

EMPLOYMENT LAW

Lectures given in the second semester to post-graduate students in the Faculty of Economics and Business, the University of Sydney

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INTRODUCTION

This publication consists of a series of lectures given in the second semester of 2005 on employment law in the School of Business, Work and Organisational Studies, within the Faculty of Economics and Business in the University of Sydney.

The major text books and resources relied upon in delivering these lectures are:

Breen Creighton and Andrew Stewart, *Labour Law: an introduction*, 4th edition, 2003 Federation Press; and Macken, O'Grady, Sappideen and Warburton, *Law of Employment*, 5th edition, 2002 Law Book Company.

I readily acknowledge the debt these lectures owe to these outstanding texts on Australian labour law. But (hopefully) the lectures do contain some original thoughts. They certainly aim to provide a clear, concise distillation of the relevant law for post graduate students who, generally speaking, had not studied law.

The lecturer would like to thank the students for their active participation in the course and seminars, and the Tutor Dom Rowe for her invaluable support during the currency of this course.

J W Shaw QC

“Nothing is more misleading than the ambiguity of the word “freedom” in labour relations. By restraining the power of management over the individual worker the laws limits the range of the worker’s duty to obey rules made by management. Protective legislation thus enlarges the worker’s freedom, his freedom from the employer’s duty to command, or, if you like his freedom to give priority to his own and his family’s interests over those of the employer. Yet, paradoxically, such liberating legislation must appear to the lawyer as a restraint on freedom, on the “freedom of contract” which in this context, is the term the law uses for the subjection of the worker to the power of management ...” Sir Otto Kahn-Freund QC, *Labour and the Law*, 1977.

“The question of centripetal forces in a federation has often intrigued me. We in this country have watched (I am sure you all have) the very acceleration in the tendency towards a unitary constitution. Those of us who have lived 50 years, ... have been adult long enough to have noticed that the Australian people have tendered more and more to lean on the central government and to think that the central government has more power than it really has and that it ought to do more things than, in fact, it can do.” (Sir Garfield Barwick QC, Attorney General of the Commonwealth of Australia, 9 September 1960, *Sir Thomas More Society* Annual General Meeting, History House, Sydney, NSW.)

“I was to learn later in life that we tend to meet any new situation by reorganising; and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency and demoralisation.” (A quotation wrongly attributed to Petronius: see Alan Barcan, *The Trail of the False Petronius*, Quadrant, October 2005.)

Lecture 1

The framework of legal regulation of work relations in Australia

This initial lecture is very introductory and most of the topics will be returned to in considerably more detail in subsequent lectures, but it is intended to provide a broad overview of the nature of legal regulation of work relationships in Australia. The major philosophical divide in industrial relations today is between the concept of individualism v collectivism in the resolution of industrial disputes. This is associated with the historical development and origins of trade unionism as being the collective representatives of working people and the concomitant organisation of employers into organised bodies representing a number of employers either in a particular industry or over diverse industries.

That is, in the middle ages, work (largely agricultural) was performed by small owners of land (peasants) or by serfs who lived on large estates owned by members of the aristocratic ruling class.

But with the industrial revolution beginning in the 18th century and extending into the 19th century we saw: the evolution of private capital, the development of the contract of employment, the development of corporations as employers with a limited liability and the development of trade unions collectively representing the work force. All these things were in essence essential for the proper development of and growth of capitalism. It is inconceivable to see the factories and mines and mills which grew up in the industrial revolution operating successfully without for example being incorporated and therefore subject to limited liability. Similarly, it is difficult to see them operating successfully without contracts of employment. The essence of the contract of employment is that the employer has direction and control over the worker so that unlike the peasants and serfs of old, hours of work could be prescribed, wage levels could be fixed, the form of dismissal from employment could be formulated and in general disciplinary methods could be exercised over the work force so as to allow the development of profitable enterprises. The counter balance to this development was the evolution of what in medieval times were trade guilds (consisting of semi secret societies of stone masons, builders, butchers, bakers and the like) into modern craft unions.

Like legislative intervention in employment matters, the development of trade unions (or the collective approach to the resolution of disputes) can be justified by the expression of perhaps the greatest of the labour lawyers of last century, a refugee from Nazi Germany, Professor Kahn-Freund who said: “The main object of labour law [is] to be a counter-veiling force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.” This inherent inequality can briefly be explained as arising because, naturally enough, an employer wants to maximise his profit, whereas a worker wants to maximise his/her remuneration. There is therefore an arguable necessary tension between the two objectives and it is not hard to see that because of the power to hire and fire an employer would have an overriding strength of bargaining power. Hence, the evolution of both unions and legislation to protect the employees, and to protect working conditions.

If, in a pluralist society, trade unions are to be accorded a significant, representative role, it is important their membership be open to workers of all political persuasions (or none): cf. J Hendy QC and K D Ewing, “Trade Unions, Human Rights and the BNP”, (English) *Industrial Law Journal* Vol 34, No. 3, (September 2005), p 197.

Labour law is fundamentally concerned with paid employment. Obviously, in this community there are volunteers (the classic examples being volunteer fire fighters or charity workers). But the traditional labour law has had no real role in dealing with their relationships. And there are, of course, many other forms apart from employment in the strict or legal sense by which work is performed in the community, so one can be a self employed business person, say a small shop keeper or an accountant in small private practice although, in other contexts it is clear that both shop workers and accountants can be employees and subject to the contract of employment. Similarly, with medical practitioners they can practice as sole practitioners or in partnerships or they may be employed by a hospital as a salaried member of the hospital staff. Other workers are independent contractors, that is to say they are not subject to direction and control, they do not need to offer personal service but could substitute other people to do their job. Taxi drivers are generally regarded as “bailees” rather than employees subject to a contract of bailment, which means a

party who holds the goods of another (for example a taxi) for a specific purpose pursuant to an agreement between the parties. Similarly, lorry owner drivers (as distinct from employed drivers) are generally regarded as independent contractors because they are engaged not so much on the basis of their personal service as employees but because they own a truck and the trucking company or transport company desires to use that truck driven by somebody and it often does not particularly care who, so long as it is done by a competent driver and that the load is carried. It is true, however, that there are some fuzzy, debatable, lines between these various categories of people who do work in the labour market.

The philosophies of industrial relations as I began by pointing out are really individualism (the individual employee reaching a bargain with his or her employer) which is also known as the market approach, and some would argue for greater efficiency flowing from this market approach and therefore for the deregulation of the labour market, that is the scraping of all or at least much of the legislation which regulates employment. The second alternative philosophy is the collectivist or “protective” view, based upon the Kahn-Freund quote which I earlier put to you, it is based on the concept of a “marked advantage”, as Creighton and Stewart call it, on the part of the employers in terms of resources and bargaining skills. Of course, the matter is not simple because some elements of the work force do have significant bargaining powers such as traditionally (although not so much in recent years) waterside workers and construction workers on major construction sites where a builder is struggling to get a major project built on time and within the contractual price or else suffering penalties as a result of that failure. Again, we will return to this debate on a number of occasions and in particular one session I want to have, which will not be found in the text books, concerns the latest proposals by the Federal Government to further deregulate the labour market and to eliminate some aspects of the award or collectivist system.

Of course, even within the conventional concept of employment there are some irregular forms of employment as distinct from the traditional permanent 9 to 5 or 40 hour per week employment that was familiar in the 1950's – casuals, part-timers, agency workers who are hired out to different firms or organisations by an agency, home workers and out workers.

Now may I return to some historical facts about the development of trade unionism both in England and in Australia. I do this because it is conventionally thought that the evolution of trade unions (representing both skilled and unskilled workers) was integral to the evolution of formal statutory systems of conciliation and arbitration to which I shall refer in a moment.

I have said that in England, modern unions evolved from the medieval craft guilds, however, others emerged from “friendly societies” in the 19th century. Before the 1880’s in England there were no real stable or ongoing organisations for working people, but as the industrial revolution progressed they developed. However, one real problem for the English unions was that they were illegal both under the common law because they were said to be “in restraint of trade” and under the Combination Acts of 1799 and 1800. By the 1820’s, legislation was passed to render the trade union a lawful entity which could not be prosecuted simply because it was a combination said to inhibit free trade and in England also the *Trade Union Act* 1871 ensured that trade unions were lawful despite the fact that their objects might be thought to be in restraint of trade. This legislation was broadly replicated in New South Wales and in other Australian jurisdictions although the *British Trade Disputes Act* 1906 (rendering trade disputes free from legal attack in the common law courts) was never fully implemented in Australia.

Rather, Australia took a different and exceptional course. Beginning in the 1890’s in New South Wales, it constructed statutory systems of conciliation and arbitration whereby unions would register within the system and employer bodies would register within the system and the matter would be dealt with in a formal, some would say, legalistic way, and so it was thought that Australian unions did not need that same measure of protection from the common law in relation to trade disputes as had occurred in England. The New South Wales development of conciliation and arbitration went through various forms but it was not until 1904 that a federal system of conciliation and arbitration was constructed to deal with inter-state industrial disputes. So, in Australia we have dual systems, State systems in New South Wales, Queensland, Western Australia, South Australia and Tasmania, although some years ago Victoria referred its powers to the Federal Government in relation to industrial

relations. So there is no longer a Victorian State system, although like all other States Victoria maintains laws in relation to occupational health and safety as distinct from ordinary industrial relations regulation. The Territories use the federal system. These have traditionally been systems of compulsory conciliation and arbitration.

This does constitute a greater intrusion by the State and the imposition of third party neutral tribunals than is found in most other western countries, although it is fair to say that in every liberal democratic country there is some level of State intervention in industrial relations largely to protect the interest of employees or, it might be argued, to achieve balance at the workplace and, hence, a more equitable society. For example, in America there is a minimum wage law and there is a National Labour Relations Board (the latter largely being concerned with ballots designed to require employers to recognise a particular union as a bargaining agent). In England there are industrial and employment tribunals and there is an unfair dismissal system and on the continent of Europe there are perhaps more extensive efforts by the State to intervene in the labour market. It should be understood that where the Federal conciliation and arbitration system deals with an inter-state dispute and makes an award in respect of it then that overrides any State award or law to the contrary because s 109 of the *Australian Constitution*, 1901 provides that where there is a (valid) Federal law which is inconsistent with a State law then the Federal law prevails to the extent of the inconsistency.

So, broadly speaking in Australia we have traditionally had three layers of industrial relationships in the employment field:

1. The common law contract which is basic when a new employee enters either orally or in writing into a contract with an employer.
2. The award, whether Federal or State, which provides minimum standards of wages and conditions. Where the award contradicts the common law contract then the award prevails. One cannot contract out of an award.
3. The existence of over-award payments and conditions which may create superior wages and conditions to those contained in the minimum rates award.

Increasingly, with the passage of the *Workplace Relations Act* federally in 1996 we are seeing individual contracts which do override awards or collective agreements,

and one of the things we will be discussing is the evolution of that concept when a Bill is available from the Federal Government seeking to expand and make more widespread and operative the system of Australian Workplace Agreements (“AWA’s”).

Lecture 2

The Influence of the *Australian Constitution* in Shaping Australia’s Traditional System of Industrial Relations (3805)

There is a powerful argument that the *Australian Constitution*, as interpreted and applied by the High Court of Australia, has been highly influential on the course of federal industrial relations in Australia.

When the Constitution was formulated in the 1890’s, to take effect from 1901, H B Higgins (who became the second President of the Commonwealth Court of Conciliation and Arbitration) argued strongly for an industrial power to resolve interstate disputes. Thus, a provision was inserted in the Constitution as finally determined by the Australian people which said that:

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.”

This was s 51(35) of the *Australian Constitution*.

Before descending to the details of the way in which the High Court has interpreted this provision, it can be said that a number of aspects of the provisions are self evident:

1. this was not a direct power for the federal legislature to regulate with respect to the wages and conditions of employees.
2. on the contrary it was a power to provide, if the Commonwealth Parliament was so advised, a system of conciliation and arbitration to deal with disputes about such matters.

3. it assumed that the state legislatures would deal with disputes which were purely intrastate.
4. it did not create an obligation upon the Commonwealth Parliament to have a conciliation and arbitration system, but merely empowered it to do so if it chose.
5. the power is not merely to settle disputes by way of industrial awards but also to prevent such disputes.
6. but the power only applied when the dispute extended beyond the limits of any one state, that is to say was an interstate dispute (and, it has been held, a genuine controversy).

Thus, a balance was struck between the rights of states to deal with industrial relations and the rights of the commonwealth to legislate, if it so chose, to have a conciliation and arbitration system with respect to interstate disputation.

For H B Higgins writing articles in the Harvard Law Review, the intention of this power was to create “a new province for law and order” in Australia. In other words, he thought that the law could be applied to the resolution of industrial conflict just as it could in relation to other areas of conflict in human life, such as commercial disputes, contractual disputes, disputes about the injuries inflicted by one person upon another, the criminal justice system and so on. Some would argue that this was naïve, attempting to apply the rule of law to what was, in the light of the great strikes in the 1890’s in Australia, a bloody battle between capital and labour. Others would argue that it was a valiant attempt to apply an objective adjudicative system to that conflict between employers and employees. This debate has raged during the 20th century and beyond it.

However, what is sufficiently clear is that the constitutional provisions and that the High Court of Australia in its various judgments has played a substantial role in the industrial relations of this country. As Justice Michael Kirby and Professor Breen Creighton say in their article “The Law of Conciliation and Arbitration” contained in the book “The New Province for Law and Order: 100 years of Australian industrial conciliation and arbitration” edited by Professors Joe Isaac and Stuart Macintyre

published in 2004 say: “The story of the law of conciliation and arbitration in Australia is, to a large extent, a story of constitutional interpretation.” (p 98)

However, what emerges from a reflection upon the various decisions of the High Court and the impact that they have had on practical industrial relations, particularly in the federal sphere, is that the law is not an exact science, but rather some would regard it as an art. There is no necessary right or wrong answer. Many significant constitutional cases, including those pertaining to industrial relations, are decided by narrow majorities of the court which means that there is respectable argument on both sides of the record. A former Chief Justice of the High Court, Sir Owen Dixon, said upon his inauguration that he would apply “strict and absolute legalism” to the interpretation of the Constitution. But is that realistic? There must be, and the history shows that there has been, a role for value judgments and the intrusion of policy considerations in the interpretation of the Constitution.

One live legal argument is how one reads the words of the Constitution. Is the Constitution to be read as a living, moveable, vibrant document which expands or changes its meaning depending upon socio-economic conditions or is the search one for the original meaning of the words as used by the framers of the Constitution, the so-called “originalist theory” of constitutional interpretation championed by Justice Scalia of the Supreme Court of the United States of America. On this question, opinions, including opinions on the High Court itself, have been divided over the years and in many of these cases there is no easy answer. For example, in 1935 (*Brislan*) it was held that the Constitution empowered Commonwealth laws with respect to radio broadcasting, based upon the power in relation to “telephonic or other like services” and despite the fact that radio was not contemplated in 1901. The Justices of the High Court are appointed by governments of different political complexions, but no government has a guarantee as to how the Judge, once appointed, will apply the law. Hence, anyone who dogmatically predicts the result in an important constitutional case before the High Court is brave indeed.

It is sufficient to refer briefly to the titles of the cases without giving full citations, but those who wish to follow through the cases in their detail should be referred to the relevant provision of the classic text *Labour Law* 4th edition, 2005 (Creighton and

Stewart) but also to the book by Professor George Williams “Labour and the Constitution”, Sydney, Federation Press, 1998 which is referred to in the outline of this course as a further reference. So the lecture will be but a short summation of the immense detail which is to be found in the case law (particularly recorded in the Commonwealth Law Reports) and which is summarised in the two texts to which I have referred.

One early example of the High Court’s intervention, on constitutional grounds, in industrial relations is in relation to the Harvester Judgment. This was the case in which H B Higgins established a basic wage for Australian workers. Higgins spoke of keeping a family in “frugal comfort”. He used some material concerning the cost of living and fixed a minimum wage at seven shillings per day. This was in 1907. It is a case which has been greatly debated by economists, industrial relations scholars and to a lesser extent lawyers. But on any analysis, as Professor Stuart Macintyre says in his book “The New Province for Law and Order” to which I have already referred, the judgment was “quickly established as a landmark of Australian social democracy. It provided the basis for the system of wage determination based on the cost of living that spread to take in the majority of Australian workers ...; and it gave institutional force to the privileged position of the male bread winner.” But this was the subject of an employer appeal to the High Court and because Higgins had premised his decision upon the *Excise Tariff Act* it was said by the majority in the High Court that the decision was invalid, although the practical results of the basic wage case were thereafter reinstated on other grounds. But Higgins clearly felt frustrated by High Court intervention and said in a decision delivered in 1909 that the approach to the Arbitration Court was “through a veritable Serbonian bog of technicalities; the bog is extending”. The reference to a Serbonian bog is one to Milton’s *Paradise Lost*, in particular a reference to a lake in Egypt, a marshy tract which was so profound that into whole armies have sunk.

Now having averted to that important initial decision, let us attempt more systematically to trace the checkered path of constitutional interpretation and its impact upon employment law in this country.

First in *Whybrow* decided in 1910 the Court rejected an argument that the compulsory scheme established by the *Conciliation and Arbitration Act, 1904* (Commonwealth) was invalid and rejected an argument that this constitutional provision was antithetical to the “voluntary” nature of arbitration to be found in the common law.

More importantly, in another case of the same name (*Whybrow*) again decided in 1910, the High Court struck down the idea that the federally created arbitral tribunal could make a “common rule” award. Now, those familiar with the New South Wales industrial jurisdiction would know what a common rule award was. It is the award which encompasses all employers and all employees in the industry or occupation specified in the award. They do not have to be named. They do not have to be actually parties to the dispute. Yet they are covered by what is in effect a legislative prescription which universally encompasses the industry or occupation to which the award is directed. And this has been the great difference between the federal jurisdiction and a state jurisdiction such as that in New South Wales. Federally, because of *Whybrow*’s case and its interpretation of the Constitution, a federal award can only bind parties to the original industrial dispute. Thus, a federal award can bind a specifically named employer or it can bind an employer organisation and all of its members if the employer organisation is a party to the original industrial dispute. But where there are no ascertainable parties between whom an ascertainable difference capable of being composed exists, then according to Chief Justice Griffith “the basis of arbitration is wanting.” The focus was thus shifted on making an award binding on the parties to the industrial dispute rather than exploring more creatively the other concept contained in the constitutional power, namely “prevention”.

The impact of this severe limitation upon federal industrial powers was somewhat lessened by two subsequent cases, namely *Burwood Cinema* decided in 1925 and the *Metal Trades Employers Association Case* decided in 1935 which in combination decided that a registered trade union could create an industrial dispute with an employer who did not employ any members of the union and they could do so despite the fact that their employees were not in dispute with them about the terms and conditions of employment. Secondly, the cases determined that awards could be binding upon all members of a registered organisation of employers that was a party to an industrial dispute, even though that individual employer member was not itself

formally a party to the industrial dispute. So, where there were registered bodies of employers the union could serve a log of claims on that registered body, create and have formally found by the Commonwealth Court of Conciliation and Arbitration an industrial dispute involving that employer body and argue that that award was binding on all of its members. If the member left the employer body then there could be what became known as a “roping in” award whereby the dissident member or outsider could then, after being given due notice, become bound by the award that had been made.

It should also be said that federal awards apply to situations where an employer bound by the original dispute and bound by the award has engaged in a transmission of business. And thus it was that the potentially extremely restrictive effects of *Whybrow* were ameliorated by those subsequent cases thus allowing the federal award system to maintain its efficacy.

The decision of the High Court in *Jumbunna Coal Mine* (1908) supported the provisions concerning the registration of employer and employee organisations and generally facilitated the collective resolution of disputes by the federal tribunal.

Then there is the question as to what is the meaning of the expression “industrial disputes” in the relevant constitutional power. It seemed clear that any dispute which could be the subject of the jurisdiction of the federal tribunal had to be in an industry. But what was an industry? Certainly, manual workers employed by local government authorities were regarded by the High Court in a case decided in 1919 as being engaged in an industry. But then over the years, the High Court took the view that industry usually involved blue collar workers, although in 1923 it decided that insurance employees and bank officers were working in an industry because their employers were “ancillary” to the functioning of industry. But in 1929 it was decided that state school teachers were not engaged in an industry. Importantly in 1959, the High Court determined that professional engineers employed by state government departments involved, for example, in construction activities, were employed in an industry. But clerks employed by state government departments, fire fighters and university lecturers were not employed in an industry. And so the labyrinth went on. It was a patchy and unsatisfactory result which made it difficult to predict when a

group of employees would be regarded as in an industry for the purpose of the commonwealth constitutional power or whether they were not. A series of somewhat obscurantist tests grew up – was the employer involved in the production and distribution of wealth? Was the employee doing work which was the same in character as work performed by other employees who were directly engaged in the production and distribution of wealth? In any event was the employer operating in a way which was incidental or ancillary to industry? In other words a kind of degree test emerged.

