

November 2006

# workplace relations | law alert

## High Court upholds WorkChoices

On Tuesday 14 November 2006, the High Court of Australia upheld WorkChoices. With that decision, the Howard Government's revolutionary step to abolish the industrial relations system of the previous 100 years of Australian history was found to be legal.

The decision was not unanimous. Justices Kirby and Callinan would have upheld the challenges by the various state governments and the union movement, but five other High Court Justices (including the Chief Justice), found otherwise. Throughout the hundreds of pages of the judgment the text is littered with sentences in which the arguments of the challengers were dismissed. In fact they did not get a single point up. A more comprehensive defeat could not have been imagined.

We have briefly summarised some of the interesting points which the High Court majority judgment contains.

### The framing of the Constitution

The idea that we could, or even should, consider what the framers of the Australian Constitution had intended when they put the Constitution together was dismissed as "...a mirage more often than not".

### Width of the Corporations Power

The width of the Corporations Power is profound. That had been the case for some time (particularly since the Tasmanian Dams case of the early 1980s) but is now reinforced. The Corporations Power was found to extend to the making of laws that affect corporations, their employees, shareholders and those with whom the corporation does business.

### WorkChoices

The argument that WorkChoices can or does give rise to "extremist results" was rejected. In rejecting the argument, the High Court looked back at the end of the nineteenth and the

beginning of the twentieth centuries when strikes and industrial disputes dominated the landscape. The court noted that industrial action was the scourge of that age and governments had a duty to prevent disputation going to extremes. To summarise, one can infer that the High Court does not foresee that WorkChoices will return us to the time of the 1890s when employers and unions alike waged a form of extremist warfare on each other.

### Regulations

Much of WorkChoices depends on the government passing regulations. This makes it difficult as users of the legislation (which is just about everyone) have to juggle between the Act and the Regulations, which are continually changing and developing. The court makes the point that this technique is "...undesirable and should be discouraged". Query whether the Howard Government and its ministers will actually heed that advice.

### Where to now for the Labour Movement?

We do not imagine that the political argument will cool off. Quite the contrary. We foresee that with two state elections on our very doorstep and a federal election due next year, the arguments will go on. For now the Howard Government has won a resounding legal victory and may even achieve its ultimate political victory over the Labour Movement, although that has yet to be played out.

Mark Diamond Partner  
e: mdiamond@ebsworth.com.au  
t: 61 2 9234 2391

sydney melbourne brisbane

Ebsworth & Ebsworth Lawyers respects your privacy and allows only limited use and disclosure of personal information. A copy of our privacy policy is available on our website. This publication is not legal advice. Professional advice should be sought before applying the information to your particular circumstances. We regularly produce publications to keep our clients up-to-date with important legal developments. If you do not wish to receive this publication in the future or if you would like to receive other publications, please email: publications@ebsworth.com.au © Ebsworth & Ebsworth Lawyers 2006