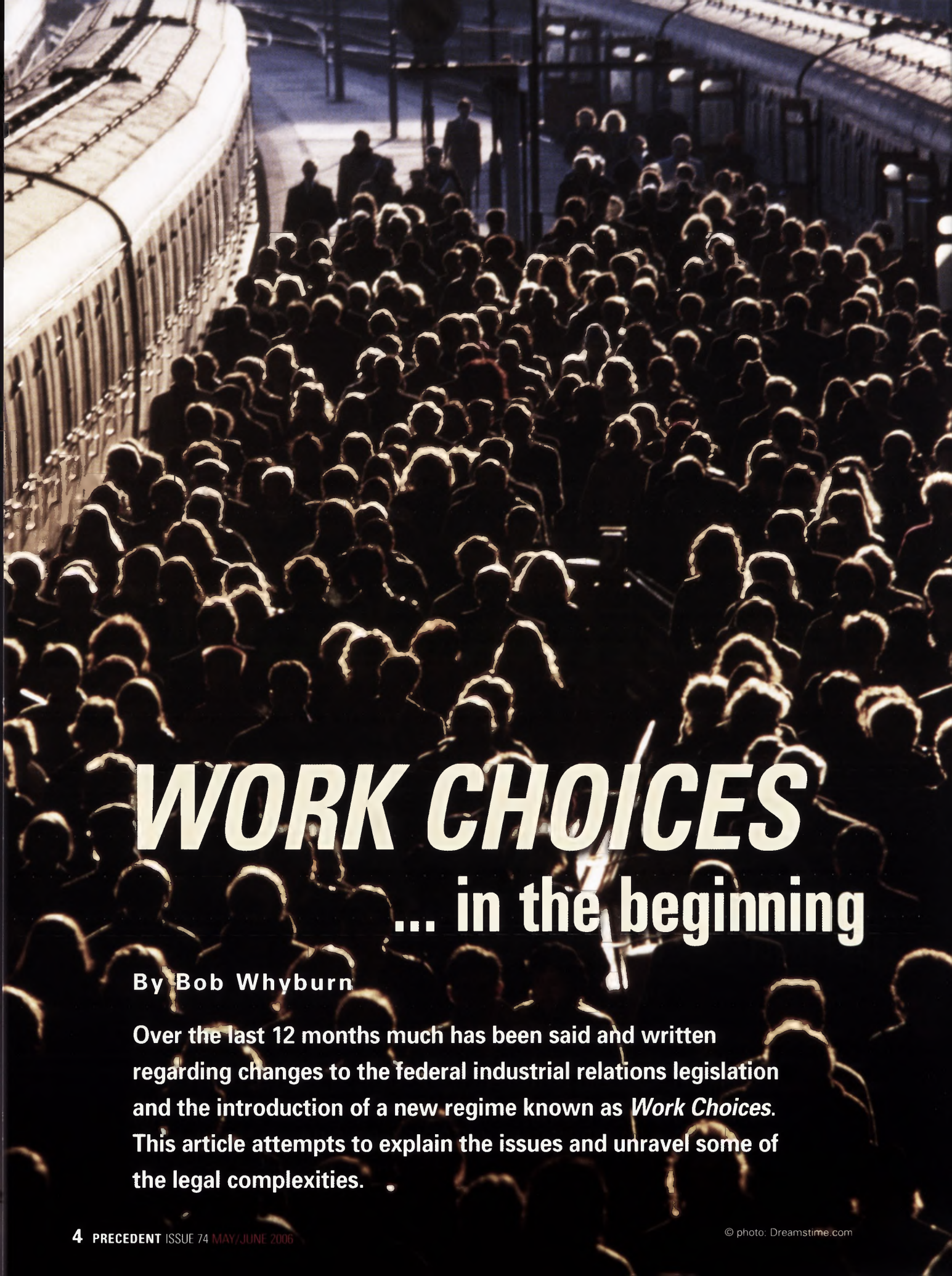

WORK CHOICES
... in the beginning

By Bob Whyburn

Over the last 12 months much has been said and written regarding changes to the federal industrial relations legislation and the introduction of a new regime known as *Work Choices*. This article attempts to explain the issues and unravel some of the legal complexities.