Certainly the 1959 *Professional Engineers Case* rejected the idea that it was only manual labourers who were engaged in an industry. But in a sense this only increased the fuzziness of the line between industrial workers and those who were not working in an industry for the purposes of federal conciliation and arbitration. All of this obscurantism was put aside in the *Social Welfare Workers Case* (decided in 1983) which rejected much of the old, antiquated authority and held that the words “industrial disputes” should be given their popular meaning – what do they convey to an ordinary person, and that this was a question of fact. Profitability was rejected as a criterion. The court said in the *Social Welfare Workers Case*: “We reject any notion that the adjective ‘industrial’ imports some restriction which confines the constitutional conception of ‘industrial disputes’ to disputes in productive industry and organised business carried on for the purpose of making profits.” Nonetheless, the court in that case expressly reserved the position as to the “administrative services of the states”. In other words, at that stage, such employees were not necessarily engaged in an industry. However, incrementally, the High Court determined that public sector employees were engaged in an industry and ultimately in the *Australian Education Union Case* 1995 held that state employed teachers and other analogous public servants could be said to be engaged in an industry. But they made a couple of qualifications: certain senior public sector employees would not fall within the group of those engaged in an industry because that would involve federal interference with the activities of a state and secondly, a state government must maintain the right to determine the number and identity of the persons whom it wishes to employ so that, although minimum wages and working conditions could be prescribed with respect to state public servants the numbers and identity of such persons would be beyond the federal power.

The tendency thereafter of High Court decisions was to expand the federal industrial power. So, occupational superannuation funds could be the subject of an industrial dispute.

An explosive development occurred in 1956 involving constitutional restrictions on the established system of federal conciliation and arbitration. The Boiler Makers' Society was fined by the Commonwealth Court of Conciliation and Arbitration. That union argued that the penalty was invalid because there was a separation of powers to be discerned in the Australian Constitution. A majority of the High Court (and subsequently in the Privy Council) held that there was such a separation of powers (so that there could not be vested in one and the same tribunal judicial and arbitral powers). This provision is not supported by the text of the Constitution but rather by a theoretical construction based upon philosophical doctrines that the judicial function should be separated from the executive or legislative function. Was this judicial activism? Was this reading into the Constitution an implied term which is not otherwise there expressly? In any event, the result of the litigation was that the old Commonwealth Court of Conciliation and Arbitration needed to be separated and a separated arbitral tribunal had to be created, as it was. Thus, subsequently there was a differentiation between judicial and arbitral powers vested in different tribunals. It is certainly the conventional wisdom that, as subsequent cases have indicated that the separation of powers is a fundamental tenet of the Constitution. So arbitral tribunals cannot definitively interpret or enforce awards. That is a matter for the courts.

In a number of matters the High Court decisions have held restrictions upon the function of arbitral tribunals. Thus, the tribunals cannot deal with trading hours, certain areas of staffing levels, compulsory unionism or perhaps more importantly, the reinstatement of dismissed employees. Nevertheless in the latter category more recent decisions of the High Court allowed such matters to be dealt with despite earlier opinions that whether someone was unfairly dismissed or not was a "judicial" function within the Boiler Makers' principle. By a series of cases starting with *Ranger Uranium Mines* (which was a case determined under the Territories Power, s 122 of the *Australian Constitution*) the High Court came to the view that the area of unfair dismissals could be dealt with in a non-judicial or non-court forum and hence

this paved the way for the unfair dismissal powers enacted under the corporations power. Perhaps for more abundant caution, this power was vested in a separately established federal court, but the logic of the High Court decisions is that the unfair dismissal powers could have been and (perhaps) should have been vested in the Australian Industrial Relations Commission.

So the Constitution, its terms and provisions, and its interpretation for the High Court remains a very relevant factor in contemporary Australian industrial relations. No sensible person should dogmatically predict the outcome of any constitutional case in that court. It depends upon rational discourse and learned thinking about our Constitution. The High Court is a safeguard against excessive legislative power, and represents an objective assessor of the legality of laws which might be passed by the Commonwealth Parliament. There is therefore an interesting and complicated interaction between policy considerations enacted by the legislature and constitutional law considerations determined, ultimately, by the High Court of Australia.

Lecture 3

The New Industrial Framework: “Individualisation and Union Exclusion”

We began this lecture series by emphasising the philosophical divide in industrial relations between individualism and collectivism.

The move to enterprise bargaining under the then Labour Government of the 1980's still contained a strong collectivist flavour about it. It was designed to produce agreements focused upon the needs of a particular workplace rather than the general universalist prescriptions of a federal award. However, the development of the Australian Workplace Agreements (AWAs) has marked a qualitative shift in the philosophy of the federal Conciliation and Arbitration system towards individualism or individual contracts. The inevitable result has been, to the extent that AWAs have been taken up, an undermining of the award system and a reduction of the influence of registered industrial organisations of employees.

AWAs are dealt with in part VID of the *Workplace Relations Act (Commonwealth) 1996*. They constituted a new form of industrial agreement introduced by legislation in 1996, constituting an alternative mode of regulating conditions of employment. There is evidence that when they are reached there is a significant decline in union membership.

Here follows a summary of the various legislative provisions pertaining to AWAs under the current legislation:

- The AWA can only have effect if the employer is a constitutional corporation, the Commonwealth, where the employee's primary workplace is in a Territory, where the employer is a waterside employer of a waterside worker, the employee is a maritime employee or where the employee is a flight crew officer.
- The Australian Industrial Relations Commission (AIRC) has a role in approving AWAs but in the performance of those functions section 90 of the Act, (which concerns the public interest, the objects of the Act and the state of the national economy) is inapplicable).
- An employer and employee may make a written agreement which is an AWA, dealing with matters pertaining to the employment relationship, and this may be made before the commencement of employment.
- The employer must ensure that the AWA includes the provisions relating to "discrimination" prescribed by the regulations.
- The AWA must not contain provisions that prohibit or restrict disclosure of details of the AWA by either party to another person.
- The AWA must include a dispute resolution procedure. Such a dispute resolution procedure may confer powers on the AIRC to settle disputes between the parties to the AWA.
- Unless an expiry date is specified in the AWA then the nominal expiry date is the 3rd anniversary of the AWA date, although there can be a written agreement to extend that nominal expiry date which can not be more than 3 years after the AWA date.
- For a new employee, the AWA can commence the day after a "filing receipt" is issued for the AWA, the day specified in the AWA is the starting day or the day the employment commences; for existing employees the AWA starts operating the day after an approval notice is issued or the day specified in the AWA as the starting day.
- An employer or an employee may appoint a person to be his or her bargaining agent in relation to the making, approval, variation or termination of the AWA providing that appointment is done in writing. It follows that AWAs are not necessarily individual but can be effected by an organisation of employees or some other bargaining agent duly appointed by one side or the other.
- There is to be no coercion by one party or the other to appoint or not appoint a particular person as an authorised bargaining agent.
- Written agreements can vary the terms of an AWA.

- After the nominal expiry date of the AWA, the Commission may, on application by either party, terminate the AWA if the Commission considers that it is not contrary to the public interest to do so and that termination takes effect at the end of the day on which the Commission issues copies of its determination or at such later time as is specified by the Commission's determination.
- After the nominal expiry date of the AWA, either the employer or the employee may file a termination notice stating that the AWA is to be terminated in a manner provided for in the AWA.
- The AWA would ordinarily be filed with the Employment Advocate who is compelled to issue a receipt if that Advocate is satisfied that the filing requirements for the document have been met or that, even if not strictly met, the failure to meet the filing requirements does not disadvantage a party to the AWA.
- The AWA must be filed with the Employment Advocate within 21 days after the AWA date.
- The employer must have explained the affect of the AWA to the employee, and the employee must have genuinely consented to making the AWA. In cases where the employer did not offer an AWA in the same terms to all comparable employees, a requirement of the approval is that the employer did not act "unfairly or unreasonably" in failing to do so.
- The litmus test to be employed by the Employment Advocate in relation to the approval of an AWA is that the Employment Advocate must be quite sure that the AWA passes the "no disadvantage test" and is satisfied that the other approval requirements have been met. Even where the Employment Advocate has "concerns" about whether the AWA passes the no disadvantage test then that Advocate nonetheless, must approve the AWA if a written undertaking is given by the employer and accepted by the Employment Advocate or there is other actions by the parties which resolve those concerns. Where the Employment Advocate does have concerns about whether the AWA passes the no disadvantage test and they are not resolved under this process, then the Employment Advocate must refer the AWA to the Commission.
- The no disadvantage test is met where an agreement does not disadvantage employees in relation to their terms and conditions of employment. This is a question as to whether the AWA would result "on balance" in reduction in the "overall" terms and conditions under relevant awards or laws of the Commonwealth or of a State or Territory "that the Employment Advocate or the Commission (as the case may be) considers relevant".
- The identities of the parties to the AWA are not to be published.
- Any hearing by the AIRC for the purposes of the relevant part of the Act must be held "in private".

- No intervention in the proceedings is allowed; it is only the parties or an approved bargaining agent who are allowed to make submissions or to be heard in relation to the filing, approval, variation or termination of the AWA.
- A non party to the negotiations relating to an AWA must not use threats or intimidation with the intention of hindering the negotiations or the making of the AWA.
- There is limited protection for industrial action both by employers and employees in relation to the negotiation of AWAs.
- Importantly, during its period of operation, an AWA operates to the exclusion of any award which would otherwise apply to the employee's employment and also the AWA operates to the exclusion of any State Award or State Agreement that would otherwise apply to the employee's employment.

COERCION IN RELATION TO THE ENTERING OF AWAs

[s.170NC.5] History

See generally [s 170L.0.5] above dealing with the history of the certified agreement provisions.

This section was introduced by the **Workplace Relations and Other Legislation Amendment Act 1996** (No.60, 1996).

[s.170.NC.10] Constitutional Validity

See generally [s 170L.0.10] above.

See also Mansfield J's discussion of the Federal Court's jurisdiction to award injunctions under s 170NC in *Auspine Ltd v Construction, Forestry, Mining & Energy Union* (2000) 97 IR 444; [2000] FCA 501; BC200001861 at [30].

[s.170.NC.15] Purpose of s 170NC

The purpose of s 170NC is stated as being to defend the right to request and use representation whilst enabling free bargaining so that 'persons are not left naked during negotiations' *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16; (2000) 106 IR 158; [2000] FCA 1468; BC200006200 per Gyles J at [46].

To achieve this, the section was 'to establish a regime for the negotiation through collective bargaining, execution, certification and giving effect to agreements to regulate terms and conditions of employment', per Finkelstein J in *The Age Company Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 103 IR 148; [2000] FCA 1757; BC200007435 at [2]. 'That regime contemplates free bargaining between employers and their employees or organisations of employees and allows the parties to undertake industrial action within a framework

created by [Part VIB]’, per Ryan, Moore and Goldberg JJ of the Full Court of the Federal Court in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530; (2000) 182 ALR 563; (2000) 102 IR 359; [2000] FCA 1188; BC200004922 at [44].

[s.170NC.20] Person – s 170NC(1)

See definition in s 170VK.

[s.170NC.25] Threaten – s 170NC(1)(a); s 170NC(1)(b)

See Ryan J’s recent examination of the meaning of the word ‘threaten’ in *Laing v Construction, Forestry, Mining and Energy Union* [2005] FCA 765; BC200503937, where it was stated at [55] that ‘advising’, ‘querying’ and ‘enquiring’ of various matters or of the complainant did not constitute threats, but rather lay a foundation for imputing a certain state of mind.

A specific case example of where a threat will be found is illustrated in *Seven Network v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia & Ors* (2001) 109 FCR 378; (2001) 184 ALR 65; (2001) 106 IR 404; [2001] FCA 456; BC200101831 where Merkel J ruled at [51] that statements made in a radio interview that ‘industrial action hadn’t been ruled out’ would in certain circumstances constitute a threat of industrial or other action, with the conditional nature of the statement bearing no relevance on the existence of the threat itself.

[s.170NC.30] Industrial Action – s 170NC(1)(a); s 170NC(2)

See definition in s 170WB and general explanation in [s.4.60.10] – [s.4.60.25].

Note, Ryan J in *Laing v Construction, Forestry, Mining and Energy Union* [2005] FCA 765; BC200503937 at [72] considers the meaning of ‘action’ referred to in s 170NC(1)(a) and (b), and states that it must be done with ‘coercive intent’ (see definition from [s.170NC.40]) for it to be captured by operation of s 170NC.

Ryan J also, at [74], states that s 170NC does not extend to cover the threat or undertaking of industrial action of third parties, except where the party making the threat is an appropriate party to the bargaining process and in a position to control the actions of that third party. See also Weinberg J in *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114; (2002) 114 IR 20; [2002] FCA 441; BC200201567 at [95].

[s.170NC.35] Other Action– s 170NC(1)(a)

‘Other Action’ is not defined expressly in the Act. It has, however, been considered by Weinberg J in *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114; (2002) 114 IR 20; [2002] FCA 441; BC200201567 at [93] – [95], where its scope was said to be limited by the phrase’s use in conjunction with ‘industrial action’. Such proximity under the maxim of *noscitur a sociis*, (must be construed in light of the surrounding text) is ‘strongly suggest(ive)’ of legislative

intent to limit the scope of an otherwise permissively interpreted phrase to that of the bounds of ‘industrial action’ itself, such as not contemplating the threats of industrial action of third parties, so ‘including conduct of a kind taken by an employer, or employee, or an organisation registered under the Act, which related to the performance of work but is not included in the definition of ‘industrial action’.’ Such an interpretation of ‘other action’ was said to also be limited by the penal character of s 170NC (See discussion below at [s.170NC.80]) so as to not accord it any undue width, at [96].

Note, Merkel J in *Australian Worker’s Union v Yallourn Energy Pty Ltd* (2000) 95 IR 207; [2000] FCA 65; BC200000137 at [69] held that the commencement of any proceeding with the requisite coercive intent (ie intent to coerce into agreement/varying terms of agreement, see below at [s.170NC.50]) is capable of being characterized as ‘action’ for the purposes of s 170NC(1)(a).

[s.170NC.40] Intent to Coerce– s 170NC(1)

Whilst not expressly defined in the Act, the meaning of ‘intent to coerce’ has been defined extensively in the case law.

‘Coercion’ is more than simple persuasion, (Ryan J, *Laing v Construction, Forestry, Mining and Energy Union* [2005] FCA 765; BC200503937 at [55]) or incentive (Weinberg J *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114; (2002) 114 IR 20; [2002] FCA 441; BC200201567 at [115]), it demands a high degree of compulsion negating choice (at [103]), generally embodied by the threat to take away something possessed or an advantage that would otherwise be obtained (at [104]). Much of the authority considers coercion akin to duress, (at [101], Gyles J, *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16; (2000) 106 IR 158; [2000] FCA 1468; BC200006200 at [21].)

Ryan, Moore and Goldberg JJ of the Full Court of the Federal Court in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR 530; (2000) 182 ALR 563; (2000) 102 IR 359; [2000] FCA 1188; BC200004922 held that conduct, other than ‘protected action’ (see [s.170NC.55], which is intended to prevent ‘free bargaining’ would amount to coercive conduct, at [44], and further that s170NC will be contravened even where the coercive conduct has several other purposes or objectives, at [45], ‘(i)t is... sufficient that the proscribed reason is a substantial or operative reason’, (see generally, *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605; (1976) 51 ALJR 235; BC7600115.)

The coercive intent must relate to entering into or altering an agreement, thus necessarily fails to cover any unlawful action in response to other industrial action not connected to this bargaining process, and thus is not caught by s 170NC as it fails to have the requisite intention, see Finkelstein J, *Cadbury Schweppes Pty Ltd v Australian Liquor Hospitality and Miscellaneous Worker’s Union* (2000) 106 FCR 148; (2000) 185 ALR 480; [2000] FCA 1793; BC200007519 at [22].

Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia (2001) 109

FCR 378; (2001) 184 ALR 65; (2001) 106 IR 404; [2001] FCA 456; BC200101831 provides a succinct and well supported consideration of the authorities in this area. Merkel J at [41] distills the authorities (i.e. *Cadbury Schweppes Pty Ltd v Australian Liquor Hospitality and Miscellaneous Worker's Union* (2000) 106 FCR 148; (2000) 185 ALR 480; [2000] FCA 1793; BC200007519; *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16; (2000) 106 IR 158; [2000] FCA 1468; BC200006200; *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90; (2001) 183 ALR 475; (2001) 106 IR 373; [2001] FCA 178; BC200100649) to provide 'intent to coerce' a two stage test:

1. First, it needs to be shown that it was intended that pressure be exerted which, in a practical sense, will negate choice.
2. Second, the exertion of the pressure must involve conduct that is unlawful, illegitimate or unconscionable...(which) must be considered in the context of the scheme of the Act and of the fact that, subject to the immunity in respect of protected industrial action under s 170MT of the Act, many forms of industrial action are unlawful: see *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637.

It should be noted here that Ryan J questions the relevance of the term 'illegitimate' in the above mentioned test in *Laing v Construction, Forestry, Mining and Energy Union* [2005] FCA 765; BC200503937, see his discussion at [89]. Further, Weinberg J in *National Tertiary Education Industry Union v Commonwealth of Australia* (2002) 117 FCR 114; (2002) 114 IR 20; [2002] FCA 441; BC200201567 doubted the applicability of the concept of 'unconscionability' under the same test, due mainly to consideration of its equitable context, at [121].

In *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia* (2001) 109 FCR 378; (2001) 184 ALR 65; (2001) 106 IR 404; [2001] FCA 456; BC200101831, Merkel J, at [37], imports the further requirement that subject to the qualification of willful blindness, intent for the purposes of s 170NC(1) requires actual knowledge of the circumstances that made the conduct in question 'coercive conduct' (rather than the knowledge of the probability of the result – at [33] from *He Kaw The v The Queen* (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; BC8501099 at [569]-[570]), on the reasoning from [35] for the reasons stated in *Giorgianni v The Queen* (1984) 156 CLR 473. If such actual knowledge can be shown, that person will be liable even where they establish a belief in the conduct's legitimacy and lawfulness, at [35]. See also *Laing v Construction, Forestry, Mining and Energy Union* [2005] FCA 765; BC200503937 at [89].

As a question of fact, the entire circumstances of the case will be evaluated to find coercive intent, rather than simply the events immediately preceding the conduct in question, *Auspine Ltd v Construction, Forestry, Mining and Energy Union* (2000) 97 IR 444; [2000] FCA 501; BC200001861 per Mansfield J at [43].

[s.170NC.45] – Nominal Expiry Date – s 170NC(1)(c)

Defined in s 170VH, see [s.170VH.20] – [s.170VH.30].

[s.170NC.50] – An Agreement Under Division 2 or 3 - s 170NC(1)(c)

See definition under s 170X.

Note, the majority of the High Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116; (2004) 78 ALJR 1231; (2004) 133 IR 49; [2004] HCA 40; BC200405590, held that the agreement did not necessarily have to be able to be certified or even certifiable for there to be a breach of s 170NC, so long as the requisite intent was there.

[s.170NC.55] – Protected Action – s 170NC(2)

See definition of Protected Action in s 170ML

In *The Age Company Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 103 IR 148; [2000] FCA 1757; BC200007435, Finkelstein J at [3] summarizes protected actions as generally those defined in s 170ML, that is, as being industrial action carried out during a period of negotiation for a proposed certified agreement (s 170MI) provided notice is given that industrial action is to be taken (s 170MO).

[s.170NC.60] – Employer – s 170NC(3)

See definition of employer in s 489, referring to section 3 of the **Commonwealth Powers (Industrial Relations) Act 1996** (No.59, 1996) of Victoria.

[s.170NC.65] – Employee – s 170NC(3)

See definition of employee in s 489, referring to section 3 of the **Commonwealth Powers (Industrial Relations) Act 1996** (No.59, 1996) of Victoria, yet specifically excluding people undertaking vocational placement.

[s.170NC.70] – Request from s 170LK(4) – s 170NC(3)(a)**s 170LK:**

(4) The notice must also state that if:

(a) any [person](#) whose employment will be subject to the [agreement](#) is a member of an organisation of [employees](#); and

(b) the organisation is entitled to represent the [person](#)'s industrial interests in relation to work that will be subject to the [agreement](#);

the [person](#) may request the organisation to represent the [person](#) in meeting and conferring with the [employer](#) about the [agreement](#).

That is, a request by employee to be represented by their employee organisation when in negotiations with employer.

[s.170NC.75] – Liability

See Ryan, Moore and Goldberg JJ of the Full Federal Court in *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 100 FCR

530; (2000) 182 ALR 563; (2000) 102 IR 359; [2000] FCA 1188; BC200004922, at [58]-[76] for discussion of the interrelationship of common law vicarious liability, direct corporate liability and the statutory mechanism for imputed corporate liability under s 349, all principles operating in tandem, not being mutually exclusive in the operation of s 170NC.

[s.170NC.80] – Penalty

Merkel J in *Seven Network v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia & Ors* (2001) 109 FCR 378; (2001) 184 ALR 65; (2001) 106 IR 404; [2001] FCA 456; BC200101831, (see also *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2000) 106 FCR 16; (2000) 106 IR 158; [2000] FCA 1468; BC200006200 per Gyles J at [45]) held that s 170ND provides that 170NC is a penalty provision, at [26], and in giving rise to the imposition of a penalty, appropriately demanding the *Briginshaw* standard of proof, at [48]: see *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100 at [362]; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34; (1999) 165 ALR 67; (1999) 94 IR 244; [1999] FCA 899; BC9903707 at [200]-[201] and *The Employment Advocate v National Union of Workers* (2000) 100 FCR 454; (2000) 173 ALR 479; (2000) 98 IR 302; [2000] FCA 710; BC200002796 at [25]-[29].

