High Court ruling hangs over Howard's IR changes

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With passage of the Howard government's new workplace laws, labour market watchers will be keenly searching for early results in 2006. At this stage, only the reckless would claim to know exactly what will happen. Perhaps the only certainty is that the most extreme claims from both architects and opponents of the new regime are unlikely to be vindicated, at least in the short term. Employment conditions are unlikely to collapse overnight. Nor will there be an early surge in new jobs or labour productivity. Battleships simply do not turn around on a sixpence.

All the same, nobody should doubt that these are massive changes with potential to generate a very different workplace in the longer run. Whether you support or despise the traditional approach, it cannot plausibly be denied that our industrial relations system has been a major part of what might be called the Australian way of life for more than a hundred years. That is now set to change. Nor can there be any real doubt that the new system fundamentally changes the balance of power between capital and labour — and you need not be a raving Marxist to say so. Australia is now the only developed country in which the right to collective bargaining is not legally protected. Even in the USA — usually seen as the toughest and most individualised of all labour markets — when a majority of employees want collective negotiations their employer is legally bound to conduct them.

Interestingly, the many far-reaching changes sought by the government will not be achieved through reduced use of the law, as might have been expected. Instead, the new agenda adopts a raft of new laws that, in fact, increase regulation. As such, they do not represent the oft-touted deregulation. Rather, the new regime will rely on heavy re-regulation. Overall, the law will play a bigger role in Australia's labour relations system than before.

Having said that, it is also important to emphasise that little will change for some workers. Anybody employed by a state government, for example, will be unaffected by these changes. Employees of unincorporated businesses will also be untroubled by the new system. For the majority who are covered, existing conditions will not disappear simply because these laws operate. Current awards and agreements will continue undisturbed until they reach their expiry date or active steps are taken to replace them. But some new provisions will certainly bite immediately. Around 80 per cent of the workforce can no longer lodge an unfair dismissal claim, for example. And the Australian Industrial Relations Commission can make no more decisions on minimum wages.

Hanging over much of the legislation, however, is the High Court challenge launched by the states. This will go to the question of whether it is constitutional to use one head of power — Section 51 (20), Corporations: 'to make laws concerning certain corporations' — to displace another — Conciliation and Arbitration, Section 51(35): 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. It is an issue whose importance reaches far beyond labour relations to the fundamentals of Australian federalism. The government's case will essentially invite the Court to accept much broader use of the Corporations power to regulate virtually any activity undertaken by trading corporations, rather than reading it more narrowly as covering only actual trade issues. Success would open the way for federal governments to spread their control to almost anything a trading corporation is involved in. Potentially, this could make traditional state functions, such as hospitals, private schools, town planning, environmental regulations and universities, vulnerable to federal interference. In that regard, it is supremely ironic to see Australian federalism under such clear threat from the legislation of a government whose leader once described himself as 'the most conservative' his traditionally states rights-defending Liberal party has ever had. At the same time, the party that has always favoured expansion of Commonwealth power is now hell-bent on preventing it.

Forecasting a result is almost impossible, even for those most familiar with the High Court's inclinations. Australia's most expert Court watchers are suggesting that on past rulings the seven judges are best categorised as: probably supportive — two; almost certainly opposed — two; and, unpredictable — three. In other words, just how much of the government's industrial relations agenda survives is anyone's guess.

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Not until the dust settles will we be able to say exactly what workers and their organisations will be dealing with as far as new workplace laws and practices are concerned. When that is clear, ALIA will be providing detailed material designed to help both individual and institutional members apply and cope with new arrangements. In the meantime, more detailed analysis than space permits here can be found at http://alia.org.au/members-only/employment/workplace.html. ■