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IRSQ: Working Towards 2020

*The New Legal Environment: Towards
Harmonisation*

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Introduction

- *We are close to achieving a harmonised industrial relations system*
- *However two different systems of industrial relations still operate in this country*
- *The present political situation - the cooperative climate for a national industrial relations system?*

Outline

1. *Harmonisation: what is it?*
2. *Proposals for harmonisation*
3. *Historical attempts at harmonisation*
4. *Work Choices & harmonisation*
5. *ALP legislative action*
6. *Recent developments in harmonisation*

Harmonisation: what is it?

- *The process of synchronising the Federal and State legal systems to achieve a common legislative framework for the regulation of industrial relations*

Harmonisation: what is it?

- *The need for harmonisation: the two system structure*
 - *The States have direct power to legislate with respect to industrial relations*
 - *The Commonwealth system is based on constitutional heads of power:*
 - *1904 - 2006: s 51(35) Conciliation and arbitration power*
 - *2006 - present: s 51(20) Corporations power*

Harmonisation: what is it?

- *The need for harmonisation: the two system structure*
 - *Harmonisation via use of constitutional heads of power will always fall short of achieving a harmonised industrial relations system*

Harmonisation: what is it?

- *Arguments in favour of harmonisation*
 - *Equality*
 - *Inequality arising from State/type of business*
 - *A harmonised system would ensure employees are subject to the same laws irrespective of where they work*
 - *Certainty*
 - *Uncertainty arising from State/Federal divide and definition of 'constitutional corporation'*
 - *A unitary system would remove uncertainties and reduce costs*

Proposals for harmonisation

- *Direct power*
 - *Commonwealth obtains direct power to legislate nationally in respect of industrial relations matters traditionally exercised by the States or where both state and Federal legislation exists*
- *Common standards*
 - *State and Commonwealth government work together to agree to common principles and standards across jurisdictions.*

Proposals for harmonisation

- *Direct power*
 - *Constitutional amendment*
 - *s 128 Australian Constitution*
 - *Constitutional heads of power*
 - *s 109 Australian Constitution*
 - *Referral of powers*
 - *s 51 (37) Australian Constitution*
 - *General referral*
 - *Text referral*

Proposals for harmonisation

- *Common standards*
 - *Model/uniform legislation*
 - *Commonwealth and State jurisdictions enacting identical legislation resulting in consistent legislative systems*
 - *Intergovernmental cooperation*
 - *Council of Australian Governments (COAG), the senior intergovernmental forum within Australia*
 - *Workplace Relations Ministerial Council*

Historical attempts at harmonisation

- *Constitutional change*
 - *Unsuccessful referenda*
- *Constitutional heads of power*
 - *s 51 (35) Conciliation and arbitration power*
 - *s 51 (29) External affairs*
 - *s 51 (2) Taxation power*
 - *s 51 (20) Corporations power*

Historical attempts at harmonisation

- *Referral of power - (1996) Victoria*
 - *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*
 - *Subsequent Labor government have continued the referral*

Historical attempts at harmonisation

- *Recent Inquiries*
 - *1985: Hancock Review*
 - *1988: Constitutional Commission Report*
 - *1996: National Commission of Audit Report*
 - *2000: Breaking the Gridlock paper series*
 - *2002: National unfair dismissal system attempt*

Work Choices & harmonisation

- *Workplace Relations (Work Choices) Act 2005*
 - *Relied on the corporations power as the basis for Federal industrial relations regulation*
 - *Constitutional validity confirmed by the High Court*
 - *Commonwealth able to directly regulate industrial relations of constitutional corporations*

Work Choices & harmonisation

- *Main characteristics of Work Choices*
 - *Minimum standards for employees of constitutional corporations*
 - *Australian Fair Pay and Conditions Standard*
 - *Basic rate of pay*
 - *Maximum 38 hours*
 - *4 weeks annual leave*
 - *Personal carers leave and compassionate leave*
 - *52 weeks of unpaid parental leave*

Work Choices & harmonisation

- *Harmonisation achieved?*
 - *Still no common legislative framework*
 - *Federal system based on the corporations power has brought many workplaces under the scope of Federal regulation*

Work Choices & harmonisation

- *Harmonisation achieved?*
 - *Workplace Relations Act 1996 applies to:*
 - *Employees of "constitutional corporations" within Australia,*
 - *All employees located in Victoria, ACT and the NT;*
 - *Employees of the Commonwealth, or Commonwealth Authorities; and*
 - *Flight crew officers, maritime employees, and waterside workers*