In imposing a penalty, the issue of privilege against self-incrimination is raised, (not for corporations, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; (2002) 192 ALR 561; (2002) 77 ALJR 40; (2002) 23(18) Leg Rep 2; (2002) 43 ACSR 189; (2002) ATPR 41-896; [2002] HCA 49; BC200206568, at [31] per Gleeson CJ, Gaudren, Gummow and Hayne JJ.) Under *Rich v The Australian Securities and Investments Commission* (2003) 203 ALR 671; (2003) 183 FLR 361; (2003) 48 ACSR 6; (2004) 22 ACLC 286; [2003] NSWCA 342; BC200307152 at [93] per Spigelman CJ, with Ipp J agreeing, where a penalty is imposed, which can be loss of one's position in a company as well as imposition of financial penalty or custodial sentence, the privilege against self incrimination can be relied upon even with s 170NC, subject to the normal conditions of the privilege under the Evidence Acts.

S 170NC also provides for injunctions and declarations, which cannot properly be characterized as penalty provisions, see the Full Court of the Federal Court in *Construction, Forestry, Mining & Energy Union of Australia v Inspector Alfred* [2004] FCAFC 36; (2004) 135 FCR 459; (2004) 130 IR 343; BC200400598 per Wilcox J at [13] and Marshall J at [39], raising the question of whether the privilege against self-incrimination still stands where no 'penalty' as such is sought. Within Moore J's reasoning in this case, found at [18]-[19], the possible argument that such remedies could attract the privilege as being analogous to penalty proceedings is raised on the authority of Beaumont J in *R v Deputy Commissioner of Taxation; Ex Parte Briggs* (1987) 13 FCR 389; (1987) 71 ALR 86; (1987) 18 ATR 469. However, Deane J's test from *Refrigerated Express Line's (A/Asia) Pty Ltd v Australian Meat and Live Stock Corporation* (1979) 42 FLR 204; (1979) ATPR 40-137 at [17] in showing where the threshold lies for privilege to operate was followed to the exclusion of *R v Deputy Commissioner of Taxation; Ex Parte Briggs* (1987) 13 FCR 389; (1987) 71 ALR 86; (1987) 18 ATR 469 by the Full Court of the Federal Court in

Construction, Forestry, Mining & Energy Union of Australia v Inspector Alfred [2004] FCAFC 36; (2004) 135 FCR 459; (2004) 130 IR 343; BC200400598, thus the privilege against self-incrimination will only apply to s 170NC proceedings where the remedy sought can appropriately be characterized as a penalty, and thus doesn't apply to injunctions or declarations.

In *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia & Ors* (2001) 110 IR 372; [2001] FCA 672; BC200102905, Merkel J declared that when determining the appropriate penalty, all circumstances of the particular case must be considered, at [5], affirming Finkelstein J at [4] in *The Age Company Limited v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2000) 103 IR 148; [2000] FCA 1757; BC200007435, at [20]-[21] that matters to be taken into account in determining the appropriate penalty include the cost of the contravention, deterrence, the flagrancy and deliberateness of the breach, the offender's past record of behavior and any contrition displayed by the offender. Similar observations were made by Branson J in *Construction, Forestry, Mining and Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231; [1999] FCA 1714; BC9908046, at [8].

So what are the practical effects of AWAs on Australian Industrial Relations?

Obviously, according to Commonwealth plans, they are destined for further development and deregulation. However, as Professor Mark Wooden says in his article "Workplace Reforms 'where to now?'" in the Australian Economic Review of June 2005: "the issue of workplace relations reform remains highly contentious and reaching a consensus on the direction of reform, let alone its scope is unlikely". These developments towards individualised contracts take place in a context where part time and casual work is an important and growing component of employment in Australia (see Sarah Charlesworth and Jenny Chalmers "Studies in Quality, Part time employment" Vol 15 No. 3 April 2005 Labour and Industry. There is evidence of growing wage inequality which the federal government would in fact support as enhancing the productivity and flexibility of the workforce by promoting incentive (see Martin J Watts and William Mitchell "Wages and Wage Determination in 2003, 2004 Vol 46 No. 2 Journal of Industrial Relations at pp166,167).

There is an absence of empirical and supportive evidence that individual contracts will enhance productivity. A comment by David Peetz in a paper published in 2005 "Is individual contracting more productive?" concluded that following the introduction of the *Workplace Relations Act 1998* annual productivity growth fell to just 2.3% per annum and has since worsened, well below productivity performance stemming from the movement towards enterprise bargaining under which productivity growth peaked at 3.2%. Reference is made to the article by Wayne Swan in the *Australian Financial Review* of 9 August 2005.

The take up rate for AWAs has not been high in terms of the total Australian workforce. There have been notable examples in the mining industry in the Pilbara in Western Australia, in the upper echelons of the Australian Public Service and elsewhere. But by and large, the Australian workforce remains governed by awards, collective agreements, enterprise bargains and the like and this may be at least a

partial explanation as to why the federal government is determined to liberalise the means whereby AWAs can be approved and to restrict the criteria which may limit the approval of such individual contracts, that is to reduce the “transaction costs” involved in the making of an AWA.

Conclusion

This is then a complicated, and indeed, labyrinthine regime quite out of kilter with traditional conciliation and arbitration in Australia.

Lecture 4

The Employee and Employment Law

This talk is about the contract of employment, the contemporary relationship between an employer and an employee.

The method of work by slavery fell, as a result of legal decisions in the late 18th century. The writ of habeas corpus (deliver up the body) was a valuable tool in freeing people from slavery once on English territory so that form of labour by black people deprived owners and producers of free labour. Lord Mansfield said in the House of Lords that the air of England was too pure to allow the institution of slavery to endure – let the slaves go free! In England, this was achieved by legal process. In America, it took a bloody civil war to obtain the same result.

After the Norman conquest, land tenure was the theme and the villeins, a kind of serf, worked their patch of land under lords appointed by the monarch. Villeinage was a menial form of feudal tenure where the tenant was required to perform the services required by the lord of the manor. Such service was compulsory. The fleeing villein could be recaptured. Workers in the towns formed guilds consisting of skilled tradesmen and apprentices, the embryonic trade unions.

However, with the emergence of the industrial revolution, the law of contract was applied to workers and is said in Macken and others: “this bargain was to be treated at law in the same way as any other commercial bargain or contract and the same rules of law would be applied to its terms”. There was no longer a right to land. The

concept of direction and control emerged by which an employer could enforce working hours, wages, methods of working, levels of production and the like. This was the common law evolving in the same way as it evolved the general law of contracts. If there were breaches, then the ordinary remedy was to sue for damages in common law.

But the question of whether there was in fact and in law a contract of employment arose and still remains a vexed and somewhat fuzzy issue in many cases. A person can perform work in an industry as an independent contractor, an agent, a tenant, a franchisee or a partner.

In England, the “unorganised” worker (not in a union or covered by a collective agreement) is the norm; only 22.1% of employees are covered by collective bargaining in the private sector; the “individualisation” of employment promoted under Mrs Thatcher’s Tory government has basically continued under Mr Blair’s “new Labour” government – neo-liberalism and “flexibility” remain the themes of English labour relations: A Pollert, “The Unorganised Worker: the Decline in Collectivism and New Hurdles to Individual Employment Rights” (English) *Industrial Law Journal* Vol 34, No. 3 (September 2005) p 217.

The courts have articulated various tests to determine whether the contract is truly one of employment and of course this consideration is vital for the operation of an industrial relations system which is underlaid by the concept of employment. One test has been the “organisation” test. Is the person working as part and parcel of an organisation?

However, the more vital test and the predominant test, even if not the exclusive consideration is whether the person engaging the labour has direction and control over the worker. Thus it has been said that the final test to be generally applied lies in the nature and degree of detailed control over the person alleged to be an employee. It has been said that: “what matters is lawful authority to command so far as there is scope for it. There must always be some room for it, if only in incidental or collateral matters”.

There are various specialised occupations in life where actual and detailed direction and control over the day to day work is simply impractical.

Take the case of a high wire walker performing in a circus. This was dealt with by the High Court of Australia in *Zuijs v Wirth Brothers Circus* (1955). Obviously, when on the high wire, the operators of the circus are in an impossible position in telling the performer just what to do. Nonetheless, they can lay down times of performances and other ancillary requirements of the job including the time to be spent on the high wire and, almost certainly, safety considerations. The court determined that that person was to be regarded as an employee for the purposes of workers' compensation legislation.

Take the case of an employed medical practitioner treating patients in a particular hospital. Some of the earlier cases thought that such a person was not an employee. But in more recent years as Lord Denning put it in *Cassidy v Minister for Health* (1951), the reason why the employers are liable in such cases is not because they can control the way in which the work is done – they often have not sufficient knowledge to do so – but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal. Similar analogies arise with the ship's captain who is in charge of his ship and with a crane driver, both of whom could justly say that "I take no orders from anybody". But that is not sufficient to say that they are not employees and not subject to some measure of direction and control by the employing authority. Denning said in a case decided a year after *Cassidy* (1952) "it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffer and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services."

Sometimes the interests of the Australian Taxation Office (ATO) and the labour movement converge as they did in litigation concerning *Vabu* (1996). *Vabu* employed courier drivers and the ATO submitted to the court of appeal in New South Wales that those courier drivers should be the subject of PAYE taxation. That court disagreed emphasising the view that the engagement was of a courier to provide services rather than an individual and that the particular courier could delegate his/her services to

somebody else providing the work was done. In subsequent personal injury litigation, again in *Vabu*, the High Court took a different position and held that the couriers could be characterised as employees because of the extent of the control which they were under.

One interesting example of a worker who may be an employee (and who indeed is deemed to be an employee for the purposes of NSW workers compensation laws) is that of a jockey. In the federal commission, it was determined that the Australian Workers Union could not obtain coverage or eligibility over jockeys because they were not employees but rather independent contractors engaged for a particular race. On the contrary, in the NSW jurisdiction before the industrial registrar and on appeal to the Supreme Court of NSW it was held that, provided that the rules of the union specified that it was only jockeys who were “employed” who were to be covered by the rules, then that was valid. This was not a definitive decision that all jockeys are employees, although they are required under the rules of racing to take directions from the trainer and the owner of the horse, but rather an acknowledgement that there could be conceivably a jockey who was undoubtedly an employee, such as a jockey who was employed to ride track work regularly at specified times.

It is these notions governing the contract of employment and the determination of who is an employee which underpin both the federal and NSW statutory systems of conciliation and arbitration. Although, in NSW the legislature has deemed certain people to be employees who would not otherwise be considered as such, nonetheless, the contract of employment remains generally speaking litmus test for the invocation of the jurisdiction of the tribunals.

Of course there are other legal mechanisms whereby a person may perform work in an industry. At least in the NSW jurisdiction, there is a remedy provided to a person who is the subject of an unfair or harsh contract which has the effect of undermining an otherwise applicable award or industrial agreement. This is to be found in section 106 of the *Industrial Relations Act, 1996 (NSW)* replicating provisions introduced in 1959 which enables the court to strike down the contract or arrangement whereby the work is performed in an industry as being invalid where it provides remuneration less than that which would be provided if the award applied to an employment contract, and to

provide compensation in respect of any such unfairness. This has been described, by W S Sheldon J as a “radical law” which was designed to and does in fact interfere with otherwise binding contractual relationships in the public interest and in defence of the system of industrial arbitration. One series of cases which arose in the late 1970’s where a registered trade union tested out these provisions and succeeded in striking down arrangements which avoided the award rates was that of the *Federated Miscellaneous Workers Union (NSW) Branch v Wilson Parking*. Wilson Parking formed its car attendant workforce into a series of partnerships. The first question which went to the Privy Council in London, was whether the union itself had the standing to attack the contract or arrangement notwithstanding that no individual “partner” lent his/her name to the litigation and complained about the arrangement. The answer to that question being in the affirmative, the matter went back to Dey J of the Industrial Commission of NSW who had little difficulty in deciding that when one analysed the remuneration paid to these so called partners, it was less than was provided for by the relevant industrial award which had been obtained by the Miscellaneous Workers Union. Hence, the partnership arrangement was struck down and compensation was awarded accordingly.

Other non employment arrangements include the following:

- Subcontractors who enter into a contract for a portion of the work contracted for and may do the work him/herself or he/her may employ labour to do that work or share the work with other people. This phenomenon is of course well known in area of the building industry.
- Franchisees pay money to operate small businesses (such as McDonalds) and although they may and ordinarily would employ people under a contract of employment the franchisee is not him/herself an employee of the parent company.
- Taxi drivers work under a contract of bailment (that is, a contract which essentially is about the delivery of property), although it is conceivable that

some taxi drivers given a regular and established relationship with a particular owner might be considered to be an employee.

- Lorry owner drivers have traditionally been regarded at least since the case of *Humberstone v Northern Timber Mills*, decided by the High Court in 1949, as independent contractors. However, that case turns upon its own particular facts with Dixon J saying that “in the present case the contract by the deceased was not to provide merely his own labour, but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck...”. His Honour went on to characterise the contractor as one of “mechanical traction” rather than the employment of labour.

One of the legal challenges of a modern system of conciliation and arbitration is to grapple with these alternative forms of the performance of work either by deeming (that is, creating a legal fiction) certain classes of workers to be employees for the purposes of the statute or by creating (as is the case with lorry owner drivers in NSW) a particular series of prescriptions designed to set and determine their rates of remuneration whilst accepting that they are not, in the common law sense, employees. This has been a relatively neglected area of legislative intrusion into the labour market.

Lecture 5

The Formation of the Employment Contract

The old terminology of master and servant faded out during the 20th century in favour of the verbiage employer and employee. Nonetheless, in order to attract broad labour law, processes of conciliation and arbitration and the like, it is necessary to find a common law contract of employment between identifiable parties.

In the middle ages, it was said that the courts did not ordinarily concern themselves with “private arrangements”. However, as early as the 13th century certain writs were

developed in the courts which enabled private transactions of what we would today call a contractual nature to be enforced: in particular, the writ of debt. By the 16th century more general contractual remedies were being developed by the courts in England. What evolved was a proceeding called an “action on the case”. What are the basic principles of the law of contract which were developed by the English courts and which remain applicable in Australian common law?

- (a) The contract may be either oral or in writing. In employment matters both forms of contract are to be found. The arrangements between a managerial or executive employee of a major corporation will usually consist of an elaborate written contract making provisions for bonuses, commissions, rights on termination, the allocation of shares and, of course, the fundamental question of regular remuneration. On the other hand, many a blue collar worker (either skilled tradesman or labourer) will be employed on little more than a brief conversation, a hand shake, an agreement as to starting date and a presumption that the relevant award (state or federal) would apply to the terms and conditions of contract. However, there may be an additional agreement, often oral, about over-award payments or other benefits and entitlements not specified by the award.

- (b) To find the existence of a contract there must be ascertainable an offer and an acceptance. The question has to be asked as to whether there has been a definite offer to an individual or to the public generally. Sometimes the courts have considered, for example, an advertisement merely to be an offer to negotiate, an offer to receive offers and therefore what is called an “invitation to treat” rather than an offer that can lead to a binding contract. Then there must be evidence of the intention on the part of the offeree to accept the offer. Where a prospective employee puts to the prospective employer a counter offer, the law considers that to be a rejection of the original offer and, hence, while negotiations might continue, no binding legal transaction has been entered into. But the law has drawn a distinction between putting a counter offer and merely requesting information. However, to enforce the contract, the acceptance must be unconditional and must be communicated in some form or other. The offer can be revoked if that is done before acceptance. The

bargain between the parties must involve some valuable consideration, that is, there must be an element of mutuality about the agreement. In employment situations the question of consideration is usually quite simple. An employer promises a person that if he or she performs certain work for the employer then remuneration would be paid and other conditions of the employment given. In the case of voluntary provision of work, there may be no consideration and therefore no contract. But ordinarily the performance of work and the payment of wages will be sufficient to demonstrate a binding legal relationship. Although the consideration must be “valuable” or “sufficient” the courts have been traditionally been ready to find the existence of consideration where that is possible.

- (c) Although there has been some controversy about it, the conventional view is that in addition to the factors mentioned, there must be ascertainable an intention to create legal relations. For example, some domestic agreements might be held to fail to disclose an intention to create binding legal relationships. Sometimes the parties to an arrangement may expressly say that the matter is binding only in honour and is not intended to be binding in law.
- (d) The contract may consist both of express terms and implied terms. Express terms are what the parties said or wrote. There is a general presumption that where the contract is in writing then that written contract represents exhaustively the express terms of the contract (the so-called “parole evidence rule”). However, there can be contracts which are partly in writing and partly oral. It is only a presumption that a written contract exhaustively states the express terms of the contract and that presumption can be rebutted. Implied terms are hard to make out. The leading case remains the decision of the Privy Council in *BP Refinery (Western Port) Pty Limited v Shire of Hastings*, decided in 1977 and which has subsequently been applied by the High Court of Australia. Putting it simply, to find an implied term one must conclude that such a term is “necessary” to the contract not merely that it is “reasonable”. In the 1995 High Court case of *Byrne v Australian Airlines Limited* the court formulated the test so as to enquire whether the “implication of the particular term is necessary for the reasonable or effective operation of a contract of that

nature in the circumstances of the case.” There can be terms implied in the contract by custom, that is by establishing by the use of extrinsic evidence some general usage or custom in an industry, but the conventional view is that the custom has to be so well known that everyone must be assumed to have known it when they entered the contract and certainly the customary practice in an industry would not be imported if it were contrary to the intention to be discerned from the language used by the parties to the contract.

- (e) Where an agreement has been reached on the basis of a common mistake (that is by both parties) it will be regarded as legally void. In some limited cases, a contract can be regarded as void where there is unilateral mistake, for example where there is a mistake of identity as to the person involved.
- (f) Misrepresentation by one party or the other can lead to an avoidance of the enforcement of the contract but damages are only obtainable if the representation is itself a term of the contract. Where the misrepresentation is fraudulent then the contract may be avoided altogether and damages may be recoverable whether the representation is actually a term of the contract or not.
- (g) Just as a contract may be made by consent, it can also be varied by consent.
- (h) The doctrine of privity of contract means that only the parties can enforce the contract, and a third party, despite any harm that might have accrued to that party, is unable to enforce it. This is a rule developed in the 19th century.
- (i) The consequences of breach of contract are, generally speaking, to be found in damages at common law. The courts will not ordinarily enforce a contract for personal services because of policy reasons that an injunction should not be granted in such category of cases. Thus, the party alleging breach is left to sue for monetary compensation rather than being able to have the contract put back in place by some urgent interlocutory injunction. (Compare and contrast the industrial relations remedy of reinstatement of a dismissed employee.)

These then are some of the basic principles of contract law. We should now talk about some more specific matters relating to employment law.

One important point is that although the contract of employment is the underpinning of the relationship for the purposes of Australian labour law, and can be foundational if a question mark is raised as to whether there was actually a contract of employment, generally speaking much more important has, at least traditionally, been the relevant state or federal award, the industrial agreement or other forms of registered agreements or in more recent times the Australian Workplace Agreements (“AWA’s”), which can take the form of the individual arrangements but which are nonetheless registered pursuant to statute. The common law contract is important where there is a dispute as to whether the person involved is at law an employee and also where there is some provision in the common law contract to provide over-award benefits.

Some employment contracts will be unenforceable if they are illegal or contrary to public policy, especially where the contract is associated with unlawful conduct.

A major question in Australian employment law is whether the award or agreement is part of the employment contract of the employee. One reason why this is important is if the award is part and parcel of the contract and, in the area of dismissal, the award has been breached, the employee can take action not only for the relatively modest penalties available for award breach, but can sue for more general damages. However, the question has been answered in the negative by the High Court in *Byrne v Australian Airlines Limited* (1995). We shall need to consider this important case in detail. There was a relevant award provision applicable to baggage handlers working at the airport which forbade a dismissal which was “harsh, unjust or unreasonable”. It was alleged that two baggage handlers stole goods from the bags of passengers. There was a video recording but that video was not shown to the workers involved for months after the event and, at least in the Federal Court of Australia, the evidence against the workers was regarded as inconclusive. The Federal Court took the view that they had been dismissed without an adequate opportunity to present their case to the employer and that therefore the award had been breached. Hence, it would follow that damages could be awarded. The High Court took a different view and was

unable to characterise the dismissal as harsh, unjust or unreasonable by reason of procedural unfairness. The High Court's reasoning focussed upon the substantive conduct and took the view that if the employer could justify the dismissal on the basis of the substantive conduct then the dismissal was not rendered unfair merely because of procedural inadequacies. Moreover, the court took the view that the employer was entitled to use material which had emerged subsequent to the dismissals even though that material was not part of the employer's reasoning process when the employees were dismissed. More fundamentally, the High Court took the view that the award was not an implied term and condition of the contract of employment. It seems to have been accepted that the award could expressly be given contractual force if, for example, there were a clause of the contract which said that the award was part of the contract, however, apart from such an exceptional provision the incorporation of the award into the contract was not "necessary" and was not so obvious that the incorporation of the award went without saying. In the instant case there was no evidence to support the implication of a term by reason of any established custom and practice in the industry. The idea that the award was automatically imported into the contract, whatever the intention of the parties, was rejected, largely on the basis that the legislation itself did not seem to intend to give that contractual effect to an industrial award. This judgment is the subject of a caustic critique in *Creighton and Stewart's Labour Law* (4th edition) at pp 314, 315.

An award or other registered industrial instrument is presumptively fair and reasonable, but where what is relied upon is the contract of employment then the unfair contracts provisions of the *Industrial Relations Act 1996* (NSW) have a role to play – beginning with s 106. There are equivalent provisions in the Queensland state legislation. In recent years Parliament apparently took the view that some of the awards to aggrieved parties to a work contract were excessive and placed limitations on the salary levels before a person could bring a case and also imposed some time limitations. Subject to those limitations, the relevant legislative provisions contain the following ingredients:

- They apply where there is a contract whereby work is performed in an industry.