© photo: Dreamstime.com

ANNOUNCEMENT OF *WORK CHOICES*

In the House of Representatives on Thursday 26 May 2005, the Prime Minster sought leave of the House to make a ministerial statement, saying that he wished "to outline the Government's plan for a historic modernisation of Australia's workplace relations system".

He said:

> "The measures I am outlining today represent the next logical step towards a flexible, simple and fair system of workplace relations. Australia must take this step if we are to sustain our prosperity, remain competitive in the global economy and meet future challenges such as the ageing of our society."

It is clear that the Government sees change to workplace laws as fundamental to an ongoing program of economic reform.

After outlining in broad terms the areas that would be affected by the amendments, the PM then made the following prediction.

> "The Chicken Littles
> There will be those who will say that these reforms are unnecessary. Some will argue that they represent an attack on the pay and conditions of the working men and women of Australia."

THE REACTION

The Prime Minister could not have been more correct, as the announcement drew criticism loud and long and from a number of sources.

The trade union movement embarked on a very successful campaign of public education, which included media and other advertising. It resulted in a national day of action, in which an estimated half a million people participated, 200,000 of them at a rally in Melbourne.

When referring to the 'Chicken Littles', the Prime Minister was presumably anticipating such a response from the trade union movement. What he could not have anticipated was the reaction from other quarters, including church groups of all denominations, the Family First party (represented by Senator Fielding in the Parliament), the National Party (and, in particular, Queensland Senator Barnaby Joyce), the National Farmers' Federation, and other employer groups.

The churches and the Family First party attacked the planned amendments as being tantamount to an attempt to reduce the wages, working and living conditions of Australian workers, particularly those in the workforce who might be regarded as more vulnerable, such as young people, casual workers, unskilled workers and women.

The concerns expressed by the National Farmers' Federation and some other employer groups focused mainly on the fact that a number of small businesses would not be included in the new regime because they are not trading as corporations: not having the 'benefits' of *Work Choices*, they would be operating at a disadvantage.

Others, including the National Party, saw the proposals as an attack on states' rights.

The ministerial statement made by the Prime Minister was notable for the fact that it was made by him and not by the Minister for Workplace Relations, who would ordinarily be responsible for matters squarely within his portfolio. The Prime Minister also made it very clear that the new industrial relations regime, to be known as *Work Choices*, would be based on the corporations power, found in s51(xx) of the Constitution.

CONSTITUTIONAL POWERS: CORPORATIONS V CONCILIATION AND ARBITRATION

Prior to federation, each state had its own constitution, giving it power to deal with industrial relations within its boundaries. The drafters of the Australian Constitution gave the Commonwealth strictly limited authority over industrial relations.

The conciliation and arbitration power, to be found in s51(xxxv), gives power to the Commonwealth to make laws for the 'conciliation and arbitration' of 'interstate disputes' over 'industrial matters'. That power enabled the Commonwealth to deal with disputes that fell beyond the power of individual states by crossing the jurisdiction of more than one state. This was an emerging problem in the late 1800s because of the increasing trade between states and the unionisation of the workforce.

The conciliation and arbitration power has, for the last 100 years, been the mainstay of federal legislation in relation to industrial relations. However, since 1993 the federal government, firstly under Prime Minister Keating and subsequently under Prime Minister Howard, have made use of alternative powers including the corporations power and the external affairs power. The use of alternative constitutional heads of power allowed the federal government to usurp control formerly held at state level.

The corporations power gives the federal parliament power to make laws with respect to 'trading or financial corporations'. By abandoning the conciliation and arbitration power in favour of the corporations power as the foundation of the new laws, the federal government is able to further usurp a large proportion of the states' industrial relations powers. It is estimated that if the *Work Choices* legislation is found to be constitutionally valid, up to 85% of the Australian workforce will be covered by it.

FIRST HIGH COURT CHALLENGE

Despite intense opposition and media attention to the proposals outlined in the ministerial statement, the government did not produce a draft Bill, nor did it agree to enter into any public debate about the content of the Bill. The government was challenged in the High Court by the ACTU and the Opposition in relation to its allocation of approximately $50 million of public money to support an advertising campaign to sell the proposals to the public, albeit in the absence of a draft Bill.

The High Court challenge sought orders that would have had the effect of declaring the expenditure on the advertising unconstitutional, on the grounds that there was no proper basis for the allocation of the funds in either of the Appropriation Bills.

