Labor Party and then the Democrats who seemed to regard it as merely part of the second wave scheme. Thus the attempt to vest jurisdiction in the Federal Magistrates Court failed:<sup>18</sup> See 19 October 1999, Debate on the *Federal Magistrates (Consequential Amendments) Bill 1999*: Hansard p 11882-5, which concerns the proposed opposition amendment to delete Schedule 25 of the Bill. During the debate in the House, the Shadow Attorney-General made comments such as, "We feel that this is more a case of the government trying to bypass the messenger of the Federal Court of Australia in its determination that the government had acted inappropriately in the waterfront dispute rather than a genuine desire to think through a rational allocation of appropriate jurisdiction to the Federal Magistrates Court". The Attorney's response at 11884-5, seems to have dealt with the criticisms. See further debate on 25 November 1999 at 12737-42, which according to the Attorney reflected "paranoia rather than reality". The Senate amendment was ultimately accepted "in order to secure the passage of both bills, the *Federal Magistrates Bill 1999* and the *Federal Magistrates (Consequential Amendments) Bill 1999*": see House of Representatives, Hansard, at 13029-13036. It is necessary to examine the debate on the *Federal Magistrates Bill 1999*, as some members of the opposition, including both the current Shadow Attorney-General and the then Shadow Attorney-General, were not, apparently, aware that the bill conferring workplace relations jurisdiction upon the Federal Magistrates Court was found in the *Federal Magistrates (Consequential Amendments) Bill 1999*; not the *Federal Magistrates Bill 1999*.

later on and Work Choices vests a very large industrial jurisdiction in the FMC<sup>19</sup>.

14. This will have an impact upon the FMC. Persons with experience in the workplace relations area will have to be appointed. Some changes in the FMC procedure will be necessary<sup>20</sup>. For example, pleadings will be required in many cases. Some competition for business will develop between the various state Magistrates Courts (eg the Industrial Division of the Magistrates Court in this State), and the FMC. And some sort of protocol will presumably be developed with the Federal Court of Australia ("FCA") to work out which matters should be bumped up to the FCA and which ones should be sent down to the FMC<sup>21</sup>.
15. From the point of view of the conferral of jurisdiction, the FMC is a mini-FCA. It is not limited by monetary amounts<sup>22</sup>, and can exercise the so-called accrued/associated/pendant jurisdiction<sup>23</sup>. The combination of these factors makes me think that the FMC will, within one or two years, deal with somewhere around 50% of all industrial litigation (at least in Victoria). In time, it is not hard to imagine a situation where the state inferior courts are prevented from exercising federal industrial jurisdiction, just as the state Supreme Courts are, arguably, excluded now.

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<sup>19</sup> See eg s321 re Part 8 "Workplace Agreements"; s419 re Part 9 "Industrial Action" penalties; s717 re Part 14 "Compliance"; and s847 re Part 20, "Jurisdiction of the Federal Court of Australia and the Federal Magistrates Court"

<sup>20</sup> The Federal Magistrates Court commenced sitting in the middle of 2000; its rules are only four years old. See generally McInnes FM, *Federal Magistrates Court – Refresher*; at: [http://www.vicbar.com.au/pdf/CLESeminar\\_10052004.pdf](http://www.vicbar.com.au/pdf/CLESeminar_10052004.pdf)

<sup>21</sup> See Part 5 of the *Federal Magistrates Act 1999*; *Federal Court Act 1976*, s32AA; s32AB; *Federal Court Rules*, O82.

<sup>22</sup> Like the jurisdiction under the HREOC Act; but unlike eg the TPA jurisdiction: s86AA.

<sup>23</sup> *Federal Magistrates Act 1999*, s18

## Example

16. The human resources manager, the registered employer organisation and the workplace relations solicitor (who both participate in the negotiations for a workplace agreement) and the auditors are sued by a union, or employees, as ancillaries to a contravention of s401 by an employer<sup>24</sup>. The contravention is that the employer has made a false or misleading statement (or has been reckless as to the falsity etc). A union demand for payments of accrued entitlements into trust was dropped on the basis of employer assurances as to solvency made by the human resources manager (in which statements the employer organisation, solicitors and auditors were “knowingly concerned” (s728)), and a workplace agreement was made, approved etc. The employer becomes insolvent and the accrued entitlements are lost.
17. A proceeding is brought in the FMC. A claim, in the associated jurisdiction, under the TPA and/or the FTA, and in deceit is tacked on. Damages are sought under these other statutory causes of action as well as compensation under s413. Even if the claim is not successful, it is protected by the old s347 (now s824).<sup>25</sup>

## Conclusion

18. The legislation has been in operation one week, and the changes to which I have referred will take some time to take hold. Nevertheless, I believe that a combination of the many (large) penalty provisions, ancillary liability

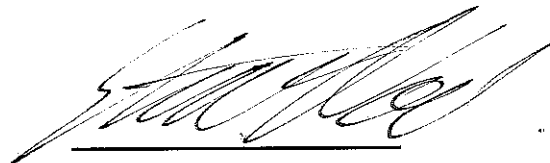
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<sup>24</sup> See eg *NRMA v Morgan* [1999] NSWSC 407, at paras [120-5] and [1456], eg “Knowledge of the essential facts alone is not sufficient for accessory liability. There must be something more constituting involvement, within the groups of words, in the primary contravention. A person who is no more than an adviser may not be involved; alternatively, it may be that a person who, though an adviser, is intimately involved in the transaction giving rise to the contravention, is involved”; see also *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, at 102-3; para [307]; p109, paras [334-46]. Though note that this decision is based partly on s82 TPA, which is in different terms to s728.

<sup>25</sup> Note the new s824(2).

and access to a full service magistrates court, coupled with what seems to be a determination, on behalf of the executive, to enforce the terms of this legislation, will result in an increase in industrial litigation in the courts over the remainder of this federal parliamentary term.

**Date:** 03 April 2006

A handwritten signature in black ink, appearing to read 'Stuart Wood', written over a horizontal line.

**STUART WOOD**  
**LATHAM CHAMBERS**