- This includes an “arrangement” so that it applies even if there is not an established legally binding contract.
- It enables such a contract or arrangement to be challenged when it is contrary to the public interest, unfair or unjust or where it undercuts the provisions of a relevant state award.
- For constitutional reasons there are problems in applying these provisions to an employee or a worker covered by federal industrial legislation, essentially because of potential inconsistencies between federal and state laws and the provisions of s 109 of the Australian Constitution. There are also difficulties where the “proper law” of the contract is that of a jurisdiction other than that of NSW.
- Where, however, the Industrial Relations Commission of New South Wales in Court Session is satisfied that the contract was relevantly unfair (to use shorthand for the other criteria that are also to be found in the section) then the contract can be declared void from its outset, varied and/or compensatory payments can be ordered.

This has been described as a “radical law” because it interferes with what the law has traditionally regarded as the freedom of parties to bargain. Introduced in 1959 its fundamental object was to safeguard the system of industrial awards in the New South Wales jurisdiction and to ensure that devices or schemes designed to circumvent those award minimum wages and conditions could be dealt with by the state tribunal. There is much law on these provisions and an on-going debate about how closely the contract or arrangement must be linked with an industry, that is to say whether it has an industrial flavour or whether the provision gives a broader charter to the Commission to examine contracts or arrangements which might be regarded as having a commercial flavour. What is clear, for example, is that the mere sale of a shop would not come within those provisions because that transaction does not directly or perhaps even indirectly contemplate that work would be performed in an industry. It may be that the purchaser would simply buy the shop to close it down or use it for some other purpose. The Court of Appeal has told us that s 106 (and related provisions) should not be used for the enforcement of a work contract – that, apparently, is a matter for the common law courts.

Apart from the regime of award and industrial agreement provisions, these provisions facilitating challenges to unfair work contracts are the most spectacular example of where legislative industrial relations provisions intercept with the traditional notion of freedom to contract and the more conventional law of contracts.

Lecture 6

The Employee's Duties

The question here is what obligations fall upon an employee once entering into a contract of employment and engaging in a productive work in an industry under the direction and control of an employer.

Obviously, in any contractual relationship, there are duties, obligations and rights. However, for present purposes we shall attempt to define what are the obligations of an employee in relation to an employment contract.

These are:

- (a) The obvious obligation to provide work for the employer of a productive character. It is axiomatic that if work is not provided then the whole contract is pointless and has been breached and that breach would be fundamental.
- (b) The employee is also obliged to comply with an old fashioned term "obedience" and perhaps a more modern term "cooperation". The employee must comply with lawful orders; obviously he or she could refuse to comply with orders which were unlawful or even unreasonable, and which were within the scope of the arrangement, whether specified by contract, award or legislatively enforceable agreement. The latter concept is one of illusory reference and would require a somewhat subjective judgment as to what was unreasonable in the circumstances. The courts have acknowledged managerial prerogative in the giving of instructions to employees, but this cannot be unfettered. One limitation is lawfulness, but other limitations lie in whether

the direction or instruction to the employee is reasonable in all of the circumstances of the situation.

- (c) The courts will give considerable flexibility to the employer to require re-training or the acquisition of new skills or alternative systems of work which might be different from those which were in place at the point of engagement. But unreasonable obligations or burdens quite beyond the initial capacity of the employee, having regard to his or her training and skills, could well be held to be an invalid exercise of the employer's right to require the employee to perform a particular duty.
- (d) Courts have also recognised a broader conception of the duty to cooperate with the employer. This is again a term of vagueness and requires analysis in the circumstances of the particular facts of a case. However, it is at least clear that cooperation would be infringed by the undermining of the enterprise, unnecessary aggression towards supervisors or other workers or, of course, dishonesty or theft. It has been held, for example, that an employer direction to an employee to cease the sexual harassment of a co-employee in the workplace is valid.
- (e) Moreover, it is established that employees can be obliged to provide truthful answers to questions posed to them by employers, if those questions are reasonable, fair and relevant. Questions which are quite extraneous to the employment relationship and relate only to private life should not be allowed to be a part of the enforceable employment relationship.
- (f) It is obvious that an employee is expected to perform his or her work with appropriate and relevant care and skill, providing that the care and skill comes within the ambit of the employment and the claim of the employee to be able to exercise such functions.
- (g) The employment relationship is "fiduciary" in nature, that is to say requires faithful service and a commitment to the employer as opposed to third parties but, as *Creighton and Stewart* point out, the general fiduciary duty does not

require the putting aside of every aspect of self interest and the absolute commitment to the interests of the employer. This does not mean that a person cannot work for other persons part-time outside of the ordinary hours of the employment contract, provided that there is no conflict of interest. Of course, what the Americans describe as “moon lighting” can be prohibited by the contract, but unless it is, and unless there is the requisite friction between the outside work and the primary contract of employment, then there is nothing unlawful about it. For example, a salesman could be employed as a rugby league player on the weekends.

- (h) The same duty of loyalty means that employees cannot use information acquired during the course of their employment to benefit third parties. The intellectual property is owned by the employer. This concept of fidelity may not need to be an express term of the contract of the employment but may be necessarily implied.

One statutory and notable example restricting the use of information by employees is to be found in the corporations law, that is the *Corporations Act 2001* (Commonwealth). Section 182 requires that an employee must not improperly use their position to gain advantage for themselves or someone else or to cause detriment to the corporation. (This is a section which also encompasses comparable obligations on directors, secretaries or other officers of a corporation.) To breach this provision, it does not necessarily need to be shown that the accused employee earned a profit from the forbidden transaction. Section 183 of the same corporations law provides civil obligations on a person who, having been (relevantly) an employee, of a corporation uses information to gain an advantage to themselves or someone else or cause a detriment to the corporation can be subject to a civil penalty. Information means no more than the sort of information which a court would protect by injunction if a director used it in breach of fiduciary duty, and impropriety comprehends a concept of something which would also be a breach of fiduciary duty outside the law. A most egregious example is that of insider trading, where profits flowing from it are recoverable by the company.

The leading exposition of the interaction between confidentiality in the employment relationship is that written by Andrew Stewart in his article “Confidentiality in the Employment Relationship” in (1988) vol 1 *Australian Journal of Labour Law* at p 1. Stewart makes it clear that the employment relationship “is a fertile field for the operation of the doctrine of breach of confidence”. As he points out, employers generally possess secret information which may be valuable; secondly, where an employee obtains that information during the course of his or her employment the law would ordinarily consider that that confidentiality should be maintained; thirdly, the potential for unauthorised use exists in the possible disclosure of the information to others, most commonly competitors, where the employee may gain subsequent work. There could also be the situation of an employee setting up in competition with a former employer. Stewart concludes that the present legal position is unsatisfactory. The author suggests a position whereby the employee should be subject to an equitable duty of confidentiality, enforceable only where the effect on the particular employee would not be unduly restrictive, but with a more robust view of human capacity to stay silent on matters specifically identified in an injunction. Thus, there could be a balance between the employer having an appropriate protection for secrets whilst liberating most ex-employees who are not seeking to make a “windfall” gain from a period of service.

The post employment situation of restraints is a particularly difficult area of the law. Should the employer be able to use contractual restrictions to prevent competition between itself and former employees? Should former employees be, in effect, put out of work for specified periods whilst they cannot obtain clients in the relevant field? English law recognises that there can be contractual restraints upon former employees poaching clients from their employers. What is clear, to use the words of Creighton and Stewart, that any such restrictive covenant “must be no wider than is reasonably necessary to protect the employer’s interests, when judged in terms of the duration and area of its coverage and the activities restrained.” If the scope of the restrictive covenant extends beyond what is reasonable it will, generally speaking, not be enforceable by the courts. Again, this is a category of illusory reference and requires an examination of the market in a particular field of enterprise. However, one can readily conceive of extreme examples whereby the restriction far and away exceeds anything necessary to protect the former employer. At the same time, and on balance,

the former employer is entitled to be protected against the use of information acquired during the employment, at least for a finite and reasonable period; compare and contrast the post-employment use of expertise acquired.

One interesting case, albeit at a relatively modest level of the judicial hierarchy, is the decision of Commissioner O'Connor of 15 November 1999 [Print SO947] dealing with an application for relief in respect of termination of employment under s 170CE of the *Workplace Relations Act*, 1996. This is the decision of *David Kenny v Epic Energy*. Mr Kenny alleged that his termination by Epic Energy was harsh, unjust or unreasonable and sought compensation. He was paid four (4) weeks' wages in lieu of notice. It was said that he had used in an unauthorised way the company's internet facilities contrary to Epic Energy's internet security policy.

It seemed to be established that either Kenny or some other person using his access codes had used unauthorised sites on a number of occasions in 1998 and 1999. Following enquiry, Mr Kenny's employment was terminated. Mr Kenny said that his wife had accessed his company accounts on his home computer by mistake and that there was no incentive for him to use company accounts, and any usage was a mistake. He was a senior manager. The Commissioner held that Mr Kenny's evidence on the events was inconsistent and preferred other evidence. He was given four (4) weeks' pay in lieu of notice, and the Commissioner held that there was a valid reason for termination. The Commissioner went on to find that this was not a "single incursion into unauthorised areas" which could support the argument of inadvertency, but rather it was not an isolated incident and furthermore that the company was entitled to have its security policies adhered to by a person responsible to them. In all of the circumstances the Commissioner held that he should decline to interfere with the employer's decision about termination and dismissed the application. Interestingly, the Commissioner said that the Commission had "no opinion one way or the other on the morality of a person accessing pornography sites on the internet in their home, nor should it, and the decision is based entirely on the employer's right to place rules and constraints on the use of its assets".

Perhaps quaintly the Commissioner revives old New South Wales criteria in relation to reinstatement cases stemming from some statements of Commissioner Gil Manuel

of the Industrial Commission of New South Wales in using the rather colloquial expression that everyone should get a “fair go all round”. This rather plain speaking expression was picked up by W S Sheldon J in *Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95 who adopted that terminology. This is a short decision. Whether it was right or wrong is no doubt arguable, and it does have implications for the use of email by employees perhaps by analogy with the use of the telephone by the workforce for personal reasons.

In any event, this decision marks another step in the articulation of the duties of employees to their employer and underpins the circumstances where dismissal can occur when such duties have allegedly been breached.

Lecture 7

The Employer’s Duties

In an obvious sense, the duty of the employer is clear: to provide work (or at least remuneration in lieu thereof) in order to further a productive enterprise. But it is a somewhat more sophisticated and subtle concept to consider that the employer has duties, apart from the obvious obligations of paying wages and conditions pursuant to the contract of employment and/or the award or industrial agreement.

Yet, the law does prescribe other obligations on employers in relation to the work force.

The most obvious duty of the employer is to provide a safe working environment, to avoid risks of physical injury, to provide adequate supervision and instructions to remove the danger of injury and death, as far as is practicable. This is a topic to which we shall return.

But there are other obligations of an employer that the law would imply.

Putting this fundamental obligation to aside, for the time being, other obligations falling upon the employer include:

- The obligation of indemnity, that is to say, an employer must reimburse an employee for an expense incurred on behalf of the employer, where that expense has been authorised expressly or by implication. Interestingly, this requirement to give indemnity occurs even in relation to a criminal act, where the employee is not aware of the criminal nature of that act.
- An obligation to provide for medical assistance in the event of sickness or ill health.
- Obviously, there is an obligation on the employer to provide statutory, award and/or industrial agreement conditions such as annual leave, long service leave, sick leave and the like.
- More interestingly is the development of the law towards an employer's duty of reasonable treatment, quite apart from express statutory obligations to which reference has been made. The courts have recognised that employers may be under a duty of care, quite apart from the important issue of work safety, for example, in terms of giving an employee information about their rights and benefits under the contract or the relevant industrial prescription. And, there is some authority to indicate that employers are required to respect the confidentiality of information provided by employees. However, the most radical development is the acceptance, in England, to recognise a duty not to damage or destroy trust and confidence between the parties and, thus, not to damage the employment relationship. This is an implied term in the contract of employment. It is a counter balance to the duty of the employee to show fidelity to the employer. So that this is an implied duty to maintain trust and confidence. It is, as yet, somewhat vague and amorphous in Australian law, but the tendency of the courts is clear and one can expect, in due course, an authoritative decision of the High Court of Australia on this point.

The Court of Appeal in England has recently determined that an employer may be vicariously liable for a breach of statutory duty imposed on its employee (although not on the employer) if the test of fairness and justice is met, that is, is there a sufficient connection between the breach and the employment?; and/or whether such breach was incidental to the employment contract: *Majowski v Guy's and St Thomas's NHS Trust*

[2005] ICR 977; see case note “*the Protection from Harassment Enters the Workplace*” by B Barrett in (English) *Industrial Law Journal* Vol 34, No. 3 (September 2005) p 261.

One interesting question is whether the employer is required to provide work for the employee to perform. It is clear that at common law there is no power to suspend the employee (although in public sector legislative regimes there are extensive powers of suspension either without or with pay available). In the private sector the employee is either engaged or not engaged and there is no middle position.

On the face of things, providing the employer pays the required wages, there is no general obligation to provide work. And, thus, an employer who decides to give a period of notice can give what has been described in the English courts as “garden leave” allowing the employee to have the payment, but not perform any work. But there are exceptions. Here it is significant in the contractual relationship that where there may be the opportunity to exercise or maintain a skill or talent it is possible that the courts will find that the employer has an obligation to keep a person working so as to avoid a decline in skill or professionalism. Thus, the right to work of a rugby league football player is supported by the case of *Buckley v Tutty* (1971) where the rules of New South Wales Rugby League concerning the transfer of players were held to be invalid as in restraint of trade, essentially because they deprived the football player of the right to work. And in the area of the theatre and film there is certainly an argument that the deprivation of the right to work is in restraint of trade. The same might be said of other highly skilled occupations such as a surgeon.

To return to the most fundamental duty of the employer, that is to say to provide safety at work, one needs to refer to the relevant occupational health and safety legislation applicable in New South Wales and reflected in most states of the commonwealth. The *Occupational Health and Safety Act* 1983 (NSW) was introduced against the background that there was a plethora of various acts and regulations providing specific obligations upon employers to provide a safe system of work. It was a tangled labyrinth.

The 1983 legislation in New South Wales was based upon the report of Lord Robens who had been a Minister in the Attlee post war Labour government in England and who had provided recommendations when he chaired of a committee in the early 1970's recommending abolishing the complex web of specific regulations which had grown to provide a safe working environment to assess risks in the work place and to provide a more general, less specific, obligation on employers to provide a safe working environment. As a result of an enquiry by the then Chief Industrial Magistrate, Mr Tom Williams, New South Wales embraced this theory and adopted it in legislative form in 1983. Although the Act has been replaced by subsequent amendment, its theory remains essentially in place and the changes enacted in more recent years have been largely technical in nature. The 2000 Act was essentially a re-write of the 1983 Act with some fine tuning recommended unanimously by a Parliamentary Committee.

There are two key features of the legislative regime:

1. There is a general requirement for employers to provide a safe system of work, a safe working environment and that is in an unqualified form.
2. An employer can raise a defence that it was impracticable to comply with that general or universalist obligation, although that response (where the employer bears the onus of proof on the balance of probabilities) can be difficult to discharge and usually would only be available where there was some technological reason for the absence of providing a safe working environment. The statutory scheme contemplates a criminal process whereby the prosecutor (whether it be a WorkCover inspector, trade union secretary or other person with the requisite locus standi) must prove the case that there has been a breach of work place safety, and then provides for a regime of penalties, currently up to \$500,000.00, for the first breach. Technically, the prosecution does not have to prove any actual injury to a worker, although in the ordinary scheme of events, a prosecution is triggered when there is such an accident at work, but WorkCover, or any other person with the required standing, could take a case despite the absence of any accident.

To quote John Mathews in his book, *Health and Safety at Work* (Pluto Press, 1985) (p.26):

“Workers’ health and safety in NSW is dealt with under the *Occupational Health and Safety Act* 1983. This establishes the general duties of employers, manufacturers and employees: it provides for employee participation through workplace safety committees; it provides for notification of accidents; it establishes a tripartite Occupational Health, Safety and Rehabilitation Council; and it establishes mechanisms of inspection and enforcement.

This Act amends, and complements, the existing old-style legislation, including the *Factories, Shops and Industries Act* 1962, the *Construction Safety Act* 1912, the *Mines Inspection Act* 1901, *Mines Rescue Act* 1925, *Coal Mines Regulation Act* 1982, the *Dangerous Goods Act* 1975, and the *Rural Workers Accommodation Act* 1969.

The most controversial feature of the 1983 legislation is its safety committees’ provisions, which were fleshed out in the *Occupational Health and Safety (Committees in Workplaces) Regulation* 1984. These provisions, to the extent that they do not provide for union-appointed representatives, are out of line with ACTU and ALP policy on workplace health and safety structures. There is no recognition of health and safety representatives, with rights and powers that would enable them to intervene on a day-to-day basis. Instead, representatives in NSW have statutory rights only as committee members, and can act only through the committee.”

Mathews points out (p.35) that the Robens’ model has been introduced in most states – a general duty to do all things necessary to ensure that the provisions of the Act are complied with and to take all reasonable precautions to ensure the health and safety of workers.

Again, following Mathews, it cannot be said that the statement of a general duty is worthless (that is, a statement of the obvious) because:

- (a) The legal duty cannot be delegated (for example, to a supervisor).
- (b) Inspectors employed by the state can issue enforceable safety directions.
- (c) It provides a general basis for prosecution, even though no specific regulation deals with the alleged omission or deficiency.

The (former) Industrial Commission of New South Wales obtained summary jurisdiction to deal with OHS matters only in 1987. Immediately post 1983, jurisdiction was vested in the Supreme Court of New South Wales. There was minimal activity. Even after 1987, prosecutions were low in numbers – for example, 13 in 1990; but, in 2004 there were 186 filings for prosecution of breaches.

Perhaps as a result of, amongst other factors, the doubling of penalties post the election of a Labor government in 1995, many more of these prosecutions are defended. The proportion of pleas of guilty (which yield a sentencing discount of 25%) has declined. Many of the defences mounted have been based upon highly technical considerations rather than the merits.

What principles have been developed in recent years under New South Wales OHS legislation?

- (a) The distinction between risks and the circumstances of a particular accident has been articulated. An offence can be committed in the absence of any injury/death if there is a demonstrated risk: *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149.
- (b) There must be a causal connection between the risk and the failures alleged by the prosecution; a labour hire company could not successfully defend the proceedings on the basis that it lacked sufficient knowledge of the risk to safety of its employee, working at the client's premises: *Drake Personnel v Inspector Ch'ng* (1999) 90 IR 432.
- (c) Employers are obliged to minimise or reduce risks created by external factors outside the employer's control such as unpredictable acts of a violent person or of a disabled student: see (for example) *O'Sullivan v Crown (Department of Education and Training)* (2003) 125 IR 361. As Vice-President Justice Michael Walton said in his paper of 26 August 2005 given to the School of

Business at the University of Sydney: “An employer fails to ensure the health, safety and welfare at work of its employees if it fails to appropriately equip or protect them from risks inherent in their work, notwithstanding that such risks may be caused by external factors (known or unknown) and notwithstanding that it may not be possible to eliminate those risks entirely. The Act requires employers to eliminate or reduce the risk so far as possible.”

- (d) The employer cannot delegate its OHS duty, by (for example) appointing a manager to develop safe systems of work; it cannot turn its back on ensuring safety, requiring training and the like: *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd* (2003) 123 IR 121.
- (e) The imposition of penalties (sentencing) in OHS matters is to be closely aligned with the approach to sentencing in mainstream criminal law matters; thus, a balance must be struck between:
- The objective seriousness of the offence (that is, its nature and quality).
 - Specific and general deterrence.
 - Subjective and mitigating factors including prior convictions or lack thereof.

Lawrenson Diecasting Pty Ltd v WorkCover Authority of New South Wales [Inspector Ch'ng] (1999) 90 IR 464. *Capral Aluminium Ltd v WorkCover Authority (NSW)* (2000) 49 NSWLR 610; 99 IR 29 stressed the importance of general and specific deterrence in occupational health and safety sentencing. That case concerned the disintegration of an aluminium reduction cell (known as a “pot”) at an aluminium smelter. A pot disintegrates when part of the carbon cathode bottom lining of the pot is eroded and the molten metal can work its way to the outside of the pot. The hot material coming into contact with the concrete floor can cause the concrete to spall (splinter or chip) and there may be an explosion. The power to the tapped-out pot has to be diverted or – as in this case – molten metal may be sprayed across the workplace. In discussing the importance of general deterrence, the Full Bench emphasised that the fundamental duty of the court in this important area of public concern was to ensure a level of penalty for a breach which will compel attention to occupational health and safety issues and deter the commission of offences so

that persons are not exposed to risks to their health and safety at the workplace.