The case was argued before the High Court in September 2005, an order was made on 29 September and reasons >>

Employers with 100 or fewer employees are free to dismiss workers at will and those workers have no right to seek any remedy at all for unfair dismissal.

published on 21 October 2005. The Court found that the plaintiffs had not established a basis for any of the relief sought, namely declarations concerning payments to meet expenses incurred by the Commonwealth in relation to the advertising. Although the decision of the Court was unfavourable, the publicity surrounding the hearing increased public awareness of the approach that the government was taking to the proposed reforms.

PASSAGE OF THE LEGISLATION

Despite the extraordinary public outcry, the Bill was passed in even more extraordinary circumstances.

The Bill was tabled in the House of Representatives on the morning of Wednesday 2 November, the day after the Melbourne Cup. The Bill was allowed to sit on the table of the Parliament for approximately one hour. Debate then commenced, despite the fact that this had been the first opportunity the Opposition had had to read it. At the same time, the Bill was taken to have been referred to the Senate Employment, Workplace Relations and Education Legislation Committee on which the government had a majority. The debate on 2 November proceeded at the same time as the call for submissions to the Senate Committee. Wednesday 9 November was fixed as the closing date for submissions to the Committee, a period of five clear working days.

The Bill was 700 pages long, and the Explanatory Memorandum that accompanied it was 600 pages long. Having read them both, I can vouch for the fact that there were numerous instances where the Explanatory Memorandum was contrary to the Bill.

Once submissions to the Senate Committee closed, the Committee sat for five days in the week commencing 14 November in Canberra to hear public submissions. Some 5,000 written submissions were received by the Committee and those who sought to make submissions in public were, in some instances, restricted to seven minutes.

The Committee was given until 22 November to report to the Senate. When the matter came back before the Senate, there were 337 amendments moved by the government, the opposition parties opposing the Bill as a whole. Any opportunity for debate was gagged by the government and the Bill was passed by the Senate on 2 December and by the House of Representatives on 7 December, with Royal Assent being given on 14 December 2005.

Some aspects of the legislation, including the creation of the Australian Fair Pay Commission and the removal of redundancy provisions for federal award employers with fewer than 15 employees, commenced immediately. The remainder of the legislation came into effect on 27 March 2006. The regulations supporting the amendments were published on Sunday 19 March, the day after the state elections in Tasmania and South Australia. They were 400 pages long and they, too, commenced one week later on 27 March.

Speaking in the Senate on 12 October 2005 in support of a motion to refer the Bill to the Senate Employment, Workplace Relations and Education References Committee (on which the government did not have a majority), Democrat Senator Murray said this:

> "(it is) the most complex and challenging exercise any government in this country has ever conducted. It is the most complex and challenging because it is the one area where you are taking on all of the states contrary to the wishes of the states."

WORK CHOICES – SIGNIFICANT CHANGES

Unfair dismissal

This aspect of the legislation has probably received the most publicity. Employers with 100 or fewer employees are free to dismiss workers at will and those workers have no right to seek any remedy at all for unfair dismissal. Employees who work for corporations with more than 100 workers may, in certain circumstances, seek a remedy for unfair dismissal, although a new provision allowing employers to dismiss for 'operational reasons' will strictly limit the claims that can be brought.

Unlawful dismissals are not affected; it is still unlawful to terminate on various grounds, including grounds that are discriminatory.

Workplace agreements/awards

The focus of the legislation is to encourage employers and employees to enter into individual contracts and move away from the award system, which has underpinned the wages and conditions of workers for the last 100 years. It is still possible under the legislation to enter into collective agreements, although the restrictions on the right to take industrial action make this very difficult.

Trade unions

A number of aspects of the legislation are clearly aimed at restricting the right of unions to represent employees. These include restrictions on the right to enter a workplace for the purposes of discussion or investigating a suspected breach of an award or occupational health and safety legislation, restrictions on the freedom of association, and the right of unions to represent employees generally.

The amendments make many further changes; these are just examples of the more significant ones.

SECOND HIGH COURT CHALLENGE

The states and territories have commenced constitutional challenges in the High Court and the Court set aside 4-11 May 2006 to hear argument. A decision is not expected until possibly the third quarter of 2006.