Work Choices & harmonisation

- *Workplace Relations Act 1996 covers the field except in relation to:*
 - *superannuation;*
 - *long service leave;*
 - *workers compensation;*
 - *occupational health and safety*
 - *EEO and discrimination (there continues to be a dual role for both States and Cth)*
 - *child labour;*
 - *deductions from wages or salary;*
 - *traineeships (except relating to pay).*

ALP legislative action

- *The creation of a national industrial relations system was announced as Labor party policy in April 2007*
- *The system under Labor comprises*
 - *National Employment Standards (NES)*
 - *Award modernisation*
 - *Fair Work Australia*

ALP legislative action

- *National Employment Standards (NES)*
 - *Maximum weekly hours*
 - *Request for flexible working arrangements*
 - *Parental leave*
 - *Annual leave*
- *Personal, carer's and compassionate leave*
- *Community service leave*
- *Long service leave*
- *Public holidays*
- *Notice of termination and redundancy*
- *Fair Work information statement*

ALP legislative action

- *The system under Labor*
 - *Award modernisation*
 - *Modern awards and the NES form the ALP's "safety net" for employees*
 - *The Transition Bill provides for the award modernisation process*
 - *The first award modernisation request - 28 March 2008*

ALP legislative action

- *The 10 minimum award entitlements*
 - *Minimum wages*
 - *Type of work performed*
 - *Arrangements for when work performed*
 - *Overtime rates*
 - *Penalty rates*
 - *Minimum annualised wage or salary arrangements*
 - *Allowances*
 - *Leave*
 - *Superannuation*
 - *Consultation, representation and dispute resolution*

ALP legislative action

- *The system under Labor*
 - *Fair Work Australia*
 - *"a one stop shop, to provide practical information, advice and assistance, to settle grievances and ensure compliance with Labor's workplace laws"*
 - *Functions*
 - *resolving unfair and unlawful dismissal claims*
 - *facilitating collective bargaining and enforcing good faith bargaining*
 - *adjusting minimum wages and award conditions*
 - *reviewing and approving collective agreements*

ALP legislative action

- *Further plans for harmonisation*
 - *23 May 2008, the Workplace Relations Ministerial Council (WRMC) issued a Communiqué which endorsed principles intended to*
 - *guide the development of governance arrangements for a stable uniform national system of workplace relations*

ALP legislative action

- *Further plans for harmonisation*
 - *How will a national system be achieved under Labor?*
 - *States will be able to elect if and how they opt into the national system, for example **by full referral of powers, text based referral, mirror legislation, or harmonisation**. It will be open to the States to include specific issues and/or particular areas in the national system beyond those currently covered eg) public sector employees (WRMC, Communiqué, 23 May 2008)*

Recent developments in harmonisation

- *Occupational Health & Safety*
 - *23 May 2008, the WRMC agreed in principle to the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*
 - *All governments have agreed to work cooperatively to harmonise OHS legislation by 2011.*

Recent developments in harmonisation

- *Occupational Health & Safety*
 - *Harmonisation will involve:*
 - *Model OHS Act*
 - *Model OHS regulations*
 - *Model codes of practice and;*
 - *Nationally consistent approach to compliance policy and enforcement.*
 - *The states and territories will then enact or give effect to their own laws to mirror the model legislation and regulations*

Recent developments in harmonisation

- *Occupational Health & Safety*
 - *The Australian Safety and Compensation Council will also be replaced with a new Australian Government body that will drive and oversee national policy development*
 - *In April 2008, a National Review into Model Occupational Health and Safety Laws was announced.*
 - *The Review is expected to report in October 2008.*

Recent developments in harmonisation

- *Anti-discrimination*
 - *The Standing Committee of Attorney Generals (SCAG) have stated their intention to examine options for harmonising Commonwealth, State and Territory anti-discrimination laws*

Conclusion

- *There is a long history of the Commonwealth attempting to create a national, harmonised system of industrial relations*
- *We are the closest we have ever been, yet the current system of industrial regulation remains far from harmonised*
- *Momentum in favour of harmonisation is at its peak - we must wait to see if cooperative Federalism can achieve a national, harmonised system of industrial relations*

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