- (f) The principle of “totality” applies to multiple offences, that is, the court determines an appropriate sentence for each offence and then considers whether the sum of the separate sentences properly reflects the totality of the criminality involved: *Crown (NSW) (Department of Education and Training) v Keenan* [2001] NSWIRComm 106, applying *Pearce v The Queen* (1998) 194 CLR 610.
- (g) OHS proceedings involve an individual culpability; so that criticism of a third party (say the equipment supplier or installer) which has not been prosecuted cannot exonerate the defendant employer; nor would the contribution of a third party reduce or apportion the maximum penalty available: *WorkCover Authority of New South Wales (Inspector Ankucic) v McDonald’s Australia Ltd* (1999) 95 IR 383.
- (h) There has been a significant increase in fines imposed by the court and an emphasis on the importance of general deterrence: *Inspector Campbell v Hitchcock* [2005] NSWIRComm 34.
- (i) A wide range of subjective factors can be relevant in mitigating a penalty – contrition, early plea of guilty, efforts to improve workplace safety, prior record: *Crown (NSW) (Department of Education and Training) v O’Sullivan* [2005] NSWIRComm 198.

So this is the heart and substance of the employer’s obligation to the employee, to protect him or her from work place injury or fatality.

But, as I have endeavoured to emphasise, there are a miscellany of other obligations falling upon the employer flowing both from the common law and from statutory obligations which are designed to provide a fair and equitable working arrangement.

With force and effect from 15 June 2005, legislation enacted by the New South Wales Parliament entitled the *Occupational Health and Safety Amendment (Workplace Deaths) Act* 2005 No. 34 had application.

The legislation emerged from agitation directed towards the creation of a specific crime of industrial manslaughter. The government rejected that concept, but on the other hand opted to boost penalties and increase obligations in the event of fatalities at work.

A summary of the legislative amendment can be set out as follows:

- (a) It defines reckless conduct causing death at the workplace by a person with OHS duties, in particular a person whose conduct has caused the death of another person at a place of work or is reckless as to the danger of death or serious injury to another person to whom the relevant duty is owed.
- (b) Over and above the general regime of penalties there are prescribed for breaches of this particular provision of the legislation greater maxima, namely in the case of a corporation \$1,650,000.00, and in the case of an individual \$165,000.00 or imprisonment for five (5) years or both. It should be stressed that the amending legislation retains the concept of the legislature prescribing maximum penalties, and leaving unfettered judicial discretion to provide penalties at a lower level than the maximum. In other words, this is not mandatory sentencing, rather it is traditional judicial discretion.
- (c) A defence is provided for any person where that person proves that there was “a reasonable excuse” for the conduct which has been impugned.
- (d) Although prosecutions under this new section are to be taken before the Industrial Relations Commission of New South Wales in Court Session, they can only be taken with the written consent of the Minister of the Crown or by an inspector and there is a right of appeal against conviction and sentence to the Court of Criminal Appeal (an innovation in the scheme of OHS legislation in this State) where a person has been convicted and sentenced to a term of imprisonment, provided that an appeal right has been exercised to a Full Bench of the Industrial Relations Commission prior to invoking the jurisdiction of the Court of Criminal Appeal. This provision is said to be one granting a right of appeal despite the provisions of the privative section of the Act (finality of decisions).
- (e) By way of concession to cross bench amendments, a provision was enacted to require the Law Reform Commission of New South Wales to enquire into and

report upon the particular provisions, to commence before the expiration of three (3) years after the commencement of the relevant provisions.

In introducing the Bill, the Minister argued for a significantly higher penalty regime in relation to the new offence on the basis that there was a greater degree of culpability needed to be proven by the prosecution under the new offence. He also drew attention to the defence of “reasonable excuse” as being a matter for the court to determine in a particular case, but it was said this would require “a compelling and overriding reason why reckless conduct causing death in the workplace might be excused”. Some examples were given:

- Emergency action resulting in death.
- In the context of farm work, unexpected change of weather leading to drowning.
- The disregard by a worker of specific instructions to wear a safety harness where a fall from a roof resulted in death, but where the employee’s actions may have been a substantial cause of the death.

The Minister made it quite clear that this was not intended to be a manslaughter proposition. Whatever its genesis, it was simply an upgrading of penalty in fatality cases where the causal nexus between the employer’s operation and the death could be demonstrated by the prosecution.

Lecture 8

Firing – Termination of Employment

Obviously, there are circumstances in which an employer can terminate the employment of a person. Clear examples are serious misconduct, closure of business and redundancy.

The termination of a person’s employment is usually going to be traumatic, particularly if the employee has a permanent, ongoing job. We are not in times of

high unemployment. Nonetheless, there is an obvious element of distress and difficulty for a person who needs an income to maintain home or family.

In considering the termination of employment, issues arise under the common law contract of employment, including the question as to whether there can be summary dismissal or whether reasonable notice is required as well as statutory rights (federal and state) for the dismissed employee to apply alleging unfair dismissal and seeking either reinstatement or compensatory payments. It is these matters which we will need to consider in more detail.

There are some areas of dismissal which are simply unlawful. For example, both under federal and state industrial laws, it would be unlawful to dismiss a person because he or she were a member of a trade union, a delegate or acting on behalf of the union. Anti-discrimination laws are relevant. It would be unlawful under those laws, both state and federal, to dismiss somebody because of race or some other irrelevant consideration.

At common law, and subject to any express provision in an industrial award or in a statute which might govern public sector employment, the employer cannot suspend or stand down the employee without pay. If, however, there is serious misconduct the employer has two choices: dismissal or retention of the employee with continuity of the contract as Macken and others put it in their text, *Law of Employment*, for the employer it is “all or nothing”.

Putting aside for the moment the situation of serious misconduct which might justify summary dismissal, ordinarily an employer can dismiss an employee if that employee is given reasonable notice. Reasonable notice may be defined in the contract of employment, by an implied term in the contract arising from custom and practice in the industry or, providing there is nothing in the contract or award to the contrary, the giving of reasonable notice to be determined generally in the absence of specification. The adjective “reasonable” is difficult to define and depends upon the concrete circumstances of the case. Two factors loom large in attempting to define what is reasonable notice. One is the time for which the employment has endured. Secondly, there may be an industry practice which is indicative of what is reasonable in the

circumstances. Cases and text writers have identified a number of other factors which may be relevant in ascertaining what is reasonable: the level of the appointment, its importance, the amount of the salary, the nature of the employment, the length of service of the employee, the age of the employee, the chances of obtaining an alternative position and the time it would take to do so, the right of the dismissed employee to obtain a pension or superannuation payments. It may be thought that there is some irony in the conclusion that the higher grade employees warrant greater levels of notice if that notice is to be “reasonable”. For it is surely arguable that the lower paid employee, further down the hierarchy, may need a greater quantum of notice because he or she is likely to suffer greater hardship and find it more difficult to obtain an alternative job on the labour market. Nonetheless, the common law has traditionally recognised that a high grade employee with an important job and on a high salary warrants a greater level of notice for that notice to be reasonable.

It should be noted that even resignation by the employee might lead to the conclusion that there was constructive dismissal and that therefore reasonable notice has to be given. Take the most conspicuous example where an employer says “you resign or I will dismiss you”. That would be constructive dismissal.

Whether the termination is effected by oral or written communication, it is a requirement for the employee to be able to identify at what time the termination is to occur.

It may seem incongruous, but it has been held in the High Court that, even where the termination breaches an award clause, the termination still takes effect, although remedies for breach of the award would lie.

Usually, if the notice is valid the employee cannot refuse to accept it, or in any event the non acceptance does not affect the termination of employment. Sometimes, of course, it is the employer who wants the maximum period of notice in the event of resignation because the employee may be valuable and may be headed off to work for a competitor. But the employer can only insist on reasonable notice of resignation or that which is prescribed by an award or the contract of employment.

The employer may give payment in lieu of notice in the sense that a lump sum is paid to compensate for wage loss during the notice period or a payment which is made in relation to the notice period but the employer may not require the performance of work duties for the period of notice.

We now turn to the circumstances in which an employer can enforce summary dismissal, that is to say dismissal without notice.

Although not fully established, the law is moving towards the position, incrementally, in which an employee who is faced with the prospect of summary dismissal must be given a fair hearing, that is to say procedural fairness and this, of course, has practical effects particularly in statutory claims based upon the unfair dismissal laws.

What then are the tests for finding the situation in which summary dismissal can be effected? *North v Television Corporation Limited*, a case decided in 1976 in the Australian Industrial Court, applied English law to the effect that the conduct complained of must be such as to show the employee “to have disregarded the essential conditions of the contract of service”. If there is one act of disobedience or misconduct then it can justify summary dismissal only if it is of a nature that shows that the employee is “repudiating” the contract or one of its essential conditions. In other words, the disobedience must have been “wilful”, a deliberate flouting of the essential contractual conditions. *North’s case* was quoting the English case decided in 1959 of *Laws v London Chronicle (Indicator Newspapers) Limited* and in particular quoting the Master of the Rolls. So the misconduct must pertain to the essential conditions of the contract, amount to a repudiation of the contract or, at least in the situation of one act only, must be “wilful”. In other language used by text writers, the court must consider “the importance” of the breach of the contract in the whole context of the relationship. It has been said that there must be “exceptional circumstances” in order to entitle an employer at common law to dismiss an employee summarily. Criminal conduct or clear dishonesty will fall within these categories.

Macken (and others) suggest a number of grounds for summary dismissal which might be thought to go beyond the category of “serious misconduct”. These are:

- incompetence.
- lack of skill.
- neglect.
- insulting or objectionable language.

One controversial suggested category which would justify summary dismissal is that of industrial action, that is strike, a work to rule campaign or selective work bans. Despite some judicial support for the proposition that such industrial action would justify summary dismissal, it seems quite antithetical to any concept of a right to strike and somewhat unrealistic in the context of the Australian tradition where strikes of the whole workforce will from time to time take place. Of course, the *Workplace Relations Act* 1996 (Cth) provides areas of protected industrial action during a bargaining period and obviously such industrial action could not possibly justify summary dismissal.

An employer may condone the misconduct. If so, the right of summary dismissal will have been waived.

Where the employee objects to the summary dismissal and wants to argue its invalidity or unfairness, a number of avenues are available. The employee might sue at common law for general damages. This can be a relatively slow and expensive process. Secondly, an action can be taken for breach of an award or registered agreement provision and a penalty imposed upon the employer if the employee is successful. Thirdly, there are the statutory unfair remedies in federal and state legislation which may lead either to reinstatement or compensatory payment.

There are other obvious ways in which the contract of employment can be terminated by frustration because it is simply impossible to continue the relationship. Examples are lengthy terms of imprisonment, death, war-time service (although this seems unfair), serious long term illness (although this was disputed by Wootten J in *Finch v Sayers* decided in the New South Wales Supreme Court in 1976, where his Honour said “The usual understanding in many types of employment today is that prolonged incapacity of an employee does not automatically terminate the employment contract,

but subject to sick leave rights, excuses the employee from work and the employer from the obligation to pay, and gives the employer (and perhaps also the employee) the right to terminate the contract.” An employee may be held to have effectively “abandoned” the employment relationship by substantial, non justifiable lack of attendance. Change of duties will, if significant, amount to the termination of an existing contract and the commencement of a separate one.

It is unusual for an employee faced with the prospect of dismissal to be able to obtain an injunction, specific performance of the contract or a declaration from the mainstream courts, because of the policy view taken by the courts that they would not enforce a personal contract of service against the wishes of one party or the other. Having said that, there are some cases which have been characterised as “special” where such remedies would be available. Obviously, the same considerations do not apply to statutory unfair dismissal cases where reinstatement is available notwithstanding the wishes of the employer. Another reason why the mainstream courts decline to provide injunctive relief is because of the view taken that damages are an adequate remedy and, as has been said, an action for damages for breach of contract can be taken provided that the employee was ready, willing and able to perform the duties required by the contract. Damages would ordinarily be calculated on the basis of what was reasonable notice.

Generally speaking, the better remedies for aggrieved dismissed employees lie in the statutory schemes – the controversial unfair dismissal laws.

Traditionally, there have been significant legal problems in the federal jurisdiction in dealing with individual unfair dismissal cases. This is for two fundamental reasons. First, the federal system based as it is upon s 51 (35) of the *Australian Constitution* can only deal with “interstate disputes” and it was not easy to argue that the dismissal of one employee in one town or city within one state constituted an interstate industrial dispute. Of course, there could conceivably be strikes supporting the dismissed worker in other states but the “sympathy strike” was probably not enough to give jurisdiction to the Commission and not enough to render the dispute in truth and substance one which extended beyond the boundaries of any one state. Secondly, the view was expressed in a number of High Court cases that the determination of

whether the dismissal was fair or unfair was essentially a judicial one which could only be determined in a court rather than in an arbitral tribunal. However, in the late 1980's and the early 1990's, various cases were more supportive of the idea of federal unfair dismissal remedies largely through the device of unions including in their log of claims, to create the interstate industrial dispute, a clause saying in effect that dismissals could only be made if they were fair. And the clause would conventionally say that any dispute about that could be resolved by the then Commonwealth Conciliation and Arbitration Commission, that is, the body which is now called the Australian Industrial Relations Commission. Nonetheless, the position was still ambiguous and could lead to litigation.

Because of the constitutional difficulties associated with federal unfair dismissal the Hawke government passed legislation in 1996 based upon the corporations power allowing applications to be made in the Australian Industrial Relations Commission claiming that the termination of employment was harsh, unjust or unreasonable (the word "unfair" may be used as a compendious summary of these adjectives) and providing that the Commission could make an order for reinstatement or re-employment, including back pay and continuity of employment. Alternatively, if re-employment were regarded as inappropriate it can make an order requiring the employer to pay the employee an amount of up to the equivalent of six (6) months' remuneration. An appeal to the Full Bench was contemplated and enforcement proceedings could be taken in the Federal Court of Australia. Certain restrictions were included in the scheme. These included:

- For those employees not employed under an award, a statutory limit of remuneration level was to be applied.
- Probationary employees where the probation was up to three (3) months or if more than three (3) months was "reasonable" having regard to the circumstances of the employment.
- Employees engaged on a casual basis for a "short period", that is not casual employees who have been engaged on a regular, systematic basis for twelve (12) months.
- Employees engaged for a specific period or specific task.

- Trainees and employees in certain industries such as the maritime industry, daily hire employees in the building industry and meat industry.

There were some quite specific considerations that the Commission must have regard to in determining whether the termination was unfair. In summary these were:

- Was there a valid reason for the termination?
- Was notification given to the employee of that reason?
- Was there an opportunity to respond to any reason related to the capacity or conduct of the employee?
- Was there warning about any unsatisfactory performance alleged?
- Any other matters the Commission considers relevant.

This federal statutory regime remains basically intact today, although there is a controversy about whether it should be amended so as to exclude businesses employing less than 100 employees.

Putting aside the questions of summary dismissal or unlawful dismissal, the question arises is when a dismissal can be characterised as “unfair”. What is required, in the terminology of the arbitral tribunals, is “a fair go all round”. Thus, a dismissal might be tainted and characterised as unfair because of procedural unfairness, or because the employer got the facts wrong or because there was simply no justification for the dismissal. Reinstatement remains the primary remedy both under federal and state laws. However, in many cases reinstatement will be impracticable, and may not even be sought by the dismissed employee, and so monetary compensation can be awarded subject to the statutory ceilings (generally speaking, 6 months’ pay).

Unlike other comparable jurisdictions, the individual right to bring a claim for unfair dismissal is relatively recent in Australian industrial law. Until the New South Wales legislation of 1991, there was a trade union monopoly over bringing such an industrial dispute to the attention of the tribunal. However, after that enactment individual rights were preserved whether the employee was supported by the union or not.

Thus, the state and federal industrial tribunals retain (at least so far) a broad discretion to deal with unfair dismissals. Sometimes, it would be impracticable to have a former employee going back to the workplace. And in those cases, the remedy will be found in damages or compensatory payments. In other cases, reinstatement will clearly be appropriate.

Why is the industrial remedy more used than an action at common law for breach of contract for unfair dismissal?

First, the common law courts will not reinstate a dismissed employee. Secondly, there is the question of the lengthy and expensive nature of a common law action for breach of the contract of employment. Thirdly, there is the doctrine that the common law or equity courts will not enforce a contract for personal services save in special or exceptional circumstances, and so damages are the usual remedy.

For these reasons, it is reasonable to have statutory schemes for redress against unfair dismissal, although the extent of those schemes and the precise terms of them will remain controversial.

In New South Wales, there has been an unfair dismissal system for many decades. However, traditionally, registered trade unions had a monopoly of making applications for unfair dismissal on behalf of their members. There was no individual access until 1991. Nonetheless, this was a useful jurisdiction and provided some of the litmus tests of unfairness which are applicable in the federal system now. In particular, the idea of “a fair go all round” was applied by Sheldon J in *Re Loty and Holloway v Australian Workers’ Union*, a case decided in 1971. In summary, the principles formulated by Sheldon J were:

- the objective is to do industrial justice.
- weight must be given to the right of the employer to manage his business, but however, this right is not inviolable.
- the nature and quality of the work in question is relevant.

- the Commission considers the circumstances surrounding the dismissal and the likely practical outcome if reinstatement is ordered.
- there may be cases where the dismissal was unfair but it might be practically useless to try to re-establish the employment relationship, and so the Commission would not intervene.
- in other cases there may be reasonable prospects for the future of the relationship if “clarifying conditions” are imposed.

In 1991, to the consternation of trade unions and some employers, the Fahey government in enacting a new Industrial Relations Act gave individual access to employees to claim unfair dismissal. This was continued in the legislation in New South Wales of 1996. Broadly speaking, the exclusions to be found in the federal regime also flowed through to the new New South Wales system of individual access for unfair dismissal claims.

The onus of proof lies upon the applicant employee, however where an employer declines to give any reasons for the dismissal then the dismissal is presumptively unfair.

The question arises as to whether these statutory systems place an excessively onerous burden on employers. Essentially this comes down to an economic argument as to whether, in truth, unfair dismissal laws deter employment or whether there are so many factors involved as to whether an employer would take on additional staff, so that it cannot be said that unfair dismissal looms large in the decision about how many employees an enterprise will have. For example, a profitable enterprise will employ as many people as it needs to successfully conduct the business. There is an on-going debate about these topics.

Lecture 9

Unlawful Dismissal

There is a dichotomy between unfair dismissals and unlawful dismissals. An unfair dismissal may be perfectly lawful and yet tainted with unfairness which warrants reinstatement or compensation. In other words, there might not have been a “fair go all round”. An unlawful dismissal, on the other hand, is one contrary to statute involving the potential for an action for a penalty in a court.

The *Boilermakers case* doctrine of 1956 tells us that judicial matters must be dealt with in a properly constituted court, constituted as an independent court with secure judicial tenure under Ch III of the *Australian Constitution*, whereas arbitral matters can be dealt with in a less formally constituted quasi-administrative tribunal. So, in 1956 both the High Court of Australia and the Privy Council upheld the concept of the division of powers between the judicial and arbitral or quasi-legislative powers. If it is alleged that the dismissal is unlawful, then it must be brought in a court, either the Federal Court of Australia (in relation to employees covered by the federal jurisdiction) or the Industrial Relations Commission of New South Wales in Court Session (in relation to an employee covered by the state jurisdiction). The latter, the State court is expressly constituted by statute as a superior court of record and led by judicial officers with security of tenure.

Judicial power is the ascertainment and enforcement of existing legal rights; arbitral power involves the creation of new legal rights, for example, the making of a new industrial award with higher rates of pay.

It is true that there is an intermediate grey area where the dismissal may be alleged to have taken place in contravention of some award provision (particularly a procedural provision requiring notification, the opportunity of the employee to respond to the allegation, and some form of fair hearing). Such matters could ordinarily be dealt with in the context of an unfair dismissal proceeding, although less satisfactorily from the employee’s point of view, it could also be the subject of a prosecution for breach of the award. But such an award breach prosecution would lead only to a penalty, not to reinstatement or compensatory payments to the employee.

Some dismissals may be unlawful in the sense that they are contrary to anti-discrimination laws (federal or state) and, if proven, such a dismissal may be the

subject of reinstatement or compensation before the relevant anti-discrimination tribunal.

However, traditionally, unlawful dismissal has been recognised as that contrary to prohibited circumstances specified in the statute. Presently, the prohibited circumstances are specified in part VI A of the *Workplace Relations Act 1996* (Cth). It is provided that an employer must not terminate an employee's employment for any one of the number of particularised reasons or for reasons including any one or more of those prohibited reasons. There are some provisions for notification to government authorities in relation to the termination of employees arising from technological, structural or other similar changes and a capacity to argue that a dismissal is unlawful if the legislatively required severance payments are not made.

More importantly, the central provision of the *Workplace Relations Act* is s 170 CK which gives effect to a number of International Labour Organisation ("ILO") conventions which results in a legislative regime in Australia prohibiting employment in circumstances of a reason for termination that:

- (a) the employee is temporarily absent because of illness or injury.
- (b) the employee has participated in union activities.
- (c) the employee is not a member of a union.
- (d) the employee is seeking office or acting in the capacity as a representative of employees.
- (e) the employee has filed a complaint.
- (f) a range of discriminatory prohibited grounds, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin or absence from work during maternity or other parental leave.

In addition there is protection for an employee who may refuse to negotiate an Australian Workplace Agreement ("AWA").

Furthermore, there exists prohibitions under federal and state laws rendering unlawful dismissal of employees who assist in the administration of occupational health and

safety laws or who complain of breaches of such legislation; and under various state laws dismissals are prohibited, with different time limitations, where the employee has claimed or is entitled to workers compensation for a work related injury or illness, or where the employee is on jury duty or involved in emergency duties. There are also state law imposed restrictions on the dismissal of an apprentice or trainee, an action which frequently requires prior approval of an independent authority, thus diluting the unilateral power of the employer.