Some of the arguments raised by these challenges include:

- The legislation invalidly relies on the corporations power in relation to its operative provisions and, in particular, seeks to regulate employment relationships where employees may not be engaged in trading or financial activities; where there may have been no industrial dispute; and where such a dispute may not extend beyond the limits of any one state.
- The legislation invalidly relies on the territories power and, in particular, seeks to extend the definition of 'employer' to those who employ at least one individual in connection with an activity carried out in a territory regardless of the extent to which that individual is engaged in activities in the territory.
- Parts of the legislation invalidly restrict the exercise of rights of entry under state and territory laws dealing with occupational health and safety.
- *Work Choices* invalidly prohibits certain conduct by persons in relation to becoming a member of a trade union (or not) or participating in industrial action (or not).
- The legislation purports to exclude certain state and territory laws.
- It invalidly gives the Crown control over state jurisdictions by purporting to regulate constitutional corporations that could be wholly owned by or on behalf of a state; subject to control or direction by a state or minister of a state; established and maintained to achieve public or governmental purposes; and/or wholly owned by or on behalf of a state and not established and maintained for purposes of profit.

While there are some differences between the claims made by the various states as to the constitutional invalidity of the *Work Choices* legislation, there is a common theme.

Proceedings have also been commenced by Unions NSW and five NSW-registered unions. Their challenge asserts that the use of the corporations power is unconstitutional but, assuming that the use of the corporations power is permissible, regulating the affairs of industrial organisations (trade unions and organisations of employers) some of whose members may be employed by constitutional corporations, is not a law with respect to the subject matter of s51(xx). Further, s51(xxxv) (the conciliation and arbitration power) prohibits the exercise of Commonwealth legislative power in respect of industrial disputes that do not extend beyond the limits of any one state. The Queensland Council of Trade Unions and a number of Queensland unions have also lodged a similar application.

WHERE TO FROM HERE

Obviously it is impossible to predict the outcome of the High Court challenges. Many great legal minds have been applied to the question of whether or not the use of the corporations power in the Constitution is permissible in relation to industrial relations, and there are strong views both ways.

I have followed the debate with great interest and while I don't profess to be a constitutional law expert, I predict the High Court will not be able to reach a unanimous decision, but that the majority will conclude, albeit via different routes, that it is constitutionally permissible to use the corporations power in this fashion, but that certain limitations should apply.

The *Electrolux* decision[1] featured decisions that effectively came to the same conclusion, making certain findings on principle but leaving the detail untouched. A number of individual cases then had to be run based on individual facts seeking rulings based upon those principles.

I suspect that the outcome of the High Court challenge to the *Work Choices* legislation will result in a similar situation. This will necessarily mean a long period of uncertainty while rulings are sought and given on particular facts and circumstances. Such an outcome cannot be expected to deliver the degree of certainty, security and economic stability that the government has identified as the main aims of these significant amendments.

WORKERS' COMPENSATION AND OH&S

In his statement to the House of Representatives on 26 May 2005, when introducing the concept of *Work Choices*, the Prime Minister said:

- "The government's program of workplace relations reforms includes full implementation of our election commitments. The government will:

  .....
- Establish the Australian Safety and Compensation Council to oversee implementation of national occupational health and safety standards and pursue a national approach to workers' compensation."

No further detail has been released in relation to that part of the statement. However, we have seen in recent times attempts by some large employers to exit state-based workers' compensation systems in favour of the Commonwealth ComCare system. It is likely that the federal government will, once the *Work Choices* legislation issue is determined, introduce further legislation based on the corporations power that will impinge in a significant way on the powers currently exercised by state governments in relation to occupational health and safety and workers' compensation. Again, this will have significant implications for state governments and employees within the states. Assuming that the High Court makes findings in the *Work Choices* challenge favourable to the use of the corporations power, it is difficult to see what, if anything, those governments can do to protect state-based employees from such attacks.

The High Court challenge will be followed by many with a great deal of interest and a lot more will be heard about these issues in the months to come. ■

Note: 1 *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40 (2 September 2004).

Bob Whyburn *is a principal of Maurice Blackburn Cashman and head of the Industrial Law Section of the Sydney office, and Director of the NSW branch of the Australian Lawyers Alliance.*
PHONE *(02) 9261 1488* **EMAIL** *Bwhyburn@mbc.aus.net*