If the court finds that there has been unlawful dismissal, then it has a range of remedies available including reinstatement, the imposition of penalty, an order for compensation or such other appropriate orders as the court thinks necessary to remedy the effect of the unlawful termination.

Other sections of the statutory scheme go further (see for example s 298 K). In particular, the statutory protections go beyond dismissal. They lay open an employer to a penalty if the employer for one of the prohibited reasons injures the employee in his or her employment, alters the position of the employee to their prejudice, refuses to employ a person or discriminates against a person in the terms and conditions on which the employer offers to employ that person. To injure an employee may include loss of pay or reduction in position and to prejudice an employee involves any adverse impact or deterioration on the advantages enjoyed by the employee before the conduct in question. For example, entering into a commercial transaction which disadvantages the employee, denying training, declining a wage increase, a change in shift arrangements, a reduction of overtime opportunities or the loss of other over award benefits. Voluntary redundancy, however, is not a prejudice or alteration to the disadvantage of the employee, but merely an offer of a prospect which is non coercive in force or effect.

Many of these provisions in the current legislative scheme flow from the long established s 5 of the *Conciliation and Arbitration Act 1904* which was designed to protect the embryonic federally registered trade unions from attack by the employers, so the theory went, people should not be able to be dismissed because they were members of the union, delegates, claimed benefits under the award or were otherwise active on behalf of their fellow employees. The concept of non discrimination

because of a person's non membership of the union is a subsequent development. The Federal Court has taken the view that conduct is not prohibited by these provisions if an employee is offered an individual contract, particularly where the offer is made to all employees, irrespective of the fact that they were entitled to the benefits of particular awards or agreements and that that does not constitute unlawful conduct within the statute. A specific provision of the federal statute (s 298 M) prohibits the employer from inducing an employee to cease being an officer or member of the relevant registered organisation, and even mere persuasion (absent any express threat or promise) may be an attempt to induce the employee to leave office in the trade union or to cease being a member of the union.

One critical element of these provisions facilitating prosecution for lawful dismissal is the reversal of the onus of proof, so that at some stage the employer bears that onus. This has been recognised from the early days of the statutory scheme in the 1904 Act. What is the policy reason for the reversal of an onus of proof in what is essentially a prosecution (whether it be characterised as a criminal prosecution or a civil action for a penalty)? It lies in the difficulty to the point of impossibility of the employee proving the employer's state of mind (or reasoning process). The prosecutor (whether it be an individual worker or the trade union) in the absence of documentation simply cannot prove what has motivated the employer, and hence the legislature has taken the view that it is for the employer to prove that the prohibited reason for dismissal was not an operative or substantial factor in effecting the dismissal of the particular employee.

The way it works in practice is this:

1. The prosecutor must prove the basic ingredients of the case as alleged, that is to say for example that person X was an employee of the employer defendant, that he or she was a member of the relevant union or a delegate or claimed a benefit of the award or whatever the particular allegation is as being the reason for dismissal, and this must be proved on the criminal onus of proof (that is these ingredients must be proved beyond reasonable doubt).
2. Once the basic matters have been demonstrated to the court (and if they have not been there will no doubt be an argument that there is no case to answer on

the part of the defendant) then the onus shifts to the defendant to prove on the civil onus of proof (that is to say the balance of probabilities) that the prohibited reason was not the reason, or at least a substantial and operative reason, for the dismissal of the employee (using that term as the short hand for the other possibilities of altering the employee's position to his or her prejudice and the like).

In running and analysing these cases, two principles are of interest and importance:

- (a) a prohibited reason does not need to be the sole reason for the dismissal or alteration to the employee's position. It is sufficient if it is a substantial and operative factor, albeit not the exclusive factor. There may be a multiplicity of ingredients in the thinking of the employer in making a particular managerial decision. But where the prohibited factor is a tangible part of the reasoning process, then the prosecutor is entitled to succeed and remedies can be granted.
- (b) where the defendant employer fails to call the actual decision maker to give evidence, the person who signed off on the decision in question, then an adverse inference can be drawn against the defendant and the prosecutor is entitled to succeed.

Despite the reversal of the onus of proof, these are not easy cases for the prosecution to win. On one side of the spectrum, there may be the case where an employer blatantly says that you are a member of the union, therefore I am going to sack you. That is a straight forward situation where the prosecution will obviously succeed. On the other hand where there is a more complex and undocumented reasoning process then an employer who gives evidence on oath that there was no question of dismissal because of union membership or because the person was a delegate or the like then, unless such evidence can be demolished by way of cross examination, a court is likely to accept it if it seems reasonable on the balance of probabilities.

One example is that of the mass redundancy situation. Keely J of the Federal Court of Australia faced this in *McShane v Uniroyal Pty Ltd* where it was alleged that John McShane was dismissed because he was the union delegate of the Federated

Miscellaneous Workers Union of Australia. The dismissal occurred in the context of widespread redundancy. Although there were strong suspicions put forward by the prosecution that McShane was singled out, particularly in the context of inter-union rivalry and the employer supporting one union against the other, nonetheless the employer was able to convince the trial judge on the balance of probabilities that although the redundancy was not conducted on the basis of the “last one on the first one off” (a traditional union demand), nonetheless some differentiation was justifiable on the basis that particular people were needed in particular sections of the tyre manufacturing company in South Australia.

Under New South Wales legislation (the *Industrial Relations Act 1996*) the matter is put more clearly and explicitly in s 210 (Freedom from Victimisation). The prohibited factors (an employer “must not” victimise an employee or prospective employee) because of certain specified matters. It is unnecessary to recite the full category of these matters but they include being a member or official of an industrial organisation, or not being such a member, refusing to engage in industrial action, claiming benefits under the Act, engaging in public or political activity. Reversal of the onus of proof is dealt with quite expressly in s 210(2) so that in enforcement proceedings it is “presumed” that an employee or prospective employee who suffers detriment was victimised because of one of the prescribed reasons, but that that presumption is “rebutted” if the employer satisfies the Commission that the alleged matter was not “a substantial and operative cause of the detrimental action”. Under s 211 of the State Act there cannot be a preference to unionist provision, and indeed it is clear that an industrial instrument cannot confer a right or preference in favour of a member over a non-member. There is also, of course, provision for conscientious objection to membership of an organisation (s 212). And the enforcement provisions are contained in s 213.

What influence have these protective schemes had on encouraging the development of “performance managing systems”?

Lecture 10

Managing Industrial Conflict

At common law, industrial action by trade unions and their members is illegal. It is either in restraint of trade or breaches one of the industrial torts (civil wrongs), for example it involves the inducement to breach a contract of employment.

This blanket prescription of illegality by the common law was always unrealistic as trade unionism and collective bargaining developed. It was obvious that strikes, temporary stoppages and black bans would occur from time to time in the day-to-day reality of industrial relations following the industrial revolution. For them to all be illegal would be untenable and bring the law into disrepute. And so it was that the Parliament in England passed a law in 1875 preventing actions in criminal law against disputes which were to be characterised as “trade disputes”. So that the English legislation, passed under Prime Minister Disraeli’s governance, removed the criminal law from industrial conflict.

Then, in the late 1800’s, English civil law developed the torts of conspiracy or inducing breaches of employment contracts. But it was the *Trade Disputes Act* of 1906 (in England) which ensured that a person could not be sued for an industrial tort if that person had acted in contemplation or furtherance of a “trade dispute”.

That general protection was never replicated in Australia, either at a state or federal level. In large part, this failure to reproduce the English protection for industrial action was a result of the Australian exceptionalist experiment in conciliation and arbitration. The theory was that if there were access to independent tribunals or courts to determine fair wages and conditions, then the industrial action could not be justified and that there would be, in the grand expression of H B Higgins (the second president of the Commonwealth Court of Conciliation and Arbitration) “a new province for law and order”. And so it was that the theory emerged that there could not be a dual approach of both allowing or legalising industrial action and facilitating the ventilation of claims by workers before an arbitral tribunal.

This was more theoretical than factual. In point of practice, it was obvious that industrial action would occur from time to time. It was equally obvious that, at least on many occasions, the resolution of a dispute could be found in the determination,

after hearing the parties, by a third party neutral, that is to say the arbitral tribunal. Thus, twentieth century Australian industrial relations sunk into a quagmire of ambiguity so far as industrial action was concerned. It was tolerated, albeit not lawful. It was accepted, however grudgingly, by the employers, governments and tribunals, although no “right to strike” was ever officially recognised by the law.

Applications for injunctions against industrial action, although they could frequently prove to be unlawful, were rare, the *Dollar Sweets case* being a notable exception. And actions for damages were virtually unknown. The common law courts exhibited a notable reluctance to engage themselves in industrial relations conflict and the parties, generally speaking, preferred to have these controversies dealt with by way of processes of conciliation and arbitration. An interesting judgment was *John Fairfax and Co v Waterside Workers Federation of Australia* (1976) Industrial Arbitration Service (Current Review) p 346. In this case, John Fairfax sought an interlocutory injunction against the Waterside Workers Federation (“WWF”), alleging that:

1. there was a contract between Fairfax and the Union Steamship Co of New Zealand to deliver newsprint.
2. the WWF (apparently in support of the union representing printing workers in Australia) imposed a “black ban” on such importation.
3. with “intent” to injure Fairfax the WWF “procured and induced” waterfront employees to breach or frustrate the contract for delivery of the goods.

It was alleged that the WWF ordered forklift drivers to refuse to load the paper (newsprint) onto the Fairfax trucks. And, so it was said, the plaintiff (Fairfax) had suffered damage.

The WWF had told the Fairfax solicitor that “it’s the usual union principle of when one union is on strike it’s all for one and one for all”.

There was no doubt that, at the Darling Harbour wharf, there was stacked a large quantity of newsprint consigned to Fairfax.

Yeldham J went out of his way to emphasise that the court was in no way concerned to deal with the “merits” of the industrial dispute.

On the face of it, the black ban amounted to an industrial tort.

Yet, there was a fatal flaw in the Fairfax case which led to the court declining to continue injunctive relief. The evidence did not disclose any directions given by the Union Steamship Co of New Zealand to its employees as to the loading of the paper; so that there was no “disobedience” of any lawful direction. Thus, one of the critical ingredients of the tort of inducement of breach of contract was absent.

Applying the judgment of the (English) Court of Appeal in *D C Thomson and Co Ltd v Deakin* [1952] 1 Ch 646 it was necessary to have proof that the employees of the shipping company acted in breach of their contracts of employment in refusing to load the paper. Indirect interference in the execution of a contract is only unlawful if unlawful means are used, including intimidation of the employer or inducing the workers to breach their contracts of employment: *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106; *Rookes v Barnard* [1964] AC 1129; cf *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762.

The matter became much more formalised with the enactment of the *Workplace Relations Act* 1996 (Cth) where industrial action was prohibited during the life of relevant industrial prescriptions, but there was a protected bargaining period once the termination date for such an agreement or award had been reached. That protected bargaining period could be terminated by the Commission on certain grounds, in particular where there were untoward economic effects resulting from the lock out or strike, but subject to that there was a window of opportunity for industrial action following the expiry of the relevant industrial instrument. This model followed American collective bargaining processes whereby a dichotomy was drawn between interests and rights. In the stage where there were existing rights, industrial action was completely banned, but there was to be a bargaining period in which either side could take industrial action in order to strike a new bargain. The theory was that such industrial conflagration was likely to be short and sharp, as opposed to an arguably disruptive series of stoppages which were intermittent and indefinite during the

currency of a collective agreement. The somewhat discretionary capacity of the Australian Industrial Relations Commission to terminate the bargaining period tends to make this right to industrial action illusory, and, in general, industrial action in Australian industrial laws remains problematic.

Particular problems attach to the selective work ban situation and the doctrine of “no work as directed, no strike”. Despite the fact that the ban may be only on a minute proportion of the work required by the employer, the law has taken a stern view where the employees decline to perform the contract as a whole, they can be denied any payment.

The conventional wisdom suggests that the principles are:

1. failure to give the service contracted for by the employee removes the employer from any obligation to pay.
2. even if there is a wrongful act by the employer, if the employee does not render the full service, the employee cannot claim wages. The employee must show that he or she is ready, willing and able to perform all of the requirements of the contract of employment, although of course if the employer is in breach of the contract then a remedy may lie in damages.
3. an employer is not bound to accept less than the service contracted for.
4. an employer can accept less than the service contracted for, and in that case the employer would be required to pay wages, although the employer may have a remedy in damages for the breach of contract.

A decision was handed down by Deputy President Sams on 17 August 2005 in the matter of the Public Service Association of New South Wales and the Department of Juvenile Justice and Anor [2005] NSWIRComm 288. Staff members at Kariiong Juvenile Justice Centre took strike action on 20 and 21 July 2005, because of concerns for their health and safety. The PSA lodged an application under s 143 of the *Industrial Relations Act* for the Department of Juvenile Justice to pay the employees for the strike days. The PSA was successful and an order was made that the Department of Juvenile Justice pay all employees employed at Kariiong Juvenile Justice Centre who engaged in industrial action on 20 and 21 July 2004 remuneration

or other financial benefits which would have been payable for them had they worked on those two (2) days. DP Sams found that the staff at Kariong Juvenile Justice Centre took industrial action on 20 and 21 July 2004, because of a reasonable concern for their health and safety arising out of incidents where staff had been assaulted, abused and where management had not paid attention to staff's concerns. DP Sams said as follows:

"I am completely satisfied that the staff, including those who worked in the Wattegan and Lawson Units, had a reasonable concern for their health and safety, having regard for the incidents leading up to the strike on 20 July and the lack of attention paid by management for these concerns."

This case is important as it is one of very few applications pursued under s 143 of the *Industrial Relations Act 1996*, for payment to staff who are engaging in industrial action because of a legitimate concern for their health and safety.

Lecture 11

Controls Over Unprotected Industrial Action

There is no general right to strike in Australia. There are, by way of statute, however, prescribed periods of protected industrial action.

The common law would outlaw all industrial action but statutory protection enables both lock outs and strikes in particular and finite circumstances.

In the absence of statutory protection, the employer has available common law remedies including seeking injunctions and, ultimately, suing for damages arising from the stoppage in question. Whether an injunction would be granted is doubtful, because the common law courts are disinclined generally speaking to engage themselves in industrial relations conflicts. Nonetheless, the industrial torts are available, in particular, to prevent the inducement to breach a contract of employment. If it comes to damages, then the question is what is the loss, what is the damage or loss of business to be quantified as the amount of damage to be awarded on behalf of a successful plaintiff.

The law of torts (civil wrongs) provides a comprehensive series of remedies for employers against industrial action, subject only to specific statutory exemptions such as those in relation to “trade disputes” in England and to protected industrial action under federal legislation in Australia.

The industrial torts have been traditionally identified as defining the liability in relation to industrial disputes between the employees, unions and employers. The particular heads of damage which would give rise to an action for industrial tort are: inducing breach of or interference with the contract of employment, intimidation and/or conspiracy and liability for causing loss by unlawful means in relation to the contract of employment.

The main tactical situation concerns interlocutory (that is, interim) relief rather than the ultimate remedy of damages which is very rarely sought in Australia. Thus, the employer seeks urgent relief by way of interim injunction to restrain industrial action. What is sought to be restrained is based upon classical contract law. Where an injunction is granted, breach of it will amount to contempt of court.

There are real practical problems about the grant of injunctions in the situation of an industrial conflict. The courts have been reluctant to grant an injunction enforcing personal services, and in the face of a general strike by a large workforce there are obvious practical difficulties in the grant of an enforcement of an injunction by the mainstream courts.

To obtain an injunction against industrial action, an applicant must demonstrate that there is a serious question to be tried and that the balance of convenience is in favour of the injunction. These are well established equitable tests for the grant of an interlocutory injunction. The courts have indicated caution in terms of involvement in industrial disputation. The grant of such relief is discretionary and may involve questions as to whether the matter ought to be dealt with by way of conventional conciliation and arbitration or whether relief should be granted in the mainstream courts.

In urgent situations, it is possible to approach the court ex parte, that is to say without notice to the other side and to seek an injunction for a short term from a judge in chambers. This is very much an interim resolution because ordinarily, the judge in chambers would require rapid service on the other side and a commitment to bringing the matter before the court to be determined as a contested proceeding.

The most fundamental of the common law claims against industrial action is founded upon interference with contract, being intentional, for example where a person persuades another person to break his or her contract. This is, so the common law would recognise, an interference with contractual relationships.

The action requires a knowing and intentional interference with the contractual rights without justification.

The origin of the conventional common law on this point lies in the case of *Lumley v Gye*, a case decided in 1835, where a theatrical entrepreneur sued an opera singer because she was induced to breach her contract, so it was said, to sing at a particular opera house. The English courts held that an action does lie for maliciously procuring a breach of a contract for exclusive services resulting in damage to the plaintiff. A common law action based on these grounds requires demonstration of intention, knowledge and either direct or indirect interference designed to obtain breach of the contract of employment. Where there is direct intervention in the contract then that is of itself regarded as wrongful, although where the involvement of a third party is indirect (the secondary boycott or black ban situation) it must be shown that the defendant to the action caused the breach or interference with the contract by “unlawful means”.

The preponderance of opinion (contrary to some observations of Lord Denning in the English Court of Appeal) is that the mere act of a strike or stoppage of work is to be regarded as a notice of intending breach of contract rather than a notice to terminate contracts of employment (*Macken and others* p.413).

The tort of interference with contract has been broadly construed so that it is not confined to the procurement of a breach of a contract, but rather, according to judicial

authority, extends to cases where a third person prevents or hinders a party from performing its contract, even though that may not constitute (technically) a breach. However, the defendant on the receiving end of an injunction of this kind can plead justification. Unlawful means cannot be justified. But in the absence of unlawful means, there can be an argument based upon justification, although this defence has in practical terms very limited scope. For example, it has been said by the House of Lords that it was not a defence to an action for inducing breach of contract that the defendants acted genuinely in pursuit of union objectives in attempting to maintain the current level of wages. Again, defences may be based upon public policy, social or moral duties but the courts have taken an extremely limited view of defences of that kind.

At least since 1964 (*Rookes v Barnard*) in the House of Lords, it is clear that the tort of intimidation was applicable to labour disputes.

However, what is worthy of significant notice is the discretionary judgment of Street J in *Harry M Miller Attractions Pty Limited v Actors and Announcers Equity Association of Australia* [1970] 1 NSW 614 where Street J sitting as a single judge in the equity division of the Supreme Court rejected an application for an injunction to prevent threatened breaches of contract on the basis that the matter was presently before the New South Wales Industrial Commission and took the view that this was the proper forum in which to pursue the matter.

If we are to consider other actions at common law against industrial actions we should bear in mind the possibility of accusations of:

- intimidation (which will require the threat of unlawful conduct).
- conspiracy; that is the culmination of two or more persons combining for the purpose of damaging trade, business or other interests.
- interference with trade or business by unlawful conduct.

In all of these actions in the courts there is the perennial argument about whether damages are the ultimate and appropriate remedy or whether some interlocutory form of relief by way of injunction should be granted.

Some would argue, however, that the better solution lies in processes of statutory conciliation and arbitration designed to address the substantial grievance of the parties as opposed to formal legal proceedings which might not ultimately resolve the issue between the parties, but which would result in coercive orders. Is the former, a “new province for law and order” in the much quoted expression of H B Higgins?

Lecture 12

Managing Corporate Restructuring

Corporations are a creature of statutory law. They have legal personality. In the words of one author they have no body or soul to be challenged. They have the benefit of limited financial liability. They have taxation benefits.

So how is it that corporations can restructure themselves, including the sending of assets overseas, obtaining overseas incorporation or splitting up into disparate entities, so as to avoid industrial or occupational health and safety obligations? What are the rights of employees in the situation where a corporation by direction of its board of directors suddenly declares that it is no longer an Australian corporation or that it has otherwise transferred liabilities off-shore? Or that a “shelf” company with no assets is suddenly the employer of the workforce.

It is a truism of corporations law that a company cannot trade in insolvency, but when it does (in breach of the law) what remedies do employees have?

These are all difficult problems that the industrial law has only just become accustomed to grappling with.

There have been some notable and controversial examples in recent times of companies who have transferred significant assets out of the Australian jurisdiction,

apparently with a view to creating defences against employee claims for redundancy or other compensation. One obvious example is CSR whose employees and former employees can be claimants for asbestosis (the carcinogenic illness created by exposure to asbestos) and which has apparently transferred those liabilities to another country. Similar manoeuvres were apparent in the waterfront dispute involving Patrick Corporation and the Maritime Services Union of Australia (“MUA”).

As to the position of the James Hardie Group and its dealings with asbestos related liabilities, including the separation off from those companies of a Medical Research and Compensation Foundation, a Special Commission of Inquiry was established in February 2004, presided over by David Jackson QC.

The enquiry involved consideration of liability for exposure to four asbestos-related diseases: mesothelioma, asbestosis, lung cancer and asbestos-related pleural disease.

By the mid-1950’s it was known that, at least in some circumstances, inhalation of asbestos fibres could cause asbestosis; by the 1960’s it was clear that such inhalation could cause lung cancer; by the mid-1960’s there was awareness that the inhalation of asbestos fibres could cause mesothelioma.

Even more starkly, Judge Curtis (of the Dust Diseases Tribunal) has held that James Hardie had actual knowledge of the damage caused by asbestos since 1938: *State Rail Authority (NSW) v Wallaby Grip Ltd* (1999) 18 NSW CCR 193; on appeal, [2001] NSW CA 105 (24 April 2001).

In these circumstances, James Hardie pursued a policy euphemistically described as “separation”.

The strategy involved a foundation to manage Hardie’s asbestos liabilities with assets of \$284million (“the Foundation”).

Other funds were allocated to medical research. Clearly, Hardie was attempting to distance itself from past and future liabilities by way of corporate re-structuring. The

company would be domiciled in the Netherlands, and would be subject to Dutch corporate and securities law.

However, alarm was almost immediately provoked that the Foundation's assets were insufficient to meet future claims and would "run out". Governments, unions and other interest groups became involved in this emotive issue.

Eventually, in the wake of the Jackson report, agreement in principle was reached to protect the rights of injured workers. The details have proved somewhat harder to pull together.

This is yet another example of how corporate re-structuring – in this case, registering off-shore – can have potentially devastating effects on the rights of workers.

The waterfront dispute of 1998 essentially involved the attempts of Patrick Stevedores to de-unionise the work of loading and unloading vessels. It was an attempt by the company to fundamentally change the culture of the docks. But controversy developed as to whether the means justified the end.

The basic story is too well known to be re-told in detail: military people would be trained in Dubai to take over the jobs of Australian stevedores, members of the MUA. That union would be broken, so it was planned.

By 1994, Chris Corrigan had full financial control of the company Australian Stevedores. It was alleged that the company was overmanned and that there were some outdated practices enforced by the union.

But the dismissal of the existing workforce faced the hurdle of big redundancy payments. The (federal) Hawke government had already provided a subsidy of \$145million to retrench 3,000 waterside workers.

Part of the plot involved sub-leasing surplus capacity and equipment at Webb Dock to the farmers' organisation; this is what led to the claim in the Federal Court and a successful interlocutory injunction based upon an alleged conspiracy. But the

farmers' company (PCS) could not, under the lease, engage in international trade and thus it seemed to be a "front" for Patrick to train non-unionists.

Subsequently, Patrick proposed a more general strategy to "contract out services in [a] major corporate restructure". It was proposed that the farmers' company would run the Patrick terminals. So, redundancy and superannuation payments would be restricted; and Patrick would go into receivership. An administrator was appointed. This meant that the union needed "leave" to continue its Federal Court proceedings. It was argued that Patrick no longer had any work for its 1,400 wharfies to do. It was argued that corporate restructuring had protected the parent company from legal action.

Indeed, there had been an even more drastic re-structuring: the Patrick employees were working for labour hire companies which had no assets. This had been reported to the Stock Exchange, but neither the unions nor the workers knew about it. The company claimed there was no money; the weekly wages could not be paid.

Patrick employees had their services dispensed with as from 7 April 1998 since the employing companies were no longer trading. At the same time, PCS using non-MUA labour commenced stevedoring operations in a number of ports (in lieu of the Patrick workforce) under contract to Patrick.

On 8 April, the MUA sought court injunctions preventing the termination of the Patrick employees. An interim injunction (for one week) preventing the terminations was granted by the Federal Court, but stayed. However the PCS operation set about docking ships and moving containers over the Easter break (10-13 April).

On 14 April, Patrick Stevedores, the National Farmers Federation and the Federal government attempted to challenge the jurisdiction of the Federal Court to hear the terminations application. On 17 April, the High Court (Justice Gaudron) rejected the challenge to the Federal Court's jurisdiction. On 21 April 1998, Justice North essentially restored the employment situation which existed prior to 7 April, but these orders were appealed. The MUA pursued substantive matters concerning alleged illegal conspiracy and breaches of freedom of association and breaches of

employment contracts. Part of Justice North's decision makes this observation of the request made to the Court:

“The court has now been asked to make orders to return the situation to the pre-7 April position. The union and the employees seek orders that the Patrick employers continue to employ the employees and the Patrick owners use only those employees to do the work, which has always been done by the employees.”[36]

The Court was prepared to grant interim injunctions to restore the pre-7 April arrangements. It was revealed that the parent Patrick company terminated contracts with another four subsidiary Patrick companies which employed its workforce under labour supply agreements, and placed these four companies under administration. However, Justice North's reasoning for his orders makes reference to the trading position of the employers, in February 1998 where revenue was \$19.7million and expenses were \$20.2million, thus “restoration” appeared commercially realistic especially in light of the MUA's commitment to forego some portion of wages. It was found that there were arguable cases in respect of unlawful conspiracy (to replace the Patrick workforce) and in respect of the freedom of association provision of the *Workplace Relations Act 1996* (C'th) being breached (employees terminated due to membership of a union).

The employers appealed to a Full Bench of the Federal Court to overturn the orders of Justice North. The orders of Justice North were stayed. A Full Bench of the Federal Court found Justice North's decision “free from appellable error” on 23 April 1998. The employer immediately challenged the decision in the High Court.

On 4 May 1998, the High Court rejected the appeals of Patrick and others against the orders of Justice North. However, the High Court also found that the orders of Justice North had the potential to force the administrator (of the four insolvent Patrick employer companies) to trade while the companies were insolvent. Thus the new orders made by the High Court gave the administrator more discretion to manage the business affairs of the four companies.

Thus, in the event, injunctions against dismissal were ultimately granted and the matter pragmatically settled. But the case does illustrate the dramatic impact corporate restructuring can have on workers' rights: see, generally, H Tinncia and A Davies, *Waterfront*, Doubleday, Sydney, 2000.

(The lecturer is grateful for this distillation of the litigious process compiled by Steve O'Neill, *Outline of the Waterfront Dispute*, Parliamentary Library, Parliament of Australia, 12 May 1998.)

The first question which arises is as to when employees' entitlements are protected by the law.

Obviously, the corporation which is an employer expressly bound by a federal award, or which is a member of a federally registered organisation of employers bound by a federal award, is obliged to pay the relevant entitlements, whether redundancy or otherwise. And by way of s 170MB of the *Workplace Relations Act* 1996 (Cth) successors, transmitters or assignees of the whole or part of the business are also bound by the relevant certified agreement. A similar provision in relation to succession applies to Australian Workplace Agreements ("AWA's") pursuant to s 170VS of the Act. And under s 149, a like provision is applicable to federal awards.

In *McCluskey v Karagiozis* [2002] FCA 1137, Merkel J of the Federal Court of Australia pointed out the "dangers of corporate restructures that are implemented to suit the interests of the controllers in disregard of the existing employee entitlement rights of the employees, without whom the corporations would have little or nothing in their business to restructure". In that case, the judge held that the controllers had pursued their own interests in disregard of the entitlements and interests of their long serving and loyal employees by transferring the employment of the employees, and the responsibility for the employee entitlements, to shell companies and thus treating those employees "as if they were serfs" rather than free citizens entitled to choose their own employer. In that case, the transfers were held to be ineffective on the basis that the employment of the transferred employees was effected without the express or implied assent of the employees. So, the original contract with the pre-restructured employer continued.

In the event of mass redundancy (15 or more employees) on the basis of economic, technological, structural or the like nature there are certain obligations falling upon the employer by way of statute to notify the relevant trade union (see s 170GA of the Act).

A question of critical importance is where the priorities of the employees' rights are in the situation of liquidation, that is to say the winding up of the corporate employer under the corporations law. Section 556 of the *Corporations Act* prescribes a hierarchy of payments in that situation, and deals with explicitly with wages, superannuation payments, injury payments and payment due because of leave of absence. It also deals with retrenchment payments. The employees are unsecured creditors, and do not have an entitlement over and above secured creditors. This emerged, controversially, during the closure of Ansett Airlines where there was some debate about re-ranking employee entitlements and putting employees ahead of secured creditors. However, at the present time, employees can continue to be beneath secured creditors in terms of payments from an insolvent company and therefore frequently there will be insufficient funds to provide their redundancy and other legal entitlements.

Company law involves the idea of a "corporate veil". That is, the individual directors are not liable for debts incurred by the corporation. A live question arises as to whether the corporate veil should be lifted in terms of the rights of employees under statute, awards or industrial agreements. As Joellen Riley has written in her article *Bargaining for Security; lessons for employees from the world of corporate finance*, *Journal of Industrial Relations* (December 2002) p.491 at 504 "... today's workforce is particularly vulnerable in corporate collapse."

What is the legal effect of the sale or transmission of a business? In (Federal) *Minister for Employment v Gribbles Radiology Pty Limited*, a case handed down on 9 March 2005, the High Court took what some might describe as a narrow view of the provisions of the *Workplace Relations Act* which concerns the continuance of a Federal award to be binding on a successor, assignee or transmittee of the business or part of the business of an employer who was party to the industrial dispute. A

majority of the High Court took the view that in the circumstances of that particular case the new employer was not a successor to or of any part of the business of the previous licensee and therefore was not bound by the Federal award. For the majority, it was not sufficient to show that the two (2) employers engaged in identical business activities. It had to be the particular business that provided the link between the industrial dispute which the award determined and the binding effect of the award upon an employer who was not party to the dispute. Kirby J dissented concluding that usually, if the business of the new employer is identical, the latter may be described as having succeeded to the business or part of the business of the previous employer.

In the absence of a strong sub-stratum of award coverage, enhanced “successor” provisions, a revision of the hierarchy of creditors in the event of insolvency and prohibitions in the corporations law against restructuring designed to defeat employees’ entitlements, it is clear that those entitlements remain fragile.

Lecture 13

A Unitary System of Industrial Relations

These lecture notes will consist of an article submitted for publication for a book to be published by the Evatt Foundation (edited by Dr Christopher Sheil) written by the lecturer and Monika Ciolek.

“State of the States 2005

Constitutional Law

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Introduction

At Federation in 1901, the colonies agreed to ‘unite in one indissoluble Federal Commonwealth’, as proclaimed by the preamble to the Australian Constitution. It is unlikely that the drafters of the document would have envisaged the ascendancy of the federal government 104 years on. They may however have guessed that if the balance of power were to shift, it would be with the assistance of the High Court. As Albert Dicey now famously noted in 1885, ‘federalism ... means legalism, the predominance

of the judiciary in the constitution'.ⁱ In concert with intergovernmental agreements, wartime fiscal relationships, and constitutional amendment by referendum, the High Court's interpretation of the Constitution has steadily increased the financial, political and legal clout of the Commonwealth government.

It seems likely that the High Court will soon have before it questions going to the heart of contemporary Australian federalism. In March 2005, John Howard's Coalition government, armed with a majority in the Senate, announced that it intends to introduce federal legislation so as 'to work towards a unified national system' for industrial relations.ⁱⁱ Since the states declined to refer their industrial relations powers to the Commonwealth on 3 June 2005, the Commonwealth intends to rely on the Constitution's corporations power to over-ride the state jurisdictions (s 51(20) of the *Australian Constitution*). The political and legal debate surrounding these proposals extends beyond labour and industrial issues, to questions of states' rights, and the appropriate use of federal power. Prime Minister John Howard has said that 'the goal is to free the individual, not to trample on the states'.ⁱⁱⁱ Having refused to refer their powers, the states have pledged to mount High Court challenges to the take-over.

Accordingly, this chapter will focus on constitutional aspects of the Coalition's proposal for a unified industrial relations scheme. The first part sketches out arguments which might be raised to challenge the use of the corporations power to displace state industrial relations jurisdictions. The second part maps the known limits of the corporations power's application, and the questions which remain to be resolved in that regard. It is argued that, in the event the proposed new system was found to be valid, it could not profess to be unified, as its coverage would be both patchy and uncertain.

Constitutional validity of a national system based on the corporations power

Section 51 of the Australian Constitution lists the subject matter with respect to which the Commonwealth parliament is entitled to make laws. Subsections 20 and 35 are the corporations and industrial powers. They are worded as follows.

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

...

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth

...

(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.

The industrial power is a limited one, as is clear from the wording of the provision.

Section 51(35) has the following characteristics:

- it is not a direct power for the federal parliament to legislate with respect to the wages and conditions of employees;
- on the contrary, it is a power to provide a system of conciliation and arbitration to deal with or prevent disputes about such matters;
- it does not create an obligation upon the Commonwealth parliament to have a conciliation and arbitration system, but merely empowers it to do so if it chooses;
- the power may only be applied when the dispute extends beyond the limits of any one state.

The Coalition has therefore pinned its hopes on the corporations power, whose potential has been progressively expanded by the High Court over the last hundred years. Simply put, from being restricted to the regulation of interstate activities of foreign, trading and financial corporations (henceforth referred to as ‘s51(20) corporations’), the power evolved to enable the regulation of the trading and financial activities of these corporations. Later still, it was held also to enable the protection of these activities, including protection against industrial action. In 1995, a narrow majority of judges indicated that they understood the power to be plenary, allowing the regulation of *any* activities of s51(20) corporations.^{iv} The question has yet to be formally resolved: the precise scope of the corporations power in the area of industrial relations is undetermined. Similarly, the specific wording and form in which the Commonwealth will put forward its new system is, at the time of writing, unknown. Nevertheless, it is possible broadly to outline three potential arguments against the validity of a national industrial relations system founded on the corporations power.

The first argument looks to precedent to contend that, although the corporations power extends to allow the protection of corporations, the proposed over-ride of state industrial relations systems is qualitatively different from such protection and is beyond the scope of the corporations power. In 1981, Fontana Films asked for an injunction against a trade union of actors and artists for organising a

secondary boycott of Fontana when it refused to sign a preference agreement with the union. The law which prohibited secondary boycotts was challenged as invalid under the corporations power. The High Court decided that the power allowed the Commonwealth to regulate not just the trading activities of s51(20) corporations, but also the conduct of others if this achieved the protection of those activities.^v Hence, the first argument would seek to highlight the differences between the direct protection of the activities of s51(20) corporations and a forceful displacement of state industrial relations jurisdictions. By distinguishing the nature of the two forms of legislation, the idea would be to show that the latter falls outside the agreed scope of the corporations power. The corporations power is both regulatory and protective, but whether it can validly be said that the ‘protection’ of corporations includes the decimation of state industrial relations systems is more problematic.

The second potential argument is a doctrinal one. The *Melbourne Corporation* case of 1947 stands for the proposition that the federal nature of the Constitution implies certain prohibitions on Commonwealth action. The case involved a challenge to a federal banking law which prohibited any banks from doing business with state government agencies. The aim was to compel all the state governments to bank with the Commonwealth Bank. The Court found that the law was invalid because

federal laws which ‘discriminate’ against the states are not laws authorised by the Constitution. Laws ‘discriminate’ against the states if they single out the states for taxation or some other form of control, and they will also be invalid if they ‘unduly interfere’ with the performance of what are clearly state functions of government.^{vi}

The doctrine was restated in 1995, in the following terms.

The limitation (recognised in the Melbourne Corporation case) consists of two elements (1) the prohibition against discrimination which involves the placing on the states of special burdens or disabilities (‘the limitation against discrimination’) and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the states or their capacity to function as governments.^{vii}

Commonwealth laws may be struck down for infringing either of these limbs. The first has been used to invalidate a federal law obliging an agency of the Queensland government to submit to arbitration.^{viii} The second has prevented Commonwealth laws from control of the number and identity of state employees, and prevented control also of their appointment and their dismissal.^{ix} While the precedent is not strong, a challenge to Commonwealth industrial relations laws on doctrinal grounds

might therefore seek to show that the Commonwealth laws unduly interfere with the performance of state functions of government; namely, state industrial relations jurisdictions. Alternatively, it would seek to show that by aiming to restrict and control state industrial relations jurisdictions, the Commonwealth laws affect the integrity of the states and their capacity to function as governments.

The third potential argument is an originalist one. The validity of Commonwealth laws resting on the corporations power to create a national industrial relations system would be weakened if it could be contended that the framers of the Constitution did not intend to enable direct industrial relations regulation under s51(20). This contention is supported – though certainly not resolved – by the observation that s51(35) grants only very limited industrial powers to the federal parliament, leaving intra-state matters to be dealt with by the states. Championed by Justice Scalia of the US Supreme Court, originalism is often sharply contrasted with theories of living, adaptable Constitutions. Even though the High Court has long adopted an approach which looks to *both* the original meaning of words and their contemporary understanding, a strong originalist argument would assist any challenge to the validity of the proposed Commonwealth laws.

Of course, as we have already pointed out, the validity of the proposed national system will depend in part on the precise form and nature of the legislation which may ultimately be enacted – and all potential challenges to the laws will be borne in mind throughout the drafting process. So far as is possible, the legislation will be crafted to avoid these issues. It will also most likely be in the form of several bills, to constrain the effect of challenges, and make them more difficult. The composition of the High Court has, moreover, changed since the last time its members gave an indication of their position on industrial relations and s51(20), and the question of the scope of the corporations power has divided opinions on the bench since 1909. Therefore it is impossible to predict with any dogmatism whether or not the High Court will grant the Commonwealth a further extension of its influence by validating a national industrial relations system under the corporations power. In any event, the progress of the legislation and of the eventual challenges to it will provide us with a glimpse of the future of the Australian states' relationship to the Commonwealth.

Likely extent of a national IR system

The Coalition has put forward its proposals for changes in the industrial relations arena on the ground that ‘the workplace relations system is still complex and further improvements are needed to make the system simpler, accessible and more effective’. It is true that the current system is complex and could do with improvement. However the suggestion that the proposed changes will achieve these aims requires qualification.

First, it may be possible that, despite the enactment of a federal law, state conciliation powers might persist. This is currently being determined with respect to the present federal legislation: the union representing the employees of Newcrest Mine is attempting to have a state tribunal exercise some powers of conciliation and, or, recommendation in relation to their dispute.^x

Second, even if the proposals are found to be valid under the Constitution, the power in s51(20) cannot support a uniform industrial relations system across all employers, since it applies only to laws with respect to certain sorts of corporations. There are a number of areas in which it is clear that proposed changes will not operate. The Commonwealth Constitution via section 122, gives the federal parliament power over the Australian Capital and Northern Territories. Outside these areas, its powers over employees are limited to people working for the types of corporations named in section 51(20): ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. Therefore, any industrial relations system relying on the corporations power will not extend to the employees of businesses which operate as sole traders, partnerships or trusts. In 1997 such businesses employed a significant number of private sector workers in Australia.^{xi} Workers outside the scope of the power include the following.

- Employees of small to medium businesses, which tend to be sole traders or partnerships. As Breen Creighton and Andrew Stewart have pointed out, it is ironic that the small business sector – considered so politically and economically vital by the Howard government – will be excluded from the proposed system.^{xii}
- Owner-managers of unincorporated enterprises. These accounted for 13 per cent of employed people nationwide in 2005.^{xiii}
- Farmers and their employees, another group of significance to the Coalition parties, would be excluded as they tend not to incorporate for tax reasons.

- Contract workers who do not contract directly with foreign, trading or financial corporations would not be covered by the new system, as laws purporting to affect these contracts are not considered to be laws with respect to s51(20) corporations.^{xiv}
- People working directly for the state Crown (ie. the administrative edifice of the executive) and for other unincorporated government departments and, arguably, people working for local government. The Crown, although perhaps a corporation sole, would not generally be regarded as a trading or financial corporation.^{xv}

Should a new national industrial relations system based on the corporations power be found valid, these workers would not be covered. A range of others would find their position uncertain, their awards and rights subject to litigation. This is for two reasons.

The first is that some employees work for corporations whose status under the Constitution is unclear. One example is local councils. In 1974, local councils were held not to be s51(20) corporations.^{xvi} This decision has never been technically overruled, but the High Court's reasoning on the question has since changed. The Court now looks to the actual activities of the corporation rather than the purpose for which it was established. If trading or finance are a substantial or significant proportion of its overall activities, the corporation will fall within s51(20), irrespective of whether it also performs a government or public interest role.^{xvii} Because the question is one of fact and degree, the status of each council – and the consequent industrial rights of its employees – will need to be determined on a case by case basis.

The same goes for any incorporated organisation which has made some investments or which sells goods or services for a profit. This could include some state government departments, medical services, emergency services and universities.^{xviii} For example, the Federal Court recently decided that University of Western Australia is a trading or financial corporation because 18–28 per cent of its activity was trading, and it also had 'substantial' investments in the short-term money market and short-term bills.^{xix} Given that the trading and investment activities of universities are likely to vary across the sector, employees of each institution may well need to have their rights determined through litigation.

A special case of corporations of indeterminate status is state-owned corporations (SOCs). A number of states have created SOCs by legislation.^{xx} The

laws creating these corporations show a legislative intention to provide for commercial, profit-oriented entities. If their activities match this intention, they may be trading corporations under the Constitution and within the Commonwealth's power. Of interest is the fact that, with a few intricate exceptions, the NSW legislation about SOCs explicitly excludes them from the reach of existing national corporations legislation. An argument could be attempted that, because of this exclusion, and because of the *Melbourne Corporation* doctrine, the SOCs are not within the scope of the corporations power. These limitations provide a doubtful basis for such an argument, however, as has been recognised by the CPSU-SPSF (Community and Public Sector Union-State Public Services Federation group). In March 2005, the CPSU-SPSF announced that it would lobby the states to bring employees of SOCs back into direct employment by the Crown, in the hope of removing them from the reach of the corporations power. Approximately 300,000 employees nationwide were thought to be eligible for such a transfer.^{xxi}

The second reason for which some employees' status under the new system will be unclear is as a result of the *Melbourne Corporation* doctrine, which protects the integrity of states as functioning entities.^{xxii} As mentioned, the Commonwealth is prevented from passing laws which destroy or curtail the continued existence of the states or their capacity to function as governments. It has been held that, because of this protection, those working 'at the higher levels of government ... Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges ... and possibly others as well' may not have their terms of employment regulated by the Commonwealth under s51(35) of the Constitution.^{xxiii} It is possible that the same doctrine may prevent Commonwealth control over these people under s51(20). Also excluded from the new system might be employees engaged in 'the administrative services of the state'. As with the 'higher level' employees, these have previously been considered to fall outside the scope of s51(35) and may arguably be beyond the reach of s51(20).^{xxiv}

From what we have set out above, it seems that any new system relying on the corporations power cannot expect to be either unified or simple. Though many more employees would come under the federal system, state conciliation and arbitration functions will persist and may even coexist with it. Anyone not working for or contracting directly with a foreign, trading or financial corporation will be excluded, and a range of employees will be in uncharted legal territory. The new system, if

valid, would still be incomplete, uncertain and would therefore inevitably precipitate litigation. The new system would still be inconsistent with the professed goals of the proposal.

Certainly, this prospect is not a fundamental obstacle to the Coalition government's plans. The prime minister expects that states may eventually cede and refer their industrial relations powers, should they find running a separate system for fewer workers too burdensome. In the meantime, lack of uniformity and lack of certainty are consistent with the ultimate aim of de-regulation. The Coalition wishes to create a fragmented system of negotiation in the place of centralised adjudication or bargaining. And uncertainty as to the detail of what employees may expect from their employers may not be seen as undesirable – rather, it is just another way of referring to the 'flexibility' of employment conditions on which the Coalition places so much importance.

Conclusion

The manner in which change is brought about will have just as significant an effect on Australian federalism as the operation of the new system will have on industrial relations. Reducing the complexity of Australia's overlapping industrial relations systems is an arguable objective, but for such an objective to be properly achieved, the simplification must be a matter of substance: the new system must in fact work better than the ones it replaces. And it must be fair to employees, protective of their wages and all of their working conditions. The creation of a so-called unitary system may be more ideological than technocratic: to prevent state labourist systems being a fetter on the de-regulation of the labour market. To recall Albert Dicey again, in 1885 he also observed that federalism tends to produce conservatism.^{xxv} How the High Court will resolve the tension between legal conservatism and John Howard's self-proclaimed political conservatism remains to be seen. Ironically, a relatively conservative constitutional court may take a sceptical view of the use of the corporations power for ulterior purposes."

The Debate

Further discord amongst labour market economists occurred during a conference in September 2005 concerning the proposed federal changes. Professor Mark Wooden

criticised every plank of the changes and suggested that it was either “pork barrelling” or acquiescence to employer interests. He said: “There is no economic sense in it.”

Wooden is pro-labour market deregulation, but seems less than enthusiastic about the changes which he describes as having been hastily drawn up, do not give employees real choices and asserted that there was “no evidence” to show that AWA’s (individual contracts) would enhance productivity as the government has claimed. On the contrary, the professor asserted that productivity in the 1990’s was helped by union-based collective agreements and that “individual arrangements did not suit work places based on team work”. (See *The Australian*, 28 September 2005; *Sydney Morning Herald*, 28 September 2005.)

On the other hand Professor John Freebairn, Director of the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, argued at the same conference that lower minimum wages could open up training and job experience for the low skilled leading to better job opportunities in the future. He argued that minimum wage objectives were outdated and that the lowest income earners were protected by welfare payments. He argued that changes in the social security system were a better way to improve social equity. Professor Freebairn said that minimum wages in Australia were high by international standards, being about 58% of median earnings.

In short, if you put two economists in the same room, you are sure to have at least three opinions on any relevant topic.

The radical changes proposed in federal workplace relations law have given place to great controversy

Labour market economists are deeply divided as to whether the reduction of labour costs, which will apparently follow from the proposed changes, will enhance employment, productivity and profitability. Some argue, dogmatically, that there is a clear nexus between labour costs and employment and that if labour costs can be reduced then employment will thereby be enhanced. Others are agnostic. Yet again, others say that there is no clear linkage and that entrepreneurs will hire what staff suits

them in order to make a profit with little regard to the question of wages and conditions. The essential ingredients for the package were described by Paul Gollan, a fellow at the London School of Economics and also at the Labour-Management Studies Foundation at Macquarie University (*Australian Financial Review*, 27 September 2005). His summary of the proposals is as follows:

- The centrepiece of the package would be the creation of a new statutory body, the Australian Fair Pay Commission [sometimes ludicrously described in the Murdoch press as the “low pay commission”] to replace the Australian Industrial Relations Commission (“AIRC”) in deciding minimum wage rates and also to encourage skills in the labour market by setting minimum apprentice and trainee wages.

(It is curious that in relation to a government which has had unfettered powers to make appointees to the AIRC over many years that a new and totally replacement body is called for. If more technical economic expertise had been required, then it was entirely open to the executive government to appoint such people to the bench. Certainly, under the Hawke government, distinguished labour economists Professors Joe Isaac and Keith Hancock were appointed as Deputy Presidents of the Commission and played a valuable role in injecting their technical knowledge in the decisions about minimum wages and the like.)

- It is suggested by Gollan that the long term impact of the AIRC’s role is to create “artificially high wages” and lack of skills in the labour market.
- Another significant ingredient of the package is to change unfair dismissal laws, in particular to amend the definition of “employee” to further exclude casual and temporary employees from the scope of such remedies.

Unfortunately, the author’s conclusions about these proposed reforms are deeply agnostic. He says that there are “many unanswered questions” and he says that “only time will tell”. So much for evidence-based or empirical material being the sub-

stratum for legislative change. The theory seems to be that any labour market de-regulatory regime, however hypothetical, is worth a go.

By way of stark contrast are the observations of Professor James Galbraith whose observations to the Economic Society of Australia are reported in the same edition of the *Australian Financial Review* (27 September 2005). According to Galbraith, employers would not demand more labour simply because pay scales were widened through de-regulation. Galbraith argued that what it is all about is businesses deciding whether they can make money selling the product and that it is an “aggregate demand” function, with nothing to do with the structure of the labour markets.

This is a rather ancient debate about the relationship between minimum wages (and at least, by analogy, unfair dismissal laws) to employment levels. The classic work is David Card and Alan B Krueger, *Myth and Measurement, the New Economics of the Minimum Wage*, Princeton University Press, 1995. Based upon rigorous empirical investigation, the authors argued that: “... the anticipated negative effect of a minimum wage hike on employment failed to materialise.” And so the authors questioned the applicability of the conventional models that were taught as a matter of orthodoxy in introductory economic courses. This book, therefore, constitutes a piece of healthy scepticism about conventional economic thought in terms of the linkage between labour costs and employment levels.

Of course, the federal reforms are not put forward straight forwardly as a matter of reducing labour costs, for this would be too unpopular. Rather, by way of obfuscation, it is suggested that greater flexibility or deregulation would enhance employment in the Australian economy. Yet, this is shorthand for capping wages and/or reducing the conditions of employment at work.

Mr Andrew Robb, the federal Liberal MP for Goldstein has argued for the simplification of the industrial relations system (the unification of six different systems) streamlining awards into documents reflecting the needs of the modern workplace and more ready access to agreement making (see *Australian Financial Review*, 24 August 2005).

On the contrary side of the argument, Greg Combet, the leader of the Australian Council of Trade Unions (“ACTU”), has argued that “collective bargaining rights” constitute the defining issues in contemporary times. He argues for a good faith bargaining process, as distinct from individual contracts (*Australian Financial Review*, 24 August 2005).

There is in fact no convincing evidence that collective bargaining undermines productivity or that individual contracts boost productivity. The issue is in the area of metaphysics rather than rational analysis.

It should also be observed that a barracker for the Howard proposed changes (Mr Alan Wood, Economics Editor of *The Australian*) has urged that the government should hasten slowly in relation to the matter. He supports the thrust of the proposed reforms but argues that it is crucial to “get the legislation right” and to allow more time to do that so that, notwithstanding the publicly announced deadline for the bill to be introduced into Parliament, there is the potential for the AIRC to expand its jurisdiction into any new area left open, there is the risk of drafting errors, there is a problem about farmers being thrown into state industrial relations systems, gaps in federal legislation would leave (for example, in the case of long service leave, state laws to apply) and that “cashing out” agreements into the mining and other industries as to the annual leave would be put under scrutiny by the federal proposals. In short, Mr Wood argues that the federal changes may result in changes and complexities in the legislation which means that it is less transparent and offers the possibility of “loop holes” to be exploited. Mr Wood is also concerned about residual powers in the AIRC to deal with matters such as penalty rates and that in the process “business can be its own worst enemy ...”.

When the current federal government gained a majority in both houses of Parliament a radical industrial relations agenda became inevitable.

Laurie Oakes (“Exit Stage Right”, *The Bulletin*, 18 October 2005) has reminded us that as long ago as 1985, when addressing the Metal Trades Industry Association, Mr Howard engaged in a vigorous critique of the H B Higgins criteria for wages

determination – what was “fair and reasonable”- as distinct from market determination.

The Higgins tradition has, so far, prevailed as orthodoxy in Australia. It is exemplified not only in famous Higgins’ judgments which fill the early years of the *Commonwealth Arbitration Reports* – the 1907 *Harvester Case* (the basic wage) and the 1909 *Broken Hill Mine Case* (“proper wages”) – but also in a series of articles Higgins published in the *Harvard Law Review* in 1915, 1919 and 1920, gathered together in the volume *A New Province for Law and Order* (London 1922).

For Mr Howard, the Higgins philosophy needed fundamental review because “Australia cannot become fully competitive again while we ... determine wages without regard to the capacity of individual industries and enterprises to pay.” (The lecturer is indebted to Oakes for the quotation.)

And so, even in the absence of a bill, the debate has raged on. The churches have expressed concern about the oppression of the low paid. The government has responded by saying that, at least de-regulation will give the unemployed a job. But will this be the equivalent of America’s “working poor”?

The admittedly humorous columnist for *The Australian Financial Review*, Peter Ruehl (18 October 2005) has quoted US economic guru, Alan Greenspan, as arguing that the diminution of unfair dismissal laws “apparently” increases willingness to hire. But is there empirical evidence for this somewhat tentative proposition? And, ominously, Greenspan, so it is said, acknowledges “losers” in the process, described in the blood curdling expression “creative destruction”.

The agnosticism of the economic commentators prevails to this day. Saul Eslake (chief economist at the ANZ) says: “My interpretation of the economic data is that it lends some support to the Howard government’s proposed reforms, but that support is neither unequivocal nor incontestable.” (*Australian Financial Review* 26 October 2005.)

The lecturer wrote a piece in 2002, published in the conservative journal *Quadrant* (January-February 2002 page 36) which espoused a sceptical view as to the centralisation of labour relations. It is reproduced here:

“Should We Centralise Labour Relations?”

The understandable desire of business to have the issue of Commonwealth power over corporations clarified by the states referring such power to Canberra has been distracted and complicated by the former minister Mr Reith’s bid for a unitary system of industrial relations. States of different political complexions are apprehensive that the accrual of power at a federal level may have the unintended consequence of assisting demolition of state-based labour law. The onus will fall on the Commonwealth to persuade the states that the complexities of business law can be rectified without intruding on the more controversial territory of industrial relations.

When the framers of the Australian constitution adopted the industrial power in relation to conciliation and arbitration, it is clear that they intended to divide the regulation of labour disputes between state and federal governments. The federal government was given power to establish a system to deal with disputes extending beyond the boundaries of any one state, whereas state governments were left to make laws with respect to intrastate disputes.

That provision remains intact today, although the authority and scope of federal regulation have increased, mainly because of the use of logs of claims to create interstate disputes with resultant federal awards or agreements. The states, with the recent exception of Victoria, maintained viable and respected state systems of conciliation and arbitration to deal not only with state public sector employees but a variety of industries within those states. And Victoria, under its present government, is moving towards reconstitution of the state tribunal.

If the industrial power were the only relevant constitutional provision, then that would be the end of the argument. However, the 1920 *Engineers’ Case* exploded the doctrine that there were implied immunities to safeguard the powers of the states. And the High Court held that each head of power was to be given a broad

and general meaning, and was not to be read down merely by reason that there were other more specific powers. The external affairs power can be used where the legislation is grounded upon fulfilling international treaty obligations. Second, the corporations power has been liberally interpreted by the High Court and can sustain legislation designed to regulate the employment relationships between a corporation and its workforce.

In this legal environment the Commonwealth has suggested, for discussion, the idea of more comprehensive Commonwealth legislation dealing with workplace relations, either abolishing or greatly reducing the role of the states.

A case can be made for a single system. Industry and commerce increasingly cross historically determined state boundaries. The wages and conditions of employees are relevant to national economic considerations, and it will often be convenient for both employers and unions to have uniform national conditions.

However, that result can be achieved under the current structure. For example, the major retail stores and the union covering shop employees reached a series of national agreements prescribing employment conditions for the employees of those big stores. On the other hand, smaller shops continue to be regulated by state common-rule awards.

The technical arguments for the abolition of the separate state systems have been overstated. Issues are from time to time raised as to whether a state or federal award applies, and whether if the federal award applies state laws are void to the extent of the inconsistency. Some employers have work sites on which federal awards apply to some employees and state awards to others. The Australian Industrial Relations Commission has sometimes to determine whether it should intervene in a dispute and has the power to decide that the dispute is proper to be dealt with by a state industrial tribunal or that further proceedings are not necessary or desirable in the public interest.

However, these frictional issues are peripheral. They do not go to the heart of our contemporary debate about industrial relations. If one party or the other wants to

“go federal” then, despite its apparently artificial nature, an interstate dispute can readily be created by the service of written claims. Moreover, in the last decade or so state and federal industrial laws have developed reciprocal arrangements for joint sittings and dual appointments.

Take, for example, the handling of the industrial relations of the Sydney Olympics. In January 1999, New South Wales IRC President Justice Wright made consent awards covering Games employees. In May 1999, the President sat on a federal full bench which suspended various federal awards for the period of the Olympics. This was co-operative federalism in action.

In the determination of wage issues of national importance there has been a high degree of comity between federal and state tribunals. As to national wage increases, J.H. Portus said in 1979 that in practice, inconsistency between Commonwealth and state awards has not been significant. He said that “taken as a whole, state tribunals have tended to follow the lead of the Commonwealth Commission in an industrial field where the Commonwealth is dominant”. The same can be said of the subsequent history as exemplified by state tribunals adopting the determinations of the AIRC as to “living wage” adjustments.

There is nothing unique to industrial relations about competitive tribunals. It occurs in the mainstream court system. Adam Smith noted in *The Wealth of Nations* that competition amongst courts had led to the development of causes of action like trespass, and he, as an advocate of the free market, regarded that as a good thing.

There are a number of problems about the proposed unitary system based on the corporations power. One is that, however expansively that power might be interpreted, it cannot apply to non-corporations. So, the employees of partnerships, trusts or sole traders could not be comprehended by the system. Much of small business would fall within this lacuna. Second, the system could only apply to those corporations which were trading or financial corporations and there is obvious scope for argument about the extent of that expression, including whether local government authorities or statutory suppliers of electricity are

within the power. Third, there are limitations on the Commonwealth's powers with respect to state public sector employees.

In re *Australian Education Union: ex parte The State of Victoria* (1995) 184 CLR 188, the High Court affirmed that disputes between a state and its employees could fall within the conciliation and arbitration power of the Australian constitution. However, the court also affirmed earlier authority to the effect that there was an implied limitation on the exercise of Commonwealth power, protecting the states from the exercise of any power that would threaten their existence or their capacity to govern, or would impose a particular disability or burden upon an operation or activity of a state. So it was that the court quashed certain orders which had been made by the Australian Industrial Relations Commission preventing or inhibiting certain Victorian state government instrumentalities from offering redundancy packages to employees.

Moreover, the judgment of the court casts great doubt about the capacity of the AIRC to deal with redundancy disputes at all affecting state government employees. The court referred to certain aspects of a state's functions which are critical to its capacity to function as a government. The court then said:

“it seems to us that critical to that capacity of a state is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons, and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds.”

So, while minimum wages and conditions could be prescribed for state government employees there is a constitutional barrier to dealing with redundancy questions; question marks were also raised over the possibility of dealing with questions of promotion or transfer. There was also reference to a difficulty of federal legislation with respect to “the higher levels of [state] government” and in relation to this rather vague category even minimum wages and working conditions could not be fixed under Commonwealth law.

It is unlikely that any proposed system would be comprehensive, so the issue is whether the supposed problems justify the project, fraught with legal and political hurdles.

A cynic might think that the competing arguments were driven more by policy than by technocratic considerations. For example, at a time when state governments, other than New South Wales, were legislating for a deregulated labour market, the Commonwealth parliament in 1996 passed a provision, breaking from the tradition of paramount federal law in this area, to the effect that a state employment agreement binding an employee would mean that federal award coverage would no longer apply.

The proposal for a single national scheme heads precisely in the other direction. Perhaps the political cycle is seen as more relevant than any question of principle.”

Further Observations

There are also constitutional difficulties in the proposed reliance solely on the corporations power to sustain a unitary system of industrial relations. Is this really what those who formulated the *Australian Constitution* intended?

The foolishness and ignorance attaching to the critique of the Australian Industrial Relations Commission’s (AIRC) role in fixing minimum wages is illustrated by the article by Adam Bisits (apparently the vice-president of the HR Nicholls Society – but, apart from this is unknown) [*Australian Financial Review*, 29 September 2005].

This article defends the proposed “fair pay commission” and attacks the AIRC.

It alleges ignorance on the part of the AIRC as to how many employees are on the minimum wage rate. The learned author says: “the commission can’t expect the evidence to walk in the door while it sits in comfort in Melbourne”.

This is ridiculous. The commission hears from all the parties (including the federal government and employer organisations) which (at least presumptively) have

economic expertise. All relevant data is received and debated in an open forum. It is then the subject of objective adjudication.

So, it is asserted, the “adversarial” system of minimum wage fixation is no good. But what is so wrong with giving everyone with an interest in the matter their say? There are said to be “huge gaps” in the evidence which the commission itself should have removed.

This is bizarre. The parties appearing before the commission have the requisite competence. It is plain that the AIRC considered the economic impact of its minimum rates decisions in accordance with the statute; the complaint about an absence of a reasoning process is a hopeless point in the context of what is inevitably a value judgment, involving elements of economic analysis and subjectivity. The federal government supported an increase in the minimum wage rate. In these circumstances, it would be difficult for a tribunal to decline such an increase. The quantum is a matter for discretion having regard to the evidence tendered by the parties.

Would the position be any different under a government-based “fair pay” commission? There is no reason to believe that a decision by some new tribunal would be more “rational”. That piece of polemic is mere assertion, not based upon any empirical evidence.

Certainly, the proposed alternative system would be more opaque, non-public, government influenced and bureaucratic.

But, is this a good thing?

As the economic commentators are always telling us – only time will tell.

And as the great economist, John Maynard Keynes, famously said: “In the long run we are all dead.”

NOTES
5. The Constitutional question (Shaw & Ciolek)

- ⁱ. Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed 1885, 10th ed 1959) 173.
- ⁱⁱ. Prime Minister John Howard, Joint press conference with the Minister for Employment and Workplace Relations, Kevin Andrews (Parliament House, Canberra, 26 May 2005).
- ⁱⁱⁱ. Prime Minister John Howard, 'Reflections on Australian Federalism' (Speech delivered at the Menzies Research Centre, Melbourne, 11 April 2005).
- ^{iv}. *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 per Mason CJ, Brennan, Toohey and Gaudron JJ.
- ^v. *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.
- ^{vi}. Latham CJ, *Melbourne Corporation v The Commonwealth* (1947) 75 CLR 31, 60.
- ^{vii}. *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
- ^{viii}. *Queensland Electricity Commission & Ors v The Commonwealth* (1985) 159 CLR 192.
- ^{ix}. *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 232.
- ^x. *Construction, Forestry, Mining and Energy Union (NSW Branch) v Newcrest Mining Limited* (2005) 139 IR 50.
- ^{xi}. '1.2 million workers in the cold', *Workforce* Issue 1114, 9 May 1997, 1.
- ^{xii}. Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 4th ed, 2005) 85.
- ^{xiii}. Australian Bureau of Statistics, 19 May 2005, <http://www.abs.gov.au/Ausstats/abs@.nsf/0/a9ca77bff6370aa3ca2568a90013941b?OpenDocument> (accessed 30 August 2005).
- ^{xiv}. *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
- ^{xv}. *Workcover NSW v State Police* (2000) 102 IR 252, 263 per Hungerford J.
- ^{xvi}. *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.
- ^{xvii}. *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Adamsons case)* (1979) 143 CLR 190; *Commonwealth v Tasmania* (1983) 158 CLR 1.
- ^{xviii}. Re medical services: *Jones v Aboriginal Medical Service* [1997] AIRC 557 (25 September 1997); Re emergency services: *United Firefighters Union v Metropolitan Fire and Emergency Services Board* [1998] FCA (Unreported, Marshall J) 20 May 1998.
- ^{xix}. *Quickenden v O'Connor* (2001) 109 FCR 243.
- ^{xx}. *State Owned Corporations Act 1989* (NSW), *Government Owned Corporations Act 1993* (Qld),
- ^{xxi}. CPSU-SPSF, 'State public sector unions seek to counter IR changes' (Press release, 3 March 2005).

^{xxii}. *R v Lee; ex parte Harper* (1986) 160 CLR 430; *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188.

^{xxiii}. *Re Australian Education Union: Ex parte Victoria* (1995) 184 CLR 188.

^{xxiv}. Re s51(35): *Ibid*.

^{xxv}. Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed 1885, 10th ed 1959) 173.